IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2020] SGHC 135

Magistrate's Appeal No 9053 of 2019/01

Between

Effrizan Kamisran

… *Appellant*

And

Public Prosecutor

… *Respondent*

JUDGMENT

[Criminal Procedure and Sentencing] — [Sentencing] — [Appeals]

Effrizan Kamisran
v
Public Prosecutor

[2020] SGHC 135

High Court — Magistrate's Appeal No 9053 of 2019/01
Sundaresh Menon CJ, Steven Chong JA and Aedit Abdullah J
7 February 2020; 28 May 2020

6 July 2020 Judgment reserved.

Sundaresh Menon CJ (delivering the judgment of the court):

1 Rehabilitation in a drug rehabilitation centre ("DRC") has long been a mainstay of Singapore's multi-pronged strategy to combat drug abuse. A DRC admission depends on the Director of the Central Narcotics Bureau ("the Director" and "the CNB") making an order under s 34 of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) ("MDA"). Singapore's anti-drug strategy, which has been fine-tuned over the years, has also included the punishment and deterrence of *repeated* drug abuse through mandatory imprisonment under the long-term imprisonment ("LT") regime. The LT regime provides for extended mandatory minimum terms of imprisonment that are prescribed for offenders with certain antecedents. In general, the mandatory minimum terms are extended in line with the number of relevant antecedents the offender has (referred to as "LT-1" and "LT-2"). Imprisonment follows the successful prosecution of the accused person in court proceedings.

2 The present appeal brings to the fore a number of issues about the relationship between DRC admissions and prosecutions in court for drug consumption. Specifically, how does the exercise of the Director's discretion to admit a drug abuser to a DRC under s 34 of the MDA (a "DRC order") interact with prosecutorial discretion? May a subsequent prosecution be brought based on the same conduct that founded a drug abuser's DRC admission (a "same-conduct DRC/prosecution" scenario), as was held to be the case in *Lim Keng Chia v Public Prosecutor* [1998] 1 SLR(R) 1 ("*Lim Keng Chia*")? And, does the Director have a duty to give reasons for making a DRC order?

3 In our judgment, in general, the exercise of the Director's discretion to make a DRC order does not impinge on the prosecutorial discretion vested in the Attorney-General ("AG"). However, same-conduct DRC/prosecutions are not generally permissible because they will usually give rise to an abuse of the judicial process and, indeed, of the prosecutorial power that is vested in the AG in his capacity as the Public Prosecutor. Further, the Director is *not* generally required to give reasons for his decision in making a DRC order. We now explain our decision.

Background and procedural history

Proceedings below

4 The appellant, Effrizan Kamisran ("the Appellant"), who was 39 years old at the time of sentencing below, has a long history of drug-related offending. In 2005, he was sentenced to eight years' imprisonment and eight strokes of the cane for drug trafficking. Following his release, he re-offended and was subsequently punished in 2012 with seven years and three months' imprisonment and six strokes of the cane for drug consumption pursuant to the LT regime.

5 In October 2018, the Appellant was again arrested on suspicion of committing offences under the MDA. In March 2019, the Appellant pleaded guilty to a repeat LT-2 consumption charge for consumption of methamphetamine under s 8(*b*)(ii) punishable under s 33A(2) of the MDA; an enhanced possession charge for methamphetamine under s 8(*a*) punishable under s 33(1) of the MDA; and a possession of utensils charge under s 9 punishable under s 33(1) of the MDA.

6 The District Judge ("the DJ") sentenced the Appellant to seven years six months' imprisonment and six strokes of the cane for the first charge, two years' imprisonment for the second charge, and three months' imprisonment for the third charge. The sentences for the first and third charges were ordered to run consecutively, resulting in an aggregate sentence of seven years nine months' imprisonment and six strokes of the cane. Two other charges (an LT-2 charge for consumption of monoacetylmorphine and an enhanced possession charge for diamorphine) were taken into consideration.

The Appellant's mention of a case of a "similar nature"

7 The Appellant, who was unrepresented, appealed against his sentence. While he did not provide any specific reasons why his sentence was manifestly excessive, his skeletal arguments named one Mohamed Salim bin Abdul Aziz ("Salim"), who apparently faced similar charges but was sent for treatment in a DRC instead of being prosecuted. In material part, his skeletal arguments read as follows:

> 1) I wish to seek clarification from the court, why there are 2 different structures of sentencing in cases of similar nature?
>
> 2) I wish to produce an example antecedent [*sic*] of sentencing under the similar nature but of a different structure of sentencing?

