IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2018] SGHC 106

Originating Summons No 1196 of 2017

In the Matter of Section 18 of the Supreme Court of Judicature Act (Cap. 322)

And

In the Matter of Section 33 B of the Misuse of Drugs Act (Cap. 185 Rev. ed)

And

In the Matter of Order 53 Rules 1 and 2 of the Rules of Court (Cap. 322 R 5)

Between

Adili Chibuike Ejike
(FIN No. G9056833M)

… *Applicant*

And

Attorney-General

… *Respondent*

GROUNDS OF DECISION

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Introduction

1 Adili Chibuike Ejike ("the Applicant") was convicted after trial by Senior Judge Kan Ting Chiu on 30 June 2016 on a charge of importing not less than 1,961g of methamphetamine into Singapore, an offence under s 7 of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) ("MDA"). This offence is punishable with death, unless the Applicant could satisfy s 33B of the MDA, which provides that where a person convicted of an offence under s 5(1) or s 7 of the MDA is able to fulfil the criteria set out in s 33B(2) or s 33B(3), the court may sentence him to life imprisonment and caning of not less than 15 strokes instead of imposing the death penalty.

2 In order to fulfil s 33B(2), the Applicant had to prove on a balance of probabilities that he satisfies the criteria under s 33B(2)(*a*) (commonly known

as the "courier" criteria), and the Public Prosecutor had to certify that the Applicant has substantively assisted the Central Narcotics Bureau ("CNB") in disrupting drug trafficking activities within or outside Singapore under s 33B(2)(*b*). Kan SJ found that the Applicant satisfied the criteria under s 33B(2)(*a*) of the MDA, but the Public Prosecutor declined to issue a certificate that he had substantively assisted the CNB under s 33B(2)(*b*) ("the substantive assistance certificate"). Accordingly, Kan SJ sentenced the Applicant to suffer death on 11 April 2017.

3 The Applicant appealed against the decision of Kan SJ, whose grounds of decision is reported at [2017] SGHC 106 ("the GD"). His appeal is pending before the Court of Appeal. The Applicant further filed the present Originating Summons No 1196 of 2017 ("OS") seeking leave to commence judicial review proceedings against the decision of the Public Prosecutor not to certify that he had substantively assisted the CNB.

4 The main issue in this OS was whether the Public Prosecutor had acted in bad faith in exercising his discretion not to issue the substantive assistance certificate under s 33B(2)(*b*) of the MDA. My reasons for dismissing his application are set out in full below.

Background facts leading to HC/OS 1196/2017

5 As outlined in the GD, the Applicant is a citizen of Nigeria and had arrived at Terminal 3 of Changi Airport Singapore from Lagos, Nigeria via Doha, Qatar, on 13 November 2011 when two packets wrapped in tape were discovered in his luggage ("the bag"). The contents of the two packets were analysed and found to contain methamphetamine. The Applicant was arrested and charged under s 7 of the MDA for importing not less than 1,961 grams of

methamphetamine. Various statements were taken from the Applicant in the course of the investigations. Pursuant to the introduction of s 33B of the MDA by Parliament on 14 November 2012, the CNB recorded a further statement from the Applicant on 27 June 2013 as to whether he could substantively assist the CNB, and the Applicant indicated that he was unable to provide any information.

6 The trial on the importation charge was heard between June to November 2015. On 21 January 2016, the Public Prosecutor determined, having considered the information provided by the Applicant then, that he had not substantively assisted the CNB. The Applicant's case during the trial was that he did not pack the bag and did not know what it contained. He had called his childhood friend Chiedu Onwuka ("Chiedu") for financial help and was able to reach Chiedu with the help of another friend Izuchukwu Ibekwe ("Izuchukwu"). Chiedu promised to give the Applicant 200,000 to 300,000 nairas (a naira is a unit of Nigerian currency, and in 2011 the exchange rate was approximately 151 nairas to US$1). Subsequently, the Applicant and Chiedu met up with Izuchukwu, and Izuchukwu told the Applicant that he would be travelling to Singapore with a bag that he was to pass to somebody in Singapore. The Applicant agreed to do that in order to receive the promised help from Chiedu.

