IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2016] SGHC 125

Magistrate's Appeal No 118 of 2015

Between

Faisal bin Tahar

… *Appellant*

And

Public Prosecutor

… *Respondent*

GROUNDS OF DECISION

[Criminal Procedure and Sentencing] — [Appeal] — [Summary rejection of appeal]

TABLE OF CONTENTS

Faisal bin Tahar
v
Public Prosecutor

[2016] SGHC 125

High Court — Magistrate's Appeal No 118 of 2015
See Kee Oon JC
15 January; 16 March 2016

1 July 2016

See Kee Oon JC:

Introduction

1 The appellant pleaded guilty to a charge of consuming monoacetylmorphine, a specified drug, under s 8(*b*)(ii) of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) ("MDA") in the District Court. In the charge, it was stated that he had one previous admission and one previous conviction for consumption of specified drugs, and would therefore face a mandatory minimum sentence of five years' imprisonment and three strokes of the cane for the current offence under the enhanced punishment regime set out in s 33A(1) of the MDA.[1] Such a charge is commonly referred to as a "Long Term Imprisonment 1" or "LT1" charge for short and I will use this acronym to refer both to charges of this form as well as to the regime of enhanced punishments

---

[1] ROP, pp 4.

set out under s 33A(1) of the MDA more generally. The appellant was represented by his present counsel, Mr S K Kumar ("Mr Kumar"), who confirmed that the appellant understood the nature and consequences of his plea and the punishment prescribed for the offence[2]. The appellant was convicted and the mandatory minimum sentence was duly imposed. Dissatisfied, the appellant filed an appeal against his sentence on the ground that he did not qualify for enhanced punishment. The appeal was set down to be heard in January 2016.

2 Three weeks before the appeal was scheduled to be heard, the Prosecution wrote to invite the court to exercise its power under s 384(1) of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) (I will refer to the provision simply as "s 384(1)" and to the Criminal Procedure Code as the "CPC") to summarily reject the appeal.[3] The letter was addressed to the Registrar of the Supreme Court and a copy was extended to the appellant. However, no response was received from the latter. At my direction, no order was made as to the Prosecution's request and the parties attended before me at the appointed time for the hearing of this appeal. The appeal was heard over two days and two rounds of submissions were filed.

3 After careful consideration of the arguments presented, I dismissed the appeal. I now set out the grounds for my decision. I do so chiefly with a view towards clarifying two points of criminal procedure which arose in this case. The first is the ambit of this court's power to summarily reject an appeal under s 384(1) and, more specifically, the meaning of the expression "question of law" in s 384(1). The second is the proper procedure to adopt if an accused

---

2 ROP, pp 14–15.

3 Letter from the Prosecution dated 21 December 2015 ("Prosecution's letter").

wishes to plead guilty to a charge but nevertheless intends to challenge the constitutionality of the punishment statutorily prescribed for the offence. This touches on, among other things, the ambit of s 375 of the CPC, which governs the right of appeal afforded to an accused convicted following a plea of guilt. In examining these issues, I will build on the comments I made in *Mohd Fauzi bin Mohamed Mydin v Public Prosecutor* [2015] SGHC 313 ("*Mohd Fauzi*").

Background

4 The facts of the offence were concisely set out in the statement of facts ("SOF") to which the appellant admitted without qualification. On 2 April 2014, the appellant, then 41 years of age, was arrested on suspicion that he had consumed a specified drug. On the day of his arrest, he provided two samples of urine which were sent to the Health Sciences Authority ("HSA") for testing. Later that month, analysts from the HSA issued a total of four certificates under s 16 of the MDA. The certificates stated that the urine samples had been analysed and found to contain monoacetylmorphine and methamphetamine, both of which are specified drugs listed in the Fourth Schedule to the MDA. Two charges under s 8(*b*)(ii) of the MDA (one each for monoacetylmorphine and methamphetamine) were preferred against the appellant.[4]

5 Section 33A(1)*(d)* of the MDA provides that an accused is liable for enhanced punishment if two conjunctive conditions are met, *ie* that he had "one previous admission and one previous conviction for consumption of a specific drug under section 8*(b)*". Both charges against the appellant specified that (a) first, he had previously been convicted of consuming cannabinol derivatives, a specified drug, in 1997 and sentenced to 15 months'

---

4 Statement of facts (ROP, pp 5 and 6)

imprisonment; and that (b) second, he had previously been admitted to an "approved institution" (the Cluster B (Changi Prison Complex) Drug Rehabilitation Centre ("DRC")) for consuming morphine, which is also a specified drug, in 2010.[5] The appellant pleaded guilty to the charge of consuming monoacetylmorphine and consented to having the charge for the consumption of methamphetamine taken into consideration for the purpose of sentencing.[6]

6 The appellant's other antecedents were all drug-related. He had prior convictions for possessing controlled drugs (in 1995 and 2011) and he had been the subject of two separate drug supervision orders (in 1998 and 2012). In mitigation, Mr Kumar submitted that the appellant's prospects for rehabilitation were favourable and urged the court to impose the mandatory minimum sentence on him. The Prosecution did not object to this. On 5 August 2015, the District Judge sentenced the appellant to the mandatory minimum sentence of five years' imprisonment and three strokes of the cane.[7]

7 The appellant filed an appeal the very next day. In his petition of appeal ("the petition") which was filed on 28 August 2015, the sole ground of appeal raised was that his sentence was invalid because he did not, despite what was stated in the charge and in the SOF, satisfy the two conjunctive conditions for enhanced punishment set out in s 33A(1) of the MDA. Specifically, he took issue with the use of his admission to the DRC in 2010 as a condition for the imposition of enhanced punishment. On this, he submitted as follows:[8]

---

5 Charge (ROP, p 4); SOF at para 10 (ROP, p 6).

6 Notes of Evidence (ROP, p 15); 2nd Charge (ROP, p 7).

7 ROP, p 19.

> [The appellant] humbly appeals against the sentence on the grounds [sic] that the charge under s 33A(1) of MDA is erroneous as he was taken out from the Drug Rehabilitation Centre (DRC) even before he had received any counselling or treatment such that reliance on the DRC admission is wrong.