> Example individual is: Mohamed Salim Bin Abdul Aziz (DOO399/2018)
>
> Individual above is under similar nature of case is undergoing treatment in D.R.C since 2018 He was allowed on the conversion as I had stated in my previous mitigation in (Pg 77 of 77) on the 12th April 2018.
>
> 3) I wish to seek clarification on how the court arrived on the conclusion?
>
> 4) With regards to the ground of decision stated in (Pg 45 of 77) of the serial number (35 and 36)
>
> a. Serial no 35 in the ground of decision stated that the amendment introduced by the Bill had yet to come into operation. For the record, I was sentenced on the 4th March 2019, whereas, bearing in mind the above example given were charged on April 2018, clearly indicates contradiction.
>
> b. Serial no 36 indicates that my argument on the example given as above would be successful IF the provision of the Bill were already in force when I was sentenced on the 4th March 2019 However, the date of the conversion awarded to the example given above, again, contradicts with the ground of decision.
>
> 5) With respect, I see no basis for treating these circumstances as a factor that should not be recognised in sentencing me to Enhanced consumed or the possibility of conversion to D4 (D.R.C.)
>
> 6) With respect to the Honourable Court, I wish to state that I did not question the integrity of the Court's decision and the credibility of the Prosecutor's office in prosecuting my case. Neither do I ask for a discharged on my case because I fully understand the consequences to the nature of my case. However, I seek for the court fair judgment on the arguments stated, and the example given towards the ground of decision, as the law now stands.
>
> …

8 The Appellant had also mentioned Salim in his mitigation plea before the DJ, when he asserted that Salim was "converted to DRC" because he was categorised as a "pure abuser". According to him, Salim was admitted to a DRC on 12 April 2018 even though his case had been dealt with "before the

amendment bill was made". By the "amendment bill" the Appellant was presumably referring to the Misuse of Drugs (Amendment) Bill 2019 ("the MDA Bill"), which was passed by Parliament on 15 January 2019.

9 As explained by the Minister for Home Affairs and Minister for Law Mr K Shanmugam in the second reading speech for the MDA Bill, from 16 January 2019 (the "Effective Date"), pure drug abusers who admitted to drug consumption would be admitted to a DRC regardless of how many times they had previously been detained (*Singapore Parliamentary Debates, Official Report* (15 January 2019) vol 94:

> Now, let me move on to the rehabilitation aspect of the Bill. Drug abusers today, arrested for the first and second time, go through rehabilitation, which is mandatory, in DRC. We call it DRC1 and DRC2 …
>
> …
>
> The Long-Term Imprisonment (LT) regime was introduced in 1998. That targeted hardcore abusers, who, at that time, formed three-quarters or more than three-quarters of the abusers who were being arrested. The purpose was to punish, but also to deter their drug use because everything else has been tried, but it was not possible to keep them away from drugs. They were getting into drugs, and they were contaminating others, and the problem was spreading. So, it was to protect the public from abusers who turned to crime to feed their drug habits as well.
>
> So, third-time abusers face mandatory imprisonment of five to seven years, and three to six strokes of the cane. Fourth time and beyond: seven to 13 years in LT. In LT2, six to 12 strokes of the cane.
>
> …
>
> … we have been studying how to bring down recidivism down even further. Our assessment is that for pure abusers, we can now afford to focus, shift our balance quite decisively, and focus more on rehabilitation as opposed to detention. …
>
> …
>
> So, we have decided, let us try and distinguish between those who only consume drugs – I call them the "pure" abusers – from

> those who also face charges for other offences. For example, trafficking, property offences, violent offences. So, if they have abused drugs and they have committed some of these other crimes, we put them in one category. We put those who only abused drugs in one category.
>
> For the second group, those who consume drugs and commit other offences, they will continue to be charged for their drug-consumption offences as well as the other offences. If they are liable, they will be sentenced to LT.
>
> *For those who only abuse but do not have any other criminal offence, that means they only consume drugs and they admit to their drug abuse, then the general approach, regardless the number of times, would be that the Director of CNB will make the appropriate supervision or detention order, and channel them into the rehabilitation regime.*
>
> *So, this group of abusers may also include those who have minor consumption-related offences like possession of drug-taking utensils or possession of small quantities of drugs. If AGC agrees with CNB that there is no need to charge the drug abusers for these minor offences, then these persons will also be channelled to the rehabilitation regime.*
>
> This will be conditional on the abusers admitting to their drug offences. …
>
> …
>
> … to benefit as many persons as possible, CNB, with the concurrence of AGC, will generally not charge abusers, who meet the criteria I have explained, from tomorrow, 16 January 2019, on the assumption that the Bill is passed today.
>
> [emphasis added]

10 The Appellant's reference to Salim's case and the alleged inconsistent treatment of two seemingly similarly situated offenders raised questions about the exercise of discretion by the Director in deciding whether to make a DRC order, as well as the interaction between the CNB and the AG's exercise of prosecutorial discretion. The Director's exercise of discretion is governed by s 34(2)(*b*) of the MDA, which provides:

> **Supervision, treatment and rehabilitation of drug addicts**
>
> **34**.—(1) The Director may order any person whom the Director reasonably suspects to be a drug addict to be committed, for a period not exceeding 7 days, to any place specified by the Director for the purpose of any medical examination or observation.
>
> (2) If, as a result of such medical examination or observation under subsection (1) or both the urine tests conducted under section 31(4)(*b*) or the hair test conducted under section 31A, it appears to The Director that it is necessary for any person examined or observed, or who supplied the urine specimen for the urine tests, or who supplied the hair specimens for the hair test —
>
> (a) to be subject to supervision, the Director may make a supervision order requiring that person to be subject to the supervision of an officer of the Bureau for a period not exceeding 5 years; or
>
> (b) to undergo treatment or rehabilitation or both at an approved institution, the Director may make an order in writing requiring that person to be admitted for that purpose to an approved institution.