7 At the conclusion of the trial, Kan SJ convicted the Applicant on the importation charge on 30 June 2016. The Prosecution informed the court that no certification under s 33B(2)(*b*) of the MDA would be given, but Kan SJ nonetheless asked the Applicant whether he wished to offer substantive assistance at that juncture. Kan SJ then adjourned the case for the applicant to provide any additional information.

8 On 25 July 2016, the Prosecution and the CNB received new information from the Applicant by way of a letter (the date stated on the letter was mistakenly stated as 25 July 2015 instead of 25 July 2016). In the letter, the Applicant named six individuals and provided their contact numbers and/or where they worked. They comprised Izuchukwu and Chiedu, three of his close friends and one close associate.

9 During the Pre-Trial Conference ("PTC") on 2 December 2016, the Prosecution updated Kan SJ on the CNB's efforts in the investigations following from the Applicant's information. The Prosecution informed that Interpol had, at the CNB's request, made inquiries with and chased its Nigerian counterparts, but had received no response. On 15 December 2016, the Prosecution informed the Applicant's counsel and the court that the decision not to issue the substantive assistance certificate was to stand. On 11 April 2017, the Prosecution informed the court of the same in open court and Kan SJ accordingly sentenced the Applicant to death.

10 On 6 July 2017, the hearing of the Applicant's appeal against conviction and sentence (CCA 18/2017) was set down for a date between 6 and 14 November 2017, with submissions to be filed by 27 October 2017. On 27 September 2017, the Applicant sent a letter to the Prosecution to confirm whether there was any response from Interpol or the Nigerian narcotics agency regarding the information provided by the Applicant on 25 July 2016, and whether the CNB had sought assistance from the Nigerian High Commission in Singapore to contact the Nigerian narcotics agency regarding the information. There was no reply from the Prosecution.

11 On 11 October 2017, the Applicant wrote to the Nigerian High Commission in Singapore to enquire if the CNB had contacted them for

assistance in liaising with Interpol or the Nigerian narcotics agency, and whether the Nigerian High Commission would have rendered assistance upon such request. On 16 October 2017, the Nigerian High Commission in Singapore replied to the Applicant, stating that it received no request for assistance from the CNB, and that it would have rendered all necessary assistance if it had. It further stated that it had followed up on the telephone numbers provided in the letter dated 25 July 2016, and found out that three out of eight numbers provided were incorrect and the rest of the numbers were active.

12 On 19 October 2017, the Applicant filed the OS for leave to commence judicial review of the decision of the Public Prosecutor not to certify that he had substantively assisted the CNB in disrupting drug trafficking activities within or outside Singapore. On 20 November 2017, the Applicant filed HC/SUM 5304/2017 to seek an extension of time for the late filing of the OS.

13 On 23 October 2017, the CNB received its first and only response from the Nigerian narcotics agency, acknowledging the request for assistance sent by the CNB over a year ago (after the Applicant had furnished new information on 25 July 2016). There was no indication of when the CNB's Nigerian counterparts would respond with their findings.

The parties' cases

14 The Applicant sought leave to apply for the following by way of the OS application:

> (a) A declaration that the Public Prosecutor had acted in bad faith in not granting the Applicant a certificate under s 33B(2)(*b*) of the MDA that the Applicant had substantively assisted the CNB in disrupting drug activities within or outside Singapore;

(b) A mandatory order that the Public Prosecutor do reconsider and review his earlier decision on whether to certify, under s 33B(2) and s 33B(4), that the Applicant had substantively assisted the CNB in disrupting drug activities within or outside Singapore;

(c) An order that this case be then remitted to the trial judge in Criminal Case No 17/2015, namely the Honourable Senior Judge Kan Ting Chiu, to reconsider and pass the appropriate sentence under s 33B(1) of the MDA;

(d) That there be a stay of execution pending the final determination of the application herein; and

(e) Such further or other orders as may be deemed necessary or just and proper in all the circumstances of this case.