8 On 4 September 2015, the Crime Registry of the State Courts wrote to inform parties that an electronic copy of the Record of Appeal had been uploaded onto the eLitigation system and could now be accessed. On 28 October 2015, the Registrar of the Supreme Court notified parties that the matter had been scheduled to be heard on 11 December 2015. On 20 November 2015, the hearing date was revised to 15 January 2016.

9 On 21 December 2015, the Prosecution wrote to invite the court to reject the appellant's appeal summarily under s 384(1) of the CPC. Among other things, they pointed out that the appellant had, acting through Mr Kumar, sought the imposition of the minimum sentence in the court below. It was submitted that there was therefore plainly no basis for a reduction of the sentence and that the summary rejection of the appeal would save valuable judicial time and public resources.[9] Mr Kumar did not send a reply even though he received a copy of the letter. I will make further observations in this connection later. On 29 December 2015, I directed the Registry to inform the parties that the hearing date would stand and the parties then filed their submissions. Only the Prosecution did so in accordance with the prescribed timelines. Mr Kumar only did so on 14 January 2016 (one day before the hearing date) and he filed not one, but three sets of submissions.

---

[8] Petition of Appeal, para 2 (ROP, p 10).

[9] Prosecution's letter at paras 1, 8, and 9.

The Prosecution's application for summary rejection of the appeal

10 In *Mohd Fauzi* at [23], I explained that s 384(1) of the CPC provides that an appeal may be summarily rejected without first being set down for hearing if the following three conditions are satisfied:

(a) First, the grounds of appeal do not raise any question of law ("condition 1");

(b) Second, it appears to the appellate court that the evidence is sufficient to support the conviction ("condition 2"); and

(c) Third, there is no material in the circumstances of the case which could raise a reasonable doubt whether the conviction was right or lead the appellate court to consider that the sentence ought to be reduced ("condition 3").

11 The Prosecution argued that the three conditions had been satisfied. Among other things, they submitted that the plea of guilt had been recorded in full compliance with the safeguards prescribed by the CPC and that it was plain that there was sufficient evidence to support the appellant's conviction on the charge. In particular, they pointed to the fact that there was ample documentary evidence (in the form of certificates from the HSA and the like) to show that the requirements for enhanced punishment under s 33A(1) of the MDA had been satisfied. In the premises, they submitted that both the conviction and sentence imposed were in order and that the ground of appeal neither raised any question of law for determination nor provided any basis for a reduction of the sentence (which was already the minimum prescribed by law).[10]

12 I agreed with the Prosecution that conditions 2 and 3 had been satisfied. From my perusal of the record, it was clear that the relevant papers were in order and there was sufficient evidence to support the appellant's conviction for a LT1 drug consumption charge. It was also clear, from the criminal records issued by the Criminal Records Office and the certificate of previous admission issued under s 33A(3) of the MDA, that the appellant had (a) been convicted of drug consumption in 1997 and (b) been admitted to the DRC in 2010.[11] That being the case, it would follow that the court is legally bound to impose the statutory minimum sentence prescribed and there was no basis upon which the court may consider that the sentence ought to be reduced. However, I did not agree that condition 1 (the grounds of appeal do not raise any question of law) had been satisfied.

The question of law requirement and the purpose of s 384(1)

13 A question of law is most commonly understood in contradistinction to its counterpart: a question of fact. Without placing too fine a point on it, the traditional position has been that the legal meaning of an enactment is quintessentially a question of law; whether a state of affairs exists in the world is eminently a question of fact; and whether a set of facts falls within the ambit of a statutory provision is a question of mixed fact and law (see *Edwards (Inspector of Taxes) v Bairstow and another* [1956] 1 AC 14 at 30–31 *per* Viscount Simonds). However, the line of demarcation between a question of law and a question of fact varies, as it must, depending on the context and the purpose to which the distinction is being put (see *Novelty Dept Store Pte Ltd v Collector of Land Revenue* [2016] 2 SLR 766 at [22]–[23]). The parties did

---

[10] Prosecution's letter at paras 6–8.

[11] Certificate of previous admission (ROP, p 34); CRO (ROP, p 43).

not address me on this issue at length, but given that this is the first time that this provision has been considered in depth, I thought it useful to examine the history of this provision as an aid to construction and to set out some of my thoughts on this issue.

14 A summary rejection procedure for criminal appeals was first introduced in our jurisdiction with the passage of the Supreme Court of Judicature Act (Act No 24 of 1969) (I will refer to this statute and its legislative successors generically as the "SCJA"). Section 52 of the SCJA provided that the Court of Criminal Appeal would have the power to summarily reject an appeal if the three conditions set out at [10] above were satisfied. However, s 52 of the SCJA was not the progenitor of s 384(1); instead, it was itself based on s 58 of the Courts of Judicature Act 1964 (Act 7 of 1964) (M'sia) ("Malaysian CJA"): see the explanatory statement to the Supreme Court of Judicature 1969 Bill (Bill 24 of 1969).

