Yong Vui Kong *v* Public Prosecutor
[2012] SGCA 23

Case Number	: Criminal Motion No 2 of 2012
Decision Date	: 04 April 2012
Tribunal/Court	: Court of Appeal
Coram	: Chan Sek Keong CJ; Andrew Phang Boon Leong JA; V K Rajah JA
Counsel Name(s)	: M Ravi (L F Violet Netto) for the applicant; Mavis Chionh, Teo Guan Siew, Kow Weijie Kelvin and Kok Shu-en (Attorney-General's Chambers) for the respondent.
Parties	: Yong Vui Kong — Public Prosecutor

Constitutional Law – Attorney-General – Prosecutorial discretion

Constitutional Law – Equality before the law

4 April 2012 Judgment reserved.

Chan Sek Keong CJ (delivering the judgment of the court):

Introduction

1 On 10 January 2012, this court delivered its judgment in *Ramalingam Ravinthran v Attorney-General* [2012] SGCA 2 ("*Ramalingam*"). Based on the principles which we clarified and enunciated in *Ramalingam* (see [17] below), Yong Vui Kong ("Yong") filed this criminal motion ("this Motion") on 27 January 2012 seeking the following orders:

(a) that this court re-opens its decision upholding Yong's conviction of a capital drug trafficking offence under the Misuse of Drugs Act (Cap 185, 2001 Rev Ed) ("the MDA");

(b) that the selective prosecution as between Yong and his alleged boss and supplier, Chia Choon Leng ("Chia"), who had the charges against him discontinued pursuant to a discontinuance not amounting to an acquittal ("DNAQ") and who was detained under the Criminal Law (Temporary Provisions) Act (Cap 67, 2000 Rev Ed) ("the CLTPA"), violated Yong's right to equality before the law and equal protection of the law under Art 12(1) of the Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint) ("the Constitution"); and

(c) that Yong's conviction be quashed and the matter remitted to the Attorney-General ("the AG") to consider whether or not to proceed against both Yong and Chia for the same offence; or, alternatively

(d) that the capital charge against Yong be amended, and the sentence of death imposed on him be set aside and replaced with a suitable non-capital sentence so that there is no difference in treatment as between Yong and Chia.

2 The basis of Yong's application is that the decision of the AG (who is also the Public Prosecutor) to prosecute him for a capital offence under s 5(1)(*a*) of the MDA was a breach of Art 12(1) of the Constitution because the AG had, in contrast, applied for (and obtained) a DNAQ of various charges under the MDA against Chia, including three capital charges, even though Chia was

Yong's alleged boss and supplier. Chia is currently still being detained under the CLTPA.

The factual background

3 Yong was convicted on 14 November 2008 of trafficking in 47.27g of diamorphine and was sentenced to suffer death pursuant to s 33 of the MDA read with the Second Schedule thereto (see *Public Prosecutor v Yong Vui Kong* [2009] SGHC 4). Yong appealed against his conviction and sentence, but subsequently withdrew the appeal on 29 April 2009 before this court on (*inter alia*) the ground that as a converted Buddhist, he could not rely on a defence which was a lie. He then petitioned the President for clemency. Yong's petition for clemency was rejected on 20 November 2009.

4 Yong later changed his mind about not appealing against his sentence, and applied to this court for an extension of time to pursue such an appeal on the ground that the mandatory death penalty ("MDP") imposed by s 33 of the MDA read with the Second Schedule thereto was unconstitutional. This court granted the application (see *Yong Vui Kong v Public Prosecutor* [2010] 2 SLR 192). Subsequently, at the substantive hearing of Yong's appeal against his sentence, this court dismissed Yong's constitutional challenge to the MDP (see *Yong Vui Kong v Public Prosecutor and another matter* [2010] 3 SLR 489).

5 Yong next applied for leave to bring judicial review proceedings in respect of the integrity of the clemency process set out in Art 22P of the Constitution on the ground that due to certain remarks made by the Minister for Law ("the Law Minister") at a constituency function (which remarks were reported by the media), the integrity of the clemency process in his case had been fatally compromised as the Law Minister's remarks showed that the Cabinet had made up its mind to reject his second clemency petition (which he had not even filed at that point in time). This application was dismissed by the High Court (see *Yong Vui Kong v Attorney-General* [2011] 1 SLR 1). Yong's appeal to this court against the High Court's decision was dismissed on 4 April 2011 (see *Yong Vui Kong v Attorney-General* [2011] 2 SLR 1189). On 14 July 2011, Yong applied to the President a second time for clemency. [note: 1]

6 As mentioned earlier, on 10 January 2012, this court delivered its judgment in *Ramalingam*. That case, which was likewise a drug trafficking case, concerned a criminal motion filed by an accused person who was unconnected with Yong but who was represented by Yong's counsel in this Motion, Mr M Ravi ("Mr Ravi"). In that judgment, this court set out the principles of law governing the relationship between the prosecutorial discretion vested in the AG as the Public Prosecutor by Art 35(8) of the Constitution and the right to equal protection set out in Art 12(1) of the Constitution (see [17] below). These two Articles provide as follows:

> **Equal protection**
>
> **12.**—(1) All persons are equal before the law and entitled to the equal protection of the law.
>
> ...
>
> **Attorney-General**
>
> **35.** ...
>
> (8) The Attorney-General shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for any offence.

…

The particular facts upon which this Motion is based

7 Yong was arrested in the early hours of the morning on 13 June 2007 near Meritus Mandarin Hotel at Orchard Road, Singapore. He admitted in his police statement recorded on 15 June 2007 that he had been asked by Chia to deliver some "gifts" to Singapore in return for a payment of RM2,000. This conversation took place on 12 June 2007 in Johor Baru, Malaysia ("Johor Baru"). Yong then asked his friend, one Chai Hor Hsiang, to drive him to Singapore. They entered Singapore at about 9.00pm on 12 June 2007, after which they proceeded to Yishun and then to Orchard Road, where they were both arrested. The "gifts" contained, *inter alia*, the 47.27g of diamorphine which formed the basis of the capital charge which Yong was subsequently convicted of.

8 In a police statement recorded on 16 June 2007, Yong was shown a photograph of Chia and was asked to identify Chia. Yong identified Chia as the man who had asked him to deliver the "gifts" to Singapore. Yong requested a colour photograph of Chia in order to confirm the identification. Approximately two weeks later, on 3 July 2007, Yong was shown a colour photograph of Chia and confirmed that Chia was indeed the man who had asked him on 12 June 2007 to deliver the "gifts". However, Yong went on to state in a police statement recorded on 3 July 2007: [note: 2]

> ... I do not wish to identify him in court because I am worried about my own safety as well as that of my family. I request that Chia … would never kn[o]w that I had identify [*sic*] him in the photo.

9 On 4 August 2007, Chia (who had been arrested by the police in Malaysia and handed over to the Central Narcotics Bureau ("the CNB") in Singapore) was charged with (*inter alia*) instigating Yong in Johor Baru on 12 June 2007 to transport 36 packets containing a gross weight of approximately 1,227.02g of diamorphine from Johor Baru to Singapore. This charge, which was a capital charge, was amended on 7 October 2007 to state the weight of the diamorphine involved as 61.36g. On the same day, Chia was also charged with four other non-capital charges of instigating Yong to transport controlled drugs to Singapore, namely:

(a) instigating Yong on 12 June 2007 in Johor Baru to transport 189.65g of ketamine to Singapore;

(b) instigating Yong on 12 June 2007 in Johor Baru to transport 29.81g of N,α-dimethyl-3,4-(methylenedioxy)phenethylamine to Singapore;

(c) instigating Yong on 12 June 2007 in Johor Baru to transport 23.01g of methamphetamine to Singapore; and

(d) instigating Yong on 12 June 2007 in Johor Baru to transport 1,500 tablets containing nimetazepam to Singapore.

