IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2021] SGHC 259

Magistrate's Appeal No 9161 of 2019/01

Between

Koh Rong Gui

… *Appellant*

And

Public Prosecutor

… *Respondent*

JUDGMENT

[Constitutional Law] — [Equal protection of the law]
[Constitutional Law] — [Judicial power]
[Criminal Procedure and Sentencing] — [Sentencing] — [Mandatory treatment order]

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v
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18 November 2021 Judgment reserved.

Aedit Abdullah J:

1 The present case engages the question of the limits to which the Legislature may prescribe that certain facts ought to be found by the Executive and not the court; and whether it is permissible for sentencing discretion to be constrained as a result. In the context of the regime for mandatory treatment orders ("MTOs"), it is argued that judicial power is infringed as the determination by a psychiatrist appointed by the Director of Medical Services of the Ministry of Health ("MOH") is "final and conclusive" on whether an offender is suitable to be sentenced to an MTO. It is also argued that this amounts to a breach of an offender's right to equal protection under Art 12(1) of the Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint) ("the Constitution"), as such an arrogation of the determination of factual matters do not take place in other laws which provide for psychiatric conditions to function as a defence or mitigating factor.

2 After hearing parties on the matter, I am of the view that the constitutional challenge does not have merit. However, certain consequences follow from an apparent breach of statutory procedure in the present case.

Background

3 The appellant ("the Appellant") is a 45-year-old male who was convicted after trial of four charges of intruding upon the privacy of three women, punishable under s 509 of the Penal Code (Cap 224, 2008 Rev Ed).[1] He had recorded videos of their cleavage and breasts (for the first three charges) and taken an upskirt video (for the fourth charge). The incidents had taken place variously around Jurong East MRT station, in an MRT train, and at Jurong East Mall on 10 November 2016, 20 January, and 4 April 2017 respectively. He was arrested following the last occasion, which took place on an escalator in the mall.[2]

4 On 10 July 2019, the District Judge imposed a sentence of six weeks' imprisonment in relation to each charge, with the sentences for the third and fourth charges to run consecutively and the sentences for the first and second charges to run concurrently.[3] While the Appellant initially appealed against his conviction and sentence, he later abandoned the appeal against conviction. The appeal is now only in respect of his sentence.

5 On 5 October 2020, I allowed an application by the Appellant to adduce fresh evidence consisting of two psychiatric reports ("the Appellant's Reports"), in support of his submission that he should have been sentenced instead to an

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1 Record of Appeal ("ROA"), pp 5 to 8.

2 Arrest Report (ROA, p 546); 4th Charge (ROA, p 8).

3 Grounds of Decision, [63] (ROA, p 536).

MTO.[4] The court was subsequently persuaded to call for an MTO suitability report under s 339 of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) ("CPC") on 26 February 2021. Applying the approach in *GCX v Public Prosecutor* [2019] 3 SLR 1325 ("*GCX*") which I followed in *Ng Hai Chong Brandon v Public Prosecutor* [2019] SGHC 107, I found that the sentencing consideration of rehabilitation was not outweighed by other principles and some rehabilitative potential was present.[5] In my view, there was insufficient evidence to exclude the possibility that a psychiatric condition was a contributing factor to the commission of the offence.[6]

6 The report dated 22 April 2021 by the appointed psychiatrist at the Institute of Mental Health ("the MTO Suitability Report", "the Psychiatrist" and "IMH" respectively) found that the Appellant was not suitable for an MTO.[7] The Psychiatrist found that the Appellant had Obsessive Compulsive Disorder and a disorder of hoarding, and his illnesses were shown to have benefitted from treatment.[8] He was also able to comprehend the features of an MTO and had good family support.[9] However, there was no evidence supporting the diagnosis of a Paraphilia.[10] As there was no contributory factor between his psychiatric illnesses and the offences, he was considered an unsuitable candidate for an MTO. [11] In other words, the requirement under s 339(3)(*c*) of the CPC was not

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4 HC/CM 10/2020; Appellant's submissions dated 14 July 2020 ("AS1"), [4]–[5].

5 Oral Judgment, [9] and [12].

6 Oral Judgment, [14].

7 Mandatory Treatment Order ("MTO") Suitability Report, [11.4].

8 MTO Suitability Report, [8] and [11.1].

9 MTO Suitability Report, para 11.4.

10 MTO Suitability Report, para 11.2.

11 MTO Suitability Report, para 11.2.

satisfied. This precluded the court from making such an order, pursuant to s 339(4) of the CPC.

7 The Appellant has subsequently argued that ss 339(3), 339(4) and 339(9) of the CPC (collectively, "the MTO Provisions") are unconstitutional, being in breach of Arts 12(1) and 93 of the Constitution.[12] He argues that the provisions should therefore be struck down and that a Newton hearing be convened, particularly on the issue of whether s 339(3)(*c*) is satisfied in his case.[13] The contest at this stage is therefore primarily on whether the Psychiatrist's conclusions should indeed be regarded as conclusive, as s 339(9) of the CPC provides.

Summary of the Appellant's arguments

8 The Appellant argues that the effect of the MTO Provisions is that the court's discretion to consider whether to impose an MTO only arises when the appointed psychiatrist is of the view that the three criteria in s 339(3) of the CPC are satisfied.[14] The court has no power to impose an MTO if the psychiatrist's report states that one or more of the criteria is not satisfied, and the findings of the psychiatrist in this regard are final and conclusive. The Appellant submits that the criteria triggering the court's discretion to impose an MTO are therefore "solely decided by the appointed psychiatrist and not the court, even though they involve questions of fact which ought to have been adjudicated upon by the court".[15] Furthermore, s 339(9) is said to "oust" the courts' jurisdiction to review the appointed psychiatrist's opinion. These constitute a violation of Art

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12 Appellant's submissions dated 21 May 2021 ("AS2"), [3].

13 AS2, [28].

14 AS2, [10].

15 AS2, [11].

93 of the Constitution in his view.[16] The Appellant also submits that the MTO Provisions contravene both limbs of the "reasonable classification" test in relation to determining the constitutionality of a statute under Art 12(1) of the Constitution.

9 The Appellant argues that the MTO Suitability Report also did not comply with s 339(8) of the CPC, which provides that before making an MTO suitability report, an appointed psychiatrist "shall take into consideration the report made by the psychiatrist engaged by the offender".[17] The Psychiatrist had stated in the MTO Suitability Report that she relied upon several sources of information, but made no mention of the Appellant's Reports. As such, due to the unconstitutionality of the MTO Provisions as well as non-compliance with s 339(8), a Newton hearing ought to be convened in respect of the MTO Suitability Report and on the issue of whether the Appellant's psychiatric conditions had contributed to his offending.[18] Finally, the Appellant argues that the term of 12 weeks' imprisonment is manifestly excessive, and that a custodial sentence of about two weeks' imprisonment per charge would be an appropriate starting point.[19]

Summary of the Prosecution's arguments

10 The Prosecution submits that the MTO Provisions were "carefully designed" to ensure that the IMH, which administers the MTO regime, is not placed in a position where it is compelled to treat a person even though it does

16 AS2, [22].

17 Appellant's letter dated 10 August 2021 ("AL"), [2] to [6].

18 AS2, [28]; AL, [2].

19 AS2, [29] and [37].

not believe that he has a treatable medical condition.[20] Thus, ss 339(3) and (4) ensure that the court only sentences an offender to an MTO after the IMH has found him clinically suitable for such an order; and s 339(9) ensures that the court does not impose an MTO simply because it takes a different view from the appointed psychiatrist on the s 339(3) criteria. The Prosecutor argues that the courts have "consistently held" that statutory preconditions to sentencing such as ss 339(3) and (4) do not intrude into judicial power, and have given effect to provisions such as s 339(9), which treat as conclusive findings of fact by a statutorily designated fact-finder other than the courts.[21] Furthermore, the MTO Provisions do not go so far as to require the court to impose an MTO simply because the appointed psychiatrist takes the view that an offender is suitable for one.[22] The court initiates and determines the inquiry since it decides (a) whether to call for an MTO suitability report; (b) whether the statutory preconditions in ss 339(3) and (4) are satisfied; and (c) whether to impose an MTO.[23] The Prosecution also submits that the MTO Provisions satisfy both limbs of the "reasonable classification" test and therefore do not breach Art 12(1).[24]

11 On non-compliance with s 339(8) of the CPC, the Prosecution submits that following from the decision in *Low Gek Hong v Public Prosecutor* [2016] SGHC 69 ("*Low Gek Hong*"), the threshold for questioning an MTO suitability report is high, only being met where the report is unclear or draws manifestly wrong, illogical or absurd conclusions. Furthermore, a Newton hearing ought to

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20 Respondent's Submissions dated 13 August 2021 ("RS2"), [14]–[15].