Questions directed to the Prosecution

11 In view of the concerns outlined in the previous paragraph, the Prosecution was directed to answer these questions, without derogating from their submissions filed earlier in July 2019:

> (a) What is the nature and scope of the discretion afforded to the Director under s 34(2)(*b*) of the MDA, and how does this cohere with the power of the AG under Art 35(8) of the Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint) ("the Constitution") to direct criminal prosecutions?
>
> (b) Does the Director have a duty to give reasons for the way in which he exercised his discretion under s 34(2)(*b*) of the MDA?

(c) What were the circumstances surrounding the DRC admission of Salim, if there was indeed such an admission?

The hearing in August 2019 was adjourned to allow the Prosecution time to respond.

12 The Prosecution filed its submissions together with an affidavit of the Deputy Superintendent of the CNB ("the CNB affidavit") in September 2019. The court then directed that a three-judge coram be convened and a young *amicus curiae* ("YAC") be appointed. Mr Tan Ruo Yu was appointed as YAC. The Prosecution filed further submissions and a second CNB affidavit ("the Second CNB Affidavit") in December 2019, and the YAC filed his submissions in January 2020.

13 At the hearing before us in February 2020, we directed that the Prosecution also address us on, amongst other issues, the significance of the certification issued by the Health Sciences Authority ("HSA") in respect of the urine tests referred to in s 34(2) of the MDA; the nature of the interaction between the Public Prosecutor and the CNB when handling potential prosecutions or DRC admissions; the correctness of *Lim Keng Chia* in relation to the abuse of process doctrine; and the circumstances of Salim's previous conviction(s). The YAC was also invited to file further submissions. We are most grateful to the YAC for his diligent and thorough submissions.

14 In March 2020, the Prosecution filed its second set of further submissions, a third CNB affidavit ("the Third CNB Affidavit") and other supporting affidavits. In April 2020, the YAC filed his further submissions. After receiving these we sought clarification from the parties on two further issues. All parties tendered further submissions in May 2020, including a fourth

CNB Affidavit that was tendered by the Prosecution ("the Fourth CNB Affidavit").

Parties' submissions

The Appellant's submissions

15 The Appellant relied on his skeletal arguments, reproduced at [7] above, and a further letter to the court dated 18 May 2020. We will turn to the contents of this letter below (at [42]–[44]).

Prosecution's submissions

(1) Director's discretion and prosecutorial discretion

16 The Prosecution explained how the Director's exercise of discretion does not interfere with prosecutorial discretion by setting out the entire decision-making process for determining whether an individual is prosecuted, admitted to a DRC, or allowed to go free. Although there appeared to be some inconsistencies between the position taken by the Prosecution in its July 2019 submissions and the Second CNB Affidavit, these were resolved in the Third CNB Affidavit. The Prosecution's final position is as follows.

17 To trigger the Director's discretionary power to issue a DRC order under s 34(2)(*b*) of the MDA, the Director *must* first find it necessary for that person to undergo treatment or rehabilitation as a result of (a) urine tests conducted under s 31(4)(*b*) of the MDA, (b) medical examination or observation conducted under s 34(1) of the MDA, or (c) a hair test conducted under s 31A of the MDA. What counts as a "qualifying result" for this purpose varies depending on the test that is being relied on:

(a) In respect of the urine tests, both urine specimens must test *positive* for the same controlled drug, and be so certified by the HSA. *Trace* results for one or both urine tests would mean there was no qualifying result.

(b) In respect of the medical examination or observation, this requires an assessment by a doctor that the subject showed signs and symptoms consistent with drug withdrawal (whether "mild", "moderate", "moderately severe", or "severe") under the Clinical Opiate Withdrawal Scale ("COWS"), as recorded in a medical report received by the CNB. A "negative" assessment would mean there was no qualifying result.

(c) In respect of a hair test, this requires the specimen to test positive for a controlled drug, and be so certified by the HSA.

18 The CNB explained that fulfilling at least one of the three tests is a necessary precondition to the Director's exercise of discretion. In practice, if there is no qualifying result for the *urine tests*, the CNB will refer the matter to the Attorney-General's Chambers ("the AGC") to decide whether a prosecution should nonetheless be initiated. Should the AGC decline to prosecute, the Director will then consider if there is a qualifying result for either the medical examination or observation, or the hair test. If there is no qualifying result, the subject will be released.