As can be seen from the contents of these charges, they all arose out of the particular incident in Johor Baru on 12 June 2007 when Chia allegedly instigated Yong to transport controlled drugs to Singapore.

10 On 9 September 2008, Yong's then defence counsel, Mr Kelvin Lim Phuan Foo ("Mr Lim"), made representations to the Prosecution to seek a reduction of the capital charge against Yong to a non-capital charge of trafficking in not less than 14.99g of diamorphine. [note: 3] Mr Lim drew the

Prosecution's attention to, *inter alia*, Yong's young age and low level of culpability. As the Prosecution did not reduce the capital charge against Yong, we can infer that Mr Lim's representations were rejected.

11 Yong's trial in the High Court took place over five days in September and October 2008. On the second day of the trial (*viz*, 30 September 2008), the trial judge ("the Trial Judge") asked the Prosecution about Chia: [note: 4]

> [DPP] Tan: Your Honour, as we are moving on to the identification and the marking of the exhibits, can we ask for a 5 minutes' adjournment to prepare the exhibits?
>
> Court: Yes, all right. By the way, what's happened to this Chia Choon Leng?
>
> [DPP] Tan: Yes, your Honour.
>
> [DPP] Koy: *He has been detained under the Criminal Law Temporary Provisions Act.*
>
> Court: So he's not facing any charges at the moment?
>
> [DPP] Koy: ***Initially, he was but due to the difficulty of the evidence** , we decided that we would withdraw the charges against him and executive action was taken against him*.
>
> [emphasis added in italics and bold italics]

The Trial Judge queried the Prosecution about Chia (who was also known as "Ah Hiang") again on the third day of the trial (*viz*, 2 October 2008): [note: 5]

> Court: … Mr Koy, this person known as Ah Hiang, [has] he been apprehended or not?
>
> [DPP] Koy: This – this is the person who was arrested, *initially charged but unfortunately, the evidence is not sufficient against him*.
>
> Court: It's the one in – under the criminal law detention.
>
> [DPP] Koy: That's correct, your Honour.
>
> Court: Do you have his full name again?
>
> [DPP] Koy: Chia, C-H-I-A –
>
> Court: Yes.
>
> [DPP] Koy: Choon, C-H-O-O-N, Leng, L-E-N-G.
>
> Court: Thank you.
>
> [emphasis added]

12 On 19 October 2011 (about three months after Yong's second clemency petition was filed), Mr Ravi wrote to the Prosecution to ask why Chia had not been produced at Yong's trial as a prosecution witness. [note: 6] The Prosecution replied on 25 October 2011, *inter alia*, as follows: [note: 7]

(a) In his police statement recorded on 3 July 2007, Yong had identified Chia as the alleged mastermind of the operation to transport controlled drugs to Singapore. However, Yong had also made it clear that he did not wish to identify (and by implication, testify against) Chia in court and that Chia should not be informed that Yong had identified him.

(b) Chia had been detained under the CLTPA. The Prosecution had informed the Trial Judge of this fact on two occasions.

(c) The Prosecution had not called Chia as a witness because his evidence was not necessary for its case against Yong. Mr Lim, Yong's then defence counsel, had also not called Chia as a defence witness despite the disclosure during the trial of Chia's detention under the CLTPA.

The Prosecution's reply enclosed extracts of those parts of the certified transcript of the notes of evidence of Yong's trial where the Prosecution informed the Trial Judge that Chia had been detained under the CLTPA because the evidence against him was insufficient (see [11] above).

13 About two months later, on 6 January 2012, Mr Ravi wrote to the Prosecution again asking, *inter alia*, if it was willing to provide him with the following: [note: 8]

(a) particulars of the other members of the drug syndicate in which Yong and Chia were involved ("the Drug Syndicate"); and

(b) copies of the charges against Chia which were subsequently discontinued pursuant to a DNAQ.

The Prosecution replied on 7 February 2012 stating that the particulars of the other members of the Drug Syndicate were "irrelevant to the charge [Yong] was convicted of". [note: 9] As for the charges against Chia, the Prosecution informed Mr Ravi that 26 charges had been preferred against Chia, but only five charges "were in relation to [the] charges tendered against [Yong]". [note: 10] The Prosecution provided Mr Ravi with copies of those five charges, but declined to disclose the remaining 21 charges because it took the view that they were not relevant to Yong's case. The five charges which were disclosed are the five instigation charges set out above (at [9]).

14 After the hearing of this Motion on 14 March 2012, we disclosed to both parties the minute sheet of the pre-trial conference held before District Judge Chew Chin Yee ("the DJ") on 13 May 2008 ("the Minute Sheet"), which recorded the Prosecution informing the DJ that it would be applying for a DNAQ of the capital charges against Chia as follows:

> ... Prepared to take PI [preliminary inquiry] for [Yong]. *But for [Chia], had time to consider evidence against him. Going to apply for DNAQ against [Chia]*, in May or at next mention, in respect of the capital charge [*sic*]. ... [emphasis added]

In the light of this disclosure, leave was given to both parties to tender written submissions on "the relevance and/or effect (if any) of the Minute Sheet". [note: 11] (It should be noted that the DNAQ which the Prosecution eventually applied for and obtained covered all 26 charges against Chia, and not merely the capital charges against him.) Upon receiving the Minute Sheet, Mr Ravi wrote to the court asking for disclosure of the remaining 21 charges against Chia. The record of the preliminary inquiry proceedings in the High Court shows that of these 21 charges, there were two capital charges, namely:

(a) that Chia trafficked in 17.21g of diamorphine on 2 April 2007 in the vicinity of Serangoon Central, Singapore by giving it to one Koh Bak Kiang ("Koh"); and

(b) that Chia, together with one Lim Jessie and in the furtherance of their common intention, trafficked in 25.07g of diamorphine on 4 April 2007 at Block 209, Serangoon Central, Singapore by giving it to Koh.

We disclosed these two charges to both parties and indicated that they could similarly submit on "the relevance and/or effect (if any) of these charges". [note: 12] As for the other 19 of the remaining 21 charges against Chia, we were unable to see their relevance, much less their materiality, to the substantive issue of discrimination raised by Yong in this Motion as they apparently contained no reference to him at all. These 19 charges were therefore not disclosed to the parties.

The procedural issue: Whether this court should hear this Motion

15 Before we address the substantive issue raised by Mr Ravi in this Motion, we first consider the Prosecution's objection to this court hearing this Motion on the ground that Yong could have raised his allegation of breach of Art 12(1) of the Constitution at any of the three earlier stages of the proceedings involving him (*ie*, at his trial, at his appeal against his sentence on the ground that the MDP imposed under the MDA was unconstitutional and in his application for leave to bring judicial review proceedings in respect of the integrity of the clemency process), but had failed to do so.

16 Mr Ravi's response to the Prosecution's objection was that the law (*ie*, the legal position on the relationship between Arts 12(1) and 35(8) of the Constitution) underwent a significant review and clarification as a result of *Ramalingam*, and that Yong's legal position was directly impacted on by the court's re-evaluation of previous decisions in that judgment. Yong thus acted reasonably in filing this Motion in reliance on the principles set out in the most recent judicial pronouncement on this area of the law. [note: 13] Mr Ravi contended that it was not correct to say that Yong had three earlier opportunities to raise his present arguments on Art 12(1) of the Constitution because he did not then have the benefit of this court's judgment in *Ramalingam*.