15 I will set out s 58 of the Malaysian CJA presently but before I do so I think it is important to note that the position in Singapore prior to 1964 differed from that in Malaysia (and Malaya before that) in two respects. First, an accused convicted in the High Court of Singapore was only afforded an appeal as of right if he wished to appeal against his conviction on a *question of law alone* (see Ord 5(a) Straits Settlements Court of Criminal Appeal Ordinance (Cap 129, 1955 Rev Ed) ("SS CCA Ordinance")). If an accused wished to appeal against (a) his conviction on a question of fact alone or on a question of mixed law and fact, or (b) if he wished to appeal against his sentence, then he required the leave of court (see Ord 5(*b*) and 5(*c*) SS CCA Ordinance). By contrast, the Criminal Procedure Code of the Federated Malay States (Cap 6, 1932 Rev Ed) (M'sia) ("FMS CPC") afforded all accused persons an appeal as of right, irrespective of the ground of appeal raised.

Second, and as I mentioned above, before the passage of the SCJA in 1969, no appellate court in Singapore had the power to summarily reject a criminal appeal. In the Federated Malay States, however, all criminal appeals could be summarily rejected under s 309 of the FMS CPC.

16 Section 309 of the FMS CPC provided as follows:

> 309(i) On receiving the documents mentioned in the preceding section, the Judge shall peruse the same, and if he considers that there is no sufficient ground for interfering he may reject the appeal summarily; *provided that no appeal shall be rejected summarily except in the case mentioned in subsection (ii) unless the appellant or his advocate has had a reasonable opportunity of being heard in support of the same.*
>
> 309(ii) Where an appeal is brought on the ground that the conviction is against the weight of the evidence or that the sentence in question is excessive and it appears to the Judge that *the evidence is sufficient to support the conviction and that there is no material in the circumstances of the case which could raise a reasonable doubt whether the conviction was right or lead him to consider that the sentence ought to be reduced the appeal may without being set down for hearing be summarily rejected* by an order under his hand certifying that he has perused the record and is satisfied that the appeal has been lodged without any sufficient ground of complaint.
>
> [emphasis added]

17 These differences had to be resolved when the Federation of Malaysia was formed. At the time of merger, there were three extant Supreme Courts, each comprising a Court of Appeal and a High Court, in the Federation of Malaya, Singapore, and in the Borneo States. With the passage of the Malaysia Act 1963 (Act 26 of 1963) (M'sia), these Supreme Courts were replaced by three High Courts – one each in Malaya, Singapore, and Borneo – and a Federal Court, which exercised exclusive appellate jurisdiction over matters heard by the High Courts. Given this change, there was a need to harmonise the divergent appellate procedures in the States. This provided the impetus for the passage of the Malaysian CJA, s 58 of which read as follows:

> Where the grounds of appeal do not raise any question of law and it appears to the Lord President and two other Judges of the Federal Court that the evidence is sufficient to support the conviction and that there is no material in the circumstances of the case which could raise a reasonable doubt whether the conviction was right or lead the Federal Court to consider that the sentence ought to be reduced, the appeal may, *without being set down for hearing*, be summarily rejected by an order under the hand of the Lord President, certifying that the said Judges, having perused the record, are satisfied that the appeal has been brought without any sufficient ground of complaint and notice of the rejection shall be served upon the appellant: … [emphasis added]

18 Section 58 of the Malaysian CJA was, in essence, an updated version of s 309 of the FMS CPC, which was adopted in preference to the position in Singapore (and the Borneo States, where accused persons likewise required the leave of court to bring an appeal) as a model to be applied throughout the Federation. However, there is one important difference. The FMS CPC distinguished between appeals which would be summarily rejected after the appellant or his advocate had a reasonable opportunity to be heard and those which could be dismissed without the need for the appellant to be heard. The latter could only be done where it appeared to the Judge that there is "no material in the circumstances of the case which could raise a reasonable doubt whether the conviction was right or lead him to consider that the sentence ought to be reduced" – basically, conditions 2 and 3. By contrast, s 58 of the Malaysian CJA did not distinguish between cases where the appellant and his advocate were to be heard and those where they were not. However, it provided, in addition to conditions 2 and 3, one further requirement that had to be satisfied before an appeal could be summarily rejected: the grounds of appeal must not contain a question of law. This is the origin of the question of law requirement, which I have referred to as condition 1 in these grounds.