19 Assuming there is a qualifying result for at least one of the three tests, the Director will next consider whether the person would benefit from DRC admission. The Prosecution explained in the Third CNB Affidavit that this was

considered holistically and the relevant factors "include[] but are not limited to":

> (a) Whether the person admitted to drug consumption in his investigative statements. A DRC order will not be made in the absence of such an admission. The CNB considers that a person who does not admit to drug consumption has not accepted the need for rehabilitation, and so any dispute as to whether the person has consumed drugs should be resolved in court. The need for an admission is not a statutory requirement but a "self-imposed condition" of the CNB. It seems to us also to cohere with the notion that admission to a DRC is not primarily a form of punishment consequent upon the commission of an offence but rather a form of rehabilitative treatment for an addiction, as to which see further at [50] below.
>
> (b) Whether the person has committed other drug-related offences apart from drug consumption, or other non-drug related offences. Where this is the case, the CNB will consider whether the offences are those for which the AGC has authorised the CNB (and/or other law enforcement agencies, if there are non-drug offences involved) to waive prosecution. If the drug-related offences are waivable and prosecution of any non-drug offences has been waived by the relevant agency, then upon the making of a DRC order, prosecution will be waived for the drug-related offences. If any of the offences are non-waivable, the CNB will refer the matter to the AGC to decide whether it wishes to prosecute the person for a criminal offence. Only if the AGC decides against prosecution will the Director consider whether to make a DRC order.

20 In response to the court's further queries in May 2020, the Prosecution clarified that, as is apparent from the wording "includes but not limited to", the Director may have regard to other unenumerated factors. One such factor, as explained by the Prosecution, is the risk of further drug abuse. This would affect whether a first-time drug abuser is put on an Enhanced Direct Supervision Order or admitted to a DRC. Such unenumerated factors would in any case only be considered if there is both a qualifying result and an admission by the person to the CNB that he consumes drugs as noted at [19(a)] above.

21 Some mention should also be made of the difference before and from the Effective Date (see [9] above) in the Director's general approach indicated at [19] above. Essentially, whether an individual is liable for punishment under the LT regime is no longer relevant.

(a) Before the Effective Date, individuals who had no relevant antecedents and who were therefore not subject to the LT regime were subject to a "general policy" of being admitted into a DRC. The AGC had on 15 February 1997 authorised the CNB to exercise the power to waive prosecution for drug consumption offences against any person considered suitable for a DRC order. On the other hand, in respect of individuals who were subject to the LT regime because they had relevant antecedents ("LT-liable") and whose urine was certified to contain a specified drug, prosecution would be initiated against them. There were some exceptions to this, which are not material to the present analysis.

(b) From the Effective Date, the general approach towards pure drug abusers was, as noted in the Minister's speech referred to at [9] above, to channel them into the DRC system without regard to whether they were LT-liable. The AGC had, on 20 November 2018 authorised the

CNB to exercise the power to waive prosecutions against such persons from the Effective Date.

22 The Prosecution made two further arguments in support of the view that the Director's exercise of discretion does not interfere with prosecutorial discretion:

(a) The Director's discretion under s 34(2)(*b)* of the MDA is an executive power exercised for the purposes of individual and public health, with the object of *treating and rehabilitating* drug addicts. DRC admissions are not meant to be punitive.

(b) As was held in *Lim Keng Chia*, the Director's exercise of discretion under s 34(2)(*b*) has no legal bearing on whether criminal proceedings will or may be brought, and in fact cannot preclude the AG from exercising his prosecutorial powers to institute criminal proceedings. It follows based on that precedent that a DRC admission is not a conviction and a person may be charged and convicted of the same act of consumption that led to the DRC admission.

(2) Correctness of Lim Keng Chia

23 The Prosecution's argument at [22(b)] above is premised on the correctness of *Lim Keng Chia*. That case concerned an offender who was admitted to a DRC for a year, and thereafter was charged for the consumption of morphine, based on the same incident which had led to his detention in the DRC. The offender filed a petition for criminal revision in the High Court, arguing that the charge was bad in law for violating the rule against double jeopardy enshrined in Art 11(2) of the Constitution and the decision to prosecute was therefore an abuse of the court process. The petition was heard and

dismissed by Yong Pung How CJ, who held that there was no basis for saying that the DRC order amounted to a criminal conviction and so the double jeopardy doctrine was not engaged (*Lim Keng Chia* at [6]–[14]). The legislative intent underlying the MDA was for the detention provisions to *complement* penal sanctions, and Parliament never viewed the making of a DRC order as a bar to subsequent prosecution of the detainee after his release from a DRC. Regarding the abuse of process doctrine, it was not suggested that the AG's decision to prosecute was *mala fides* (*Lim Keng Chia* at [15]–[19]).