17 Before we consider the respective arguments of the Prosecution and Mr Ravi, it would be useful to revisit our decision in *Ramalingam*. The applicant in that case ("Ramalingam") met one Sundar Arujunan ("Sundar") at a temple at Sungei Kadut Avenue, Singapore. Sundar placed a sports bag containing cannabis and cannabis mixture on the back seat of Ramalingam's car. The two men then drove off in the same car. After some time, Sundar alighted from the car. Both men were separately arrested shortly afterwards. Sundar was charged with and prosecuted for *non-capital* drug trafficking offences, with the amount of drugs specified in the charges quantified at just below the threshold carrying the MDP. Sundar pleaded guilty and was sentenced to 20 years' imprisonment and 24 strokes of the cane. At Ramalingam's subsequent trial for *capital* drug trafficking charges, Sundar testified against him. Although Sundar turned hostile on the stand, the Prosecution successfully applied under s 147(3) of the Evidence Act (Cap 97, 1997 Rev Ed) to admit his previous inconsistent statement and substituted it for his oral evidence. Ramalingam was convicted and sentenced to death. He then applied to this court to set aside his conviction on the ground that the Prosecution's decision to bring capital charges against him while prosecuting Sundar for non-capital charges was a breach of Art 12(1) of the Constitution. We dismissed the application and enunciated the following principles:

(a) The exercise of the prosecutorial discretion under Art 35(8) of the Constitution is subject to judicial review. The rule of law requires that all legal powers, including constitutional powers, be subject to limits, and it is the court's constitutional role to ensure that those limits are

observed (see *Ramalingam* at [43] and [51]).

(b) The exercise of the prosecutorial discretion is subject to judicial review on two grounds, *viz*: (i) abuse of power (*ie*, an exercise of power in bad faith for an extraneous purpose); and (ii) breach of constitutional rights (see *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [149], which was approved in *Ramalingam* at [51]).

(c) Article 12(1) of the Constitution requires that like cases must be treated alike in the context of the classification of offences in legislation. In contrast, in the context of the exercise of the prosecutorial discretion, Art 12(1) only entails that the Prosecution must give unbiased consideration to every offender and must avoid taking into account any irrelevant considerations. In the case of a single offender, this would suffice to ensure that like cases are treated alike, *ie*, to ensure compliance with Art 12(1) (see *Ramalingam* at [51], applying the principle laid down by the Privy Council in *Teh Cheng Poh v Public Prosecutor* [1979] 1 MLJ 50 ("*Teh Cheng Poh*")).

(d) Where several offenders are involved in the same criminal enterprise, Art 12(1) permits the Prosecution to consider various factors in deciding which offenders' cases are alike (if any) and should therefore be treated alike. These factors include, *inter alia*, the available evidence, public interest considerations, the personal circumstances of the offender and the degree of co-operation of the offender with the law enforcement authorities. Where these factors apply differently to different offenders, this would justify differential treatment among them as their cases would *not* be alike for the purposes of Art 12(1) (see *Ramalingam* at [24], [52] and [63]). However, differential treatment would *not* be justified if these factors do *not* apply differently to different offenders. In other words, differential treatment of offenders involved in the same criminal enterprise must be justifiable by reference to relevant differences between the offenders.

(e) The court will presume that the Prosecution has exercised its discretion lawfully (*ie*, in accordance with the requirements of the law) by reason of the separation of powers (see *Ramalingam* at [44]–[46]).

(f) The AG is under no obligation to give reasons for the exercise of his prosecutorial discretion in prosecuting an offender for any offence (see *Ramalingam* at [74]–[78]).

(g) Where an offender alleges that the exercise of the prosecutorial discretion to prosecute him for an offence is in breach of his constitutional rights, the burden lies on him to produce evidence of a *prima facie* breach of such rights. In relation to Art 12(1), a mere difference in the offences which different offenders in the same criminal enterprise are prosecuted for will not in itself be sufficient evidence of such a *prima facie* breach (see *Ramalingam* at [70]–[71]).

(h) If the offender establishes a *prima facie* breach of Art 12(1), the Prosecution will then be required to justify its prosecutorial decision to the court, failing which, it will be held to be in breach of Art 12(1) (see *Ramalingam* at [28]).

(i) If the Prosecution provides some explanation for its decision, the court will then decide, based on the evidence on record and the arguments on both sides, whether the offender has rebutted the presumption of legality, *ie*, whether he has persuaded the court that the Prosecution has indeed breached Art 12(1) (see *Ramalingam* at [73]).

18 Having regard to the principles established in *Ramalingam*, we rejected the Prosecution's argument that Yong should not be heard on this Motion. As we noted in *Ramalingam* (at [17]), we decided to hear the substantive matter in that case because it was necessary to clarify the

constitutional relationship between Arts 12(1) and 35(8) of the Constitution in the public interest. Before our decision in that case, the legal position in Singapore *vis-à-vis* that issue was unclear. In *Ramalingam*, we observed (at [32] and [36]) that the two Court of Appeal decisions which dealt with allegations of breach of Art 12(1) of the Constitution *vis-à-vis* prosecutorial decisions made in relation to two co-offenders involved in the same criminal enterprise (*viz*, *Sim Min Teck v Public Prosecutor* [1987] SLR(R) 65 ("*Sim Min Teck*") and *Thiruselvam s/o Nagaratnam v Public Prosecutor* [2001] 1 SLR(R) 362 ("*Thiruselvam*")) merely applied the principles laid down in *Teh Cheng Poh* without taking into account the fact that that case involved a single offender, and not co-offenders engaged in the same criminal enterprise. *Teh Cheng Poh* did not engage Art 12(1) of the Constitution in the same way that *Sim Min Teck*, *Thiruselvam* and *Ramalingam*, all of which concerned co-offenders involved in the same criminal enterprise, did.

19 In our view, the present case has two features which distinguish it from *Sim Min Teck*, *Thiruselvam* and *Ramalingam*. The first is that Chia, who is alleged to be Yong's boss and supplier as well as the kingpin of the operation to import controlled drugs into Singapore, appears to be a more culpable offender than Yong (who was only a mule), and is liable to be prosecuted together with Yong if he committed the same offence as that committed by Yong or abetted Yong's commission of that offence. The second feature is that the Prosecution has discontinued (*inter alia*) three capital charges against Chia even though, according to Yong, Chia was not only a co-offender in the same criminal enterprise but also the more culpable offender as Chia was his boss and supplier as well as the kingpin of the operation to bring controlled drugs to Singapore. Further, Yong's arguments in this Motion are based substantially on the principles which we recently clarified and enunciated in *Ramalingam*, and Yong filed this Motion without any delay approximately two weeks after the judgment in *Ramalingam* was delivered. In the circumstances, we decided to hear this Motion.

The substantive issue: Whether the AG's prosecutorial decision in respect of Yong was in breach of Art 12(1) of the Constitution

20 We turn now to the underlying substantive issue raised in this Motion, *viz*, whether the AG's decision to prosecute Yong for a capital offence in the factual matrix described above was a breach of Art 12(1) of the Constitution.

21 Mr Ravi argues that the said decision was in breach of Art 12(1) because the AG:

(a) failed to give consideration to all the relevant factors;

(b) took into account irrelevant considerations; and

(c) failed to give unbiased consideration to all the offenders concerned (for the purposes of this Motion, Yong and Chia).