19 Paragraph 9(a) of the explanatory statement to the Courts of Judicature Bill 1963 (Malaysia) provides a vital clue as to the reason for the introduction of condition 1:

> Clause 58 (summary rejection of appeal) brings the law in Singapore and Borneo in line with that of Malaya. At present in Singapore and Borneo a convicted person who wishes to appeal on grounds of fact only or against sentence only must obtain leave to appeal from a single Judge. *In Malaya he can appeal as of right but his appeal can be* ***summarily rejected if three Judges consider it has no hope of success.*** *It is thought that the existing system in Malaya makes for* ***expedition and affords ample safeguards to appellants.*** [emphasis added in italics and bold italics]

20 When the drafters of the Malaysian CJA elected for the position in the FMS CPC over that adopted in Singapore and the Borneo States, they were conscious that there was a need to balance the desire to provide greater access to appeals against the need for "expedition" and efficiency in the administration of justice. This was achieved through an expansion of the power of summary rejection. Under s 58 of the Malaysian CJA, appeals which had "no hope of success" may be summarily rejected without the need for the appellant to be heard. However, the caveat was that those applications which raised questions of law (the determination of which is traditionally the preserve of an appellate court) would automatically proceed for an oral hearing before the Federal Court. This allocation of roles was not new and it reflected the traditional deference of appellate courts to factual findings made by courts of first instance. This had *always* been a part of the law in Singapore and the Borneo States before merger. Even before the Malaysia CJA was passed, the SS CCA Ordinance had distinguished between appeals which were premised on questions of law only (which may be brought as of right) and appeals which were premised on questions of fact (which lay only with leave): see [15] above.

21 The Parliament of the newly independent Singapore adopted s 58 of the Malaysian CJA as s 52 of the SCJA without effecting any substantial changes to it. Section 52 of the SCJA remained largely unchanged (and also largely unused) until the passage of the Criminal Procedure Code 2010 (Act 15 of 2010), which repealed and re-enacted s 52 of the SCJA as s 384(1) of the CPC. Save for the addition of s 384(2) – which states that in cases where the appellate court comprises more than one judge, a decision to summarily reject an appeal must be made unanimously – the provision was unchanged. From this, it may be inferred that the policy intent underlying s 384 mirrors that of the original enactment and may be relied on by the courts as a guide towards the exercise of their power of summary rejection.

22 To summarise, the pertinent policy considerations are as follows:

(a) Section 384 was introduced to strike a balance between two competing imperatives: (i) access to justice – all accused persons should be able to appeal as of right; and (ii) expedition and efficiency in the administration of justice – to avoid placing an undue burden on the judicial system.

(b) The summary rejection procedure allows appeals to be dismissed *in limine*, without any need for an oral hearing to be convened. However, the power of summary rejection should only be exercised in respect of appeals which are *ex facie* unsustainable and have "no hope of success".

(c) The summary rejection procedure may only be exercised in respect of appeals which do not contain a question of law. The traditional definition of "question of law" – *ie*, that which is not a question of fact – applies here. This ensures that only matters which

> are more suited to appellate determination will proceed for an oral hearing as a matter of course, whereas those which turn on findings of fact (in respect of which deference is traditionally given to the trial court's findings) may be dismissed summarily.

Why this case was not suitable for summary rejection

23 With these points in mind, I turn to the facts of this case. In advancing the case that the petition presented no question of law for determination, the Prosecution made the following points:[12]

> (a) Section 375 of the CPC provides that an accused who has pleaded guilty and been convicted on that plea may only appeal against the extent or legality of his sentence.
>
> (b) The Appellant had pleaded guilty voluntarily at the advice of counsel and the procedural safeguards set out in the CPC had been adhered to.
>
> (c) Mr Kumar had confirmed that the appellant understood the nature and consequences of his plea and that he intended to admit to the charge.
>
> (d) Mr Kumar had specifically requested that the court pass the minimum sentence prescribed by law on his client.

24 In my judgment, these points go towards an assessment of the *merits* or the *bona fides* of the appeal, but not to the character of the question posed. The sole ground raised in the petition was whether the charge was erroneous

---

12 Prosecution's letter at para 6.

because it was premised on the appellant's 2010 admission to the DRC, even though the appellant had allegedly not received any counselling or treatment during his time in the DRC. This engages an inquiry which touches on issues of general principle relating, at least in part, to the proper interpretation of the relevant provisions of the MDA. It seemed to me that this was *prima facie* a question of law, or at least a question of mixed fact and law. This case was quite different from *Mohd Fauzi*, where the sole ground of appeal raised by the appellant was that his sentence (the minimum provided for by law) was manifestly excessive. This was clearly not a question of law within the meaning of the summary rejection procedure because s 384(5) of the CPC expressly states that the "question of whether a sentence ought to be reduced shall be deemed not to be a question of law".

25 It appeared to me that the Prosecution's chief complaint was not that no question of law had been posed at all, but that the question of law posed did not present itself as a *bona fide* question deserving of appellate consideration. This was evident during the substantive hearing of the appeal, where the Prosecution argued forcefully that the appellant ought to have raised this point in the court below and that the issue of law raised in the petition was well-settled.[13] As will be clear in the course of these grounds, I eventually agreed with the Prosecution on both of these points, but they were not enough to justify the summary rejection of the appeal without affording the parties a right of hearing. Section 384(1) does not call on the court to assess the *merits* of the question of law or whether it has been put forward in a *timely* manner, but merely to ascertain that such a question has been posed.

---

[13] Prosecution's written submissions at paras 15, 24, and 26.

26 This may be thought of as unsatisfactory, for appellants may seek to evade the summary rejection procedure by including a question of law, irrespective of its merit. However, it should be remembered that the power granted to the court under s 384(1) is draconian: it empowers the court to reject an appeal summarily before any submissions have been tendered and before the matter has even been set down for hearing. Therefore, the exercise of this power must be attended with "ample safeguards" (see [19] above), one of which is the requirement that only appeals which do not raise relevant questions of law may be summarily dismissed. This is eminently a policy decision which reflects, among other things, the traditional allocation of responsibilities between appellate courts and courts of first instance, and it is still a feature of our jurisprudence today (see *Public Prosecutor v Mohammed Liton Mohammed Syeed Mallik* [2008] 1 SLR(R) 601 at [32]).