15 The Applicant's key contention in the OS application was that the Public Prosecutor had acted in bad faith in the light of the following circumstances: (a) the Applicant had provided all the information within his knowledge; (b) the CNB did not genuinely attempt to pursue the information he had provided, as illustrated by its failure to contact the Nigerian High Commission in Singapore; and (c) it was not fair to assume that the information would not be helpful at the point when the Public Prosecutor made his decision since the effect and value of the information provided were still unknown.

16 Although the Applicant had stated in the OS application and his affidavits that he was of the view that the Public Prosecutor had violated Articles 9 and 12 of the Constitution, this argument was not addressed in his written submissions or in his oral submissions.

17 The Respondent submitted that the Applicant failed to establish any grounds for leave to be granted. Firstly, good faith cooperation was neither a necessary nor sufficient basis for the Public Prosecutor to grant a certificate of substantive assistance; the decision to certify was based on whether actual results as to drug trafficking disruption were achieved. Secondly, the CNB did pursue the information by seeking assistance from the Nigerian drug authorities through Interpol but no response was forthcoming. It was submitted that the CNB was entitled to take an operational perspective of how important the information was and whether it was likely to bear fruit, and the Applicant could not dictate how the CNB conducted its investigations.

My decision

18 To obtain leave to commence judicial review of the Public Prosecutor's decision to not issue a substantive assistance certificate, the Applicant had to establish a *prima facie* case of reasonable suspicion that the Public Prosecutor had acted in bad faith. With regard to the allegation of breaches of Articles 9 and 12 of the Constitution, since it had been all but abandoned by the Applicant in his written and oral submissions, I saw no need to deal with the argument. In any event, no evidence was put forward by the Applicant to substantiate this bare claim.

Preliminary Issues

Threshold for granting leave

19 Three conditions have to be met before leave to commence judicial review can be granted (*Muhammad Ridzuan bin Mohd Ali v Attorney-General* [2015] 5 SLR 1222 ("*Muhammad Ridzuan*") at [32]):

(a) the subject matter of the complaint has to be susceptible to judicial review;

(b) the applicant has to have sufficient interest in the matter; and

(c) the materials before the court have to disclose an arguable or *prima facie* case of reasonable suspicion in favour of granting the remedies sought by the applicant.

20 The Applicant and the Respondent agreed that the first two conditions listed were not in dispute, and the main point in contention was whether the third condition was satisfied. During the hearing, the Respondent also informed that it would not be pursuing the argument that there was undue delay on the part of the Applicant in filing the OS application; therefore, I made no order on the application to extend time and proceeded to hear the OS application directly.

Burden on the Applicant

21 An applicant can challenge the sole discretion of the Public Prosecutor whether to certify that he has provided substantive assistance on the ground of either bad faith or malice under s 33B(4) of the MDA, as well as on constitutional grounds (*Cheong Chun Yin v Attorney-General* [2014] 3 SLR 1141 ("*Cheong Chun Yin*") at [31]). Section 33B(4) of the MDA states:

> The determination of whether or not any person has substantively assisted the Central Narcotics Bureau in disrupting drug trafficking activities shall be at the sole discretion of the Public Prosecutor and no action or proceeding shall lie against the Public Prosecutor in relation to any such determination unless it is proved to the court that the determination was done in bad faith or with malice.

22 The burden is on the applicant to adduce evidence to establish a *prima*

facie case of reasonable suspicion of bad faith on the part of the Public Prosecutor (*Muhammad Ridzuan* at [36]). An applicant can discharge the evidential burden by highlighting circumstances that establish a *prima facie* case that the decision was made in bad faith; he would not be required to produce evidence directly impugning the propriety of the Public Prosecutor's decision-making process (*eg*, records of meetings showing that the decision was motivated by malice, bad faith, unconstitutional considerations) (*Muhammad Ridzuan* at [40]). The Public Prosecutor is not required to disclose his reasons every time an applicant challenges his decision not to issue a substantive assistance certificate, nor to justify his decision until the applicant meets the threshold of a *prima facie* case. Otherwise, it could result over time in information relating to the CNB's *modus operandi* ending up in the public domain (*Muhammad Ridzuan* at [39]; *Muhammad bin Abdullah v Public Prosecutor* [2017] 1 SLR 427 ("*Muhammad bin Abdullah*") at [66]). Therefore, I found that the Applicant was wrong in law to argue that the burden was on the Respondent to show that the Public Prosecutor took reasonable steps to ascertain the usefulness of the information provided by the applicant, and to show that the information turned out to be false or not helpful.