22 Before we examine these arguments, it would be useful to first emphasise that a DNAQ of a charge against an offender does not prevent the AG from prosecuting the same offender for the discontinued charge or any other charges at a future time. This can be seen from s 239 of the now repealed Criminal Procedure Code (Cap 68, 1985 Rev Ed) ("the CPC (Cap 68)"), the provision in force at the time of the DNAQ of the 26 charges against Chia. Section 239 reads as follows:

Person once convicted or acquitted not to be tried again for offence on same facts

239.—(1) A person *who has once been tried* by a court of competent jurisdiction for an offence *and* convicted or *acquitted of that offence shall, while the conviction or acquittal remains in*

force, not be liable to be tried again for the same offence ...

...

The dismissal of a complaint or *the discharge of the accused is not an acquittal for the purposes of this section*.

[emphasis added]

We should add that s 239 of the CPC (Cap 68) is *in pari materia* with its successor provision, s 244 of the Criminal Procedure Code 2010 (Act 15 of 2010).

23 In *Dorai Manickam alias Davis v Rex* [1936] MLJ 209 at 212D, the Straits Settlements Court of Criminal Appeal stated (in relation to the then equivalent of s 239 of the CPC (Cap 68)):

> It may be well to point out how carefully our Criminal Procedure Code differentiates between an order of mere "discharge" and one of "acquittal." Where there is an order of "acquittal" the order of discharge follows as a matter of course but the bare order of "discharge" is that appropriate to cases where the Court intends to make no decision "on the merits."

Unlike the situation where an offender has a discontinuance amounting to an acquittal ("DAQ") recorded for a charge against him or is convicted of a lesser charge than a co-offender involved in the same criminal enterprise (see, *eg*, *Ramalingam*, where Sundar, the co-offender, was prosecuted for and convicted of non-capital drug trafficking charges), in the present case, the DNAQ of the 26 charges against Chia does not provide him with any immunity from being prosecuted in the future for some or all of those discontinued charges. This is a material factor which undermines substantially the legal basis on which Yong claims that he has been discriminated against by the Prosecution. We will return to this point later in this judgment.

Failure to give consideration to all the relevant factors

24 We now consider the first limb of Yong's complaint of breach of Art 12(1) of the Constitution ("the first limb of Yong's complaint"), namely, that the AG failed to consider all the relevant factors relating to his case. Specifically, it is argued that the AG overlooked the following considerations in prosecuting Yong for a capital offence while not prosecuting Chia for the same offence or any other offence under the MDA:

(a) Chia had instigated Yong to transport controlled drugs to Singapore, and had also been identified as the boss of the Drug Syndicate by Yong in his written statement. In addition, Chia had been considered sufficiently culpable to be detained indefinitely under the CLTPA.

(b) Yong was a compellable witness and the Prosecution could have called him to give evidence against Chia, the more culpable party. Accordingly, Yong's unwillingness to identify and testify against Chia in court did not support the Prosecution's decision to apply for a DNAQ of the 26 charges against Chia.

(c) Yong had provided a high degree of co-operation in identifying Chia, and had sought assurances for the safety of his family and himself in doing so.

(d) There was sufficiently strong evidence against Chia in the form of: (i) the evidence used to support the 26 charges brought against him; (ii) the evidence already obtained from Yong;

(iii) the evidence that would be available from Yong if he were called as a witness; (iv) the evidence obtained from the Malaysian authorities who handed Chia over to the CNB; and (v) the intelligence obtained from other members of the Drug Syndicate.

(e) Yong had mitigating factors in his favour such as his young age, his relatively minor role in the operation to transport controlled drugs to Singapore and his low level of sophistication.

(f) It was not the policy of the law to apply the death penalty to less culpable parties who were mere conduits.

(g) Yong could have been induced to give evidence against Chia in exchange for the Prosecution preferring a non-capital charge against him (Yong).

25 We are unable to accept any of these arguments, some of which are mere assertions and others, contrary to the evidence. These arguments are insufficient to support Yong's contention that the AG failed to take into account the aforesaid considerations (in so far as they are relevant) in prosecuting him for the capital offence which he was subsequently convicted of whilst not prosecuting Chia for any offence under the MDA at all. In our view, Yong has not discharged the burden of proving that the AG abused his prosecutorial power or exercised it in a way that was an unlawful discrimination against him *vis-à-vis* Chia in the context of Art 12(1) of the Constitution. Our specific comments on the above arguments by Yong are as follows:

(a) Points (a) and (d) are relevant only if Chia's alleged instigation of Yong in Johor Baru to transport controlled drugs to Singapore (assuming this allegation is factually proved in court) constituted an offence under the MDA. As we will explain at [40]–[47] below, such instigation was, as a matter of law, not an offence under the MDA.

(b) With respect to points (b) and (g), even though Yong was a compellable witness against Chia, the AG had a discretion whether or not to call Yong as a prosecution witness to testify against Chia. Yong's assertion that he was not prepared to identify (and by implication, testify against) Chia in court as he was fearful of doing so (see [8] above) would have been relevant to the Prosecution's assessment of Yong's reliability as a potential prosecution witness. Furthermore, Yong has not shown us how his testimony (assuming that he was prepared to testify against Chia) would have helped the Prosecution to secure the conviction of Chia with respect to the capital charges against Chia, given that two of those charges (*viz*, the two charges mentioned at [14] above) were unconnected with Yong while the capital charge which did relate to Yong (*viz*, the capital charge of instigating Yong to transport 61.36g of diamorphine to Singapore (see [9] above)) did not in law amount to an offence under the MDA (see [40]–[47] below).

(c) With respect to point (c), Yong's own statements to the CNB showed that he did not wish to identify (and by implication, testify against) Chia in court and also did not wish the CNB to let Chia know that he had identified Chia as the person who had asked him on 12 June 2007 to deliver the "gifts" to Singapore.

(d) With respect to point (e), the evidence clearly shows that the AG did consider the said mitigating factors before deciding to prosecute Yong for a capital offence (see [10] above).

(e) With respect to point (f), the alleged policy of the law is not borne out by the debates in Parliament when the MDP was introduced in 1975 for certain drug trafficking offences (see [31] below). Furthermore, the evidence clearly shows that the AG did take into account Yong's personal circumstances and was of the opinion that he was sufficiently culpable to be prosecuted

for a capital offence.

The fact that the 26 charges against Chia were discontinued

26 For the purposes of the first limb of Yong's complaint, Mr Ravi has placed great emphasis on the Prosecution's application for a DNAQ of the 26 charges against Chia as evidence of a breach of Art 12(1) of the Constitution. Mr Ravi argues that the Prosecution must have had sufficient evidence against Chia as, otherwise, it would not have charged him with 26 offences under the MDA and then amended one charge after two months. In this connection, Mr Ravi relies on a press release by the Attorney-General's Chambers ("the AGC") dated 20 January 2012, where the AGC asserted that each of its prosecutorial decisions "is made carefully, with full consideration of the facts and due regard to what is required in the public interest", [note: 14] and that in many cases, there are multiple levels of review, including personal review by the AG himself. [note: 15] Mr Ravi accordingly argues that the discontinuance of the 26 charges against Chia shows that Yong was discriminated against in spite of the fact that he was less culpable than Chia in relation to the operation to bring controlled drugs to Singapore.