24 The Prosecution submitted that *Lim Keng Chia* was correctly decided on the double jeopardy point, and that there was insufficient basis to conclude it was incorrectly decided in relation to abuse of process. There was no evidence to show that the prosecution of the petitioner was for an extraneous purpose – in fact, the court had observed that the Prosecution had taken into account how the petitioner was a recalcitrant repeat offender in deciding to prosecute him (*Lim Keng Chia* at [19]). Absent bad faith, the presumption of constitutionality and regularity that attached to decisions made by constitutional office holders meant that *Lim Keng Chia* was correctly decided. Additionally, while it was true that the petitioner in *Lim Keng Chia* had been deprived of his liberty due to DRC detention, it was unclear whether he had *successfully* completed his DRC stint or had been discharged in order to be prosecuted.

(3) Director's duty to give reasons

25 The Prosecution further argued that the Director has no duty to provide reasons for the exercise or non-exercise of his discretion under s 34(2)(*b*) MDA. No such requirement is provided for in the MDA, in contrast with the position under other statutory provisions that deprive an individual of personal liberty, such as those in the Criminal Law (Temporary Provisions) Act (Cap 67, 2000

Rev Ed) and the Internal Security Act (Cap 143, 1985 Rev Ed). Nor is there any duty to give reasons at common law. The Prosecution made the following key points (it also proffered some other arguments which we do not find persuasive and have not set out here).

26 First, reasons are not required at common law for administrative decisions except where necessary to ensure fairness. Fairness in this context does not necessitate the giving of reasons by the Director. The absence of reasons would not prevent affected persons from understanding how the decision was arrived at given the need for an admission to drug consumption or otherwise affect their ability to challenge the decision. There are also statutory safeguards to check the Director's exercise of discretion, namely s 39 of the MDA, which permits complaints to be made to a Magistrate in respect of improper detention in a DRC by reason of any misconduct or breach of duty by any officer under the MDA; and ss 34 and 38, which vest the power to decide on the ultimate duration of an individual's DRC stint in the Review Committee as opposed to the Director. For similar reasons, accountability is also not compromised.

27 Second, imposing a duty to give reasons would place an undue burden on the Director and potentially cause delay. The CNB's current and strictly *voluntary* practice is to inform, upon request, an individual who is subject to a DRC order that he has met the qualifying criteria under the MDA for a DRC order. Imposing a legal duty would cause a surge in the number of cases that would have to be dealt with in this way and this would lead to inefficiency.

28 Third, requiring the Director to disclose the reasons for his decision when challenged runs counter to the presumption of legality that attaches to

decisions of public officials (see *Muhammad Ridzuan bin Mohd Ali v Attorney-General* [2015] 5 SLR 1222 at [36]).

(4) Salim's and the Appellant's circumstances

29 Finally, according to the CNB Affidavit, Salim was admitted to a DRC because: (a) only *trace* amounts of morphine were detected in his urine samples and he was not found with any drugs during his arrest (thus posing evidentiary difficulties in proving the fact of drug consumption); (b) he had admitted to drug consumption; and (c) he was found to display signs and symptoms consistent with moderate drug withdrawal after medical examination. Salim was released from the DRC on 11 October 2019.

30 In contrast, the Appellant was not admitted to a DRC because there was sufficient evidence to prosecute him for drug consumption punishable under s 33A of the MDA. The HSA had certified that his urine samples were *positive* for monoacetylmorphine (from diamorphine consumption) and methamphetamine. The Appellant was also found in possession of diamorphine, methamphetamine, a straw and drug utensils when he was arrested.

31 The Prosecution argued that in view of their different circumstances, the varying *outcomes* in Salim's and the Appellant's cases do not suggest actual or apparent bias on the Director's part. That said, the Second CNB Affidavit admitted to a lapse in *procedure* in deciding whether to admit Salim to a DRC. It turned out that the CNB had opted to review Salim's matter after receiving the court's queries, and found that it should have first referred Salim's case to the AGC to determine if Salim could and should be prosecuted before admitting Salim to the DRC. In view of this, the CNB referred Salim's matter to the AGC in November 2019. The AGC directed that the CNB issue Salim with a stern

warning in lieu of prosecution for drug consumption. This, however, had no bearing on or relevance to the Appellant's case.

YAC's submissions

32 The YAC was instructed to address the issues of the Director's discretion under s 34(2)(*b*) of the MDA, the correctness of *Lim Keng Chia*, and the Director's duty to give reasons.

(1) Director's discretion and prosecutorial discretion

33 The YAC submitted that the Director's decision to make a DRC order under s 34(2)(*b*) of the MDA is an executive decision, involving a regime not intended to be punitive in nature, that does not impinge on prosecutorial discretion. The policy of the DRC regime is that *with the concurrence of the AG*, pure drug abusers who admit to their drug consumption will generally be channelled to the DRC instead of being prosecuted. Therefore, the Director will have consulted or conferred with the AGC and obtained the AGC's agreement.