23 In the present case, the Applicant sought to adduce the following circumstances to establish a *prima facie* case of reasonable suspicion that the Public Prosecutor had exercised its discretion under s 33B(2)(*b*) of the MDA in bad faith:

(a) The Applicant had "done whatever he humanly could" to assist the CNB by giving all the information within his knowledge to the CNB to enable them to disrupt, dismantle and smash drug trafficking activities;

(b) The CNB did not make a genuine attempt to pursue the information provided; and

(c) Since the effect and the value of the information provided by the Applicant were still unknown at that point in time, it would not be fair to assume that the information would not be helpful at all.

Whether there was bad faith

Relevance of providing all information within the Applicant's knowledge

24 It was not disputed that the Applicant did furnish information to the CNB. The first circumstance the Applicant adduced to support the allegation of bad faith could be quickly addressed. The Court of Appeal has dealt with the exact same argument in *Muhammad Ridzuan*, and held unequivocally that "an offender's good faith cooperation with CNB is not a necessary or sufficient basis for the [Public Prosecutor] to grant him a certificate of substantive assistance" (at [45]). The Court of Appeal analysed the Parliamentary debates and opined that "[t]he question of whether the offender had cooperated with CNB in good faith is an irrelevant consideration because the purpose of giving the court the discretion to sentence 'couriers' (a term used during the Parliamentary debates to refer to persons whose involvement in the trafficking offence is limited to those acts enumerated in s 33B(2)(*a*) of the MDA) who have rendered substantive assistance to CNB to life imprisonment and caning instead of death is to enhance the operational effectiveness of CNB" (at [46]).

25 The Court of Appeal's observations in *Muhammad Ridzuan* are statements of general principle which I had due regard to. Taking the Applicant's case at its highest, even if he had indeed provided all the information within his knowledge to the CNB, and even accepting that they

were accurate and true, if it had been determined that this did not enhance the CNB's operational effectiveness in actually disrupting drug trafficking activities, it must follow that this could not justify certification from the Public Prosecutor.

Alleged failure to pursue information and potential usefulness of the information

26 The Applicant next contended that the CNB's failure to pursue the information provided was the reason why no actual substantive outcomes could be obtained. The Applicant submitted that there was a glaring lack of any proactive follow-up by the CNB after the initial contact it made with Interpol, suggesting bad faith on the part of the Public Prosecutor. As a result of the lack of a genuine attempt to pursue the information provided even in the face of silence from Interpol, the information was not found to be useful in disrupting drug trafficking and no certification was given in favour of the Applicant. The Applicant also submitted that there was no requirement that the information provided must lead to an outcome within a particular time frame and since the effect and value of the information were still unknown at the time of the Public Prosecutor's decision, it would not be fair to assume that the information would not be helpful at all.

27 From the outset, bad faith within the meaning of s 33B(4) of the MDA refers to the knowing use of discretionary power for extraneous purposes, *ie*, for purposes other than those for which the decision maker was granted the power (*Muhammad Ridzuan* at [71]). The purpose of the s 33B regime is to enhance the operational capacity of the CNB, and the Public Prosecutor "would be acting in furtherance of this purpose if he exercises his discretion under s 33B(2)(b) of the MDA in favour of those couriers who provide information that leads to the

actual disruption of drug trafficking activities" (*Muhammad Ridzuan* at [73]). The two submissions that the Applicant made did not support the allegation that the Public Prosecutor had made the non-certification decision for a purpose extraneous to the intended purpose of the s 33B regime.