21 RS2, [22] and [23].

22 RS2, [30].

23 RS2, [31].

24 RS2, [45].

be the "last resort" after clarification has first been sought from the appointed psychiatrist. The Prosecution also argues that the District Judge was correct to hold that deterrence was the primary sentence consideration, and the sentence imposed was not manifestly excessive in light of similar sentencing precedents.[25]

Decision

12 I have concluded that the constitutional challenge raised by the Appellant against the MTO Provisions cannot succeed.

Analysis

13 The court will consider the following in turn:

(a) the statutory framework of s 339 of the CPC;

(b) whether the MTO Provisions infringe Art 93 of the Constitution;

(c) whether the MTO Provisions infringe Art 12(1) of the Constitution; and

(d) the consequences in this case.

The statutory framework

14 Section 339 of the CPC reads as follows:

> **Mandatory treatment orders**
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> **339.**—(1) Subject to subsections (2), (3) and (4), where an offender is convicted of an offence, and if the court by or before which he is convicted is satisfied that having regard to the circumstances, including the nature of the offence and the character of the offender, it is expedient to do so, the court may

[25] Respondent's Submissions dated 14 July 2020 ("RS1"), [31].

> make a mandatory treatment order requiring the offender to undergo psychiatric treatment for a period not exceeding 36 months.
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> …
>
> (2) Before making a mandatory treatment order, the court must call for a report to be submitted by an appointed psychiatrist.
>
> (3) A court may make a mandatory treatment order in respect of an offender only if the report submitted by an appointed psychiatrist states that —
>
> (*a*) the offender is suffering from a psychiatric condition which is susceptible to treatment;
>
> (*b*) the offender is suitable for the treatment; and
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> (*c*) the psychiatric condition of the offender is one of the contributing factors for his committing the offence.
>
> (4) A court must not make a mandatory treatment order in respect of an offender if the report submitted by the appointed psychiatrist states that he is not satisfied with any of the matters referred to in subsection (3)(*a*) to (*c*).
>
> …
>
> (8) Before making any report, the appointed psychiatrist shall take into consideration the report made by the psychiatrist engaged by the offender.
>
> (9) Any report made by the appointed psychiatrist shall be taken to be final and conclusive as to the matters referred to in subsection (3)(*a*), (*b*) and (*c*).

15 The operation of s 339 of the CPC was summarised by See Kee Oon J in *GCX* at [28]–[29]. First, s 339(2) provides that the court must call for an MTO suitability report before it can order an MTO, having regard to the guidance in s 339(1), namely "the circumstances, including the nature of the offence and the character of the offender". Second, an MTO may be ordered only if an appointed psychiatrist (that is, a psychiatrist appointed by the Director of Medical Services of the MOH) is of the view that all the conditions in s 339(3) are satisfied. In assessing whether an offender satisfies s 339(3)(*b*), s 339(5) also indicates several factors which the appointed psychiatrist may take into account,

including whether the offender is likely to attend the treatment sessions as required, his physical and mental state, and his financial standing and ability to pay for his treatment. Third, even if the appointed psychiatrist is satisfied that the cumulative conditions in s 339(3) are met, the court retains a discretion whether or not to order an MTO. This is because s 339(1) provides that the court may make such an order where it is satisfied that "it is expedient to do so". To this, I add that the language of s 339(9) is clear: an MTO suitability report is "final and conclusive" regarding whether or not the requirements in s 339(3) have been met in respect of an offender.

16 The rationale for s 339(9) was explained by Ms Indranee Rajah ("Ms Rajah"), then Senior Minister of State for Law and Finance, during the Second Reading of the Criminal Justice Reform Bill (No 14 of 2018) (*Singapore Parliamentary Debates, Official Report* (19 March 2018) vol 94). In response to a point raised by Mr Murali Pillai ("Mr Pillai"), Member of Parliament for Bukit Batok, that the court's determination on whether to impose an MTO ought not be "constrained by the sole professional judgement of the appointed psychiatrist", Ms Rajah stated that since the IMH is generally "the institution to administer treatment under the MTO, there is a concern of conflict of medical ethics if IMH were to be asked to treat a person it believes does not have a treatable mental condition. The current position therefore aligns the diagnostic and treatment elements of MTOs".

17 Before turning to discuss the constitutionality of the MTO Provisions, I pause to note that following from the Court of Appeal's observations in *Saravanan Chandaram v Public Prosecutor and another matter* [2020] 2 SLR 95 ("*Saravanan*") and *Wham Kwok Han Jolovan v Public Prosecutor* [2021] 1 SLR 476 ("*Jolovan Wham*"), the presumption of constitutionality can be "no more than a starting point that legislation will not presumptively be treated as

suspect or unconstitutional" (*Saravanan* at [154]; *Jolovan Wham* at [26]). That being said, in analysing the constitutionality of any law, the court must bear in mind that "each branch of Government has its own role and space" (*Jolovan Wham* at [27]).

Constitutionality under Article 93

18 I find that the MTO Provisions and s 339(9) of the CPC in particular do not violate Art 93 of the Constitution, that is, there is no infringement of the judicial power which is exclusively vested in the courts.

19 Article 93 of the Constitution reads as follows:

> **Judicial power of Singapore**
>
> **93.** The judicial power of Singapore shall be vested in a Supreme Court and in such subordinate courts as may be provided by any written law for the time being in force.

20 The focus of the Appellant's argument is that Art 93 is violated because s 339(9) of the CPC allows the determination of the criteria under s 339(3) of the CPC to be "arrogated to the appointed psychiatrist alone". It leaves the court with "no power to adjudicate on disputes of fact", should an accused person wish to challenge the determination by the appointed psychiatrist "on any basis".[26]

21 The primary question then is what amounts to judicial power.

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[26] AS2, [11].

Judicial power in the context of findings of fact

22 The judicial power of the Supreme Court which derives from Art 93 has been held as "co-equal in constitutional status with the legislative power and the executive power, subject only to the limitations expressed in the Singapore Constitution" (*Mohammad Faizal bin Sabtu v Public Prosecutor* [2012] 4 SLR 947 ("*Mohammad Faizal*") at [16]). It has been defined as being concerned with the determination of controversies or questions between persons or groups of persons (*Mohammad Faizal* at [20]–[21] and [24]; citing cases such as *Huddart, Parker and Co Pty Ltd v Moorehead* (1909) 8 CLR 330, *The Queen v The Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361, and *Nicholas v The Queen* (1998) 193 CLR 173). In *Mohammad Faizal*, which concerned a challenge to mandatory minimum punishment under s 33A of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) ("MDA"), Chan Sek Keong CJ further noted that the "judicial function entails the courts making a finding on the facts as they stand, applying the relevant law to those facts and determining the rights and obligations of the parties concerned for the purposes of governing their relationship for the future" (at [27]).

