Muhammad bin Kadar *v* Public Prosecutor
[2014] SGCA 48

Case Number	: Criminal Motion No 43 of 2014
Decision Date	: 29 September 2014
Tribunal/Court	: Court of Appeal
Coram	: Andrew Phang Boon Leong JA; Tay Yong Kwang J; Tan Siong Thye J
Counsel Name(s)	: Amarick Singh Gill (Trident Law Corporation) and Peter Ong Lip Cheng (Templars Law LLC) for the applicant; Anandan Bala and Kevin Tan (Attorney-General's Chambers) for the respondent.
Parties	: Muhammad bin Kadar — Public Prosecutor

Criminal law – offences – murder

29 September 2014 Judgment reserved.

Andrew Phang Boon Leong JA (delivering the judgment of the court):

Introduction

1 Mr Muhammad bin Kadar ("the Applicant") was previously convicted of a charge of murder punishable under s 302 of the Penal Code (Cap 224, 1985 Rev Ed) ("the Act") and was sentenced to what was then the mandatory death penalty. After his conviction and sentence, amendments were made to the Act via the Penal Code (Amendment) Act 2012 (No 32 of 2012) ("the Amendment Act"). Section 4(5) of the Amendment Act ("s 4(5)") reads as follows:

> **Savings and transitional provisions**
>
> …
>
> (5) Where on the appointed day, the Court of Appeal has dismissed an appeal brought by a person for an offence of murder under section 302 of the Penal Code, the following provisions shall apply:
>
> (*a*) either the Public Prosecutor or the person may file a motion for re-sentencing with the Court of Appeal;
>
> (*b*) when a motion for re-sentencing has been filed, the person or the Public Prosecutor may also apply to the Court of Appeal to hear further arguments or admit further evidence for the purpose only of determining the meaning of murder that the person is guilty of;
>
> (*c*) if an application is made under paragraph (*b*), the Court of Appeal shall before dealing with the motion for re-sentencing —
>
> (i) either dismiss the application, or give directions for the hearing of further arguments or the admission of further evidence for the purpose only of determining the meaning of murder that the person is guilty of, including directions for the High Court to hear such further evidence and to transmit its findings to the Court of Appeal; and

(ii) after dismissing the application or after its directions for hearing further arguments or the admission of further evidence have been complied with, clarify the meaning of murder that the person is guilty of;

(*d*) if no application is made under paragraph (*b*), the Court of Appeal shall clarify the meaning of murder that the person is guilty of;

(*e*) if the Court of Appeal clarifies under paragraph (*c*)(ii) or (*d*) that the person is guilty of murder within the meaning of section 300(*a*) of the Penal Code, it shall affirm the sentence of death imposed on the person;

(*f*) if the Court of Appeal clarifies under paragraph (*c*)(ii) or (*d*) that the person is guilty of murder within the meaning of section 300(*b*), (*c*) or (*d*) of the Penal Code, it shall remit the case back to the High Court for the person to be re-sentenced;

(*g*) when the case is remitted back to the High Court under paragraph (*f*), the High Court shall re-sentence the person to death or imprisonment for life and the person shall, if he is not re-sentenced to death, also be liable to be re-sentenced to caning;

(*h*) the provisions of Division 1 of Part XX of the Criminal Procedure Code relating to appeals shall apply to any appeal against the decision of the High Court under paragraph (*g*) with the modification that any appeal must be lodged by the appellant with the Registrar of the Supreme Court within 14 days after the date of the re-sentencing by the High Court;

(*i*) if the High Court re-sentences the person to death, the execution of the sentence of death must not be carried out until after the sentence is confirmed by the Court of Appeal pursuant to an appeal by the person or a petition for confirmation lodged by the Public Prosecutor; and

(*j*) section 313(*e*) to (*p*) of the Criminal Procedure Code shall apply in relation to any affirmation of the sentence of death or confirmation of the sentence of death by the Court of Appeal.

2 The present proceedings relate to an application ("the Application") by way of a criminal motion by the Applicant that he be re-sentenced in accordance with s 4(5). Specifically, the Applicant prays that this court clarifies that he is guilty of murder within the meaning of s 300(*c*) of the Act ("s 300(*c*)") and remits this case back to the High Court to *re-sentence* the Applicant accordingly.

3 The Public Prosecutor ("the Respondent"), on the other hand, opposes the Application, submitting that the court should clarify that the Applicant is guilty of murder within the meaning of s 300(*a*) of the Act ("s 300(*a*)"), the consequence of which would be that the original death sentence would be affirmed, and the case would not be remitted to the High Court for re-sentencing (see s 4(5)(*e*) of the Amendment Act reproduced above at [1]). This is because, unlike s 300(*b*), (*c*) or (*d*), murder within the meaning of s 300(*a*) continues, even after the amendments effected to the Act by the Amendment Act, to be punishable with the *mandatory* death penalty. Section 300 of the Act ("s 300") itself reads as follows:

Murder

300. Except in the cases hereinafter excepted culpable homicide is murder —

(*a*) if the act by which the death is caused is done with the intention of causing death;

(*b*) if it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused;

(*c*) if it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death; or

(*d*) if the person committing the act knows that it is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death, or such injury as aforesaid.