27 We are unable to accept this argument. The AG may, under Art 35(8) of the Constitution, discontinue any prosecution at his discretion. The relevant issue in connection with the DNAQ of the 26 charges against Chia is whether the Prosecution had a valid reason to seek the DNAQ. It may be noted that the Prosecution did not seek a DAQ. The evidence on record shows that the Prosecution decided to seek the DNAQ because of "difficulty of the evidence" [note: 16] (see [11] above), *ie*, it did not think it had sufficient evidence to prove that Chia was legally guilty of any of the offences set out in the 26 charges. This can be seen from the fact that at the pre-trial conference held on 13 May 2008 *vis-à-vis* the capital charges proffered against Yong and Chia, the Prosecution informed the DJ that having "had time to consider [the] evidence against [Chia]", it would be applying to discontinue the capital charges against Chia (see [14] above). Similarly, during Yong's trial, the Prosecution informed the Trial Judge (in response to his query about whether any charges had been brought against Chia) that Chia had initially been charged, but a DNAQ had been sought and obtained in respect of the charges due to "difficulty of the evidence" [note: 17] (see [11] above).

28 There is no evidence to suggest that the AG made the decision to prosecute Yong but not Chia despite considering *Yong* to be a *less* culpable offender than Chia. Instead, the evidence on record shows very clearly that the AG decided to apply for a DNAQ of the 26 charges against Chia because he did not think the Prosecution had sufficient evidence to secure Chia's conviction of any of those charges. This was a decision which was wholly within the AG's discretion to make, and unless the contrary is shown, the court must proceed on the basis that the AG took into account all the relevant considerations in making that decision. As we reiterated in *Ramalingam*, the court will presume the legality or regularity of the AG's exercise of his prosecutorial discretion. This principle applies equally to a decision to discontinue a prosecution, regardless of whether or not the discontinuance amounts to an acquittal. Indeed, in general, the court has no power to prevent the AG from discontinuing any prosecution. However, if the exercise of such power results in a breach of Art 12(1) of the Constitution, then the court can intervene, but not otherwise. The burden is on an applicant, such as Yong, to produce some evidence of arbitrary or discriminatory conduct by the AG before the court will intervene and call upon him to justify his decision. No such evidence has been produced in the present case. Instead, as we have just stated, the evidence on record is to the contrary. We are thus unable to accept Yong's argument that the mere discontinuance of the 26 charges against Chia was *per se* an arbitrary or discriminatory exercise of the prosecutorial discretion, especially when the discontinuance did not amount to an acquittal.

Yong's compellability to testify

29 The second main argument made by Mr Ravi in connection with the first limb of Yong's complaint is that since Yong was a compellable witness, his unwillingness to identify and testify against Chia in court for fear of reprisals to himself and his family did not support the Prosecution's decision to seek a DNAQ of the 26 charges against Chia. Yong, if called as a witness, would presumably have testified against Chia and could have provided the necessary evidence to convict Chia. Ms Mavis Chionh ("Ms Chionh"), counsel for the Prosecution, does not dispute that Yong was a compellable witness against Chia, but submits, in response to Mr Ravi's argument, that this factor was not the critical consideration for the Prosecution in deciding whether or not to proceed against Chia because that decision could not be and was not made purely on the basis of Yong's compellability as a witness alone. Instead, that decision could only be and was only made after considering various other factors, including whether there was any objective evidence to corroborate Yong's allegation concerning Chia's role in the Drug Syndicate.

30 In our view, Yong's argument – *viz*, that since he was a compellable witness, his unwillingness to identify and testify against Chia in court did not support the Prosecution's decision to apply for a DNAQ of the 26 charges against Chia – has no merit. The prosecutorial discretion in Art 35(8) of the Constitution to proceed with or discontinue a prosecution necessarily implies that the Prosecution has a discretion to choose who to call as a witness to support its case. There may be many legitimate reasons why the Prosecution may not wish to call a particular person as a witness, examples of which would be the lack of credibility of his evidence and/or the immateriality of his evidence (despite its apparent credibility) apropos the charges being pursued by the Prosecution. In the present case, Yong's unwillingness to identify and testify against Chia in court for fear of reprisals to himself and his family would clearly have been a relevant consideration in the AG's decision on whether or not to prosecute Chia even though Yong could have been compelled to testify in any criminal proceedings against Chia, and even if his testimony were credible or material to the charges against Chia. The mere fact that the AG ultimately decided not to prosecute Chia does not necessarily mean that the AG did not take Yong's compellability as a witness into account in determining whether or not to prosecute Chia. Further, this factor was not necessarily the only relevant consideration which the Prosecution had to take into account. In this regard, we accept Ms Chionh's submission that there were various other factors which the Prosecution had to consider as well (see [29] above). We thus reject Yong's argument that the mere fact of the Prosecution's failure to compel him to testify against Chia is evidence of an improper exercise of the prosecutorial discretion by the AG in applying for a DNAQ of the 26 charges against Chia.

The purpose of the MDP in the MDA

31 Mr Ravi's third main point in relation to the first limb of Yong's complaint is that the MDP is not intended to be invoked against offenders who are mere conduits in a drug trafficking syndicate since their culpability would be low. Mr Ravi points out that when the earliest predecessor of the MDA (*viz*, the Misuse of Drugs Act 1973 (Act 5 of 1973) ("the 1973 Act")) was amended in 1975 to introduce the MDP, the then Minister for Home Affairs and Education ("the Minister") stated that the MDP was "not intended to sentence petty morphine and heroin pedlars to death" (see *Singapore Parliamentary Debates, Official Report* (20 November 1975) vol 34 ("*Singapore Parliamentary Debates* vol 34") at col 1382). In our view, the Minister's statement has been quoted out of context by Mr Ravi as it was made to explain why the threshold quantity of diamorphine needed to attract the MDP (*ie*, 15g) was set at a level much higher than the daily requirements of a drug addict. What the Minister said was as follows (see *Singapore Parliamentary Debates* vol 34 at cols 1382–1383):

> Under the Misuse of Drugs Act, 1973 [*viz*, the 1973 Act], trafficking is defined as selling, giving, administering, transporting, sending, delivering and distributing drugs. *It is not intended to sentence petty morphine and heroin pedlars to death*. It is, therefore, necessary to specify the quantity by weight, exceeding which the death penalty will be imposed. *The weights refer to the pure substance. For heroin any quantity in which the pure heroin content is above 15 grammes will attract the death penalty. Such an amount when mixed with adulterants is sufficient to spike some 500 heroin cigarettes. One heroin-spiked cigarette is usually shared by a few beginners*. Thus 15 grammes of pure heroin can do considerable damage and ruin a very large number of our youths. ...
>
> ***Let me also allay the fear of those who may have the impression that drug addicts might inadvertently be hanged as a result of their having in their possession a controlled drug which contains more than 15 grammes of pure heroin*** . The heroin that is commonly used by drug abusers and addicts in Singapore is referred to as Heroin No. 3. This is currently sold in little plastic phials at $32 per phial. It is usually mixed with other substances in the proportions of about 40% pure heroin and 60% adulterants. Each phial contains about 0.8 grammes of the mixed substance. Therefore, ***a person will only be in danger of receiving the death penalty if he has in his possession some 37.5 grammes of adulterated heroin which contains 40% of pure heroin. This works out to 47 phials. And it costs about $1,500 to buy this amount at the current retail price*** .
>
> *It is, therefore, most unlikely for a person who is in possession of so much heroin to be only a drug addict and not a trafficker.* ***An addict uses between half to one phial of heroin a day*** . *Even if he is rich and can afford it, he does not buy more than two or three phials at a time for fear of being arrested and convicted as a trafficker*.
>
> [emphasis added in italics and bold italics]

Our ruling on the first limb of Yong's complaint

32 For the reasons outlined above (at [25]–[31]), we find that Yong has failed to produce any evidence to show a *prima facie* case of breach of Art 12(1) of the Constitution in the form of the AG failing to consider all the relevant factors relating to his case. Some of the factors which Mr Ravi claims are relevant (as set out at [24] above) are either misguided (*eg*, point (f) of [24] above) or not borne out by the evidence (*eg*, point (c) of [24] above, in so far as Yong was unwilling to identify and testify against Chia in court). Of the remaining factors, Mr Ravi's contention that the Prosecution did not consider these factors is, in our view, nothing more than an *ex post facto* attempt to "rationalise" (from Yong's perspective) why Yong was prosecuted for a capital offence while the 26 charges against Chia (including the three capital charges) were discontinued pursuant to a DNAQ – there is absolutely no evidence that the Prosecution *failed to consider* these factors *at all*.