23 However, it is not a breach of Art 93 for the Legislature to statutorily designate a fact-finder other than the courts. For example, the determination of whether an offender has provided substantive assistance under s 33B(2)(*b*) of the MDA has been upheld as being within the sole discretion of the Public Prosecutor and not a violation of the principle of the separation of powers (*Prabagaran a/l Srivijayan v Public Prosecutor and other matters* [2017] 1 SLR 173 ("*Prabagaran*") at [76]; *Abdul Kahar bin Othman v Public Prosecutor* [2018] 2 SLR 1394 ("*Abdul Kahar*") at [40], [49] and [52]; *Nagaenthran a/l K Dharmalingam v Public Prosecutor and another appeal* [2019] 2 SLR 216 ("*Nagaenthran*") at [67]). Apart from the fact that s 33B of the MDA "expressly

confers upon the [Public Prosecutor] the discretion to make the decision on substantive assistance", it was emphasised that the question as to whether there has been the requisite disruption to drug trafficking activities within or outside Singapore is an "operational one" for which the Central Narcotics Bureau ("CNB") and the Public Prosecutor have "distinctive expertise" (*Muhammad Ridzuan bin Mohd Ali v Attorney-General* [2015] 5 SLR 1222 at [66]; *Prabagaran* at [67]).

24 In a similar vein, the criteria under s 339(3) of the CPC are questions of fact which the appointed psychiatrist is best placed to determine. The relevant Parliamentary debates (as noted at [16] above) also clarify why the appointed psychiatrist should determine these questions. Apart from the need to prevent a conflict of medical ethics, wherein the IMH would be compelled to "treat a person it believes does not have a treatable mental condition", it is also difficult to imagine the purpose of the MTO regime being met in such instances. As noted by See J in *GCX*, the MTO was part of a suite of community-based sentencing options introduced by Parliament via amendments to the Criminal Procedure Code in 2010, and was intended to give "more flexibility to the courts" (at [31]–[32]; citing the Second Reading of the Criminal Procedure Code Bill 2010 (No 11 of 2010), *Singapore Parliamentary Debates, Official Report* (18 May 2010) vol 87 at col 422 (Mr K Shanmugam, Minister for Law). The MTO targets persons with specific and minor mental conditions where rehabilitation is the dominant sentencing principle. In such cases, by drawing on resources in the community, "the offender remains gainfully employed and his family benefits from the focused treatment". It is not clear that there can in fact be focused treatment if the IMH is, for example, of the view that there is no contributory link between an offender's psychiatric condition and his commission of the offence (as required by s 339(3)(*c*)).

25 Counsel for the Appellant referred to several cases in which it was specified that it is the court that should determine certain facts, not the expert. These included the following: (a) *Eu Lim Hoklai v Public Prosecutor* [2011] 3 SLR 167 ("*Eu Lim Hoklai*"); (b) *Anita Damu v Public Prosecutor* [2020] 3 SLR 825 ("*Anita Damu*") and (c) *Iskandar bin Rahmat v Public Prosecutor and other matters* [2017] 1 SLR 505 ("*Iskandar bin Rahmat*"). In my view, these cases did not quite address the present situation, namely one where the Legislature has designated that the Executive shall decide certain facts.

26 In *Eu Lim Hoklai*, concerning a conviction for murder under s 300(*c*) of the Penal Code (Cap 224, 1985 Rev Ed), a crucial issue to be determined was how the accused person sustained his wounds, as it would enable the court to evaluate the viability of his defences to the charge. The Court of Appeal observed that the trial judge had, following from equivocal expert evidence, concluded that these injuries "*may* have been inflicted by the accused *or* the deceased" [emphasis in original] (at [43]). It considered that this was an error on his part, as (at [44]):

> Expert evidence will not always offer a clear answer to every question before the court. This does not excuse a judge from making a crucial finding of fact. Ultimately, all questions – whether of law or of fact – placed before a court are intended to be adjudicated and decided by a judge and not by experts. An expert or scientific witness is there only to assist the court in arriving at its decisions; he or she is not there to arrogate the court's functions to himself or herself. …

27 In *Anita Damu*, the High Court considered the relevance and admissibility of certain psychiatric reports which opined that the accused person was acting under the influence of a mental illness at the material time when she committed various acts of abuse against her domestic helper. The opinions provided that she had suffered from major depressive disorder with psychotic features, these being auditory hallucinations which were causally linked to her

offending. However, the opinions were based on the accused's self-reports and the accused did not testify, which called into question the factual basis for the expert evidence. Sundaresh Menon CJ observed that the expert evidence, insofar as it purported to opine on whether the appellant did in fact hear voices at the material time, "c[ame] close to contravening the ultimate issue rule", which "[i]n orthodox terms … provides that an expert should not give evidence on the ultimate issue, which is to be decided by the court. Its rationale is that this would usurp the role of the court as the trier of fact" (at [34]).

28 The Appellant points to an observation by Menon CJ in *Anita Damu* that "the responsibility to adjudicate on the issues that are before the court is the court's alone, and it is incumbent on the court to satisfy itself that any expert evidence it is invited to accept is first, relevant and admissible, and then, coherent and resting on sound premises" (at [1]). Following from that, as well as the statement by the Court of Appeal in *Eu Lim Hoklai* against an expert or scientific witness arrogating the court's functions to himself, the Appellant argues that s 339(9) of the CPC is tantamount to "allow[ing] the determination of the criteria under s 339(3) of the CPC to be arrogated to the appointed psychiatrist alone, leaving the courts with no power to adjudicate on disputes of fact" should the accused person wish to "challenge the appointed psychiatrist's opinion on any basis".[27]

29 The Appellant also seeks to compare the determination of the criteria under s 339(3) of the CPC to Exception 7 to s 300 of the Penal Code (Cap 224, 2008 Rev Ed) ("Exception 7 of the PC") prior to its amendment by the Criminal Law Reform Act 2019 (No 15 of 2019). This provided that culpable homicide is not murder where the offender "was suffering from such abnormality of mind

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[27] AS2, [11].

(whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by death or injury) as substantially impaired his mental responsibility for his acts and omissions" in causing or being party to causing the death. The Court of Appeal in *Iskandar bin Rahmat* at [79] noted that the exception stipulated three distinct requirements, namely that the accused was suffering from an abnormality of mind ("the first limb"); such abnormality of mind arose from the causes defined therein ("the second limb"); and that it substantially impaired his mental responsibility for his acts and omissions in causing the death ("the third limb"). The court observed that it was "well established" that while the second limb was "a matter largely to be determined based on expert evidence, the first and third limbs are matters which cannot be the subject of any medical opinion and must be left to the determination of the trial judge as the finder of fact" (at [80]).

30 The Appellant argues that the scope of the inquiry under s 339(3) of the CPC is "much narrower" than the inquiry into an "abnormality of mind" under Exception 7 of the PC, and that the Court of Appeal's use of the words "largely to be determined based on expert evidence" in *Iskandar bin Rahmat* at [80] (as mentioned in [29]) suggests that even that requirement of the root cause of the abnormality of mind is a dispute of fact to be adjudicated upon by the court.[28] He submits that the requirement in s 339(3)(*c*) of the CPC of the psychiatric condition of the offender being a contributing factor to the commission of the offence only differs from the third limb of Exception 7 of the PC in terms of "degree rather than substance", both being questions of fact to be determined by the court.[29]

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[28] AS2, [14].

[29] AS2, [15].