…

A preliminary point

4 Before proceeding to consider the Application, we pointed out to both counsel for the Applicant, Mr Amarick Gill ("Mr Gill"), as well as counsel for the Respondent, Mr Anandan Bala ("Mr Bala"), that, by making written submissions and by desiring to make oral submissions before this court, they were in fact proceeding under s 4(5)(*b*) of the Amendment Act ("s 4(5)(*b*)", reproduced above at [1]), and which we set out once again, as follows:

(*b*) when a motion for re-sentencing has been filed, ***the person or the Public Prosecutor*** *may also* ***apply to the Court of Appeal to hear further arguments*** *or admit further evidence* ***for the purpose only of determining the meaning of murder that the person is guilty of*** *;* [emphasis added in italics, bold italics and underlined bold italics]

Section 4(5)(*c*) of the Amendment Act (also reproduced above at [1]) may also be usefully noted, and reads as follows:

(*c*) if an application is made under paragraph (*b*), the Court of Appeal shall before dealing with the motion for re-sentencing —

(i) either dismiss the application, or give directions for the hearing of further arguments or the admission of further evidence for the purpose only of determining the meaning of murder that the person is guilty of, including directions for the High Court to hear such further evidence and to transmit its findings to the Court of Appeal; and

(ii) after dismissing the application or after its directions for hearing further arguments or the admission of further evidence have been complied with, clarify the meaning of murder that the person is guilty of;

5 Put simply, both the Applicant and the Respondent were in fact tendering *further arguments* to this court for the purpose of determining the meaning of murder that the Applicant is guilty of. *However*, *no application* (which is *required* by s 4(5)(*b*)) had been made to this court. This is not a mere empty requirement without any real content because, if no such application is made and no further arguments are therefore tendered by either a person who has been convicted of murder and/or the Public Prosecutor (the Applicant and the Respondent, respectively, in the context of the Application), then this court would be under a duty to proceed – *directly (and without more)* – "to clarify the meaning of murder that the person is guilty of" pursuant to s 4(5)(*d*) of the Amendment

Act (reproduced above at [1]), and which is (for convenience) set out again, as follows:

> (*d*) ***if no application*** *is made* ***under paragraph (*** **b** ***)*** , ***the Court of Appeal shall clarify*** *the meaning of murder that the person is guilty of*. [emphasis added in italics, bold italics and bold underlined italics]

6 In the circumstances, before oral submissions were tendered by Mr Gill and Mr Bala to this court, we invited them to consider making the requisite applications pursuant to s 4(5)(*b*), which they did. However, for all future applications of this nature, we hope that the relevant parties will comply with s 4(5)(*b*) by making the requisite application should they desire this court to hear further arguments and/or to admit further evidence for the purpose only of determining the meaning of murder that the person is guilty of.

7 Let us now turn to the factual background of the Application.

Facts

8 The detailed facts can be found in the judgment of this court in *Muhammad bin Kadar and another v Public Prosecutor* [2011] 3 SLR 1205 ("the CA Judgment"). We will summarise only those facts which are relevant to the Application. In this regard, we draw, in the main, from the Respondent's summary in its written submissions which constitute, in our view, a fair and objective account of this case.

9 The Applicant lived with his brother, Mr Ismil bin Kadar ("Ismil") and their family at a flat which was located one floor below the deceased's flat. The Applicant had a history of drug abuse. In particular, he began consuming Dormicum in 2004 – a drug which he had been consuming daily prior to his arrest.

10 The Applicant had gone to the deceased's flat twice before the murder which was committed on 6 May 2005. The deceased lived with her husband, Mr Loh Siew Kow ("Mr Loh"), who was a bedridden stroke patient at the time of the murder. On the first occasion, around the end of April 2005, the deceased had called out to the Applicant at the staircase landing outside her flat to assist her in lifting Mr Loh from his bed. On the second occasion, the Applicant visited the deceased's flat to bring some food wrapped in plastic because he felt sorry for Mr Loh. Mr Loh passed away shortly before the trial began.

11 On the day of the murder (*viz*, 6 May 2005), the Applicant consumed Dormicum intravenously. He subsequently went to the deceased's flat, knocking on the door a few times, whereupon the deceased let him in. He went in and saw Mr Loh for a short while before proceeding to the kitchen. He took a knife from the kitchen and signalled to the deceased to come into the kitchen, whereupon he stabbed her with the knife. The deceased fled to the toilet and the Applicant followed her there and stabbed her until the handle of the knife broke. He then went to the kitchen to obtain a chopper, whereupon he returned to the deceased at the toilet and inflicted more injuries on her.

12 The Applicant then went to Mr Loh's room and removed his feeding tube. He threatened Mr Loh by putting his left finger on his lip whilst holding the chopper with his right hand. When he emerged from Mr Loh's room, he saw the deceased standing in the kitchen area. He then used the chopper to inflict more injuries on the deceased until she collapsed. The deceased received more than 110 incised and stab wounds. She died from acute exsanguination. Put simply, she bled out from her wounds and died as a consequence.

13 Both the Applicant and Ismil were charged with murder in furtherance of their common intention to rob the deceased under s 302 read with s 34 of the Act. The Applicant relied on the defence of diminished responsibility due to an abnormality of mind caused by the consumption of Dormicum, which defence was rejected by the High Court Judge who convicted both accused as charged (see generally *Public Prosecutor v Ismil bin Kadar and Another* [2009] SGHC 84 ("the HC Judgment")).

