IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2016] SGHC 73

Criminal Motion No 4 of 2016

Phua Han Chuan Jeffery

v

Public Prosecutor

JUDGMENT

[Criminal Law] — [Statutory offences] — [Misuse of Drugs Act] — [Discretion of court not to impose sentence of death when offender was suffering from an abnormality of mind]

Phua Han Chuan Jeffery
v
Public Prosecutor

[2016] SGHC 73

High Court — Criminal Motion No 4 of 2016
Choo Han Teck J
10 March 2016

22 April 2016 Judgment reserved.

Choo Han Teck J:

1 The applicant was 26 years old in 2011 when he was convicted before this court for importing not less than 104.21g of diamorphine which he had tried to smuggle into Singapore in a car. He was convicted on 21 September 2011. The Misuse of Drugs Act (Cap 185, 2008 Rev Ed) ("MDA") was amended thereafter and the relevant provisions took effect on 1 January 2013. Prior to 2013, any accused person convicted of importing more than 15g of diamorphine faced the mandatory death penalty. The applicant's appeal against conviction was dismissed by the Court of Appeal on 25 July 2012. He then made two more attempts to have his conviction overturned but those applications (CM 74 of 2013 and CM 6 of 2015) to the Court of Appeal were dismissed on 17 March 2014 and 30 September 2015 respectively. By this application (CM 4 of 2016) the applicant is applying to be re-sentenced to be spared the death penalty on account of an abnormality of mind. His

application is made pursuant to s 33B(1)*(b)* of the MDA. Section 33B(1) and s 33B(3) of the MDA read as follows:

> 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) …
>
> (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 sub-paragraphs (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.

For the applicant to succeed under s 33B(3) he must satisfy two conditions. First, the applicant must show that he committed the offence merely as a courier, *ie* his involvement was restricted to the activities listed in s 33B(3)*(a)* of the MDA. Secondly, he must also prove, on a balance of probabilities, that he was suffering from an abnormality of mind that substantially impaired his mental responsibility for his criminal act. I am satisfied that the first condition is met in the present application. The Public Prosecutor, who is the respondent, does not dispute that the applicant was merely a courier. However, the Public Prosecutor contends that the applicant does not meet the second condition.

2 Two witnesses testified, one for the applicant and one for the Public Prosecutor. Dr Munidasa Winslow, a psychiatrist in private practice, testified on behalf of the applicant, and Dr Kenneth G W W Koh, a psychiatrist from the Institute of Mental Health, testified on behalf of the respondent. Dr Winslow produced a medical report that he had written jointly with Dr Julia Lam, a forensic psychologist. Dr Koh produced two written reports. The two psychiatrists (Dr Winslow and Dr Koh) agree that the applicant was suffering from Persistent Depressive Disorder (formerly known as Dysthymia) and Substance Use Disorder (Ketamine Dependence). The applicant had reported taking 1-2g of ketamine on a daily basis since several months prior to the date of the offence and both psychiatrists agree that with such a "moderately high" dose of ketamine consumption, the applicant would have been suffering from some mental incapacity. There was therefore sufficient evidence that the applicant was suffering from an abnormality of mind. Although DPP Mr Terence Chua submitted that the applicant might not have been a chronic ketamine abuser on the account that he had, in a previous statement to the Central Narcotics Bureau ("CNB"), claimed that he had

generally kept off ketamine for about three months before he was arrested for the current offence of illegally importing diamorphine, except for one single episode of consumption three days before he was arrested, the accuracy of this portion of the applicant's statement to the CNB was not an issue that was fully explored at the trial. Section 33B(3)*(b)* further provides that for the application to succeed, the abnormality of mind must be the result of a condition of "arrested or retarded development of mind", an "inherent cause", or must have been "induced by disease or injury". Dr Winslow testified that Ketamine Dependence causes an abnormality of mind "induced by injury".