31 In response, the Prosecution argues that these cases have been taken out of context and are not at all analogous to the present case.[30] It argues that the observations by the court in those cases on the weight to be accorded to expert evidence were made where it was the ultimate fact-finder on the issues to which the expert evidence was relevant. On the other hand, the present case is one where a statutory precondition to sentencing has been stipulated in legislation, which it argues is unobjectionable, with reference to, *inter alia*, the age of the offender in the context of the reformative training regime and s 33B(1)(*a*) of the MDA.[31] The conclusiveness of the expert evidence on this issue has also been crystallised in legislation via s 339(9) of the CPC.

32 The proper conclusion, to my mind, is that where a particular law leaves the matter for judicial determination, it is true that the court should decide. This is an aspect of the ultimate issue rule, reflecting that expert opinion cannot be determinative. Although the expert can offer his opinion hypothetically on the very issue which the court has to decide, it is for the trier of fact to determine what had actually taken place in the circumstances (Jeffrey Pinsler, *Evidence and the Litigation Process* (LexisNexis, 16 January 2021) at para 8.037). In the modern context, the rule entails that "the judge must discharge his responsibility as the adjudicator to rule on the ultimate issue. In doing so, he must not simply adopt the expert's opinion on that issue without satisfying himself that this is the correct outcome", and should nevertheless engage in the established practices of "sifting, weighing and evaluating the objective facts within their circumstantial matrix and context in order to arrive at a final finding of fact" (*Anita Damu* at [36], citing *Eu Lim Hoklai* at [44]).

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30 RS2, [29].

31 RS2, [28]–[29].

33 However, the ultimate issue rule and the cases on expert opinions do not assist in making out a breach of Art 93. The present case is not one in which the discretion resides in the court. Section 339 of the CPC does not in fact confer it upon the court. The psychiatric assessment of the matters in s 339(3) of the CPC is left in the hands of the appointed psychiatrist, and the court has no role to play in considering or weighing the assessment. For similar reasons, I do not think it assists the Appellant to argue that s 339(3)(*c*) of the CPC is comparable to the question of fact to be determined under the third limb of Exception 7 of the PC, *ie*, whether the abnormality of mind substantially impaired an accused person's mental responsibility for causing the death of another person.[32] It seems to me that the language of s 339 as outlined above (at [14]–[15]) and accordingly the intention of Parliament is clear. The relevant Parliamentary debates have also reinforced its intention that the inquiry under s 339(3) of the CPC should be for the sole professional judgment of the appointed psychiatrist. That inquiry is also one for which the appointed psychiatrist has the appropriate institutional competence, given that the IMH will generally administer treatment under an MTO.

The reviewability of a determination under s 339(3) by the appointed psychiatrist

34 It is also not a breach of Art 93 for s 339(9) of the CPC to stipulate that an MTO suitability report will be "final and conclusive" as to the matters in s 339(3).

35 As argued by the Prosecution, the courts have recognised and given effect to conclusive evidence clauses in respect of decisions by an administrative body which involve a degree of fact-finding and judgment. This

[32] AS2, [18]–[19].

was the case in *Teng Fuh Holdings Pte Ltd v Collector of Land Revenue* [2006] 3 SLR(R) 507 ("*Teng Fuh (HC)*") and *Teng Fuh Holdings Pte Ltd v Collector of Land Revenue* [2007] 2 SLR(R) 568 ("*Teng Fuh (CA)*") concerning s 5(3) of the Land Acquisition Act (Cap 152, 1985 Rev Ed) ("the Act"), which provides that a notification that land to be acquired is needed for specific purposes "shall be conclusive evidence that the land is needed for the purpose specified therein as provided in [s 5(1)]". The plaintiff had essentially argued that the defendant, the Collector of Land Revenue, acted in bad faith by, *inter alia*, acquiring its land in 1983 when it was declared to be needed for "a public purpose, viz.: General Redevelopment", but was not redeveloped over the following 22 years.

36 Phang J considered that the meaning of s 5(3) was "clear" and was consistent with the underlying purpose of the Act, particularly with the idea that the relevant government authority was "in the best position to determine whether or not the land concerned is required for one or more of the purposes set out in s 5(1)" (*Teng Fuh (HC)* at [30]). Yet, a balance was to be struck between "ensuring that the purposes of the Act and the ensuing public benefit are achieved on the one hand and ensuring that there is no abuse of power on the other" (*Teng Fuh (HC)* at [36]). Accordingly, the courts would intervene in cases of bad faith. The plaintiff's application for leave to apply for an order of *certiorari* and an order of *mandamus* was however dismissed for being out of time and in any event, the plaintiff could not satisfy the threshold for leave to be granted, since the power of acquisition had clearly been exercised by the defendant in good faith and in accordance with the requirements in s 5.

37 The Court of Appeal upheld the decision of Phang J, and expressed the view that the defendant (the respondent on appeal) could not however rely on s 5(3) of the Act to decline to offer any explanation for the delay. This was because "when the allegation of bad faith is founded on a very substantial period

of inaction, an explanation should be given" (*Teng Fuh (CA)* at [38]). In the absence of such an explanation, "[p]rolonged inaction … could constitute an arguable case or a *prima facie* case of reasonable suspicion that the land was not needed for general redevelopment when it was acquired in 1983" (*Teng Fuh (CA)* at [38]).

38 Although the courts in *Teng Fuh (HC)* and *Teng Fuh (CA)* did not directly consider an argument on Art 93 of the Constitution, which was not raised by the plaintiff, the acceptance of the effects of such a clause (in *Teng Fuh (HC))* and the recognition of its limits (*viz*, the view that such clauses do not preclude judicial review on the basis of bad faith) militates against a finding that s 339(9) of the CPC breaches Art 93.

39 Significantly, s 339(9) does not on its face go so far as to preclude judicial review in general, such that a wrong decision by an administrative decision-maker cannot be called into question (*Nagaenthran* at [45]). In this regard, it may be compared with clauses which provide that such decisions "shall not be challenged in any court", as in s 14(5) of the Employment Act (Cap 91, 1996 Rev Ed), which was considered in *Stansfield Business International Pte Ltd v Minister for Manpower (formerly known as Minister for Labour)* [1999] 2 SLR(R) 866 and has since been repealed; or s 47(2) of the Industrial Relations Act (Cap 136, 2004 Rev Ed), which also sought to limit the available judicial remedies by providing, *inter alia*, that no award or decision by amongst others the Industrial Arbitration Court "shall be challenged, appealed against, reviewed, quashed, or called in question in any court". The operation of such clauses is not before me in this case.

40 Indeed, the reviewability of a determination by the appointed psychiatrist as regards the s 339(3) criteria, in light of s 339(9), was addressed by See Kee Oon JC in *Low Gek Hong* (at [11]):

> To my mind, if an obvious clerical or administrative error results in the wrong report (*eg*, one which contains wholly erroneous contents) being tendered to the court, surely that "opinion" cannot be accepted as being "final and conclusive" such that the court is precluded from seeking any clarification whatsoever. Alternatively, if the report erroneously draws conclusions that are obviously at odds or internally inconsistent with the remainder of the report, it surely cannot be that the court is expected to unquestioningly adopt such conclusions on account of the report being "final and conclusive". I do not see why there must be a blanket prohibition on any form of enquiry or clarification if the report is unclear and particularly where it draws manifestly wrong, illogical or absurd conclusions.

It thus remains open to the court to question apparent issues of accuracy with the conclusions in the report.

The effect of s 339 of the CPC on sentencing discretion

41 It is additionally not a breach of Art 93 that as a result of the MTO Provisions, the availability of an MTO as a sentencing option is decided by the appointed psychiatrist and not the court.[33]

42 Singapore cases on judicial power in the context of sentencing discretion have held that the prescription of punishment for offences is an aspect of legislative, and not judicial power (*Mohammad Faizal* at [45]). This does not however mean that the entire sentencing function including the determination of the appropriate punishment may be intruded upon by other branches of the state, as subsequently clarified by the Court of Appeal in *Prabagaran*

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[33] AS2, [11].