33 In our view, the first limb of Yong's complaint is fatally undermined by the evidence on record. *This is not a case where the Prosecution did not charge Chia at all or charged Chia with only non-capital offences.* As mentioned earlier, the Prosecution brought 26 charges against Chia, three of which were capital charges. The evidence on record shows that the Prosecution applied to discontinue the 26 charges *only after reconsidering the evidence* against Chia, and even then, only on the condition that the discontinuance of the charges would *not* amount to an acquittal (see [11] and [14] above). Given the right circumstances in the future, Chia can still be prosecuted for (*inter alia*) those discontinued charges which involve Yong, in which event, Yong's testimony may be material in securing Chia's conviction of those charges. The evidence on record also shows that the Prosecution's decision to apply for a DNAQ of the 26 charges against Chia was not taken in haste.

There was a significant period of time that elapsed between the laying of the three capital charges against Chia (in August 2007) and the Prosecution's application for their discontinuance (in May 2008). Mr Ravi's argument is not that the Prosecution deliberately discriminated against Yong by applying for a DNAQ of the 26 charges against Chia, but that the Prosecution's application for a DNAQ of those charges is evidence that there was such discrimination. We reject this kind of "*post hoc ergo propter hoc*" reasoning. Contrary to what Mr Ravi contends, the evidence on record shows that the Prosecution, after reassessing the evidence which it had against Chia, believed that it had valid reasons to apply for a DNAQ of the 26 charges against him. In the circumstances, it is not possible to infer from this decision by the Prosecution any discrimination against Yong contrary to Art 12(1) of the Constitution.

Taking into account irrelevant considerations

34 The second limb of Yong's complaint of breach of Art 12(1) of the Constitution is that the AG took into account irrelevant considerations in deciding to prosecute him but not Chia. Specifically, Mr Ravi argues that the Prosecution "took into account an irrelevant consideration in regarding the expression of [Yong's] concern for the safety of himself and his family as a relevant factor". [note: 18] This argument appears to be based on two letters dated 25 October 2011 and 7 February 2012 written by the Prosecution to Mr Ravi (collectively, "the Two Letters"), [note: 19] in which reference was made to Yong's refusal to identify and testify against Chia in court. According to Mr Ravi, the Two Letters suggest that the lack of sufficient evidence to prosecute Chia was due to Yong's refusal to identify and testify against Chia in court. Mr Ravi submits that this suggestion is inappropriate because, as explained in Yong's affidavit dated 5 March 2012, Yong expressed the aforesaid concern about his family's and his own safety at a time when he did not know whether or not Chia was in police custody and, thus, whether or not Chia was in a position where he could have harmed him (Yong) and his family. [note: 20] In this regard, we note that the evidence on record shows that Mr Lim, Yong's then defence counsel, was informed by the Prosecution during the trial (specifically, on 30 September 2008 and 2 October 2008) that Chia had been arrested and was in the custody of the CNB. Hence, with Chia in police custody by then, Yong should no longer have had any fear of reprisals and could have volunteered to assist the Prosecution in any proceedings brought against Chia.

35 The Prosecution has made two arguments in reply. First, it argues that the Two Letters cannot be construed to mean that the AG *did* indeed take into account Yong's refusal to identify and testify against Chia in court in deciding to proceed with the capital charge against Yong but not with the 26 charges against Chia. [note: 21] Second, it argues that *even if* the AG did indeed take this factor into account, it was not an irrelevant consideration because Yong's expression of concern for the safety of himself and his family was made in the context of his statement on 3 July 2007 that he did not wish to identify (and by implication, testify against) Chia in court [note: 22] (see [8] above). This anxiety on Yong's part would have been relevant to the Prosecution's assessment of his state of mind and, thus, his reliability as a potential prosecution witness against Chia.

36 We agree with both of the Prosecution's arguments on the Two Letters. There is nothing in the letter dated 25 October 2011 to suggest that Yong was prosecuted because he refused to identify and testify against Chia in court. That letter was merely a response to Mr Ravi's query as to why Chia had not been called as a prosecution witness at Yong's trial. [note: 23] That letter, viewed in its proper context, did not support Yong's contention that the AG *did* take into account his refusal to identify and testify against Chia in court in deciding to prosecute him (Yong) but not Chia. In other words, Yong was prosecuted not because he refused to identify and testify against Chia in court, but because, in the Prosecution's assessment, he did commit the offence which he was charged with. As

for the letter dated 7 February 2012, it asked whether Yong was "*now* willing and prepared to … testify against Chia in court" [note: 24] [emphasis added] given Yong's earlier statement on 3 July 2007 that he did not wish to identify (and by implication, testify against) Chia in court. While that letter does shed some light on the matters considered by the AG in making the prosecutorial decisions which were eventually made apropos Yong and Chia, it does not assist Yong because, as was made clear by Mr Ravi in his oral submissions, Yong's allegation that the AG took into account irrelevant considerations relates to the point in time when the AG applied to discontinue the 26 charges against Chia pursuant to a DNAQ (*ie*, soon after 13 May 2008), and not to the situation in February 2012.

Failure to give unbiased consideration to all the offenders concerned

37 The third and final limb of Yong's complaint of breach of Art 12(1) of the Constitution is that the AG failed to give unbiased consideration to him *vis-à-vis* Chia. In this regard, Mr Ravi submits that there was an appearance of bias on the Prosecution's part because Chia, the mastermind behind the Drug Syndicate against whom 26 charges were preferred, was ultimately not prosecuted at all, whereas Yong, a youthful courier, was prosecuted for a capital charge. [note: 25] Mr Ravi contends that the AG's explanation that there was insufficient evidence against Chia to prosecute him "is unpersuasive given the weight of the evidence" [note: 26] against Chia. The appearance of bias, it is argued, is supported by the fact that in the Prosecution's letter to Mr Ravi dated 25 October 2011, the different treatment of Yong and Chia was "actually blamed on" [note: 27] Yong, specifically, on his refusal to identify and testify against Chia in court.

38 In our view, the above submissions by Mr Ravi have no factual basis and consist merely of bare assertions. The evidence on record shows that the Prosecution's decision to apply for a DNAQ of the 26 charges against Chia was fully considered (see [33] above). There is nothing to indicate that one or some of the prosecutors or the CNB officers involved in the investigations relating to Yong and Chia had a personal animus against Yong, or had something to gain from a discontinuance of the 26 charges against Chia. Indeed, the very fact that Chia was detained under the CLTPA is *prima facie* evidence that although the Prosecution had reason to believe that Chia might have been involved in drug trafficking activities in Singapore, it did not prosecute him because it was of the view that it did not have sufficient evidence to convict him of any of the 26 charges brought against him (which charges consequently had to be discontinued), and *not* because the AG, in the exercise of his prosecutorial discretion, decided to "let Chia off lightly". [note: 28]

39 The AG has the responsibility to protect the integrity of the prosecutorial process, which is vital to public confidence in our criminal justice system and the rule of law. He has an obligation to exercise his prosecutorial discretion impartially. This entails (*inter alia*) that the AG should prosecute an accused person only if there is sufficient evidence to support the charge against him and, conversely, should discontinue a prosecution if he concludes, after reassessing the case against the accused, that there is no or little prospect of securing a conviction. In the present case, even if the AG had mistakenly exercised his prosecutorial discretion in applying to discontinue the 26 charges against Chia, it would not matter for the purposes of determining the substantive issue before us. An error of judgment in the exercise of a discretionary power is not evidence of bias or apparent bias. If the AG did indeed make a mistake in this regard (which we are *not* in any way suggesting), he would no doubt re-open the case against Chia and proceed to prosecute him for one or more of the offences set out in the 26 charges (and/or any other offence under the MDA) if there is sufficient evidence to support such a prosecution. In our view, the DNAQ of the 26 charges against Chia contradicts any allegation of discriminatory prosecution of Yong for the offence which he committed.