28 In any event, the CNB *did* attempt to investigate the information provided by the Applicant. The CNB had sought assistance from its Nigerian counterparts through Interpol and had sent several reminders to them when no response was forthcoming. Interpol also had, on the CNB's request, made inquiries with and chased its Nigerian counterparts for a reply. This was made known to the Applicant at the hearings on 8 November 2016 and 2 December 2016. Nevertheless, the Applicant argued that the CNB had not done enough and should have done more. In the oral submissions and in the Applicant's affidavit, it was argued that there was no attempt by the CNB to contact or seek assistance from the Nigerian High Commission in Singapore to contact Interpol or the narcotics agency in Nigeria, and that this by itself would constitute bad faith.[1]

29 The High Court dealt with a similar argument in *Cheong Chun Yin*, where the applicant submitted that the CNB should have followed up with investigations on the two persons whose numbers were provided by the applicant. Tay Yong Kwang J, as then was, held as follows (at [32]):

> How the CNB decides to conduct its investigations in each case is not something which is within the purview of the courts under the statutory scheme in s 33B unless the Applicant can show bad faith or malice on the part of the CNB which may then potentially taint the PP's decision. The Applicant is practically asking the court to adjudicate on the adequacy of the investigations and to speculate on what would have happened if the CNB had done this or that. If the court accedes to this, I think the court will be making a jurisdictional error.

[1] Applicant's affidavit at para 23.

30 In the same vein, the Court of Appeal in *Muhammad bin Abdullah* held at [66] that the CNB holds the power to decide whether to pursue certain pieces of information and does not have to go to all lengths to pursue the information provided by accused persons:

> When evaluating any information given by an accused person, the CNB is entitled to take an operational perspective of how important the information is and whether it is likely to bear fruit, both of which are matters solely within its purview. For instance, the CNB cannot be expected to traverse the globe to investigate merely because an accused person mentions the names of different persons in different countries.

31 The CNB, with its understanding of and access to intelligence gathering, is best-placed to make the assessment as to which pieces of information to pursue and how to liaise with agencies to gather further intelligence especially if the information concerns foreign entities. It would be wrong for the courts to pass judgment on the adequacy of the investigations conducted by and the operational decisions made by the CNB. The fact that the CNB did not contact the Nigerian High Commission in Singapore did not necessarily mean that the CNB or the Public Prosecutor had acted in bad faith. It was certainly not the case that the CNB simply rejected the information outright. More crucially, the objective fact was that the CNB did attempt to investigate the information provided, as I have noted above at [28]. There were no grounds to doubt that this was a serious and genuine endeavour on its part.

32 With regard to the Applicant's argument that it could not be said that the information was not useful because its value could possibly be proven in the future, the Respondent had rightly pointed out that over a year had passed since the CNB followed up on the information provided by the Applicant. No intelligence had been received to date and there remained no indication as to when, if at all, the Nigerian authorities would respond. The CNB is entitled to

decide how likely it is that the information will bear fruit (*Muhammad bin Abdullah* at [66]) and whether to cease further investigations after evaluation, having regard to the lapse of time. Further, given that drug traffickers are generally tried and convicted some time after their initial arrest, the CNB would have been expected to have followed up on any relevant information furnished until there is no realistic prospect of any further progress. Chances of information possibly bearing fruit only after a long while are in any event speculative and highly unlikely (*Prabagaran a/l Srivijayan v Public Prosecutor and other matters* [2017] 1 SLR 173 at [95]). It is untenable to suggest that a certification decision should be held in abeyance almost indefinitely until the information somehow proves to be of some use at some imponderable future point in time.

Conclusion

33 In the circumstances, I concluded that the Applicant had failed to establish a *prima facie* case of reasonable suspicion that the Public Prosecutor had exercised its discretion not to issue the substantive assistance certificate under s 33B(2)(*b*) of the MDA in bad faith or unconstitutionally. For the reasons set out above, I dismissed the Applicant's application for leave to commence judicial review proceedings against the Public Prosecutor. The Respondent agreed that both parties would bear their own costs for this application.

See Kee Oon
Judge

Mohamed Muzammil bin Mohamed (M/s Muzammil & Co) and Lam Wai Seng (M/s Lam WS & Co) for the applicant;
Mohamed Faizal, Sarah Ong & Shen Wanqin (Attorney-General's Chambers) for the respondent.