(*Prabagaran* at [60]). Rather, while the Legislature can prescribe punishment, the selection of the appropriate punishment in the exercise of sentencing discretion conferred by statute belongs to the court. That is, "the judicial power in sentencing is the power to 'determine the appropriate punishment for a particular offender'" (*Abdul Kahar* at [38], citing *Prabagaran* at [61]). In this regard, the Court of Appeal in *Prabagaran* endorsed the holding in *Mohammad Faizal* at [45] (*Prabagaran* at [60]):

> Since the power to prescribe punishments for offences is part of the legislative power and not the judicial power (as Commonwealth and US case law shows), it must follow that no written law of general application prescribing any kind of punishment for an offence, whether such punishment be mandatory or discretionary and whether it be fixed or within a prescribed range, can trespass onto the judicial power. On the contrary, it is the duty of the courts to inflict the legislatively-prescribed punishments on offenders, exercising such discretion as may have been given to them by the Legislature to select the punishments which they think appropriate.

43 Judicial power therefore relates to the courts' exercise of discretion within the parameters conferred by the law enacted by the Legislature. It is within the ambit of the legislative power to specify that a particular act will be an offence, and that the punishment will only be a specific sentence for all cases. Art 93 is not breached in such circumstances, as may be seen from cases involving the mandatory death penalty. For example, in *Nguyen Tuong Van v Public Prosecutor* [2005] 1 SLR(R) 103, it was argued that a mandatory death penalty, which had in that case been imposed for an offence of drug importation, infringed the principle of the separation of powers as the discretionary power to determine the severity of punishment to be inflicted on an individual member of a class of offenders should be for the Judiciary (at [96]). The Court of Appeal, which found as well that the mandatory death penalty for the offence did not breach Arts 9(1) or 12(1) of the Constitution, observed that recent Privy Council decisions also had not declared mandatory death sentences absolutely

unconstitutional. The constitutionality of the mandatory death penalty in the context of a similar challenge on Arts 9(1) and 12(1) was affirmed in *Yong Vui Kong v Public Prosecutor and another matter* [2010] 3 SLR 489 ("*Yong Vui Kong*"). There, the Court of Appeal expressed the view that "[i]t is for Parliament, and not the courts, to decide on the appropriateness or suitability of the [mandatory death penalty] as a form of punishment for serious criminal offences" (at [122]). That did not however mean that Art 9(1), which provides for a deprivation of life "in accordance with law", "justif[ies] all legislation, whatever its nature" ([16] and [75], citing Lord Diplock in *Ong Ah Chuan v Public Prosecutor* [1981] AC 648 ("*Ong Ah Chuan*") at 659). Similarly, in *Moses Hinds v The Queen* [1977] AC 195 ("*Hinds*"), Lord Diplock observed that a fixed punishment for a defined offence, such as capital punishment for the crime of murder, could be prescribed by Parliament if it thought fit (at 226).

44 By the same token, it is not an infringement of Art 93 for Parliament to prescribe minimum sentences for an offence (*Hinds* at 226; *Mohammad Faizal* at [45]; *Prabagaran* at [60]; *R v Ironside* [2009] SASC 151 at [150]). Thus, the Court of Appeal of Trinidad and Tobago in *Francis and Another v State* [2015] 2 LRC 244 held, *inter alia*, that the creation of mandatory minimum sentences for drug trafficking did not violate the principle of the separation of powers (citing amongst others *Hinds* at 225–227).

45 It is also within the legislative power to specify by statute punishment or programs operating in lieu of punishment that may be limited by age or other qualifications. Age stipulations are in place, for instance, in respect of caning as a punishment and the imposition of or eligibility for certain regimes, such as reformative training, corrective training and preventive detention, and probation. These operate to limit the Judiciary's power to impose such sentences but do not infringe Art 93, as they do not purport to decide the matter in a

specific case, or a particular controversy between the State and a specific individual. As stated by the Supreme Court of Ireland in *Reginald Deaton v The Attorney General and the Revenue Commissioners* [1963] IR 170 ("*Deaton*") (at 182–183, as endorsed in *Hinds* at 226–227, and cited in *Mohammad Faizal* at [43] and *Prabagaran* at [61]):

> There is a clear distinction between the prescription of a fixed penalty and the selection of a penalty for a particular case. The prescription of a fixed penalty is the statement of a general rule, which is one of the characteristics of legislation; this is wholly different from the selection of a penalty to be imposed in a particular case. … The Legislature does not prescribe the penalty to be imposed in an individual citizen's case; it states the general rule, and the application of that rule is for the [c]ourts … the selection of punishment is an integral part of the administration of justice and, as such, cannot be committed to the hands of the Executive …

46 In the present case, the MTO regime is an alternative sentencing option. Section 339 of the CPC operates alongside the prescribed sentencing provisions for each charge; that is, it gives the court an additional sentencing option, provided satisfaction of the requirements in ss 337 (which sets out offences and persons in respect of which community-based sentences, including MTOs, may not be made) and 339(1), including an MTO suitability report which fulfils the criteria in s 339(3).

47 Thus, here, in respect of the Appellant's offences under s 509 of the Penal Code, the court would be able to sentence him to an MTO, or fine and/or imprisonment. In determining the quantum, the court would of course have regard to the circumstances of the case, any mitigation from the Appellant, and any applicable sentencing benchmarks. The fact that s 339 of the CPC is but one sentencing option substantially weakens the argument that there is an encroachment into judicial power. The court remains free to impose other sentences. The court's discretion is thus not circumscribed in any event.

48 On the issue of whether it infringes Art 93 as the extent of punishment to be imposed is affected by an executive decision, while such a discretion should ordinarily be for the court with the duty of imposing punishment, it is open to the Legislature to determine "whether or not such a discretion shall be given to the court in relation to a statutory offence" (*Palling v Corfield* (1970) 123 CLR 52 ("*Palling*") at 58–59, as cited in *Mohammad Faizal* at [34]). As held by the High Court of Australia in *State of South Australia v Totani* (2010) 271 ALR 662 ("*Totani*") (at [71] *per* French CJ, citing *Palling*; as cited in *Mohammad Faizal* at [48]):

> It has been accepted by this court that the Parliament of the Commonwealth may pass a law which requires a court exercising federal jurisdiction to make specified orders if some conditions are met even if satisfaction of such conditions depends upon a decision or decisions of the executive government or one of its authorities.

49 As such, in *Mohammad Faizal*, Chan CJ held that it was not an infringement of the principle of the separation of powers for various subsections of s 33A of the MDA to direct the courts to impose a mandatory minimum punishment on the occurrence of certain factors, which included an executive decision – there, the decision of the Director of the CNB under s 34 of the MDA to admit an individual to a drug rehabilitation centre. Similarly, in the present case, the decision of the appointed psychiatrist as to whether an accused person has met the criteria under s 339(3) of the CPC is a factor which could lead to a particular sentencing outcome. Unlike mandatory minimum sentencing, it does not even compel the court to impose an MTO (see [54] below). It is therefore difficult to see how Art 93 could be infringed in the circumstances.