14 After hearing arguments raised on appeal, this court (constituted by a different coram) acquitted Ismil of his charge but dismissed the appeal by the Applicant and substituted his conviction for murder in furtherance of a common intention to commit robbery under s 302 read with s 34 of the Act with murder under s 302 of the Act (see generally the CA Judgment). This court held, *inter alia*, that the Applicant's evidence that he was the sole assailant and offender should have been accepted by the High Court Judge as it was consistent with the weight of the evidence and accounted for several aspects of the case that were previously unexplained. This court also held that the Applicant had failed to establish that he was suffering from an abnormality of mind at the material time which entitled him to avail himself of the defence of diminished responsibility. Finally, this court held that the case against the Applicant for murder of the deceased had been proven beyond a reasonable doubt.

The applicable principles

15 The applicable principles, in our view, flow from – and, indeed, are inextricably connected to – the precise issue that is before the court. That issue is to determine *under which limb of s 300* the accused person was found guilty of the offence of murder (s 300 comprises four limbs, reproduced above at [3]). This is of the utmost importance because, prior to 1 January 2013, the punishment for murder was the death penalty, *regardless* of the limb (under s 300) the accused person was convicted under. The pre-amendment version of s 302 of the Act read simply as follows:

> **Punishment for murder**
>
> **302.** Whoever commits murder shall be punished with death.

16 However, on 1 January 2013, legislative amendments came into effect which made the death sentence non-mandatory for murder falling within the meaning of subsections (*b*), (*c*) and (*d*) of s 300. *Only* murder falling within the meaning of *s 300(*a*)* was punishable with the death penalty. In this regard, the amended s 302 of the Penal Code that is currently in force (Cap 224, 2008 Rev Ed) reads as follows:

> **Punishment for murder**
>
> **302.**—(1) Whoever commits murder within the meaning of section 300(a) shall be punished with death.
>
> (2) Whoever commits murder within the meaning of section 300(*b*), (*c*) or (*d*) shall be punished with death or imprisonment for life and shall, if he is not punished with death, also be liable to caning.

17 In our view, absent a concession by the Prosecution (here, the Respondent) that the murder concerned does *not* fall within the ambit of s 300(*a*), this court in re-sentencing cases such as the present ought to examine the record closely in order to determine whether *the objective evidence on record* establishes – *beyond a reasonable doubt* – that, in causing the victim's death, the accused person *intended to cause the victim's death*. If so, then the murder committed would clearly fall within s 300(*a*) and this court will affirm the sentence of death imposed on the accused person. If,

however, this is not the case, then this court will remit the case to the High Court for re-sentencing.

18 At this juncture, it would, in our view, be invidious to attempt to lay down any further guidance simply because *the objective evidence on record will differ from case to case.* What bears emphasis, however, is that, given the dire consequences for the accused person should this court find that the murder committed by the accused person falls under s 300(*a*), the Prosecution will have to establish that this is the case *beyond a reasonable doubt*. Correlatively, if a reasonable doubt is raised in favour of the accused person (in this case, the Applicant), this court will remit the case to the High Court for re-sentencing, at which point the High Court will have to exercise its discretion whether or not to impose the death penalty on the accused person. There could, of course, be an appeal to this court from that decision.

19 For the avoidance of doubt, we are of the view that where the High Court (*and* the Court of Appeal, in the case of an appeal) have already, prior to the motion for re-sentencing, *expressly* held that the accused person is guilty of murder under s 300(*a*) *only*, it would follow that this court in a motion for re-sentencing will affirm the sentence of death imposed on the accused person.

20 Correlatively, where the High Court (*and* the Court of Appeal, in the case of an appeal) have already, prior to the motion for re-sentencing, *expressly* held that the accused person is guilty of murder under any of the limbs *other than s 300(*a*)* (*ie*, under s 300(*b*), (*c*) and/or (*d*)), then this court in a motion for re-sentencing *will remit* the case to the High Court for re-sentencing.

21 A *possible* argument could be made to the effect that the facts as well as analysis of the aforementioned courts in this last-mentioned situation (see above at [20]) were incorrect and that this court in a motion for re-sentencing should take notice that the case could be characterised as involving murder within the meaning of s 300(*a*). We are of the view that, in such a situation, the benefit of the doubt ought (consistently with the standard of proof we have endorsed) to be given to the accused person and, consequently, this court ought to remit the case to the High Court for re-sentencing.

22 The *present case*, however, falls within *neither* of the two situations referred to in [19] and [20] above. Indeed, *no limb under s 300* was specified in the Charge Sheet *and* neither the High Court *nor* the Court of Appeal in their respective earlier decisions on the substantive aspects of the case *specified which limb of s 300 the Applicant was being convicted under.* This is understandable as, at the material time (and as already noted above at [15]), the mandatory punishment for murder was the death penalty, *regardless* of the limb (under s 300) the accused person was convicted under. Indeed, it seems to us that Parliament had *precisely* such a situation in mind when it enacted s 4(5). The task therefore now falls to this court to determine, *based on the objective evidence on record*, "the meaning of murder that the person is guilty of" pursuant to s 4(5)(*b*). Put simply, this court has to determine *which of the limbs of s 300* the murder committed by the Applicant falls under. Even more specifically, as the Respondent is opposing the Application, it bears the burden of proof of establishing – beyond a reasonable doubt – that the Applicant was guilty of murder within the meaning of s 300(*a*).