(2) Correctness of Lim Keng Chia

34 The YAC also submitted that *Lim Keng Chia* was correctly decided on the double jeopardy point. He noted that *Lim Keng Chia* is supported by a number of Malaysian authorities (including *Lye Pong Fong v Public Prosecutor* [1998] 6 MLJ 304, *Musa Bin Salleh v Public Prosecutor* [1973] 1 MLJ 167 and *Nadarajan v Timbalan* [1994] 2 MLJ 657), which held, in the same vein, that a detention order is an administrative order and not a conviction for an offence.

35 While initially taking a different view, the YAC's final position on the abuse of process point was that bringing a same-conduct DRC/prosecution would be an abuse of process. DRC admissions involve the deprivation of

personal liberty. It is simply unfair and unjust to imprison the person again for the same conduct upon his release from DRC, especially considering that Parliament's intention is for the drug user to be prosecuted or sent to DRC but not both. Additionally, same-conduct DRC/prosecutions distort the operation of the LT regime under the MDA, which is meant to impose enhanced punishment only when there was drug consumption on at least two previous occasions.

(3) Director's duty to give reasons

36 The YAC distinguished between two scenarios where a drug abuser would presumably wish to know the Director's reasons – where he is dissatisfied with the Director's decision to make a DRC order because he disputes that there are grounds for the order, and where he is dissatisfied with the Director's refusal to make a DRC order such that he is charged instead.

37 In the first situation, fairness dictates that the Director be required to let the individual know that the results of the medical examination or observation, urine tests or hair test referred to in s 34(2) of the MDA show that he has consumed drugs. Beyond that, the Director should *not* be required to give reasons. The YAC mainly relied on similar reasons to those raised by the Prosecution, including the lack of any statutory requirement and undue burden on the Director. He also argued, citing English authorities, that where an administrative decision involves a clear application of policy that has already been published, the reason is simply the policy. A duty to give reasons will not arise where the explanation for the decision is obvious.

38 In the second situation, it would be appropriate to require the Director to give reasons – but only in the "exceptional case" where the drug user is not facing charges for other offences and has admitted to his drug consumption. In

such circumstances, the Director may have decided not to make a DRC order for reasons that are not evident to the drug user, such as the individual's perceived unreceptiveness to treatment or risk of recidivism. Recognising a duty to give reasons would encourage the Director to carefully examine the issues and be consistent in decision-making, accord with fairness and respect for the individual, increase public confidence in the decision-making process and allow errors to be detected.

Issues on appeal

39 We consider that there are three issues for us to determine in disposing of this appeal.

(a) Is the Appellant's sentence manifestly excessive?

(b) What does the Director's decision-making process for making a DRC order entail, and does it impinge on prosecutorial discretion?

(c) Does the Director have a duty to give reasons for his decision whether to make a DRC order?

Our decision

The Appellant's sentence is not manifestly excessive

40 In our judgment, there is no merit in the Appellant's substantive appeal. We agree with the DJ's reasoning in his grounds of decision ("GD"). The sentence of seven years six months' imprisonment for the LT-2 charge was appropriate, and if anything was somewhat on the lenient side, in view of the separate LT-2 charge that was taken into consideration, and the Appellant's recent antecedents which include another LT-2 charge for which he had been sentenced to seven years three months' imprisonment (GD at [43] and [46]).

The sentence of three months for the possession of drug utensils was in line with the median sentence passed on similar offenders for offences under s 9 of the MDA (GD at [55]). Running these sentences consecutively would not offend the totality principle (GD at [76]–[80]). In any event, the DJ was obliged to run at least two of the sentences consecutively. The aggregate sentence that was meted out to the Appellant was therefore not inherently objectionable in any way.

The comparison with Salim

41 The only potential issue of concern that was raised by the Appellant was the comparison of his situation with Salim's. Although, as noted above, the Appellant made several arguments in his letter dated 18 May 2020 based on the different treatment accorded to himself and Salim, in the final analysis, we are satisfied that these do not assist him.

42 First, the Appellant argued that "the date and the CNB's referral of Salim's matter to AGC and the report above and on (Para 8/9) [of the Second CNB Affidavit] clearly contradicts". The Appellant is correct in pointing out that in some respects how Salim was dealt with contradicts the usual practice. But the fact that the CNB might have made a mistake in dealing with *Salim* is admitted by the Prosecution, and would not change the analysis in relation to *the Appellant*. To put it very simply, two wrongs do not make a right. More fundamentally, there is nothing in the way that Salim was dealt with that in any way affects the approach that should be taken with respect to the Appellant.

43 Second, the Appellant, referring to paras 9(b) and 13(b) of the Second CNB Affidavit and para 5 of the CNB Affidavit, also sought to contend that in substance, he and Salim were similarly situated in respect of the possession

charge. In fact, this is not entirely correct. The Prosecution has always maintained that "[n]o drugs or utensils were found on Salim *at the time of his arrest*" or "*when he was arrested*" [emphasis added]. Instead, a straw of heroin linked to Salim was "recovered on a bus about six weeks prior" to Salim's arrest. In contrast, the Appellant was found "*in possession*" of methamphetamine, diamorphine and drug utensils [emphasis added]. In short, in the Appellant's case, there was no evidentiary difficulty with establishing the fact of drug possession, whereas the evidential position was less clear with respect to Salim.