50 Indeed, the decision of the Court of Appeal in *Prabagaran* demonstrates that it is not a violation of Art 93 to legislatively prescribe that the court's discretion to impose an alternative sentence is conditional upon the exercise of

executive power. As mentioned at [23] above, *Prabagaran* concerned a challenge to ss 33B(2)(*b*) and 33B(4) of the MDA on the basis that they were in breach of, *inter alia*, the principle of the separation of powers. Section 33B(1)(*a*) of the MDA confers on the court the discretion to sentence a person, who has been convicted of an offence of drug trafficking or importation or exportation and would otherwise be sentenced to death, to a lesser penalty of life imprisonment. This is where: (a) the person proves on a balance of probabilities that his involvement in the offence was restricted to certain acts prescribed in s 33B(2)(*a*), *ie*, that his involvement was that of a courier; and (b) the Public Prosecutor certifies that the person has "substantively assisted the [CNB] in disrupting drug trafficking activities within or outside Singapore" (s 33B(2)(*b*)). Further, s 33B(4) provides that the determination of whether or not a person has substantively assisted the CNB in such a manner "shall be at the sole discretion of the Public Prosecutor", against whom "no action or proceeding shall lie" in relation to any such determination, save for on the grounds of bad faith or malice. The applicants argued that the Public Prosecutor's certification under s 33B(2)(*b*) of the MDA infringed the principle of the separation of powers, and was exacerbated by the fact that the Public Prosecutor's decision in this regard could only be challenged on the limited grounds in s 33B(4).

51 In relation to the specific question of whether the Public Prosecutor's determination of substantive assistance under s 33B(2)(*b*) of the MDA violated the principle of the separation of powers, the Court of Appeal concluded that it did not as its discretion is "not tailored to the punishment it thinks should be imposed on a particular offender but is circumscribed to the limited question of whether the prescribed criterion … has been satisfied" (*Prabagaran* at [76]). It remained for the court to determine the guilt of the party and impose the sentence under the Second Schedule to the MDA. The Court of Appeal noted

that, apart from the power to prescribe punishment being part of legislative power, the discretion of the Public Prosecutor to issue such a certification was not unfettered, being circumscribed by the legislative purpose and the provision itself (*Prabagaran* at [72]); and the fact that the Public Prosecutor is uniquely suited to conduct the assessment under s 33B(2)(*b*) weighed in favour of a finding of constitutional validity of the provision (*Prabagaran* at [78]).

52 In the present case, the inquiry by the appointed psychiatrist is similarly a limited one into whether the criteria in s 339(3) of the CPC have been satisfied. However, the court determines the guilt of the offender and convicts him of the subject offence. The court also ultimately imposes an MTO if it is further satisfied that "it is expedient to do so" (s 339(1)); *ie*, the discretion whether to impose an MTO or the usual sentences of an imprisonment or fine or both remains with the court (see [15] above). The MTO Provisions therefore do not give the appointed psychiatrist "the power to decide the appropriate punishment for a particular offender", which would be antithetical to judicial power (*Abdul Kahar* at [40]). Further and in any event, the discretion of the appointed psychiatrist is also not unfettered, in light of some scope for review (see [40] above). The constitutionality of the MTO Provisions is also supported by the fact that the appointed psychiatrist also has the appropriate institutional competence for the inquiry, as further clarified in the relevant Parliamentary debates (see [24] and [33] above).

53 For completeness, it is noted that in *Mohammad Faizal*, Chan CJ identified three categories of cases which involved the intrusion of judicial power by the Executive through provisions enacted by the Legislature (at [51]–[56]; as cited in *Prabagaran* at [62] and *Abdul Kahar* at [44]):

(a) Selection of sentence by the Executive, for example, allowing the Executive to elect which of two penalties prescribed were to be imposed by the court (see for *eg*, *Deaton* ("Category (a)"));

(b) Administrative decisions by the Executive directly related to the charges brought against particular accused persons, directly impacting the sentence imposed by the court, such as the Executive choosing between two different courts for the same charge, with capital punishment mandatory in one but unavailable in the other (see for *eg*, *Mohammed Muktar Ali v The Queen* [1992] 2 AC 93 ("*Muktar Ali*") ("Category (b)")); and

(c) Administrative decisions which were not directly related to any charges but which impacted the actual sentence imposed by the court, such that an executive action is disguised as a judicial decision (see for *eg*, *Totani* ("Category (c)")).

54 The MTO Provisions do not fall within any of these categories. As the Prosecution notes and as observed at [15] and [52] above, the court initiates and determines the enquiry into whether an MTO is ordered. It is for the court to call for an MTO suitability report. It does so only if it takes the view that sufficient facts show that the offender has some rehabilitative potential, and that other sentencing principles do not outweigh the prospect of rehabilitation (*GCX* at [37]; see for *eg*, *Public Prosecutor v Abdul Fathani Bin Khairuddin* [2021] SGDC 143, where the court declined to call for such a report). It also decides whether the report of an appointed psychiatrist meets the requirements of s 339(3), in the limited manner observed in *Low Gek Hong* at [11] (noted at [40] above). The court also determines whether to ultimately impose an MTO (see for *eg*, *Public Prosecutor v Tan Lian Koon* [2015] SGDC 39, where an MTO was recommended but not ordered). The MTO Provisions therefore do not fall

under Category (a), since there is no question of the appointed psychiatrist electing for the relevant penalty. That was the upshot of the impugned provision in *Deaton*, which provided that an offence would carry the alternative penalties "at the election of the Commissioners of Customs".

55 For similar reasons, the MTO Provisions also do not fall under Categories (b) or (c). The provisions do not have the effect of empowering a member of the Executive "to *choose* the court in which to try an offender so as to obtain a *particular* sentencing result on the facts", such as in *Muktar Ali* [emphasis in *Prabagaran*] (*Prabagaran* at [72], citing *Mohammad Faizal* at [57]). The MTO Provisions are additionally markedly different from the impugned legislation in *Totani*. This compelled the Magistrates Court of South Australia to impose control orders on individuals on a finding that they were members of organisations declared by the Attorney-General of South Australia to be a risk to public safety and order. However, the making of the control order did not involve any finding of criminal guilt, for example, any assessment on the part of the court as to whether a defendant posed a risk to public safety and order by reason of his status or past or threatened conduct (*Totani* at [434], as noted in *Prabagaran* at [77]). In contrast, the MTO Provisions do not involve any imposition of sentence without a finding of guilt by the court, and are targeted at the limited, legislatively-prescribed objective of rehabilitation (see for *eg*, *Mohammad Faizal* at [57], in relation to the Executive's exercise of discretion in ordering a drug rehabilitation centre admission under s 34 of the MDA).

56 Accordingly, the MTO Provisions, which effectively render the availability of an MTO conditional on the decision of the appointed psychiatrist, do not contravene Art 93 of the Constitution.

Constitutionality under Article 12(1)

57 I find that the MTO Provisions also do not infringe Art 12(1) of the Constitution. It is doubtful that there was a basis for comparison in the first place so as to engage Art 12(1). In any event, the proposed differentia of offenders with psychiatric conditions *prima facie* eligible for the MTO regime versus those for whom their conditions could be a defence or mitigating factor would satisfy the "reasonable classification" test in relation to determining the constitutionality of a statute under Art 12(1).

58 Article 12(1) of the Constitution reads as follows:

> **Equal protection**
>
> **12.**—(1) All persons are equal before the law and entitled to the equal protection of the law.

59 In *Lim Meng Suang and another v Attorney-General and another appeal and another matter* [2015] 1 SLR 26 ("*Lim Meng Suang*"), the Court of Appeal specified that the test of whether legislation is in breach of Art 12(1) is whether the classification was reasonable (the "reasonable classification" test), which requires that (a) the classification is founded on an intelligible differentia ("Limb (a)"); and (b) such differentia has a rational relation to the object sought to be achieved by the statute ("Limb (b)") (at [60]). However, in order for the test to be engaged, the impugned statute must be differentiating in the first place (at [57]).

60 The Appellant points out that the applicable test for determining whether legislation contravenes Art 12(1) is under consideration by the Court of Appeal in *Tan Seng Kee v Attorney-General and other appeals* CA/CA 54/2020, CA/CA 55/2020 and CA/CA 71/2020. However, pending any pronouncement

by the Court of Appeal, the "reasonable classification" test in *Lim Meng Suang* remains the applicable law.

