

The 28th Singapore Law Review Annual Lecture

8 November 2016

RECALIBRATION OF THE DEATH PENALTY REGIME: ORIGIN, RAMIFICATIONS AND IMPACT

The Honourable Justice Steven Chong, Supreme Court of
Singapore*

I. Introduction

1 Thank you very much for inviting me to deliver the 28th Singapore Law Review Annual Lecture. As an alumnus, it is always a pleasure and an honour to be associated with significant events in the NUS calendar. Such events always bring back fond memories of my NUS days, of which I have many.

2 It is always challenging to select a suitable topic for such an occasion. I looked at the previous lectures for some inspiration but found that there was no discernible theme. They ranged from international law to literature. I asked Eleanor for some suggestions and the Editorial Board requested that my lecture should ideally deal with criminal law. Hence, the topic for this lecture.

3 I was, by any account, a latecomer to the practice of criminal law. I had spent my entire professional career in the practice of

* I would like to record my appreciation to my former law clerk, Scott Tan, for his assistance in the preparation of this lecture.

commercial law – shipping, insurance and banking law were my bread and butter work. Only twice did I take on a criminal brief and they were two of the most significant briefs of my career. It is extremely gratifying to be able to make a difference to the lives of your clients beyond economic and financial benefits. Perhaps I have more than made up for lost time in this area of the law after being appointed the Attorney-General in June 2012. It will not be an exaggeration to say that during my 2-year term, I was personally involved in more criminal cases than most criminal lawyers would have done in their entire career. In a sense, the best preparation for the office of the Attorney-General was my first term as a Judge when I presided over a number of criminal cases and appeals. The experience of hearing and disposing of those cases shaped my perspective on the importance of criminal law in our legal system.

4 The topic today is a subject which has special significance to me. In July 2011, a moratorium was placed on all executions pending the outcome of a comprehensive review of the death penalty regime in Singapore. A few weeks after I assumed office, it was announced that the Government had completed the review and the conclusion was that the death penalty would remain, but in certain circumstances it would no longer be mandatory.¹ Pursuant to this, two amendment acts were passed at the end of the year to enact changes to the Misuse of Drugs Act and the Penal Code.² The legal, ethical, and practical challenges of administering this new piece of legislation dominated my time as the AG and it is a topic which I had cause to reflect on and to think about even after I

returned to the bench. This invitation has afforded me an opportunity to crystallise my thoughts and set them down in writing.

5 From the outset, I want to clarify what this lecture is *not* about. It is not a normative analysis of the law. This lecture is neither apologetic nor polemic, and I will not be discussing the desirability of the death penalty as a form of punishment. This lecture is also not a positive study of the empirical effect of the amendment acts. That might be a fertile subject for academic study, but it is not one which I will take up on this occasion. Instead, what I will attempt is a modest doctrinal analysis of what the law *is* at the moment. What I mean by this is that I will examine the origins, structure, and scheme of this new legal regime; the legal challenges which have arisen in the application of the discrete legal rules which comprise it; the response of the courts; and the impact that it has had on the practice of criminal law.³

II. Overview: the death penalty regime for murder and drug trafficking

6 I begin with a brief history of capital punishment in Singapore. The death penalty has been part of the criminal justice system of Singapore since our earliest days as a colony. Today, the death penalty is most often associated with the offences of murder and drug trafficking.⁴ However, what might surprise some of you is that when these offences first found their way into our statute books, neither attracted the mandatory death penalty.

A. Murder

7 I begin with the offence of murder. The Second Charter of Justice of 1826 provided for the general reception of English law in the Straits Settlements, subject to such modifications and adaptations as the circumstances required.⁵ At the time, capital punishment was widely administered in the United Kingdom under a disparate corpus of capital statutes referred to as “the Bloody Code”. A staggering number of offences (nearly 300, by one estimate) were punishable by death and the list of capital statutes comprised a random grab-bag of offences ranging from the trivial to the bizarre. Infractions running the gamut from murder to damaging Westminster Bridge to cutting down a young tree attracted capital punishment.⁶ Blackstone scathingly remarked that the tendency to create new capital statutes at a whim amounted to a “kind of quackery in government”.⁷ Samuel Romilly, a prominent legal reformer, decried the arbitrary and disorderly nature of the system, saying it produced a “lottery of justice.”⁸