27 One example of a case which might be suitable for summary determination would be an appeal against a minimum sentence on the ground that it is manifestly excessive. In our constitutional system, Parliament is vested with the power to make laws prescribing the punishments for any defined offence, whether fixed or within a defined range, and the duty of the courts is to pass sentence according to law (see *Mohammad Faizal bin Sabtu v Public Prosecutor* [2012] 4 SLR 947 ("*Mohammad Faizal*") at [45]). An appeal against a minimum sentence ought to be dismissed out of hand because it is bound to fail: the relief prayed for is not within the power of the courts to give. Another example would be where the appeal suffers from a crucial jurisdictional deficit. Take, for example, an appellant who seeks to appeal a decision made in a Magistrate's Appeal. Such an appeal is a complete non-starter because it is well-established that the Court of Appeal does not have the authority to entertain an appeal from a decision made by the High Court in the

exercise of its appellate criminal jurisdiction (see *Public Prosecutor v Lim Yong Soon Bernard* [2015] 3 SLR 717 at [32]).

28 Of course, these two scenarios cannot be exhaustive of the circumstances when the court would be justified in exercising its power under s 384(1), but they provide useful touchstones. Ultimately, the power under s 384(1) is a discretionary power, and like all discretionary powers, it must be exercised judiciously and with due regard for the object and purposes of its grant, which were set out at [22] above.

An observation on the duty of counsel in s 384(1) applications

29 The foregoing encapsulates my reasons for not exercising my power under s 384(1). Before I leave this point, however, I think it is important to make an observation about a point of practice in relation to the summary rejection procedure. Technically, the power of summary rejection is one which the court may exercise of its own motion. For example, in *Chan Heng Pye v Public Prosecutor* [1961] 1 MLJ 161 the court exercised the power of summary rejection of its own motion under s 309 of the FMS CPC. In the usual course of things, however, it will be the respondent who urges the court to exercise its powers under s 384(1) by way of a letter, as was done here. Although it is not expressly provided for in the CPC, a copy of that letter should be extended to counsel for the appellant. The Prosecution had done so here.

30 Upon receipt of such a letter, unless his client's instructions are not to oppose the call for summary rejection under s 384(1), it is incumbent upon the counsel for the appellant to reply, even if no specific directions are given by the court for this to be done. The reason for this is simple. The course of action

being contemplated – the summary rejection of the appeal – is entirely to the appellant's disadvantage. It is necessary that the appellant or his counsel (should he be represented) tender a reply conveying his position to the court. There is not to say that parties should engage in litigation by correspondence, but a short reply containing the salient points of objection and brief reasons why summary rejection is appropriate should be drafted. As I observed to Mr Kumar during the hearing, his failure to reply did his client a great disservice. If no response is received, the court might well assume that none is forthcoming and that the appellant has nothing to say in response and this could be entirely to the appellant's detriment.

The substantive appeal

31 I now turn to the substantive appeal. On 15 January 2016, the parties attended before me. On that occasion, Mr Kumar argued that an admission to the DRC would be unconstitutional if it did not last for a minimum period of six months and, consequently, such an admission could not form the condition precedent for enhanced punishment under s 33A(1) of the MDA. As this was a new argument which the Prosecution had not anticipated in their submissions, which had been duly filed in accordance with the prescribed timelines (unlike Mr Kumar's, which were only filed immediately prior to the hearing), I adjourned the matter to allow the Prosecution time to prepare further written submissions in response. This was done and on 16 March 2016, the matter was restored for hearing.

The appellant's arguments

32 Mr Kumar's core point was that a DRC stint which lasts for less than six months and/or which is not accompanied by treatment or rehabilitative programmes *cannot* be an "admission" within the meaning of s 33A(1)(*d*) read

with s 33A(5)(*c*) of the MDA.[14] This was the same argument which I had considered and rejected in *Lee Chuan Meng v Public Prosecutor* [2015] 2 SLR 892 ("*Lee Chuan Meng*"). Mr Kumar accepted that my decision in *Lee Chuan Meng* represents the law.[15] However, he contended that there is a constitutional angle to this argument which was not considered in *Lee Chuan Meng*'s case which warrants a reconsideration of this submission.

33 The essence of his argument, as far as I understand it, was as follows. The admission of a person to DRC is *prima facie* unconstitutional because it results in the deprivation of a person's liberty and thus violates Art 9 of the Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint) ("the Constitution").[16] This act of detention can only be valid if it falls within the scope of Art 9(6)(*b*) of the Constitution, which specifically excepts laws "relating to the misuse of drugs or intoxicating substances which authorises the arrest and detention of any person for the purpose of treatment and rehabilitation" from the prohibitions in Art 9 of the Constitution.[17] However, the appellant's admission to DRC in 2010, which lasted for less than five months and which was not accompanied by treatment and rehabilitation, could not have been for the purpose of treatment and rehabilitation and therefore falls outside Art 9(6).[18] Therefore, the appellant's admission to DRC was

---

14 Appellant's submissions dated 14 January 2016 (Appellant's 1st submissions") at paras 1–3.

15 Appellant's 1st submissions at para 6.

16 Appellant's 1st submissions at paras 8–10, 13–14; Appellant's "respond to response" dated 14 March 2016 at paras 7–8.

17 Appellant's 1st submissions at paras 12, 16, 19–21; Appellant's "respond to response" at paras 15, 18–19.

18 Appellant's 1st submissions at para 23; Appellant's "respond to response" at para 20.

unconstitutional and, *ex hypothesi*, the LT1 sentence which was imposed on him on the back of that previous admission would itself be unconstitutional.