61 The Appellant argues based on the "reasonable classification" test that in contrast to other laws, which provide for psychiatric conditions to function as a defence or mitigating factor, the MTO Provisions arrogate the determination of factual matters to the appointed psychiatrist, depriving the accused person of any opportunity to challenge these findings.[34] He submits that both limbs of the test are contravened since, apart from this not being an intelligible differentia, the difference also does not bear a rational relation to the purpose and object of the MTO Provisions.

62 The Prosecution argues that Art 12(1) does not require that all offenders with psychiatric conditions should be treated alike across all sentencing regimes; rather, the requirement is that offenders in like situations are treated alike (*Public Prosecutor v Nguyen Tuong Van* [2004] 2 SLR(R) 328 ("*Nguyen (HC)*") at [82]).[35] It argues that the classification in the MTO Provisions is based on intelligible differentia, including the eligibility criteria in s 337(1) CPC.[36] Furthermore, it contends that the differentia in the MTO Provisions bear a rational relation to the object of the provisions, namely, to ensure the feasibility of an MTO by ascertaining whether the IMH can treat the offender and that such treatment is relevant to his offending.

63 I could not see how Art 12(1) is even engaged by the MTO regime. By its very nature, Art 12(1) can only operate in comparing one situation and

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34 AS2, [25].

35 RS2, [43].

36 RS2, [46] to [48].

another: there is no breach if there is no comparison that can be made to begin with. The Appellant pointed to the differences between a situation where an MTO may be available as a sentencing option, and those where psychiatric conditions are available as defences or as mitigating factors. But there is no comparability; there is no measuring of like with like, as required in an assessment of equality before the law and equal protection of the law (*Ong Ah Chuan* at 673; *Nguyen (HC)* at [82]). The former is concerned with a type of sentence, the latter with either the establishing of a defence to a charge or attenuating the culpability of an accused person.

64 There is therefore no scope for the question of intelligible differentia to even arise. For that reason alone, Art 12(1) is not even engaged. I am thus also somewhat doubtful that any alternative test formulated by the Court of Appeal would affect the outcome in this case.

65 In any event, even if the two situations are indeed comparable, the MTO regime does contain sufficient factors to amount to intelligible differentia. Limb (a) of the "reasonable classification" test requires that the differentia is understandable, and not "so unreasonable as to be illogical and/or incoherent" such as, possibly, a law which bans all women from driving on the roads (*Lim Meng Suang* at [67] and [114]). This connotes a "relatively low threshold" (*Lim Meng Suang* at [65]) which would be satisfied on the facts. In the present case, there is little difficulty understanding the classification prescribed by the MTO regime. As submitted by the Prosecution, s 337 of the CPC sets out qualifying conditions to be met under the requirements for community-based sentencing, of which an MTO is a specific type or sub-category. These exclude, *inter alia*, offences for which the sentence is fixed by law, offences for which a specified minimum or mandatory minimum sentence of imprisonment is prescribed by law, and offences punishable with a term of imprisonment which exceeds three

years (thus excluding offences which would involve the possible application of Exception 7 of the PC or s 33B(3)(*b*) of the MDA). Overall, it is clear which offenders fall within or outside of these provisions; there is also no issue of illogicality or incoherence since these requirements limit community-based sentences to offences which are less serious or harmful.

66 Limb (b) of the "reasonable classification" test then enquires into whether that differentia has a rational relation to the object sought to be achieved by the statute. The relevant standard of rationality is arbitrariness (*Public Prosecutor v Taw Cheng Kong* [1998] 2 SLR(R) 489 at [80]; *Yong Vui Kong* at [111]) and the requisite rational relation will more often than not be found, as there is "no need for a perfect relation or 'complete coincidence' between the differentia in question and the purpose and object of the statute concerned" [emphasis in original omitted] (*Lim Meng Suang* at [68]). As described at [24] above, the purpose and object of the MTO regime is to target persons with specific and minor mental conditions where rehabilitation is the dominant sentencing principle. It was intended that the offender who receives focused treatment under an MTO would remain in the community, and generally receive treatment from the IMH.

67 Given this backdrop, the differentia would have a rational relation to the objectives of the MTO regime. Offenders who meet the conditions for community-based sentencing would accordingly need to meet the requirements in s 339 for an MTO, including a favourable MTO suitability report, the substance of which there is limited scope for review. This is on the basis that the IMH, which generally administers treatment under an MTO, ought not be compelled to treat those whom it believes do not have a treatable mental condition or are unsuitable for treatment, as noted at [16] above. It is therefore not arbitrary that there should be no questioning of the decision of the appointed

psychiatrist as regards whether the criteria in s 339(3) of the CPC have been met in respect of an offender. At the same time, given the overall purpose of the MTO as an alternative sentencing regime, it stands to reason that an offender's psychiatric condition should be ascertained as having contributed to his offending, and the appointed psychiatrist is best placed to so ascertain. On the other hand, for offenders who do not meet the conditions for community-based sentencing, the question of an appointed psychiatrist's determination vis-à-vis an offender meeting the requirements in s 339(3) for an MTO simply does not arise. As pointed out by the Prosecution, there is then no issue of medical ethics and the court, in considering the remaining sentencing options, assumes its role as the ultimate fact-finder on the relevance of an offender's psychiatric condition.[37]

68 It should be remembered that, as stated by the Privy Council in *Ong Ah Chuan*, in the context of the differentia of the quantity of heroin trafficked resulting in the imposition of a capital or non-capital penalty (at 673):

> All criminal law involves the classification of individuals for the purposes of punishment, since it affects those individuals only in relation to whom there exists a defined set of circumstances – the conduct and, where relevant, the state of mind that constitute the ingredients of an offence … What [A]rticle 12(1) of the Constitution assures the individual is the right to equal treatment with other individuals in similar circumstances. It prohibits laws which require that some individuals within a single class should be treated by way of punishment more harshly than others; it does not forbid discrimination in punitive treatment between one class of individuals and another class in relation to which there is some difference in the circumstances of the offence that has been committed.

Classification which is based on a difference in defined circumstances of the case therefore does not infringe Art 12(1) (*Lei Lin Thai v Public Prosecutor*

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37 RS2, [53].

[2016] 9 MLJ 631 at [35], in relation to the equivalent Art 8(1) of the Federal Constitution (M'sia)). The MTO Provisions, Exception 7 of the PC and s 33B(3)(*b*) of the MDA are all based on different circumstances, including the nature and gravity of the offence, with attendant policy considerations which are not within the judicial function to decide. It is not a breach of Art 12(1) for legislation to treat these classes of individuals differently.

Severance of unconstitutional portions

69 In written submissions, counsel for the Appellant, Mr Ravi s/o Madasamy, argued that the MTO Provisions should be struck down for infringing Arts 12(1) and/or 93 of the Constitution. However, he also appeared to take the position that an MTO should still be available in the present case, as he sought the court's leave to convene a Newton hearing in respect of the MTO Suitability Report and on the issue of whether the Appellant's psychiatric conditions had contributed to his offending.[38] In oral submissions, while he maintained the argument on the unconstitutionality of the MTO Provisions, he took the view that it was not the whole MTO regime that was at risk. Rather, the contravention of s 339(8) of the CPC was problematic in the circumstances.

70 This appears to be an argument for the operation of the doctrine of severability, *ie*, the severance of an unconstitutional portion of the law while retaining the remaining statute, which is based on Art 4 of the Constitution. Although the doctrine applies in the event that it is impossible to construe a modification into an unconstitutional law under Art 162 of the Constitution, Art 162, which falls under Part XIV of the Constitution titled "Transitional Provisions", only applies in respect of "an existing law or a law which had

[38] AS2, [28]; AL, [2].

already been enacted but not yet brought into force at the commencement of the Constitution" (*Prabagaran* at [41]; *Tan Eng Hong v Attorney-General* [2012] 4 SLR 476 at [58]–[59]). As such, it is not applicable in respect of the MTO Provisions, which were introduced in 2010 (see [24] above).