23 It is also important to emphasise what this court *cannot* do in motions for re-sentencing (such as in the Application in the present case). This court *cannot* revisit the findings of fact that it had previously made or affirmed which led to its decision that the Applicant was guilty of murder and ought therefore to be punished under s 302 of the Act. Looked at in the context of the present case, this is an important point, particularly in relation to the Applicant's argument with regard to the defence of *diminished responsibility* under Exception 7 to s 300. This defence was *rejected* by both the High Court *and* the Court of Appeal and therefore *that defence cannot be revisited (whether*

directly or indirectly) in the context of the Application before this court. The position is the same even though all three members of the present Court of Appeal were not part of the coram which heard the appeal from the High Court and which delivered the CA Judgment.

24 Before turning to examine the objective evidence on record in order to arrive at our decision with regard to the Application in the present proceedings, it would be appropriate to set out the cases of the respective parties.

The Applicant's submissions

25 The Applicant argues, in his written submissions, that this court should clarify that he is guilty of murder within the meaning of s 300(*c*) because:

(a) The Respondent bears the burden of proving beyond a reasonable doubt that the meaning of murder that the Applicant is guilty of falls within s 300(*a*) and not s 300(*c*).

(b) It cannot be permissible for the Respondent, having proceeded under s 300(*c*), as demonstrated in its Opening Address, to now claim that the meaning of murder that the Applicant is guilty of falls within s 300(*a*), as doing so would materially and irreversibly prejudice the Applicant because:

(i) The significance of the effects of intoxication coupled with his borderline IQ *vis-à-vis* a s 300(*a*) murder case was never explored at the trial because the subjective intention of the Applicant to cause death was not relevant in a s 300(*c*) case – the primary question in a s 300(*c*) case was whether the accused had intended to cause injuries which were sufficient in the ordinary course of nature to cause death.

(ii) The Applicant admitted to murder on the basis of murder under s 300(*c*), and that is different from admitting to murder under s 300(*a*).

(iii) Had the Respondent's case at trial been framed as a s 300(*a*) case, the Applicant would have had the opportunity to challenge any suggestion that he had intended to cause the deceased's death. This opportunity never arose because the Respondent had framed its case as a s 300(*c*) issue which focused on whether the Applicant had the intention to cause such injuries which were sufficient in the ordinary course of nature to cause death.

(c) The evidence led demonstrates that the Applicant's act should fall within s 300(*c*) and not s 300(*a*) because:

(i) The Applicant was under the influence of Dormicum during the attack, even though his intoxicated state did not result in him qualifying for the defence of diminished responsibility.

(ii) The Applicant remarked that he was "shocked" when told later how many times he had slashed the deceased.

(iii) The Applicant went to the deceased's flat unarmed.

(iv) The injuries caused by the Applicant, singularly, were not life threatening. It was the cumulative effect of the multiple injuries that led to the deceased's death.

26 Mr Gill helpfully (and correctly, in our view) focused – in oral submissions before this court – on

the main points contained in his written submissions set out above. In particular, he focused, first, on the Respondent's Opening Address which had referred to murder committed under *s 300(*c*)*. He also focused on the fact that, as a result of this reference in the Respondent's Opening Address, the Applicant had focused only on the charge under s 300(*c*), and was prejudiced because he was not permitted the opportunity to address this shift in the Respondent's case at trial.

The Respondent's submissions

27 The Respondent argues that this court should clarify that the Applicant is guilty of murder within the meaning of s 300(*a*) because:

(a) Even though the Respondent had initially framed its case under s 300(*c*), the Respondent's case, as demonstrated by its cross-examination and closing submissions at the trial, ultimately became one under s 300(*a*) as the evidence emerged.

(b) The wounds demonstrate that there was an intention by the Applicant to cause the death of the deceased; in particular:

(i) As stated by the High Court and recognised by the pathologist, Dr Lai Siang Hui, the killing was not accidental because of the numerous blows to the deceased.

(ii) The wounds were targeted at the deceased's vital areas, namely, her head and neck.

(iii) The wounds were consistent with the deceased trying to move away from her assailant.

(c) The Applicant's evidence suggests such an intention; in particular:

(i) The Applicant admitted that he had planned to kill the deceased (1) before the attack, (2) during the attack, and (3) after he switched from the knife to the chopper, so that she could not identify him after the robbery.

(ii) The Applicant's plan to silence the deceased explains why he attacked the deceased viciously and relentlessly.

(iii) After the Applicant stopped attacking the deceased, he went to threaten the deceased's bedridden husband, Mr Loh, and when the Applicant saw that the deceased was standing at the kitchen area after that, he used the chopper to inflict more injuries on the deceased until she collapsed.

(iv) When the Applicant left the flat, he was certain that the deceased was going to die from the injuries he had inflicted.

(d) The Applicant conceded that, notwithstanding the consumption of Dormicum, he had complete control of himself throughout the course of the entire attack, as was noted by this court in the Applicant's appeal against his conviction.