34 In my judgment, this submission was plainly without merit. Before I proceed to explain why, I will first deal with the Prosecution's preliminary objection, which was that the appeal ought to have been dismissed *in limine* because it was procedurally defective.

Preliminary objection

35 The Prosecution submitted that the appeal, while purporting to be one against sentence, was in truth an appeal against the appellant's conviction. This was something which the appellant was absolutely precluded from doing because s 375 of the CPC specifies that a person who has been convicted following a plea of guilt may only appeal against the extent or legality of his sentence. They argued, citing [32] of *Mohd Fauzi*, that any challenge to the sentence imposed ought, if at all, to have proceeded by way of an application for criminal revision, rather than an appeal.[19] I did not agree.

36 The appellant had been charged for an offence involving the consumption of a specified drug. He did not challenge the allegation that he had consumed a specified drug. He also did not dispute that he should be punished according to law for having committed this offence. However, his complaint was that he ought not to face *enhanced* punishment for it as his spell in DRC in 2010 did not, properly construed, count as an "admission" within the meaning of s 33A of the MDA. When presented in this light, it is clear that

---

[19] Prosecution's written submissions at paras 12 and 15; Prosecution's further submissions at para 5.

the appellant was challenging the *legality* of his LT1 sentence, which he was clearly entitled to do under s 375 of the CPC.

37 As Chan Sek Keong CJ explained in *Mohammad Faizal* at [46] and [47], the conditions listed in s 33A(1) of the MDA are statutory aggravating factors the satisfaction of which trigger the application of a legislatively-prescribed minimum punishment. Previous admissions and convictions which satisfy the conditions listed in s 33A(1) of the MDA are included in the charge in order that the accused may have fair notice that the Prosecution intends to prove their existence to justify the imposition of an enhanced sentence (see 123(6) of the CPC). However, they are not elements of the offence of drug consumption *per se*. The appellant may challenge the legality of the enhanced sentence imposed on him on the ground that these aggravating factors are absent without contravening s 375 of the CPC. Having said this, I must emphasise that my comments are confined only to the LT1 sentencing regime as it is set out in s 33A of the MDA. The position might be quite different if the statutory aggravating factor in question were a constitutive element of the offence.

38 The facts of *Mohd Fauzi*, which the Prosecution cited, were quite different. There, the appellant had pleaded guilty to an offence of consuming morphine. As he had previously been convicted and sentenced to an LT1 sentence in 1999, he was liable under s 33A(2) of the MDA to face a minimum sentence of seven years' imprisonment and six strokes of the cane (commonly referred to as an "LT2" sentence). The district judge imposed the minimum LT2 sentence on him and he appealed. On appeal, he explained that his complaint was with his 1999 (LT1) conviction. He argued that he ought not to have been charged in 1999 as the concentrations of drugs found in his urine samples then were very low. He therefore submitted that his LT1

conviction ought to be set aside and, as a consequence, the LT2 sentence imposed on him for the present offence likewise had to be set aside.

39 I rejected that argument in *Mohd Fauzi* as an impermissible attempt to mount a back-door challenge to his 1999 LT1 conviction (at [18]). Were he genuinely aggrieved by his LT1 conviction, the proper recourse would have been for him to file an application for criminal revision to quash it, as the applicant in *Bhavashbhai slo Baboobhai v Public Prosecutor* [2015] 2 SLR 1281, who also sought to set aside his LT2 sentence by challenging the legality of his prior LT1 conviction, unsuccessfully sought to do. My point was that the legality of his 1999 LT1 conviction was not and could not form part of the subject matter of his appeal against his LT2 sentence. This was what I was referring to when I said at [32] of *Mohd Fauzi* that "[i]f there is any quarrel with the legality or validity of the conviction [*ie*, the appellant's 1999 LT1 conviction] … [t]he proper course is not to file an appeal against sentence but a criminal revision".

40 In this case, the appellant's quarrel is not with the propriety of his present conviction for drug consumption, or with any of his previous convictions for drug consumption, but with the use of his admission to the DRC in 2010 as a condition precedent for the imposition of an LT1 sentence for his present offence. In my judgment, this could properly form the subject matter of an appeal against the legality of his sentence, and there was no need for it to have proceeded solely by way of an application for a criminal revision.

41 However, I agreed with the Prosecution's alternative submission, which was that it would have been preferable for the appellant to have applied to the District Court for a case to be stated on a question of law concerning the

effect of a provision of the Constitution pursuant to s 395(2)(*a*) of the CPC if it had genuinely been his intent all along to raise such an issue for the court's determination.[20] This was done, for example, in *Mohammad Faizal* where the applicant (who, incidentally, was also represented by Mr Kumar) had pleaded guilty but had applied, *before* he was sentenced, to state a case on the constitutionality of the LT1 regime. Regrettably, this was not done here.