71 Due to the conclusion reached above that the MTO Provisions do not violate Arts 12(1) or 93 of the Constitution, it is not strictly necessary to consider the operation of the doctrine of severability in the circumstances. In any event, even if I were with the Appellant on his arguments on the unconstitutionality of these provisions, I do not think severability would have been possible. In approaching the question of severability, "legislative intent is paramount", and the focus in such an exercise is "the effect of such excisions on the operation of the Act as a whole … it must be shown to be Parliament's intention behind the enactment of an Act that is found to be partially in breach of the Constitution that it should nevertheless continue to be given effect even after the severance and invalidity of some portions" (*Prabagaran* at [36]–[37]).

72 The legislative intention behind the CPC amendments introducing the MTO and community-based sentencing regime, and the rationale for the MTO Provisions in particular, have been canvassed at [16] and [24] above. Ms Rajah had, on another occasion, addressed a question from Mr Pillai on offenders with mental disorders who are not assessed as suitable for an MTO, but who could nevertheless benefit from treatment (Matter Raised on Adjournment Motion on Community Sentencing and Other Rehabilitative Options, *Singapore Parliamentary Debates, Official Report* (11 September 2017) vol 94):

> The Community-Based Sentencing (CBS) scheme was introduced in the Criminal Procedure Code (CPC) in 2010 to harness the resources of the community in rehabilitating offenders … We can go further, and intend to do so … For offenders with mental health conditions in particular, we are

> proposing to expand the range of offences that are eligible for MTOs.
>
> However, we must take a balanced approach. Not all cases are suitable for Community-Based Sentencing. Some crimes may be too serious, and it would not serve the justice system well to allow the offenders to be on the CBS regime. Some offenders may not benefit from CBS. Hence, the regime has to be carefully calibrated. We will need to draw a line somewhere, even if that means that some will fall outside the regime …
>
> [On Mr Pillai's point on] the availability of treatment for offenders whose mental health conditions have been clinically assessed as being not susceptible to treatment[,] [t]here are good reasons why these offenders are not given MTOs. It would pose a danger to the public and undermine confidence in our criminal justice system if offenders who would otherwise be imprisoned are allowed to remain in the community, even though there is no prospect that the underlying cause of their offending can be addressed through medical treatment.

73 The effect of the Appellant's constitutional challenge would be that, if successful, s 339(4) (which precludes the court from granting an MTO in the face of an unfavourable MTO suitability report) and s 339(9) (which provides that an MTO suitability report is final and conclusive on the matters in s 339(3)) would be excised, along with possibly s 339(3)(*c*) (which provides the criteria of the offender's psychiatric condition as a contributing factor for his offending, to be stated by the appointed psychiatrist in the report).

74 However, such an excision cannot be sustained. The intent of the amendments introducing community-based sentencing generally and the MTO regime in particular was to harness community resources in addressing the underlying cause of an offender's criminal behaviour. It would be contrary to such an intention should the inquiry under s 339(3) not be for the sole professional judgment of the appointed psychiatrist, *ie*, should the court nevertheless impose an MTO even if the appointed psychiatrist does not find an offender suitable; or further review the merits of the psychiatrist's determination of these matters. In such a situation, it would be difficult for community

resources (in particular, the IMH) to be successfully targeted towards rehabilitating an offender. It would also undermine the purpose of such an MTO as the offender would then possibly be a danger to the community, compromising as well public confidence in the administration of justice.

Consequences

75 In the present case, however, it was correctly argued by the Appellant that one of the requirements of s 339 of the CPC, specifically s 339(8), does not appear to have been facially complied with. As noted at [9] above, this provides that before making an MTO suitability report, an appointed psychiatrist "shall take into consideration the report made by the psychiatrist engaged by the offender". It is read in light of s 339(7) of the CPC, which provides that an offender may, within three weeks from the date the court calls for an MTO suitability report or "such other time as the court may allow, submit to the appointed psychiatrist any report made by a psychiatrist engaged by the offender".

76 The Appellant argues that although the Appellant's Reports were forwarded to the IMH on 26 February 2021 pursuant to the court's request for an MTO suitability report in respect of the Appellant, the Psychiatrist made no mention of the Appellant's Reports in stating the materials relied on for the MTO Suitability Report. This apparent breach of s 339(8) of the CPC is an additional ground for the court to convene a Newton hearing in respect of the MTO Suitability Report.[39]

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[39] AL, [6].

77 The Prosecution submits that the decision in *Low Gek Hong* indicates that the opinion of an appointed psychiatrist should only be questioned in cases where, for example, the report is unclear or "draws manifestly wrong, illogical or absurd conclusions" (*Low Gek Hong* at [11]). Furthermore, it submits that a Newton hearing should "generally be a measure of last resort" (*Low Gek Hong* at [12]). Rather, the court should clarify with the Psychiatrist as to whether she considered the Appellant's Reports. If she had indeed neglected this, it would not be too late for her to do so, and clarify whether she would have arrived at a different opinion in the MTO Suitability Report.

78 Sections 339(7) and (8) of the CPC indicate that the appointed psychiatrist must consider any submission by the offender of a report made by his psychiatrist. Though these were not in fact submitted by the Appellant, but rather provided by the court, nothing to my mind turns on this difference: the reports were available to the appointed psychiatrist and should have been considered before finally determining the matters in s 339(3).

79 As noted at [40] above, it remains open to the court to further enquire or seek clarification from the appointed psychiatrist, where there may be issues of obvious clerical errors leading to an erroneous report, or issues of "manifestly wrong, illogical or absurd conclusions" (*Low Gek Hong* at [11]). Moreover, I do not read s 339(9) of the CPC as precluding any curative action whether or not the non-compliance is substantive. The conclusive nature expressed as regards the appointed psychiatrist's opinion in s 339(9) is only as to the substantive conclusions in an MTO suitability report; it does not exclude the possibility that the report is wanting in some way. If anything, the various requirements in s 339, specifically s 339(8), operate as conditions precedent to the psychiatrist's opinion.

80 While the requirement in s 339(8) is a precondition to a finding by the court that there is an MTO suitability report for the purposes of s 339, it does not follow that the report must be rejected out of hand if there is failure to strictly comply. Doing so would be disproportionate where there may have been a clerical error or omission. What should be obtained is an explanation from the appointed psychiatrist. The court may then consider whether in the circumstances a correction should be permitted. As noted by See JC in *Low Gek Hong*, "satellite litigation aimed at challenging or re-interpreting what the psychiatrist has stated, or not stated" should be avoided in order to avoid unnecessary protraction of the sentencing process (at [16]). This, in his view, was the purpose of s 339(9) of the CPC.

81 Given that there needs to be further clarification on whether the precondition in s 339(8) of the CPC has been met, the court cannot impose an MTO at this stage. Section 339 of the CPC does not provide that the opinion of another psychiatrist can be substituted or considered in the event of non-compliance by the appointed psychiatrist. According to the structure of the section, in particular ss 339(1)–(4), a favourable report by an appointed psychiatrist is required before the court may impose an MTO. If the court has doubts concerning the sufficiency of an MTO suitability report, the alternative sentence of an MTO is simply not available, and the offender must then be dealt with under the general sentencing regime.

The next steps

82 In light of the apparent non-compliance with s 339(8) of the CPC, the opportunity will be given for the appointed psychiatrist to explain what had happened, and whether there is any change to her conclusions. The court will

then consider whether the custodial sentence imposed by the District Judge in the present case ought to be upheld.

Aedit Abdullah
Judge of the High Court

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