8 This was the background against which Lord Macaulay and the members of the Indian Law Commission prepared the Indian Penal Code. They were reacting not just to the general disorder which plagued the Indian legal system, but also the excesses of the Bloody Code in England, which they strove to avoid.⁹ They devoted great effort towards devising graduated schemes of punishment with the object of ensuring that the sentences imposed fit the crimes committed.¹⁰ In the original draft, the death penalty

was reserved only for two offences: murder and treason.¹¹ The Indian legislature eventually expanded this list to include other offences like gang robbery or abetting mutiny, but it still remained a very short list and in almost all cases, including murder, death could be substituted with a sentence of transportation for life.¹² After a series of abortive attempts to extend the application of the Indian Code to Singapore, the Straits Settlements Legislative Council eventually passed the Penal Code in 1871. The Straits Settlements Penal Code mirrored the Indian Code in almost every respect, and it likewise provided that persons guilty of murder would be punished with “death or penal servitude for life” [emphasis added].¹³

9 However, by the time the Penal Code was eventually enacted in the Straits Settlements in 1871, the situation in England had changed dramatically. First, the Judgment of Death Act 1823 had been passed to abolish the mandatory death penalty for most crimes and it gave judges the discretion to impose lesser punishments of imprisonment or transportation for life in lieu of a sentence of death.¹⁴ Second, the Punishment of Death Act was passed in 1832 to dramatically reduce the number of capital offences from 300 to about 60.¹⁵ In the ensuing decades, capital punishment was abolished for numerous other offences. After the passage of the Criminal Law Consolidation Acts of 1861, only 4 offences – murder, high treason, piracy with violence, and arson in the Royal Dockyards – were punishable by death, though in each case the sentence of death was mandatory.¹⁶

10 Thus, in a sense, the colonies had gone further than the Imperial Capital in cutting back on the excesses of the Bloody Code by providing that the sentence of death would be discretionary even in cases involving murder. However, this was not the case for long in the Straits Settlements. In 1883, the Penal Code (Amendment) Ordinance 1883 was passed to provide that the death penalty would be imposed for all offences of murder.¹⁷ In moving the bill, John Augustus Harwood, the acting Attorney-General of the Straits Settlements at the time, explained that it was intended to “assimilate the law [in the Straits Settlements] to the law in force in England”¹⁸.

11 After this, the death penalty remained mandatory for murder for nearly 120 years until the Penal Code (Amendment) Act 2012 was passed. Today, following the amendments, only murder within the meaning of s 300(a) of the Penal Code will attract the mandatory death penalty. For murders falling with the description of ss 300(b), (c), and (d) of the Penal Code, the courts are now granted the discretion to impose a sentence of life imprisonment and caning in lieu of capital punishment. I will discuss the rationale behind these changes later, but first, I will move briefly to talk about the offence of drug trafficking.

B. Drug trafficking

12 The Misuse of Drugs Act was first passed in 1973.¹⁹ When it was enacted, the maximum penalty provided for trafficking in a Class A drug was a sentence of 30 years’ imprisonment or a fine of

\$50,000 or both, and up to 15 strokes of the cane.²⁰ At the second reading of the Misuse of Drugs Bill, Mr Chua Sian Chin, the then Minister for Home Affairs said that the Government did not think it was necessary to go “as far as some countries which imposed the death penalty for drug trafficking.”²¹

13 However, two years later, the MDA was amended to provide that the death penalty would be mandatory for certain drug offences.²² The rationale for these changes was given during the second reading speech of the MDA Amendment Bill 1975. Mr Chua, who was still the Minister for Home Affairs at the time, cited statistics showing an increase in the number of major traffickers and financiers who had been caught since the MDA was passed in 1973 and explained that the drug problem was not just a health and safety issue, but one that could potentially develop into a “dangerous national security problem” which, if left unchecked, could threaten the very “survival” of the nation.²³ He said that the increase in penalties was “meant to provide the necessary deterrence to drug traffickers and pushers.”²⁴ Since then, the MDA has undergone many amendments and the death penalty has been extended to the trafficking, import, and manufacture of new specified drugs. Each amendment has been justified on the basis that the mandatory death penalty is necessary for the continued effectiveness of our anti-drug laws.²⁵