42 The District Judge heard the appellant's matter over two days – on 1 July and 5 August 2015 – and *no* mention was made by Mr Kumar of the appellant's dissatisfaction with the LT1 charge at any time. Instead, the indication was always that the appellant would be admitting to the charge without qualification and was content with the imposition of the mandatory minimum sentence, which was what he sought in mitigation.[21] The filing of the appeal on 6 August 2015, therefore, came as a surprise. On 11 August 2015, the parties attended before the District Judge to hear the appellant's application for bail pending appeal. When the District Judge asked Mr Kumar why the matter of the legality of the LT1 sentence had not been raised previously, he could only reply, blithely, that "[t]he State Courts are not seised with jurisdiction to hear such issues, that's why it was not mounted earlier."[22] This explanation is not convincing in the slightest.

43 It was always open, as Mr Kumar would have been well aware, for the trial court, either on its own motion or on the application of the appellant or the Prosecution, to state a case. This could have been done from the outset, even before the appellant had pleaded guilty, and would have saved time and

---

20 Respondent's further submissions dated 12 February 2016 at paras 6 and 7.

21 ROP, pp 13–23.

22 ROP, p 22.

costs. It would have obviated the need for a hearing to determine the grant of bail pending appeal and it would have put the Prosecution on notice that a constitutional argument would be raised, allowing them to tender a comprehensive set of submissions from the start, without the need for an adjournment. This was not done. Instead, the submissions containing the constitutional arguments were only raised in submissions tendered just one day before the hearing of the appeal.

44 It was evident from what Mr Kumar informed the District Judge on 11 August 2015 that he had intended all along to mount a submission on constitutional validity but had chosen not to expressly advert to this in his petition of appeal. Mr Kumar chose to leave it until the eleventh hour to articulate his submission. The overall impression is that the matter was deliberately and cynically being protracted, for ends or purposes that are not clear, leaving one in serious doubt as to the *bona fides* of the submission.

Analysis of the appellant's arguments

45 I now turn to the substance of the appellant's arguments. Mr Kumar's submission, shortly put, was that the appellant's LT1 sentence, which was based on an unconstitutional admission to the DRC, was itself unconstitutional and therefore had to be set aside. In my judgment, this submission must fail for one simple reason: It was never disputed that the appellant had taken drugs in 2010 and that it was pursuant to that act of consumption that he was admitted to the DRC. As I explained in *Lee Chuan Meng* at [20], the "basic precondition" for the imposition of an LT1 sentence is that it must be proved that the accused has consumed a controlled drug on at least two previous occasions. The fact that the appellant was admitted to the DRC in 2010

pursuant to a positive drug test, together with his prior conviction for drug consumption in 1997, satisfies this basic precondition.

46 The fact that the appellant's detention might be unconstitutional – either because he did not receive any treatment while in the DRC or because the detention did not last for at least six months – is neither here nor there as it does not change the fact that he had consumed drugs on a previous occasion. Provided that the DRC admission had been ordered following a determination that he had consumed a controlled drug, it would be entirely proper for the courts to take the appellant's prior DRC admission into account in deciding whether he qualifies for an LT1 sentence. If the appellant's constitutional rights had truly been violated, he might potentially seek redress in other ways but those would be matters which fall to be decided in different *fora* and through different forms of legal process, but it cannot be of any relevance to the present appeal. This was, in essence, the same point I made in *Lee Chuan Meng* at [22]–[23], though not in a constitutional context.

47 Alone, this would be sufficient to dispose of this matter. For completeness, however, I will go on to explain why I did not agree with Mr Kumar's submission that the appellant's admission to the DRC in 2010 was unconstitutional.

48 As a preliminary point, I first observe that Mr Kumar's reference to Art 9(6) of the Constitution was a complete *non sequitur* (see [33] above). Article 9(6) is a savings provision which narrows the scope of the substantive enactments which precede it. It states that no *law* shall be invalid merely by reason of the fact that it does not comply with either Arts 9(3) or 9(4). Both of these articles relate to the requirements of procedural due process which accompany any act of detention: Art 9(3) relates to the right to be informed of

the grounds of one's arrest and the right of access to counsel; Art 9(4) relates to the right to have the legality of one's detention reviewed by a Magistrate. However, the appellant had not argued that either of these rights was violated when he was admitted to the DRC in 2010. Instead, his complaint was that his DRC admission constituted an unsanctioned deprivation of his liberty – this was a matter which engaged Art 9(1), not Arts 9(3) or 9(4) of the Constitution.

49 Article 9(1) of the Constitution provides that "[n]o person shall be deprived of his life or personal liberty save in accordance with law." As the High Court explained in *Tan Eng Hong v Attorney General* [2013] 4 SLR 1059 at [26], Art 9(1) has a Janus-faced quality to it: on the one hand, it *proscribes* deprivations of life and liberty *unless they are sanctioned by law*; on the other hand, it also *permits* deprivations of life and liberty which are carried out *in accordance with law*. I accepted Mr Kumar's submission that an admission and detention of a person in DRC results in a deprivation of liberty.[23] However, s 34(2)(*b*) of the MDA (which, as an Act of Parliament, is undoubtedly a law-creating instrument) explicitly authorises the Director of the Central Narcotics Bureau ("the Director") to order a person to be detained in an approved institution for a period of time to "undergo treatment and rehabilitation" if he is satisfied, following a medical examination or the results of the person's urine tests, that such admission is necessary.

