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Public Prosecutor

v

Chum Tat Suan

[2016] SGHC 27

High Court — Criminal Case No 1 of 2012

Choo Han Teck J

12 February; 7 March 2016

Criminal law — Statutory offences — Misuse of Drugs Act (Cap 185, 2008 Rev Ed) — Discretion of court not to impose sentence of death in certain circumstances

7 March 2016

Judgment reserved.

Choo Han Teck J:

1 Chum Tat Suan (“Chum”) was 65 years old when he was convicted before this court on 5 August 2013 on a charge under s 7 of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) (“the Act”), for importing not less than 94.96g of diamorphine into Singapore. Prior to 1 January 2013, an offence such as his carried the mandatory death penalty, pursuant to s 33 of the Act read with the Second Schedule. After 1 January 2013, convicted persons such as Chum may be spared the death penalty and be imprisoned for life instead if the conditions set out in the newly introduced s 33B of the Act are met.

2 The first condition under s 33B is that the trial judge must be satisfied that the person convicted committed the offence merely as a courier. His

involvement must be restricted to the activities listed in s 33B(2)(a) and duplicated in s 33B(3)(a) of the Act, namely transporting, sending or delivering drugs and/or offering to transport, send or deliver drugs and/or doing or offering to do any act preparatory to or for the purpose of transporting, sending or delivering drugs. The second condition is that the Public Prosecutor certifies that the person convicted had rendered substantive assistance to the Central Narcotics Bureau (“CNB”) in disrupting drug trafficking activities within or outside Singapore, or alternatively, that the person convicted proves that he was suffering from an abnormality of mind that substantially impaired his mental responsibility for his criminal act. The words in s 33B(1) – (3) of the Act are:

33B.— (1) Where a person commits or attempts to commit an offence under section 5(1) or 7, being an offence punishable with death under the sixth column of the Second Schedule, and he is convicted thereof, the court —

(a) may, if the person satisfies the requirements of subsection (2), instead of imposing the death penalty, sentence the person to imprisonment for life and, if the person is sentenced to life imprisonment, he shall also be sentenced to caning of not less than 15 strokes; or

(b) shall, if the person satisfies the requirements of subsection (3), instead of imposing the death penalty, sentence the person to imprisonment for life.

(2) The requirements referred to in subsection (1)(a) are as follows:

(a) the person convicted proves, on a balance of probabilities, that his involvement in the offence under section 5(1) or 7 was restricted —

(i) to transporting, sending or delivering a controlled drug;

(ii) to offering to transport, send or deliver a controlled drug;

(iii) to doing or offering to do any act preparatory to or for the purpose of his

transporting, sending or delivering a controlled drug; or

(iv) to any combination of activities in subparagraph (i), (ii) and (iii); and

(b) the Public Prosecutor certifies to any court that, in his determination, the person has substantively assisted the Central Narcotics Bureau in disrupting drug trafficking activities within or outside Singapore.

(3) The requirements referred to in subsection (1)(b) are that the person convicted proves, on a balance of probabilities, that —

(a) his involvement in the offence under section 5(1) or 7 was restricted —

(i) to transporting, sending or delivering a controlled drug;

(ii) to offering to transport, send or deliver a controlled drug;

(iii) to doing or offering to do any act preparatory to or for the purpose of his transporting, sending or delivering a controlled drug; or

(iv) to any combination of activities in subparagraphs (i), (ii) and (iii); and

(b) he was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts and omissions in relation to the offence under section 5(1) or 7.

If any of the conditions in s 33B are not met, the alternative sentencing option under s 33B is not available and the court is bound to impose the death penalty pursuant to s 33 read with the Second Schedule of the Act. On the other hand, as noted by the Court of Appeal in *PP v Chum Tat Suan* [2015] 1 SLR 834 (“*Chum Tat Suan (Criminal References)*”) at [3], even if a person convicted is determined to be merely a courier and the Public Prosecutor also certifies that

the person had rendered substantive assistance to the CNB in disrupting drug trafficking activities, s 33B(1) gives the court the discretion to decide if the person convicted should nevertheless still be given the death penalty, if the court deems the death penalty to be more appropriate than the alternative sentence of life imprisonment with caning.