14 In 2012, Deputy Prime Minister And Minister for Home Affairs Mr Teo Chee Hean announced that changes would be made

to the MDA to “keep pace with the evolving operational landscape and societal changes”.²⁶ Following the changes, the court now has the discretion to sentence an accused to a term of life imprisonment and caning in two scenarios:

(a) First, where the accused proves on a balance of probabilities that (i) he was merely a “courier” – that is to say, that his role in the offence was restricted only to the transportation, sending, or delivery of a controlled drug²⁷ – *and* (ii) the Public Prosecutor certifies that he has substantively assisted the Central Narcotics Bureau in disrupting drug trafficking activities within or outside Singapore.²⁸

(b) Second, where the accused proves on a balance of probabilities that (i) he was only a courier *and* (ii) also proves that he was suffering from such abnormality of mind as substantially impaired his mental responsibilities for the acts and omissions constituting the offence.²⁹

15 For convenience, these can be referred to as the “substantive assistance” and the “diminished responsibility” limbs, as each constitutes one separate subsection of the newly-introduced s 33B(2) of the MDA. In this lecture, I will focus on the substantive assistance limb, because it has proven to be the more controversial of the two. Indeed, it has generated a considerable volume of litigation in just four years.

III. Three themes in the recalibration of the death penalty regime

16 I now turn to discuss the underlying philosophy and purpose of the amendment acts. To explain the impetus behind the reforms, the Deputy Prime Minister and the Minister for Law took to the floor to deliver two extensive statements to outline the general approach of the Government towards capital punishment, which they amplified and expanded on in the course of the debates which accompanied the second reading of the bills.³⁰ Three broad overlapping themes can be discerned from their speeches: the first theme is that of general deterrence; the second is the need for a more calibrated sentencing framework; and the last is the respective roles of the executive and the Judiciary in the criminal process. I will take each in turn.

A. General deterrence

17 I begin with the theme of deterrence. Every criminal justice system should be understood against the background of the historical forces that have shaped its development. Singapore is no different. 20 years ago, then Attorney-General Chan Sek Keong delivered the 10th Singapore Law Review Lecture and the title of his address was “The criminal process—The Singapore model”.³¹ This lecture, together with an address he delivered 4 years later at the turn of the millennium,³² stand out as the most lucid expositions of the ethos and philosophy of the Singapore model of criminal justice. He explained that the “Singapore model” was conceived in the crucible of the social disorder of the 1950s and 1960s. The need

to combat the forces of social disorder and lawlessness precipitated significant reforms to the criminal justice system which we had inherited from the British. Significant changes such as the abolition of trial by jury and the removal of the right of accused persons to make unsworn statements from the dock were made in the decade after independence.³³

18 To this day, “[t]he underlying values of our criminal justice system [still] approximate to the value system of the crime control model”.³⁴ The crime control model is marked by, among other things, laws which promote the conviction of the factually guilty and emphasises efficiency in the law enforcement process. These values show themselves clearly in the substantive assistance limb of s 33B of the MDA. In his ministerial statement, Deputy Prime Minister Teo explained that Singapore had always adopted a “highly deterrent posture towards drug trafficking”. However, the challenge was that drug syndicates had grown more sophisticated in their operation and were targeting and exploiting persons from vulnerable groups to perform the risky work of transporting the drugs while they managed the operations from a distance, often from outside the jurisdiction. He explained that making substantive cooperation with law enforcement a precondition for alternative sentencing would provide an “additional avenue” for law enforcement agencies to “reach further into the networks” to target those who were higher up in the chain.³⁵

19 In the same way, Minister Shanmugam explained in his

statement on the reforms to the Penal Code that the “cardinal objectives” of the criminal justice system had not changed. These objectives are, in his words, that: “Crime must be deterred. Society must be protected against criminals.”³⁶ When he moved the Penal Code Amendment Bill, he was careful to stress that that the changes would be made to the death penalty regime only “where it does not substantially impact our crime control framework” and that it was the low homicide rate in Singapore that paved the way for the reforms.³⁷

B. Relative blameworthiness and calibrated sentencing

20 I move to the second theme, the need for more calibrated punishments. This comes through most clearly in the amendments to the Penal Code. What is obvious to everyone in the room, though perhaps not so widely known to the general public, is that murder extends beyond intentional killing. Under s 300 of the Penal Code, murder may be committed in four different situations. Indeed, murder can be established even if the offender does not *intend* to cause death or bodily injury to a particular person.³⁸ The definition of murder is extremely wide, and correspondingly the cases which may fall within its ambit can be of widely differing moral significance.³⁹