Our decision

28 As already noted, Mr Gill placed great emphasis on the Respondent's Opening Address which (as

Mr Bala candidly admitted) referred to s 300(*c*). However, it should be noted that, owing to the unusual manner in which the trial unfolded, this particular argument requires a more nuanced analysis. In particular, the accused person, who was initially charged with *committing the actual murder* was *not* the Applicant but, rather, his brother, Ismil. The Applicant, on the other hand, was charged with murder as a result of the Respondent's invocation of s 34 of the Act. The charge with regard to both Ismil and the Applicant read, in fact, as follows:

> That you, 1. ISMIL BIN KADAR
>
> 2. MUHAMMAD BIN KADAR
>
> on or about the 6th day of May 2005, between 8.00 a.m. and 2.00 p.m., at Block 185 Boon Lay Avenue #05-156, Singapore, in furtherance of the common intention of you both to commit robbery, did commit murder by causing the death of one Tham Weng Kuen, female aged 69 years, and you have thereby committed an offence punishable under section 302 read with section 34 of the Penal Code, Chapter 224.

29 The fact that Ismil was initially charged with committing the actual act of murder is significant when regard is had to the various statements which he had made prior to trial. In particular, there was a relative dearth of information in these statements as to the actual details of the murder itself. Not surprisingly, therefore, the Respondent initially referred to s 300(*c*) in its Opening Address. *However*, the trial took *a wholly unexpected turn* when *the Applicant* stated that *he* had killed the deceased instead. It is our view that it is the evidence relating to *the Applicant's actions in killing the deceased that is relevant as to which limb of s 300 the Applicant's act of murder fell within.*

30 Looked at in this light, the Respondent's reference to s 300(*c*) in its Opening Address is *not* really material in the context of the present proceedings. In any event, Mr Gill conceded (correctly, in our view) that such an Opening Address is only an overview (see the then s 188(1) of the Criminal Procedure Code (Cap 68, 1985 Rev Ed), as well as the present s 230(1)(*d*) of the Criminal Procedure Code (Cap 68, 2012 Rev Ed)) and cannot be taken to be writ in stone so as to bind the Respondent thereafter.

31 We now turn to the objective evidence on record that is relevant as to which limb of s 300 the Applicant's act of murder fell within. We commence by referring to *the Applicant's own evidence* which clearly states that he had *intended to kill the deceased.* It bears noting that, even if we accept Mr Gill's submission to the effect that he (the Applicant) was under the impression that he had been charged with murder under s 300(*c*) (which we do *not* (see above at [29] and below at [38])), this would mean that when the Applicant gave his testimony, he did so *sincerely and truthfully, and without any preconceptions whatsoever*. This is an important point – to which we will return below. Returning to the Applicant's evidence, we note the following testimony from the Applicant during cross-examination:

> Q Mr Muhammad, when you planned the robbery of the deceased, did you also plan to kill her because she could identify you?
>
> A I did not think about that.
>
> Q And what did you plan to do *if she resisted you in the robbery? Were you prepared to use force if she resisted you*?
>
> A *I would use force against her*.

Q And it's your evidence that you did in fact use force against her, isn't it, Mr Muhammad? *You inflicted hundred over wounds on the deceased, that is your evidence, isn't it*?

A *Yes*.

Q And as per your evidence, when you inflicted those numerous injuries on the deceased, *would I be right to say that* ***you intended to kill her, not just hurt her but in fact to kill her*** *?* ***Is that on your mind*** ?

A ***Yes*** .

Q You killed her. ***Why*** *did you kill her, Mr Muhammad*? Tell us. *Was it* ***because you did not want to be identified*** ?

A ***Yes, that's true*** .

Q Are you sure you are the one who inflicted these wounds on the deceased, Mr Muhammad? Now, you are telling us ***you intended to kill Mdm Loh*** [sic], the deceased? Are you sure you were the one who inflicted those wounds on her---those injuries on her?

A Yes.

Q Are you sure you were the only person who inflicted those injuries on the deceased and no one else?

A Yes.

[emphasis added in italics and bold italics]

32 In a similar vein, the following testimony by the Applicant (also under cross-examination) should be noted (this relates to the further attack on the deceased with a chopper):

Q Now, we go on to the chopper bit. You went to get a chopper from the kitchen. Why did you go to get the chopper?

A I wanted to get the chopper because the handle of the knife was broken.

Q ***If the handle of the knife wasn't broken*** *, would you have* ***continued to stab*** *her in the kitchen---in the toilet?*

A ***Yes.***

Q So I would be right to say you went to get the chopper *to inflict* ***further*** *injuries on the deceased*?

A ***Yes.***

Q And by that, would I be right to say you planned--- ***you <u>intended to kill her</u> with the chopper*** ? ***Not just to cause hurt to her <u>but in fact to kill her</u>*** **.**

A ***<u>Yes, at that time I had that intention</u>*** **.**

Q Tell us what did you do to the deceased with the chopper.

A After I've taken the chopper from the kitchen, *I went to the toilet* ***and chopped her in the toilet <u>several times</u>*** **.**

Q Was she standing up on the toilet floor when you used the chopper on her?

A I think she was ***crouching on the floor*** .

Q Can you tell us where your blows landed on the deceased?

A I think it was on ***her head*** .

[emphasis added in italics, bold italics and underlined bold italics]

33 There is also the following testimony by the Applicant (under cross-examination) which should be noted:

Q And whilst you were in the kitchen, things unfolded as you have related to us in Court, that is you called Mdm Tham [the deceased] over and once she was in front of you, *you reached out for a knife* which is---which was taken from the receptacle as shown at photograph P15 *and you stabbed her with it*.

A *Yes, that is my evidence in Court*.