3 Section 33B(2) was introduced to provide an incentive for offenders to come forward with information that allows CNB to reach deeper into the networks of drug syndicates. See: *Muhammad Ridzuan bin Mohd Ali v Attorney-General* [2005] 5 SLR 1222 (“*Muhammad Ridzuan*”) at [46], citing the speech of Mr Teo Chee Hean, Deputy Prime Minister and then Minister for Home Affairs in *Singapore Parliamentary Debates, Official Report* (14 November 2012) vol 89. According to the Court of Appeal in *Chum Tat Suan (Criminal Reference)* (at [2]), s 33B(2) provides for a “mitigating scheme” for offenders who are less culpable.

4 After I found Chum guilty as charged, the Public Prosecutor referred the case to the Court of Appeal (see *Chum Tat Suan (Criminal Reference)* above) on points of law for its determination. Nothing in the current sentencing proceedings turned on that hearing except that the case was remitted to me to determine whether Chum had acted only as a courier. I found that he did (see *PP v Chum Tat Suan* [2015] 4 SLR 591), but the Public Prosecutor did not issue the certificate of substantive assistance. Chum’s counsel, Mr Nandwani, then applied for psychiatric evidence to be adduced for the purposes of showing that Chum suffered from an abnormality of mind at the time of the offence.

5 Three days were set down, from 10 February 2016, for the psychiatric evidence to be adduced. The proceedings were adjourned to 12 February 2016 after DPP Faizal informed me on 10 February 2016 that the Public Prosecutor had reviewed the case and would be certifying that Chum had rendered substantive assistance. On 12 February 2016, the Public Prosecutor tendered the certificate to the court. Mr Nandwani then withdrew his application for further evidence, and submitted a mitigation plea in writing on behalf of Chum which asked the court to exercise its discretion and impose a term of life imprisonment instead of the death penalty given the circumstances of the case. However, within minutes, Mr Nandwani informed the court that he had been instructed by Chum to say that Chum “does not wish to be considered” for the sentence of life imprisonment.

6 The court has to take into account all the relevant circumstances before it exercises its discretion in meting out the appropriate punishment. Although in the usual case, the submission on behalf of the person convicted is a plea for the sentence of life imprisonment *in lieu* of the death penalty, the considerations that I have to take into account in this reverse situation are largely the same as those in the mitigating plea. But that assumes that life imprisonment is the lesser punishment.

7 Is death indeed the “ultimate penalty” in the sense that there is nothing worse than death? To Chum, who is 68 years old, the alternative punishment of life imprisonment may seem like a fate worse than death for he may not see the world as a free man until he is at least in his 80s, and even then what might he do if he has no friend or family? How will a jobless man of that age be able to

look after himself? Chum may be troubled by such thoughts when he declined the court's consideration of life imprisonment.

8 We cannot assume that everyone will always prefer life to death even though death is not a horror to be dreaded for it has no sting for the dead. It is the anticipation of death that torments, and for some, like Chum, the prospect of a long, boring and purposeless life may justifiably be more terrifying than death itself. But he is not in a position here to make a personal choice. He is here to be sentenced and it is not the function of this court to oblige a prisoner his death wish. The court's duty is to determine, on the facts and circumstances of the case, whether the appropriate punishment ought to be life imprisonment or death. It is my duty is to ensure that the appropriate sentence is to be imposed on principles and in a manner consistent with the law, and not to evaluate the individual offender's choice of punishment. The discretion belongs to the court, not to the offender.