Did Chia commit an offence under the MDA in instigating Yong in Johor Baru to transport

controlled drugs to Singapore?

40 Yong's complaint that he has been unlawfully discriminated against in breach of Art 12(1) of the Constitution is predicated on Chia having committed the offence of abetment under the MDA in instigating him (Yong) in Johor Baru to transport controlled drugs to Singapore. It is on this basis that Yong claims that his prosecution was discriminatory because Chia was a more culpable offender, and yet, was let off by the Prosecution as a result of its applying for and obtaining a DNAQ of (*inter alia*) the five charges of instigating Yong in Johor Baru to transport controlled drugs to Singapore. The offence of abetment in the MDA is set out in ss 12 and 13, which provide as follows:

> **Abetments and attempts punishable as offences**
>
> **12**. Any person who abets the commission of or who attempts to commit or does any act preparatory to, or in furtherance of, the commission of any offence under this Act shall be guilty of that offence and shall be liable on conviction to the punishment provided for that offence.
>
> **Abetting or procuring commission of offences outside Singapore**
>
> **13**. It shall be an offence for a person —
>
> (*a*) to aid, abet, counsel or procure the commission *in any place outside Singapore* of an offence punishable under a corresponding law in force in that place; or
>
> (*b*) to do an act preparatory to, or in furtherance of, an act outside Singapore which if committed in Singapore would constitute an offence under this Act.
>
> [emphasis added]

41 During the hearing of this appeal on 14 March 2012, we raised the issue of whether Chia, in instigating Yong in *Johor Baru* to transport controlled drugs to Singapore, did indeed commit the offence of abetment under the MDA ("the abetment issue"). We raised this issue because there is an established rule of statutory interpretation that a domestic statute has no extra-territorial effect unless it is expressed to have such effect, and that in the absence of such express provision, acts committed outside the jurisdiction are presumed not to constitute an offence under the relevant domestic statute even if they would have amounted to an offence under that statute had they been committed within the jurisdiction (see *Public Prosecutor v Pong Tek Yin* [1990] 1 SLR(R) 543 at [16] and *Public Prosecutor v Taw Cheng Kong* [1998] 2 SLR(R) 489 at [66]–[69]). As neither Mr Ravi nor Ms Chionh was fully prepared to address the abetment issue at the hearing on 14 March 2012 itself, we gave them leave to file written submissions on the issue, on the factual assumption that Chia did instigate Yong in Johor Baru on 12 June 2007 to bring controlled drugs to Singapore. We have examined their written submissions in this regard, and our conclusions are as set out below.

42 In our view, construing s 12 of the MDA on the basis of the rule of statutory interpretation mentioned at [41] above, this section clearly applies only to an abetment *within* Singapore of an offence committed within Singapore since nothing therein suggests that the abetment contemplated applies to an abetment which occurs outside Singapore.

43 Construing s 13(*a*) of the MDA likewise on the basis of the aforesaid rule of statutory interpretation, we agree with the Prosecution's submission that the phrase "any place outside Singapore" in that provision qualifies the principal offence committed, in that the principal offence contemplated is one that is "punishable under a corresponding law in force *in that place*" [emphasis

added]. In other words, s 13(*a*) applies only to "principal offences committed *outside* Singapore" [note: 29] [emphasis in original] (*cf* the principal offence in this case, which was committed by Yong *in* Singapore). This in turn raises the question of whether the act of aiding, abetting, counselling or procuring the commission of the principal offence has to take place within Singapore before such act falls within the terms of s 13(*a*). In our view, this question can be answered by reference to the legislative history of this provision, which we consider below.

44 In this respect, we agree with the Prosecution that the legislative history of s 13(*a*) of the MDA indicates that it is intended to apply to an abetment *within* Singapore of the commission in a place outside Singapore of an offence under a corresponding law in force in that place. [note: 30] The earliest incarnation of s 13 of the MDA is s 32A of the Deleterious Drugs Ordinance (No 124) ("the DDO"), which was introduced by s 8 of the Deleterious Drugs Amendment Ordinance 1925 (No 6 of 1925) ("the 1925 Amendment Ordinance"). Section 32A of the DDO provided as follows:

> Any person *who in the Colony* aids, abets, counsels or procures the commission in any place outside the Colony of any offence punishable under the provisions of any corresponding law in force in that place or *does any act preparatory to, or in furtherance of*, any act which if committed in the Colony would constitute an offence against this Ordinance, shall be guilty of an offence against this Ordinance. [emphasis added]

It can be seen from the above that s 32A of the DDO expressly provided that only acts of abetment committed "*in* the Colony" [emphasis added] of principal offences outside the Colony would be an offence. This interpretation of s 32A is supported by the legislative intention behind its enactment. When s 32A was introduced into the DDO, the then AG stated (see *Proceedings of the Legislative Council of the Straits Settlements for the Year 1924* (30 June 1924) at p B52):

> Clause 8 [*viz*, the clause which subsequently became s 8 of the 1925 Amendment Ordinance] is new. That provides for the punishment of abetment of a crime in regard to deleterious drugs committed in the Colony or against the law in some other country. *That is one of the new provisions at Home. It is rather an innovation to* ***make it a crime in one place*** *if you abet the transgression of the law* ***of another country*** , but the deleterious drugs question is so international in character that it has been thought necessary that a provision of this sort should be inserted. ... [emphasis added in italics and bold italics]

The phrase "in the Colony" (or its equivalent when Singapore became independent) was deleted when the earliest predecessor of the MDA (*viz*, the 1973 Act) was enacted in 1973, but no explanation was given. In our view, this deletion is insufficient evidence that Parliament intended to alter the effect of the then equivalent of s 32A of the DDO (*viz*, s 11 of the 1973 Act) because the 1973 Act was, *inter alia*, a consolidating Act (see *Singapore Parliamentary Debates, Official Report* (16 February 1973) vol 32 at cols 414–415).

45 For the same reason as that set out in the preceding paragraph, s 13(*b*) of the MDA has to be construed in the same manner as s 13(*a*), *ie*, s 13(*b*) applies only to preparatory acts done within Singapore. The legislative history of what is now ss 13(*a*) and 13(*b*) of the MDA shows that they were originally enacted as one composite section, *ie*, s 32A of the DDO. Because the key phrase "in the Colony" applied equally to both limbs of s 32A of the DDO, both limbs of s 13 of the MDA must likewise be interpreted in the same manner, *ie*, to the effect that ss 13(*a*) and 13(*b*) do not apply to acts of abetment and preparatory acts occurring outside Singapore.