Q She *then went* towards *the toilet*, which is shown at photograph P12 *and therein you attacked her* ***again*** *with* ***the knife*** .

A ***Yes, correct.***

Q *After you stabbed her with a knife on a few occasions, the handle broke.*

A *That's right.*

Q ***You then went to get a chopper.***

A ***Yes.***

Q You took it from the same spot where you took the knife.

A Yes.

Q ***Thereafter you attacked Mdm Tham viciously with a chopper.***

A ***Yes.***

Q You also---in fact *when you attacked her with a chopper, your plan*, ***your <u>intention</u> was <u>to kill her, not just cause hurt to her, is it, Mr Muhammad</u>*** ? *This question I am* ***<u>putting to you</u>*** *relates to* ***what you did*** .

A *Can you repeat the question?*

Q Right, my question was *when you attacked her with the chopper*, ***your intention was to kill her, Mr Muhammad, not just to cause hurt to her*** ?

A ***Yes, my intention has changed . I intend to kill her at that time .***

Q What do you mean by your intention has changed. Is it, are you saying that your intention before the 6th of May was only to rob and cause hurt *but now it was to rob* ***and to kill*** ?

A ***Yes, I have told the Court there's a kind of boldness on my part to kill her .***

[emphasis added in italics, bold italics and underlined bold italics]

34 That the intention of the Applicant was to cause the death of the deceased is also supported by the evidence of his own psychiatrist, Dr Calvin Fones ("Dr Fones"). In his report, Dr Fones opined as follows (where his focus was on the defence of diminished responsibility):

> [The Applicant] was, however, clearly under the influence of drugs during the time of the alleged offence. ***He formed the intention*** *to rob* ***and kill*** *the women shortly after or during the time he had consumed intravenous Dormicum; as he puts it 'it made him feel brave when under influence'.* It is likely that ***his intention to kill*** was formed while under the influence of Dormicum that he had taken. The disinhibitory effects of the drug also contributed to the nature of the crime where *he slashed the woman repeatedly* without a clear recollection of how many times he had done so. Indeed, he remarked that he was 'shocked' when told later how many times he had allegedly slashed the woman. The effects of the drug had likely led to a major reduction in self-control and regulation of his own actions. [emphasis added in italics and bold italics]

35 And, in his testimony in examination by the Applicant's then lawyer, Dr Fones stated as follows:

> Q Is it your opinion that although he was suffering from this impairment, he could still form the intention to harm the deceased?
>
> A From *his* account given to me, *he did say that his* ***intention at the time*** *that he went to rob the woman was that* ***it did include an intention to try and prevent her from identifying him either by injuring her or harming her in some way*** .
>
> [emphasis added in italics, bold italics and underlined bold italics]

36 That the Respondent was in fact submitting that the Applicant had committed murder within the meaning of *s 300(*a*)* (and not s 300(*c*)) is clear in its Closing Submissions at trial, as follows:

> The reproduction of considerable extracts of Muhammad's testimony above highlight that although Muhammad occasionally vacillated and suggested that he merely wished to "cause hurt" to the deceased, **it is clear that his primary, indeed, sole, motivation in doing so had been to kill her so as to eliminate the possibility of being identified afterwards**. As Dr Fones readily conceded, Muhammad's motive extended to include "an intention to try and prevent her from identifying her or harming her in some way." The question that inevitably arises would be this – how else would one avoid the possibility of identification except by causing sufficient hurt and ensuring the eye-witness' death so as to permanently silence her? Indeed, such a line of reasoning is fully consistent with Muhammad's admission that he had ***every intention to kill her*** even when he was planning the attack. [emphasis in bold and bold italics in original]

We should observe that whilst the Respondent referred to the Applicant's motivation, the reference was, in fact, to his intention. This is clear when the submission is read in its proper context (especially having regard to the words which *the Respondent itself* rendered in bold italics in the quotation just set out above). *In any event*, the Applicant's motivation was extremely important in the context of the present proceedings. As was observed by this court in *Mohammed Ali bin Johari v Public Prosecutor* [2009] 4 SLR(R) 1058 (at [58]):

> It would thus appear that while motive is not an essential element of the crime, it can "bolster the inference that an intention to commit the offence was existent", as Yong CJ observed astutely in [*Public Prosecutor v Oh Laye Koh* [1994] 2 SLR(R) 120 at [24]). It is helpful in appropriate circumstances by casting valuable (and even significant) light on the *intention* of an accused. … [emphasis in original]

37 Also of no small significance is the following observation in the HC Judgment, where the High Court Judge observed as follows (see the HC Judgment at [504]):

> Secondly, Muhammad said he killed the deceased *because he* ***did not want to be identified*** . I am of the view that whether Muhammad or Ismil was the assailant, each must have known that *it was likely that the deceased* ***would have to be killed to avoid any risk of identifying them*** . I did not accept Ismil's allegation that the killing was accidental. The numerous blows contradicted any such suggestion. [emphasis added in italics and bold italics]

38 However, Mr Gill submitted that the use of the phrase "intended to kill" was not what the Applicant meant. He also submitted that the Applicant used this phrase whilst under the impression that he had been charged with murder under s 300(*c*). With respect, this last-mentioned argument is strained and artificial given the then state of the law. Further, this submission is premised, in the main, on the (related) submission with regard to the Respondent's reference to s 300(*c*) in its Opening Address. However, for the reasons set out above (at [29]), this submission (with regard to the Respondent's Opening Address) is not persuasive. However, what, then, about Mr Gill's first argument referred to at the outset of the present paragraph? In particular, could it be argued that what the Applicant meant was that he had merely intended to inflict the wounds he did on the deceased, which wounds were sufficient in the ordinary course of nature to cause death under s 300(*c*) – as opposed to intending to cause her death under s 300(*a*)? With respect, we are unable to accept this argument. Let us elaborate.