9 DPP Faizal did not argue for the death penalty to be imposed, presumably because the Public Prosecutor would have declined to issue the certificate of substantive assistance if he were pressing for the death penalty. I pause here to observe that the Public Prosecutor may be duty bound to certify that a person convicted had rendered substantive assistance if the facts so justify. That certificate may not be a matter for the Public Prosecutor to grant or withhold at will. Although s 33B(4) of the Act provides that the determination of whether or not a person has substantively assisted the CNB in disrupting drug trafficking activities is within the sole discretion of the Public Prosecutor, the Public Prosecutor's determination can be challenged on the basis of unconstitutionality, or if it was made in bad faith or with malice: *Muhammad*

Ridzuan at [34] – [35]. The Court of Appeal in *Muhammad Ridzuan* was further of the view (at [71]) that “bad faith” within the meaning of s 33B(4) should be understood to refer to the “knowing use of a discretionary power for extraneous purposes (ie, for purposes other than those for which the decision maker was granted the power)”. The Public Prosecutor would have exercised his discretionary power for an “extraneous purpose” if, for instance, he is satisfied that a convicted person had substantively assisted the CNB in disrupting drug trafficking activities, but deliberately withheld the issuance of the certificate because he feels that the person nonetheless deserves to be sentenced to death and so wants to prevent the court from exercising its discretion under s 33B of the Act to impose a sentence of life imprisonment *in lieu* of the death penalty. In such a situation, if the Public Prosecutor is of the view that the death penalty is the more appropriate punishment for the person convicted, the proper course will be for him to issue the certificate, but to make the relevant submissions to convince the court to exercise its discretion under s 33B to still impose the death penalty. This issue, does not, however, arise in the present case. I make these observations so as to present a clearer context of the change in the law.

10 The position of Mr Nandwani is a little more awkward. He had barely submitted his plea for life imprisonment instead of death for Chum when his client countermanded his submission.

11 The drug involved in the present case was a hard drug – diamorphine. The quantity imported was 94.96g. This is not a small amount. It is in fact several times higher than the 15g required to invoke the death penalty. However, there has been several cases where the court had felt that the overall circumstances nonetheless merit the imposition of a sentence of life

imprisonment *in lieu* of the death penalty under s 33B, even though the quantities of diamorphine imported were similarly several times above the 15g threshold (see, e.g. *PP v Purushothaman a/l Subramaniam* [2014] SGHC 231; *PP v Abdul Haleem bin Abdul Karim and another* [2013] 3 SLR 734).

12 Chum has a history of criminal offences. However, the last conviction and drug rehabilitation order that were recorded against him were in 1984 and 1996 respectively, and the DPP conceded that they were not related to the present offence.

13 There are no particular factors in the present case which may justify the imposition of the death penalty notwithstanding that the conditions set out in s 33B are satisfied. There are not much more than the simple facts of Chum's transporting the drugs in question, the details of which have been set out in my judgment of 5 August 2013 (*PP v Chum Tat Suan* [2013] SGHC 150). I have reviewed the cases where the court had exercised its discretion under s 33B to impose the sentence of life imprisonment on the persons convicted, and do not think that the present case is materially different from those cases on fact and circumstances. I am of the view that if I should impose the death penalty on the facts and circumstances of this case, there will be very few cases that might merit a life imprisonment. Chum was merely a courier and had rendered substantive assistance to the CNB. There are no compelling reasons to impose the death penalty on him. From the point of view of the law, the death penalty is the ultimate punishment because there is no way back. It closes the door to exoneration in the event of subsequent exculpatory evidence or events.

14 For the above reasons, I exercise my discretion under s 33B of the Act to impose a sentence of life imprisonment instead of the death penalty on Chum. Chum is not liable to be caned because of his age. The sentence of imprisonment shall take effect from 16 January 2010, the day he was first remanded.

- Sgd -
Choo Han Teck
Judge

Mohamed Faizal and Chan Yi Cheng (Attorney-General's Chambers)
for the prosecution.
Nandwani Manoj Prakash and Liew Hwee Tong Eric (Gabriel Law
Corporation) for the accused.