50 The question, therefore, is whether the appellant's 2010 admission to the DRC falls within the terms of s 34(2) of the MDA and is therefore a legally-sanctioned deprivation of the appellant's liberty. In answer to this, the Prosecution pointed out that it was not disputed that the appellant was (a) admitted pursuant to an order made by the Director, (b) the stated purpose of

---

[23] Appellant's submissions at para 8; Appellant's "respond to response" at para 15.

the order was for the appellant "to undergo treatment and rehabilitation", and (c) this admission was premised on the results of positive urine tests which established that the appellant had consumed morphine. It was submitted that the appellant's admission to the DRC in 2010 adhered to the requirements in s 34(2) of the MDA and was therefore a legally-sanctioned act of detention which comported with the requirements of the Constitution.[24]

51 Mr Kumar challenged this on three broad grounds:

(a) First he argued that the Prosecution had not done enough to discharge its *evidential* burden of showing that the admission order was *actuated* by the motive of subjecting the person to treatment and rehabilitation. He contended that the Prosecution had to go beyond what was said in the documents of admission and adduce positive evidence to explain, among other things, why the appellant had been released before the expiry of six months and why the appellant had (allegedly) not received any treatment during his time in detention.[25]

(b) Second, and in the alternative, Mr Kumar argued that it was not enough that a stint in the DRC was *actuated* by the motive of subjecting the person to treatment and rehabilitation if it did not last for at least six months. He submitted that under s 34(3) of the MDA, every admission to the DRC must last for least six months.[26]

---

[24] ROP, pp 34–38; Prosecution's reply submissions dated 12 February 2016 at paras 21–22.

[25] Appellant's "respond to response" at paras 10–12.

[26] Appellant's "respond to response" at paras 8–14.

(c) Third, he submitted that any admission that is either unaccompanied by any treatment and rehabilitation programmes – as he said was the case with the appellant's 2010 admission to the DRC – would be purely punitive. Insofar as this was contemplated by s 34(2) of the MDA, it was unconstitutional, as it amounted to a vesting of what is exclusively an instance of the judicial power (the power to punish) in the executive.[27]

52 In my judgment, Mr Kumar's first submission turned the matter on its head. As the Court of Appeal noted in *Ramalingam Ravinthran v Attorney General* [2012] 2 SLR 49 at [47], a presumption of legality attaches to the acts of public officials. Absenting positive evidence to the contrary, the good faith of public officials and the validity of their actions must be presumed. The burden was on the appellant to establish that the Director had exercised his discretion in an unlawful manner and he had not done so. Even if it were assumed that the appellant did not receive any treatment or rehabilitation in the DRC, it would be unwarranted to infer from this that the Director had exercised his power improperly by ordering an admission in the first instance.

53 As for his second contention, it rests on a plain misreading of s 34(3) of the MDA. Section 34(3) provides that "[e]very person who is admitted to an approved institution under this section shall be detained in the institution for a period of 6 months *unless he is discharged earlier by the Director or the Review Committee of the institution*" [emphasis added]. It is clear that it does not *mandate* that every stint at the DRC must last for at least six months.

---

[27] Appellant's "respond to response" at paras 15–18.

54 In support of his third contention, Mr Kumar relied heavily on the following passage from the decision of the High Court of Australia in *Chu Kheng Lim and others v Minister for Immigration, Local Government and Ethnic Affairs and another* (1992) 110 ALR 97 ("*Chu Kheng Lim*") at 118–119:

> In the light of what has been said above, the two sections will be valid laws if the detention which they require and authorise is limited to what is reasonably capable of being seen as necessary for the purposes of deportation or necessary to enable an application for an entry permit to be made and considered. On the other hand, if the detention which those sections require and authorise is not so limited, the authority which they purportedly confer upon the Executive cannot properly be seen as an incident of the executive powers to exclude, admit and deport an alien. In that event, *they will be of a punitive nature and contravene Ch III's insistence that the judicial power of the Commonwealth be vested exclusively in the courts which it designates*. [emphasis added]

55 In my judgment, Mr Kumar's reliance on *Chu Kheng Lim* was misplaced. The question there was whether certain statutory provisions which provided for the compulsory detention of non-citizens pending their expulsion or deportation were unconstitutional because they amounted to a vesting of the judicial power to punish in the executive. In answering this question in the negative, the court held that the power to detain a person for the purposes of expulsion or deportation was not punitive in character, and was instead properly classified as an incident of the executive powers of exclusion, admission and deportation (see *Chu Kheng Lim* at 120). Likewise, s 34(2)(*b*) of the MDA permits the detention of an individual for the "purpose" of "treatment and rehabilitation". This power of detention granted under s 34(2) of the MDA is properly seen as an incident of the executive power to administer the laws relating to the treatment and rehabilitation of drug addicts under Part IV of the MDA and it would, as Chan CJ put it in *Mohammad Faizal* at [49], "be inaccurate to characterise a DRC admission as inflicting

punishment". There is therefore no basis for concluding that s 34(2) transgresses the principle of the separation of powers.

Conclusion

56 At the end of the day, even though the appellant tried to cloak his arguments in constitutional garb, he had not gone beyond what the appellant in *Lee Chuan Meng* tried to do, which was to urge this court to hold that an admission to the DRC has to last for at least six months and be accompanied by treatment and rehabilitation before it could be used as a condition precedent for the imposition of LT1 punishment. This was an argument which had already been carefully considered and rejected.

57 For the foregoing reasons, I dismissed the appeal.

See Kee Oon
Judicial Commissioner

Udeh Kumar s/o Sethuraju (S K Kumar Law Practice LLP)
for the appellant;
Chee Min Ping and Shen Wanqin (Attorney-General's Chambers)
for the respondent.