39 A key issue is this: why did the Applicant inflict the injuries that he did on the deceased? It is the Applicant's evidence, as well as that of his psychiatrist, Dr Fones, that the Applicant had *intended* to *silence* the deceased *to prevent her (the deceased) from identifying him (the Applicant)* (see also his testimony reproduced above at [31], as well as the testimony of Dr Fones, reproduced above at [35]; reference may also be made to the Respondent's Closing Submissions and the observation of the High Court Judge, reproduced above at [36] and [37], respectively). At this juncture, it is very important to note that *the Applicant and the deceased had prior contact with each other* (see above at [10]). Put simply, there was no way that the Applicant could have *silenced* the deceased in order to *prevent her* from *identifying* him *unless* he *killed* her. In other words, the Applicant inflicted the injuries he did on the deceased *with the intention of causing the death of the deceased. This is quintessentially an instance of murder under s 300(*a*).* On a related note, we have already observed that the Applicant would have given this particular (as well as his other) testimony *sincerely and truthfully* (see above at [31]).

40 We also note that there were other facts which were consistent with the intention on the part of the Applicant to cause the death of the deceased in order to silence her and prevent her from ever

identifying him. First, the majority of the enormous number of wounds was found in a couple of the most vulnerable parts of the deceased's body – her head and her neck. Further, the Applicant's attack was *relentless* – not content with having attacked the deceased so severely the first time, he proceeded to attack her *more than once when she was already in an utterly helpless position* (see also the Applicant's testimony, reproduced above at [32] and [33]). Why would he have needed to do that if he had no intention of *killing* her? The Applicant's conduct *after* he had inflicted the wounds on the deceased is also consistent with the intention on his part to cause the death of the deceased in order to silence her; as this court observed in the CA Judgment (at [136]):

> The conduct of Muhammad after attacking the Deceased also indicates that he was firmly in control of his mental faculties and was able to think and act rationally. According to the statement of September 2007, after the attack, Muhammad grabbed a bucket of water and poured it over the kitchen floor, and wiped the chopper. During this cleanup he wore Mr Loh's [the deceased's husband's] shoes …, presumably to avoid leaving a footprint. He then disposed of the shoes by placing them on the staircase landing between the eighth and ninth floor. When he returned to his flat, he washed his hands, legs and face and then changed his clothing. In our view, all these steps to conceal his role in the killing cumulatively suggest clarity of thought and that a rational mind was at work, and further support the conclusion that he was not suffering from an abnormality of mind.

41 We also note that, given the huge number of incised and stab wounds the Applicant had inflicted on the deceased (more than 110 in total), the only other plausible reason for the Applicant doing what he did was that he had inflicted these wounds in a frenzy owing to an abnormality of mind. In this regard, Mr Gill emphasised before this court that the Applicant himself was shocked when he discovered the number of wounds he had inflicted (see also above at [25(c)(ii)]). *However*, this is premised on the assumption that the Applicant had an abnormality of mind which would, *ex hypothesi*, have entitled him to the defence of diminished responsibility in any event. But, as we have already noted (see above at [23]), this court had *rejected* this defence when considering the Applicant's appeal against conviction (see the CA Judgment at [131]–[136]). On the contrary, it appears that it was the effects of the ingestion of Dormicum by the Applicant that made him bold enough to inflict so many wounds on the deceased (see also his own testimony, reproduced above at [33]).

42 Finally, we deal with Mr Gill's submission that if the Applicant had intended to cause the death of the deceased, he would not have inflicted so many wounds on the deceased but would, instead, have inflicted just a few precise (and fatal) wounds at vulnerable parts of the deceased's body. He also pointed to the fact that none of the wounds inflicted on the deceased was, in and of itself, a *fatal* one. The logical conclusion of Mr Gill's submission was that the Applicant had *only* intended to cause bodily injury that was *short* of an intention to kill. With respect, we are of the view that these arguments are speculative. Indeed, it might well have been the case that the Applicant was simply not an effective killer – an inference that is consistent with the fact that the Applicant had been under the influence of drugs, *viz*, Dormicum, which influence could have simultaneously given him the boldness to kill the deceased (see also above at [41]) but which impaired the efficacy of his strikes on the deceased with the weapons concerned. *Most importantly*, this particular submission is *not* consistent with the fact that the Applicant had *intended* to *permanently silence* the deceased so that she would not be able to identify him. Killing her was the only way in which he could have fulfilled that objective. A mere intention to cause bodily injury was incompatible with the Applicant's objective.

43 In summary, we find that the Applicant had inflicted the wounds on the deceased intending to cause her death and which, as it turned out, did in fact cause her death, albeit not in the most conventional or effective way. The deceased died through *acute exsanguination*; she literally bled to

death from the 110 or so wounds which were inflicted on her in a brutal attack which was intended to *silence* her so that she would not be able to identify him (bearing in mind the fact that she had prior contact with him and would definitely have been able to identify him if she were alive).