3 In law, an offender cannot say that he committed the offence because he was under the influence of alcohol if he had intentionally consumed it so as to facilitate his offence, nor can an offender similarly claim to be under the influence of drugs deliberately consumed. Drugs and alcohol may affect the mental awareness of an offender but the offender cannot rely on them as a defence when he intentionally consumed drugs or alcohol before committing the offence. This law is founded more on policy than on philosophy. It will not allow offenders to take drugs or alcohol to give themselves a reason or false courage to commit crime.

4 The applicant in the present case was not merely suffering from the effects of self-induced, acute intoxication. Both Dr Winslow and Dr Koh agree that the applicant was a chronic abuser of fairly high doses of ketamine, and Dr Winslow gave further evidence that based on his experience, one can assume that the applicant's brain would have undergone some changes resulting from such ketamine abuse. DPP Terence Chua contended that Dr Winslow's testimony was not supported by scans of the applicant's brain proving that his Ketamine Dependence did cause actual brain injury. This may

be the case. Nonetheless, I cannot ignore the fact that apart from Ketamine Dependence, the applicant was also suffering from Persistent Depressive Disorder. Persistent Depressive Disorder clearly constitutes an abnormality of mind arising from an "inherent cause" and our courts have accepted it as such: see, for instance *Public Prosecutor v Tengku Jonaris Badlishah* [1999] 1 SLR(R) 800 at [61]. The evidence before me is that there was a correlation between the applicant's Ketamine Dependence and his Persistent Depressive Disorder. Both Dr Winslow and Dr Koh reported that the applicant had related to them on how he had resorted to ketamine in order to self-medicate his chronic low mood and poor esteem, as the substance numbed him physically and emotionally. He also told them that there were several occasions where he overdosed on ketamine, hoping to end his life. According to Dr Winslow's testimony, the applicant told him that he (the applicant) found life meaningless and did not wish to face the world. I am satisfied from the two psychiatrists' medical reports and their testimonies in court that the applicant was, in the totality of circumstances owing to his conditions of Persistent Depressive Disorder and Ketamine Dependence, suffering from an abnormality of mind whether arising from an inherent cause or induced by disease or injury.

5 That only satisfies the first part of s 33B(3)*(b)*. The law further requires the applicant not only to be suffering from such abnormality of mind but also that that abnormality had "substantially impaired his mental responsibility for his acts and omissions in relation to the offence [that he was convicted of]". This is a fact for the court to determine. The doctors have done their job, without much dispute in this case, in concurring that the applicant suffered from an abnormality of mind. In the course of their reports and evidence, however, both doctors gave their opinions as to how the abnormality had or had not affected the applicant's thinking and behaviour. Their views are

important and useful, and I take them into account, but the critical question remains whether the abnormality of mind had substantially impaired the applicant's mental responsibility for his acts and omissions in relation to the offence.

6 Insanity (under s 84 of the General Exceptions in the Penal Code (Cap 224, 2008 Rev Ed)) has been part of our laws since the Penal Code was first promulgated in Singapore, and diminished responsibility is provided as Exception 7 to the crime of murder in s 300 of the Penal Code in 1961. They are both defences that are based on a lack of mental capacity by reason of an illness of the mind. Section 33B(3)*(b)* of the MDA is identical in the crucial wording to that of Exception 7. Section 33B(3)*(b)*, unlike Exception 7, is not a defence but provides an alternative to the otherwise mandatory sentence of death.

7 The problem that the courts have with insanity and diminished responsibility in the criminal law lies not so much in the fact that these defences require medical evidence of a mental illness. Psychiatry as a branch of medicine has established criteria for the illnesses under its domain. That is why there is no dispute between Dr Koh and Dr Winslow as to the psychiatric condition of the applicant. But psychiatric defences in law have a non-medical component woven into them – the requirement that the mental illness had "substantially impaired [the] mental responsibility for [the accused's] acts and omissions". This is a legal requirement which tends to make doctors uncomfortable. That is why disagreement between Dr Koh and Dr Winslow arose only when they were attempting to incorporate this non-medical portion into their medical opinion.