46 In this connection, we should mention that the Penal Code (Cap 224, 1985 Rev Ed) ("the Penal

Code") was amended in 2008 to address the kind of abetment that Chia is alleged to have carried out with respect to the offence committed by Yong. Section 108B of the Penal Code, which came into operation on 1 February 2008, provides as follows:

> **Abetment outside Singapore of an offence in Singapore**
>
> **108B**. A person abets an offence within the meaning of this Code who abets an offence committed in Singapore notwithstanding that any or all of the acts constituting the abetment were done outside Singapore.

As Chia's alleged instigation of Yong took place in Johor Baru on 12 June 2007, s 108B of the Penal Code would not apply to the abetment issue. Whether or not s 108B of the Penal Code applies to the abetment of offences under the MDA (having regard to the specific provisions on abetment in ss 12 and 13 of the MDA) is not an issue before us, and we therefore express no opinion on it.

47 Given our interpretation of the scope of ss 12 and 13 of the MDA, it follows that the prosecution of Chia for the five charges of instigating Yong in Johor Baru to transport controlled drugs to Singapore would have failed if those charges had not been discontinued as the alleged acts of instigation (even if they are factually proved in court) all took place outside Singapore. That being the case, it would be an additional reason for this court to hold that the DNAQ of (*inter alia*) those charges cannot possibly support any argument that Yong's right to equality before the law and equal protection of the law under Art 12(1) of the Constitution has been infringed.

The orders sought by Yong in this Motion

48 In the light of our findings on the facts and the law, we will now deal with the orders sought by Yong in this Motion, which we set out at the beginning of this judgment. First, there is absolutely no legal basis for this court to re-open its decision upholding Yong's conviction of the capital offence which he was charged with. At the point in time when Yong was charged with that capital offence, the only issue before the court was whether or not, on the evidence, he was guilty of the offence. The Trial Judge heard the evidence and convicted Yong on the evidence. Yong was properly convicted on the evidence, and at all stages of the many proceedings he has since brought before this court, he has not denied that he is guilty of the aforesaid offence.

49 Yong's case in this Motion, brought long after his conviction, is that he should not have been prosecuted for a capital offence at all as this constituted a breach of his constitutional right to equality before the law and equal protection of the law under Art 12(1) of the Constitution. He argues that there was such a breach because Chia, his co-offender in the same criminal enterprise, was an even more culpable offender but was let off by the AG as a result of the Prosecution applying for and obtaining a DNAQ of the 26 charges against Chia, even though the discontinuance did not amount to an acquittal. We are of the view that there is absolutely no merit in this argument for the reasons we have given earlier, *ie*:

(a) The 26 charges against Chia were discontinued pursuant to a DNAQ, *ie*, the discontinuance of those charges did *not* amount to an acquittal. Thus, Chia is still liable to be prosecuted for those charges (and/or other new charges) if the AG has sufficient evidence to bring such a prosecution.

(b) The AG applied to discontinue the 26 charges against Chia because, in his judgment, there was insufficient evidence to convict Chia of any of the charges, and not because he decided, in the exercise of his prosecutorial decision, to "let Chia off lightly". [note: 31]

(c) Yong was prosecuted for the capital offence which he was subsequently convicted of not because he refused to identify and testify against Chia in court, nor because of any discrimination against him (Yong), but because the Prosecution considered that he was guilty of that offence.

(d) Chia's alleged instigation of Yong in Johor Baru to transport controlled drugs to Singapore (assuming such instigation is factually proved in court) did not in law constitute an offence under the MDA and, thus, the prosecution of Chia for the five instigation charges brought against him could not have succeeded.

50 In *Ramalingam*, we observed at [68] that if Sundar had been charged with the same capital offences as Ramalingam (the applicant in that case), Ramalingam's application could not have been brought because Ramalingam would then have had no cause whatsoever to claim that he had been discriminated against contrary to Art 12(1) of the Constitution. In the present case, the same observation applies to Yong. Chia faced (*inter alia*) three capital charges, all of which were discontinued without amounting to an acquittal. As the DNAQ of (*inter alia*) those charges was applied for by the Prosecution and granted by the court on the ground of insufficient evidence against Chia, it is not possible for this court to reject the basis on which the DNAQ was granted and infer that it was granted with a view to discriminating against Yong. We should add that Mr Ravi has not given a single coherent reason as to why the AG would have wanted to discriminate against Yong if he had a bigger fish to fry.

51 The final point we wish to make is this. Even if we were to find (*contra* our ruling at [49]–[50] above) that Yong's prosecution for a capital offence was in breach of Art 12(1) of the Constitution, we have no power to set aside his conviction for that offence simply on the basis of a breach of Art 12(1). This is because there is nothing wrong in law with the conviction, and no fresh evidence has been adduced to show that the conviction was a miscarriage of justice. Indeed, as we pointed out at [48] above, Yong has not denied that he is guilty of the offence which he was convicted of. Thus, even if Yong's prosecution were indeed in breach of Art 12(1) (which is *not* the case here), the court's power would be confined to making a declaratory order to that effect. It would then be up to the AG to decide what kind of action he should take to remedy the unequal position between Yong and Chia in order to comply with Art 12(1).

Conclusion

52 For the reasons given above, we dismiss this Motion as it has absolutely no merit both on the law and on the facts.

[note: 1] See the affidavit of Mr M Ravi dated 27 January 2012 ("Mr Ravi's 27 Jan 2012 affidavit") at para 5.

[note: 2] See Exhibit "YVK-2" of Yong's affidavit dated 27 January 2012.

[note: 3] See the Prosecution's Bundle of Documents ("the Prosecution's BOD") at Tab A.

[note: 4] See Exhibit "MR-2" of Mr Ravi's 27 Jan 2012 affidavit.

[note: 5] *Ibid*.

[note: 6] See the Prosecution's BOD at Tab 1.

[note: 7] See the Prosecution's BOD at Tab 2.

[note: 8] See the Prosecution's BOD at Tab 3.

[note: 9] See the Prosecution's BOD at Tab 5.

[note: 10] *Ibid*.

[note: 11] See the Supreme Court's letter to the parties dated 14 March 2012 at para 3.

[note: 12] See the Supreme Court's letter to the parties dated 15 March 2012 at para 3.

[note: 13] See Yong's Further Skeletal Submissions at para 6.

[note: 14] See Yong's Evidence of Lack of Equality Core Bundle at Tab 9.

[note: 15] *Ibid*.

[note: 16] See Exhibit "MR-2" of Mr Ravi's 27 Jan 2012 affidavit.

[note: 17] *Ibid*.

[note: 18] See Yong's Skeletal Submissions dated 9 March 2012 ("Yong's 9 Mar 2012 Skeletal Submissions") at para 17.

[note: 19] See the Prosecution's BOD at, respectively, Tab 2 and Tab 5.

[note: 20] See Yong's affidavit dated 5 March 2012 at para 20.

[note: 21] See the Prosecution's Further Skeletal Arguments filed on 13 March 2012 at para 24.

[note: 22] See the Prosecution's Further Skeletal Arguments filed on 13 March 2012 at para 25.

[note: 23] See the Prosecution's BOD at Tab 2.

[note: 24] See the Prosecution's BOD at Tab 5.

[note: 25] See Yong's 9 Mar 2012 Skeletal Submissions at para 23.

[note: 26] See Yong's 9 Mar 2012 Skeletal Submissions at para 24.

[note: 27] *Ibid*.

[note: 28] See the Prosecution's Skeletal Arguments filed on 8 March 2012 at para 39.

[note: 29] See the Prosecution's Further Submissions on Abetment filed on 19 March 2012 ("the Prosecution's Abetment Submissions") at para 15.

[note: 30] See the Prosecution's Abetment Submissions at paras 16–23.

[note: 31] See the Prosecution's Skeletal Arguments filed on 8 March 2012 at para 39.