44 Third, the nub of the Appellant's complaint that he and Salim were treated differently even though they were similarly situated was misplaced at a more fundamental level. The Prosecution explained that it faced "evidentiary difficulties" in Salim's case, because the HSA only detected trace amounts of morphine in his urine samples. The evidentiary significance of a *trace* result for morphine was explained in the affidavit of Dr Lui Chi Pang ("Dr Lui"), a Senior Consultant Forensic Scientist at the HSA; see further at [17(a)] above. Dr Lui deposed that the HSA reports trace amounts of morphine where the concentration of morphine in the sample is within the range of 0.2 to 0.5 µg/ml and the codeine to morphine ratio is less than 0.5. The presence of trace amounts of morphine could be due either to the consumption of heroin (diamorphine) or of codeine. Reports stating that trace amounts of morphine were detected are supplied to the enforcement agencies to be used only for monitoring purposes, and are not intended to be produced for court use. In the Appellant's case, however, the HSA report indicated not a trace result but a positive finding that "the urine sample was found to contain the following: Methamphetamine".

45 It follows that Salim and the Appellant were not in fact similarly situated, and the decision to refer the Appellant to prosecution while making a

DRC order in respect of Salim was explicable and in line with the CNB's prevailing policy.

Prosecutorial discretion

46 In the course of considering the Appellant's arguments, we also examined the process by which decisions were made to either prosecute a suspected offender or to make a DRC order. Having done so, we are satisfied that the Director's decision-making process as explained by the Prosecution (see [17]–[21] above) does *not* impinge on prosecutorial discretion. In all situations, the Prosecution will either have given its authorisation or "standing instructions", or have the case referred to it by the CNB for it to consider whether to bring a prosecution. On the basis of that process, the decision to refer *this* accused person (that is, the Appellant) to the AGC for potential prosecution was not improper. The only remaining question is whether the Director is required to give reasons for his decision.

Director's duty to give reasons

47 To recapitulate, where the Director makes a DRC order, the Prosecution and YAC are broadly agreed that the Director should not be under a duty to give reasons though the YAC suggests that as a matter of fairness, limited information should be provided as noted at [37] above. Where the Director does *not* make a DRC order and the individual is instead prosecuted, the Prosecution maintains that reasons should not be given. The YAC suggests otherwise, but only where a DRC order is not made despite the fact that the individual has admitted to his drug consumption and is not facing charges for other offences.

48 In our judgment, there is a need to distinguish between three situations in determining whether the Director is required to give reasons.

49 First, there is no need give reasons where the decision is made to refer an individual to the AG for him to decide whether to prosecute. Strictly speaking, in this situation the question of the Director giving reasons does not even arise. It is not the Director but the AG who determines how the individual's case will be dealt with, and there is no requirement for the AG to disclose his reasons for making a particular prosecutorial decision (*Ramalingam Ravinthran v Attorney-General* [2012] 2 SLR 49 at [74]). If the AG does prosecute the individual, the process is subject to the court's oversight and eventual decision on the merits.

50 Second, there is also, *in general*, no need to give reasons where the Director decides to make a DRC order in lieu of prosecution. We recognise that reasons may be required for the making of administrative decisions where, for instance, the decision involves "matters of special importance such as personal liberty": *Manjit Singh s/o Kirpal Singh and another v Attorney-General* [2013] 2 SLR 844 ("*Manjit Singh*") at [85]. Notwithstanding the loss of liberty that results from confinement in a DRC, we are satisfied that the personal liberty exception in *Manjit Singh* does not apply as a general rule in the present context. It is important to consider not only the fact of confinement but also the reason for this. In DRC admission cases, the individual is being sent for *treatment* rather than *punishment*, and this is a point emphasised in the recent changes introduced by the MDA Bill to adopt a more rehabilitative approach towards drug abusers. DRC admissions are also contingent upon the presence of a qualifying result and an admission to drug consumption in the individual's statements, as recounted at [17] and [19(a)] above, such that the individual would know why he is being admitted to a DRC. This means one of the key rationales necessitating the giving of reasons, namely to overcome the lack of awareness on the part of the person affected by the relevant order or action, is

not engaged. Finally, as we explain below, such an individual would generally be protected by the abuse of process doctrine from a prosecution being initiated based on the same conduct that had led to his DRC admission. We elaborate on this at [53]–[57] below. Whether there might be other *specific* grounds or circumstances that might warrant the giving of reasons when the Director makes a DRC order, is a matter we can decide if and when such an application is made.