21 For this reason, academics have long questioned the assumption, held since the Penal Code was amended in 1883, that all forms of murder deserve the death penalty.⁴⁰ Special criticism has been reserved for s 300(c) of the Penal Code, which provides

that an act which causes death is classified as murder if it is subjectively performed “with the intention of causing bodily injury to any person”, and the bodily injury intended to be inflicted is objectively assessed to be sufficient in the ordinary course of nature to cause death.⁴¹ It has been pointed out that s 300(c) admits of situations where there can be a gap between moral culpability and criminal responsibility. Take the example of an accused who stabs the victim in the thigh with the intention only to injure him, but ends up severing a femoral artery and killing the victim.⁴² This is murder. It would not matter that the accused did not intend to kill; and it would not even matter that he did not know that an injury to the thigh could be fatal. It matters only that he intended the injury which was caused, that this injury was objectively sufficient in the ordinary course of nature to, and did in fact, cause death. It has been argued that in such a case, there is too great a “moral distance” between the offence which the accused subjectively intended – to cause grievous hurt to the victim, which is usually punishable with a term of up to 7 years’ imprisonment – and the punishment which he will actually receive if he is convicted – death.⁴³

22 It was in part due to the recognition of critiques like these that the law was changed. Minister Shanmugam explained that the death penalty would continue to be mandatory for intentional killings because it was “one of the most serious offences in our books” and it was “right to punish such offenders with the most severe penalty.” For other forms of murder, he said that “justice

[could] be tempered with mercy”, and the courts would be given the discretion to order a sentence of life in lieu of death.⁴⁴ In making these changes, Parliament was acknowledging that social mores, norms, and expectations had changed. The imposition of a mandatory death sentence for all forms of murder was no longer consonant with the modern drive for greater texture and nuance in the application of criminal penalties. In a sense, this was a continuation of a process that began with Lord Maccaulay and the Indian Law Commissioners, who likewise sought to achieve greater symmetry between moral blameworthiness and criminal punishment.⁴⁵

23 This principle also applies to the MDA. In order to qualify for an alternative sentence of life imprisonment, the basic condition that must be satisfied – irrespective of whether one goes under the substantive assistance limb or the diminished responsibility limb – is that the accused must be a “courier”. While this alone is not a sufficient condition for an alternative sentence, it is a *necessary* one.⁴⁶ The reason for this is not difficult to discern. Those who occupy positions at the upper echelons of the syndicate – the kingpins, the producers, the distributors, and the financiers – are more culpable. Their transgressions are conscious, deliberate, and often profit motivated. As DPM Teo explained, “[t]hey know they are dealing with drugs and the consequences of their actions if they are caught and convicted.”⁴⁷ By contrast, those who act only as couriers bear less culpability, relatively speaking, for the proliferation of drugs in Singapore.

C. The respective roles of the Judiciary and Executive in the criminal process

24 The final theme I will touch on is that of the respective roles of the Executive and the Judiciary in the criminal process.⁴⁸ Each of the coordinate branches of government has a role to play in the criminal process. In our constitutional scheme, the legislature is vested with the power to make laws of general application. This includes the power to define offences and to prescribe punishments for them, whether the punishments be mandatory or discretionary; fixed or within a prescribed range.⁴⁹ The duty of the courts is first and foremost to decide on legal guilt. Once it has done so, it is duty bound to “pass sentence according to law”.⁵⁰ The duty of the Executive is to investigate possible offences and to “institute, conduct or discontinue proceedings for any offence.”⁵¹ After sentence is passed, it is legally bound to carry the sentence into effect. However, it is also empowered, through the exercise of the extraordinary power of clemency, to prevent the law from taking its course.⁵²

25 The relationship between the Executive and the Judiciary in the sentencing process is highly dependent on the structure of the laws which are passed and, in particular, the existence of mandatory sentencing. This is ultimately a question of policy for Parliament to decide on.⁵³ When the amendment acts are examined, it is clear that careful thought went into the question of what matters should be devolved to the Judiciary and those which should continue to be reserved to the Executive.