44 Before we conclude, there are two points which we would like to deal with. First, the question might be posed as to why the Applicant did not kill Mr Loh as well since his intention to kill the deceased was to conceal his identity. The answer is clear. Mr Loh was bedridden, completely helpless and (for all intents and purposes) seemingly unable to communicate effectively (or at all). The Applicant was aware of Mr Loh's physical state from his previous encounter (see above at [10]), and it was also apparent to him again on the day of the murder. In his own testimony, the Applicant said that he did not consider Mr Loh a threat, unlike the deceased, because he thought that Mr Loh, given his condition, did not have the ability to implicate him. It was immaterial whether Mr Loh was *in fact* capable of providing information to others that may implicate the Applicant; the Applicant's own assessment that Mr Loh was incapable of doing so removed any motivation or need to have to silence Mr Loh as well. Neither counsel raised this point but we deal with it for the sake of completeness as this is a case involving capital punishment. Indeed, it may well be the case that the point was not raised because it was (in our view as well) a patently clear one.

45 Secondly, we received a letter (dated 17 September 2014) from Mr Gill on behalf of the Applicant. Two days after the oral hearing before this court, the Applicant sought (on 12 September 2014) "clarification on what transpired at the Criminal Motion hearing". Mr Gill then proceeded to state (at paras 4 and 5 of this letter), as follows:

> 4. Following explanation of the arguments of the Prosecution ***and the issues raised by the Honourable Court*** , our client provided *further instructions* as summarised below:
>
> (a) Our client clarified that *at the time that the trial commenced he had received legal advice on the fact that the Prosecution was proceeding under section 300(c). He further clarified that he was advised that in this particular case he had only 2 defences (i) to contest that he shared a common intention with Ismil bin Kadar (at that time the Prosecution's named assailant) and/or (ii) diminished responsibility. He was told that because this was a section 300(c) case, it would be impossible for Ismil bin Kadar to show that he did not intend to cause the injuries sustained by the deceased.*
>
> (b) Our client *also* ***clarified on the admissions in his testimony at the trial. He explained that he intended to kill the victim because she had perished due to his acts. Essentially, our client said that he admitted that his intention was to kill the deceased only because " she already die by my hand ".***
>
> 5. Having further reviewed the Record of Proceedings, we note that ***the Prosecution only changed its position after our client had given his testimony, he was not really given a proper opportunity to address the change (notwithstanding the fact that he was represented by able Counsel at that time)*** .
>
> [emphasis added in italics and bold italics; emphasis in underlined bold italics was in italics in original]

46 Mr Gill then stated (at para 7 of this letter) that the Applicant stood ready to file an application via a Criminal Motion "for the purposes of adducing further evidence and further arguments for consideration" by this court and that he proposed "to adduce [the Applicant's] further evidence through an affidavit … which will be filed together with the aforesaid Criminal Motion".

47 We replied that we did not require further evidence or further arguments. Let us elaborate.

48 We are not surprised that the Applicant is now attempting to fill in gaps in his case after having heard the questions we posed to both counsel. We gave every opportunity to all counsel to furnish all their views on all the issues raised at the oral hearing before us. The Applicant was also present throughout the hearing. *In any event, the arguments raised in his letter (at paras 4 and 5, reproduced above at [45]) have already been addressed in this judgment.*

49 The point raised at para 4(a) of the letter (above at [45]) does *not* really impact the fact that the Respondent's reference to s 300(*c*) in its Opening Address is not really material in the context of the present proceedings (see above at [29]) and (more importantly) does *not* address the Applicant's own testimony (as well as other evidence, submissions and finding) that *he had intended to cause the death of the deceased in order to silence her so that she would not be able to identify him (bearing in mind that she had prior contact with him and would definitely have been able to identify him if she were alive).*

50 The point raised at para 4(b) of the letter (above at [45]) does *not* address the fundamental point as to why he had killed the deceased. Indeed, it is not only the Applicant's own testimony but also other objective evidence that demonstrates (beyond a reasonable doubt) that *the Applicant had intended to cause the death of the deceased in order to silence her so that she would not be able to identify him (bearing in mind that she had prior contact with him and would definitely have been able to identify him if she were alive).*

51 The point raised at para 5 of the letter (above at [45]) also does *not* address the fundamental point that, *in the context of the present proceedings*, it is precisely the evidence relating to *the Applicant's actions in killing the deceased that is relevant as to which limb of s 300 the Applicant's act of murder fell within* (see also above at [29]).

52 Indeed, in our view, the further arguments sought to be raised were merely the *same* arguments which the Applicant had *already* raised, *via* Mr Gill's written and/or oral submissions, and which were merely couched in either the same or slightly different guise. In the circumstances, we were of the view that there was no basis to permit the Applicant to adduce further evidence or further arguments.

Conclusion

53 We would like to take this opportunity to commend Mr Gill for the commitment he displayed in making all the arguments he could on behalf of the Applicant in both his written as well as oral submissions before this court. However, we are satisfied that the objective evidence on record establishes – beyond a reasonable doubt – that the Applicant had intended to cause the death of the deceased within the meaning of s 300(*a*) and that this is therefore not an appropriate case to be remitted to the High Court for re-sentencing.

54 For the reasons set out above, we dismiss the Application and affirm the sentence of death imposed on the Applicant.