8 Dr Winslow is of the view that the applicant's conditions of Persistent Depressive Disorder as well as Ketamine Dependence had, individually and collectively, "substantially impaired his judgement, impulse control and decision-making in agreeing to be a courier without seriously thinking through the possible consequences of his actions. This lack of forethought to seriously consider the seriousness of possible consequences of his actions could be deduced from his attempts to take his own life when depressed" (sic). Ketamine is a strong drug. It is also used for tranquilising horses. It is addictive. Dr Winslow produced a research report by Celia J. A. Morgan, Leslie Muetzelfeldt, and H. Valerie Curran on ketamine addiction: "*Ketamine use, cognition and psychological wellbeing: a comparison of frequent, infrequent and ex-users with polydrug and non-using controls*" (2009) *Addiction* 104, 77-87. This is just one report, and it was introduced to support Dr Winslow's view that ketamine use affects the mind in a material way. Dr Winslow also testified that a person like the applicant who is a chronic user of ketamine will be more greatly affected.

9 Dr Koh, on the other hand, maintained that the applicant's psychiatric disturbances of Persistent Depressive Disorder and Ketamine Dependence "did not significantly impair his mental responsibility for his actions (amounting to the offence)". He set out various reasons leading to his conclusion. First, Dr Koh testified that he had interviewed the applicant's sister who "reported no abnormal behaviour observed in [the applicant] around the time of the offence". However, Dr Winslow interviewed the same sister and she told him that there was an instance about a month before the offence when the applicant was very agitated and had punched her. Dr Winslow further testified that even though persons like the applicant who are suffering from Ketamine Dependence and Persistent Depressive Disorders may be

mentally impaired in many ways (such as in the way they process things, develop ideas, and make plans for the future) , they are normal in outward appearance. When cross-examined, Dr Koh accepted that it is possible that the applicant's sister might have inadvertently forgotten to mention the punching incident on the single occasion when he met her, and conceded further that even if the applicant's sister had indeed not observed any abnormal behaviour in the applicant, this does not mean that his mind was not impaired.

10 Secondly, Dr Koh was of the view that the applicant had shown that he was able to plan and perform complex, organised actions in his commission of the offence. Dr Winslow, under cross-examination, compared a person in the applicant's circumstances with a person charged for drunk driving. He said that a person might be in full control of his vehicle, but the law deems him incapable because a person under the influence of alcohol has four times the risk of crashing his vehicle.

11 Thirdly, Dr Koh testified that the applicant's ability to drive a car from Singapore to Malaysia and back is indicative of cognitive and motor functioning that are inconsistent with the severe cognitive impairments that Dr Winslow said the applicant was suffering from. But Dr Winslow clarified during his cross-examination that in his assessment, the key mental impairment that affected the applicant's mental responsibility for his acts is with respect to his ability to make rational judgment and decisions. He likened the ability to drive a car as being akin to riding a bicycle; once you have learnt it, you can carry it out quite well.

12 Fourthly, Dr Koh disagreed that the applicant's conditions of Persistent Depressive Disorder and Ketamine Dependence had substantially impaired his

ability of impulse control, as the applicant had agreed to import drugs into Singapore at least two weeks before the actual commission of the offence. It is also the Public Prosecutor's case that as the applicant had ample time to deliberate over whether he wanted to do the job, his eventual decision to proceed cannot be said to have been made on impulse.