51 Third, we leave open the question whether reasons should be given by the Director where an individual is prosecuted despite *prima facie* qualifying for a DRC admission and where this would appear to be a departure from the general stance of the CNB and the AGC. The issue is simply not engaged here since the Prosecution has explained the reason for the position that was taken in this case and the fact that the Appellant did not qualify to be considered for a DRC order based on the prevailing policies, and it is evident that there is nothing objectionable about this. It is therefore not necessary for us to deal with this at present.

52 We observe that this decision is *not* premised on the presumption of constitutionality, contrary to the Prosecution's suggestion. We reiterate the observations of the Court of Appeal in *Saravanan Chandaram v Public Prosecutor* [2020] SGCA 43, where it held (at [154]) that the presumption can only be a *starting point* that legislation or other actions will not presumptively be treated as suspect or unconstitutional, for otherwise the court would in effect be presuming the constitutional validity of the very thing that is being challenged.

Correctness of Lim Keng Chia

53 Finally, we briefly touch on *Lim Keng Chia*. We are satisfied that the decision was correct on the double jeopardy point. Because a DRC order is not a prior conviction, the making of a DRC order followed by a prosecution of the offender arising out of the same conduct would not engage the doctrine of double jeopardy. That doctrine applies where the offender is tried again for the same offence of which he has been convicted or acquitted: Art 11(2) of the Constitution.

54 However, *Lim Keng Chia* is, in our judgment, *incorrect* in so far as it held that such a scenario was otherwise permissible or that "Parliament never viewed the making of a detention order … as a bar to [the] subsequent prosecution of the detainee after his release from the DRC" (*Lim Keng Chia* at [18]). We therefore disagree with the Prosecution that it is unobjectionable in principle to charge a person who has been admitted to a DRC for the same conduct that led to the DRC admission, or that the court has no power to check such prosecutions.

55 In *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 ("*Phyllis Tan*"), the Court of Three Judges explained the concepts of abuse of process and abuse of prosecutorial discretion in these terms:

> 132 … the criminal process is intended for the *bona fide* prosecution of criminals, and to use it for an extraneous purpose is to abuse it. An example of such abuse is where the court process is being used to try the defendant on a criminal charge in order to harass him or teach him a lesson when the Prosecution has no or insufficient evidence to justify the charge, or for some extraneous purpose other than to convict and punish the defendant as an offender. Another example might be where the defendant has been promised immunity from prosecution by the prosecuting authorities in exchange for assisting the police in their investigations. Yet another example might be where the defendant is charged with a more serious

> charge (without any or sufficient evidence to support it) in order to pressure him to plead guilty to a charge for a less serious offence. These would be cases where the Prosecution is using the criminal process for a purpose for which it is not intended, thus amounting to an abuse of process. …
>
> …
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> 147 We have in the preceding paragraphs … defined an abuse of the criminal process to mean the use of that process for a purpose for which it is not intended, *ie*, to prosecute an offender for some other ulterior motive and not to punish him for an offence which he has committed. If the Attorney-General initiates such a prosecution, he also abuses his prosecutorial power. There is here both an abuse of prosecutorial power and an abuse of judicial process. …
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> …
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> 149 The discretionary power to prosecute under the Constitution is not absolute. It must be exercised in good faith for the purpose it is intended, *ie*, to convict and punish offenders, and not for an extraneous purpose. … In our view, the exercise of the prosecutorial discretion is subject to judicial review in two situations: first, where the prosecutorial power is abused, *ie*, where it is exercised in bad faith for an extraneous purpose, and second, where its exercise contravenes constitutional protections and rights …

56 In this light, we consider that the initiation of a prosecution after an accused person has been made the subject of a DRC order for the same conduct would likely amount to an abuse of prosecutorial power, because the criminal process in such circumstances would serve a purpose other than the *bona fide* prosecution of criminals. Such prosecutions involve the Prosecution proceeding on charges that have been waived pursuant to authority delegated to the CNB by the Prosecution itself. It would not ordinarily be open to the AG, having delegated the discretion in the first instance to the Director and having permitted the Director to deprive the offender of his liberty by making that offender subject to a DRC order, even if not to punish him, to then commence a fresh action alleging that this is not foreclosed by the strict double jeopardy doctrine.

57 For the avoidance of doubt, the abuse in this context is found in the commencement of the prosecution after the making of the DRC order, the latter order having been made upon the decision of the Public Prosecutor to *waive* prosecution. The Director's decision to make a DRC order is not itself objectionable on this ground in these circumstances.

Conclusion

58 We accordingly dismiss the Appellant's appeal against sentence.

59 We again express our gratitude to the YAC for his assistance in this matter.

Sundaresh Menon Chief Justice	Steven Chong Judge of Appeal	Aedit Abdullah Judge

The appellant in person;
Wong Woon Kwong, Dwayne Lum Wen Yi, and Tan Ben Mathias (Attorney-General's Chambers) for the respondent;
Tan Ruo Yu (Davinder Singh Chambers LLC) as *amicus curiae*.