13 Finally, Dr Koh expressed his opinion that there was no substantial impairment of the applicant's judgment and decision-making ability. He noted that the applicant "was able to enter in an agreement to perform a service for monetary remuneration", was "aware that he was to traffic drugs into Singapore, and knew that it was wrong to do so", and was "also aware that if caught, he would be subject to legal punishment." It was the applicant's testimony that he thought that he was illegally importing Erimin-5 (and not diamorphine), and that he believed that if he was caught with Erimin-5, he would most likely only get a fine or in default of that, a jail sentence. This, Dr Koh said, is evidence that the applicant was able to and did weigh the consequences of his actions. Dr Koh also wrote in his report that the applicant's "claim that he had been deceived into believing that he was only smuggling Erimin (a sleeping pill) into Singapore, and therefore his defence of ignorance, cannot be equated to a substantial lack of judgement." During his examination-in-chief, Dr Winslow agreed with Dr Koh that the applicant knew what was right and wrong and that he had made a decision to do something that was wrong. Further, when DPP Terence Chua pointed out to Dr Winslow in cross-examination that the applicant had said that he had sought assurance that he was indeed undertaking to import Erimin-5 and not something else, Dr Winslow conceded that this demonstrated the applicant's ability to appreciate the risk inherent in the enterprise and to exercise caution.

14 DPP Terence Chua relied on the abovementioned portion of Dr Koh's and Dr Winslow's testimonies. However, that portion of their evidence rests on statements made earlier by the applicant that he had no knowledge that he was importing diamorphine because he believed that what he was carrying was Erimin-5. This was his defence against conviction, and I had rejected that defence at the trial and the Court of Appeal had dismissed the applicant's appeal. The prosecution should not, therefore, rely so heavily on the applicant's testimony with respect to Erimin-5 (which testimony has been established to be untrue) to now assert that the applicant had the ability to make rational decisions and to take calculated risks at the time of his commission of the offence.

15 Even if the applicant knew that what he was doing was wrong and risky, he may still lack the will to resist the commission of the offence and "a man may know what he is doing and intend to do it and yet suffer from such abnormality of mind as substantially impairs his mental responsibility" (per Lord Tucker in *Elvan Rose v The Queen* [1961] AC 496 at 508, quoted with approval in *Ong Pang Siew v Public Prosecutor* [2011] 1 SLR 606 at [62]). Dr Winslow maintained that the applicant's conditions of Persistent Depressive Disorder and Ketamine Dependence had influenced the way that he thought about things and the way that he had behaved. As a result of the two conditions, the applicant focused on getting his immediate needs met, while disregarding future consequences of his actions. Hence, decisions made by the applicant would have, in Dr Winslow's words, been "based on an impaired brain making stupid decisions". Given that both Dr Koh and Dr Winslow are in agreement that the applicant was a chronic drug abuser who took moderately high doses of ketamine on a daily basis in the period leading up to the commission of the offence (see [2] above), I am of the view

that his ability in decision-making and impulse control would have been impaired throughout the entire two-week period from when he first agreed to import the drugs to his actual commission of the offence.

16 I now return to the area in which it is easy to get entangled in semantics, and I hope to avoid the snare even as I am compelled to consider the question of whether the applicant's mental illness and ketamine addiction had substantially "impaired his mental responsibility" for his act of illegally importing controlled drugs. Mental responsibility is probably a broader concept than the mental element such as knowledge or intention required to constitute the offence. Section 33B(3)*(b)* is intended to cover a diverse range of circumstances. It is not intended to create a cascade of new legal categories. Section 33B(3)*(b)* does not require an inquiry into the applicant's moral cognisance in this case, but it is probably wide enough to apply to cases in which the abnormality of mind leads the offender to be incapable of distinguishing right from wrong, but this is not such a case. The applicant knew that he was committing an illegal act. However, s 33B(3)*(b)* also does not require the abnormality of mind to be the cause that led to the applicant's act of illegally importing controlled drugs. What led the applicant to commit the offence was a complex mix of fact and circumstances that is not amenable to analysis so as to identify the cause of his act. The closest we can reasonably determine is the question of whether the abnormality of mind had an influence on the applicant's ability to resist the act in question. If that is the inquiry, and I believe that it is, then with the benefit of the evidence of both psychiatrists, especially Dr Winslow's, I conclude that the applicant's abnormality of mind arising from his mental illness and ketamine addiction did impair his mental responsibility for the act.

17 The next question is also not easy to answer. Was the impairment substantial? This is also not a question that can be answered with direct evidence but it is a necessary question. If the applicant were a person free of the illness and addiction that afflicted him, and had carried out the offence of illegally importing diamorphine, he would have no mitigation to save him from the mandatory death sentence for no rational person would have knowingly or intentionally committed what is clearly a serious offence. He must have done it for financial gain, and was thus prepared for the risks. Section 33B(1)*(b)* is not intended for such a person. The learned DPP drew my attention to an extract of the speech by the Minister for Law, Mr K Shanmugam in *Singapore Parliamentary Debates, Official Reports* (14 November 2012) vol 89, where the Minister said that under s 33B(1)*(b)*, "[g]enuine cases of mental disability are recognised, while, errors of judgment will not afford a defence". That has always been the position of the criminal law. The present case is, however, not a case where the applicant had made a mere error of judgment. The applicant here was suffering from a mental disability as ascertained by the experts. In the present case, I am satisfied, from the facts and medical evidence of his Persistent Depressive Disorder and Ketamine Dependence, that the applicant was probably incapable of resisting any internal rationality that might have dissuaded him from committing the offence.

18 The applicant is an individual. He has a name. His name is Phua Han Chuan Jeffery. He was 25 years old when he committed this offence in 2010. Only a couple of months before that, in October 2009, he was charged for driving while under the influence of ketamine. Had he freed himself from drugs after that would he have been here before this court now? I think probably not, but young as he is, he had a troubled life from bullying and

insecurity from childhood to youth. He is not given a certificate of substantive assistance by the CNB. We do not know why. He might not have much assistance to give. He might have declined to assist, in which event, we do not know if his depressive illness had any connection to that attitude. Section 33B(1)*(a)* and s 33B(1)*(b)* are distinct categories and it is therefore unnecessary for this court to find any connection between his non-assistance and his abnormality of mind. The language of the law here is precise and simple. Life, on the other hand, is not so. Every life is complex in its own way. The mandatory death penalty has been the law for a long time and I do not think that in providing the changes set out in s 33B Parliament has become more lenient towards drug trafficking. This crime is no less serious today than it was before the amendment. But rehabilitation can augment deterrence. Drug offenders are often themselves addicts, and hence part of the reasons for long custodial sentences for drug offenders is to keep them away from drugs as long as possible. The hope is that they will not return to drugs upon release. But it is pointless to release a prisoner after decades in prison if he finds that life outside prison is no better for him. Keeping him physically away from drugs is only half the solution. His mind must also be free, and thus, rehabilitation is crucial. The prospects of successful rehabilitation depend on the programmes and the facilities for it. A successful rehabilitation benefits the offender, his family, and society. It also reduces the prison population and lessens the strain on crime enforcement. That may have been the greater goal of the legislative change for offenders such as Phua Han Chuan Jeffery. He is a young man who has a mental illness and who also had a ketamine addiction, but seems to me a life that is amenable to rehabilitation. Although he had illegally imported a large quantity of diamorphine, that must be taken into consideration as part of the complexity of his case.

19 Taking into account the matters I have stated, I am of the view that the abnormality of mind arising from the applicant's mental illness and ketamine addiction had substantially impaired the mental responsibility for his act of committing the offence for which he was convicted. I therefore allow his application and impose the sentence of imprisonment for life with effect from the date of his remand.

- Sgd -
Choo Han Teck
Judge

Chia Soo Michael (MSC Law Corporation) and Prasad s/o Karunakarn (K Prasad & Co) for applicant;
Terence Chua and Tan Wee Hao (Attorney-General's Chambers) for respondent