26 In the case of the amendments to the Penal Code and the introduction of the diminished responsibility limb of the MDA, it was explained that the Public Prosecutor had long considered, among other things, the intention of the offender, the manner of the offence, and the degree of mental impairment the offender suffers from (if any) in deciding whether to prefer a non-capital charge.⁵⁴ These are already matters which the courts regularly handle in other parts of the criminal law. Thus, if it is thought that a lesser sentence should be ordered where these factors exist, the courts are at least as well placed to undertake the exercise. After all, the factors named by the Minister involve findings of fact as to the mental state of the offenders and whether there is any causal connection between the offender's mental disability and crime he committed. These are matters the courts regularly consider⁵⁵

27 However, the situation would appear to be different where the substantive assistance limb is concerned. By design, the courts are constrained to operate within the confines of the adversarial system, and the evidential, procedural, and resource limitations of the forensic process. In making decisions, courts are also constrained by precedent and established judicial principles. These features optimise the legal process as a fair and transparent mechanism for resolving narrow disputes concerning the rights and entitlements of individuals, but it also has its drawbacks. Among other things, it is slower and it restricts the range of admissible material, and it must be public. The Executive, while limited in other ways, is not similarly constrained in the same way that the

courts are. It has the institutional capacity and resources to inquire widely into everything that could possibly be relevant. It is also able to do so in quiet to protect the sensitivity of the information and the confidentiality of the sources. At the end of the day, the issue of who makes the determination of substantive assistance is one of institutional design. This is partly a question of policy and partly one of relative institutional competence. In our case, Parliament has decided that the decision is to be made by the Public Prosecutor, and that judicial review of the Public Prosecutor's decision will only be available on very limited grounds.

28 To gather up the threads of the analysis, the amendment acts represent an important development of the death penalty framework. It has allowed the courts to make more sensitive distinctions between the relative culpability of offenders and sentence them appropriately. However, it is also important to stress the limited nature of these changes. One academic has said that the Singapore government has “dramatically shifted its position on the mandatory death penalty”,⁵⁶ but I think this is perhaps somewhat overstated. There is no doubt that the changes which have been wrought are significant, but it seems to me that they fall short of inaugurating any paradigm shift in policy. In particular, the long-standing emphasis on deterrence still acts as a side constraint on any change in this area.

IV. Three contemporary legal issues

29 With that, I now turn to the last part of my lecture, which relates to the problems which have arisen in relation to the implementation of the amendment acts. Most of the problems I will cover have arisen in the context of applications for re-sentencing.

A. *Judicial discretion: the case of Kho Jabing*

30 The first issue I will examine is that of judicial discretion. When the amendment acts were passed, many lauded the greater flexibility it afforded, which promoted more individualised outcomes. However, at least one pair of commentators sounded a note of caution, observing that the absence of statutory guidelines in the statutes could lead to inconsistency and arbitrariness. They called for the introduction of broad sentencing guidelines to improve the quality of decision-making and to ensure consistency in outcome.⁵⁷ This call was answered, at least in the context of the offence of murder, when the Court of Appeal handed down its decision in *Kho Jabing's* case in 2015.⁵⁸

31 In 2010, Kho Jabing was tried and convicted of the offence of murder and sentenced to the then-mandatory punishment of death. His appeal was dismissed in 2011. Following the passage of the Penal Code Amendment Act, he applied to be re-sentenced and in August 2013, a High Court Judge re-sentenced him to a term of life imprisonment and 15 strokes of the cane. The Prosecution appealed and the Court of Appeal heard the matter in March 2014. On 14 January 2015, the court handed down its decision and by a majority of 3 to 2, allowed the Prosecution's appeal and sentenced

him to death. Even though the court was divided on the outcome, they were unanimous on the point of principle involved. Taking guidance from local jurisprudence developed in the context of the offences of kidnapping and gang robbery, the court unanimously held that in cases of murder where the mandatory death penalty does not apply, a sentence of death would be warranted where the actions of the offender outraged the feelings of the community.⁵⁹ In deciding whether this was the case, the court explained that the “*manner* in which the offender acted takes centre stage” and that the inquiry was ultimately directed at whether the offender had acted in a way which “exhibits viciousness or a blatant disregard for human life”⁶⁰ However, the court stressed that while the offender’s regard for human life was the “foremost” consideration, regard should still be had for “all the other circumstances of the case” such as the offender’s age and intelligence”⁶¹

32 This test has already been challenged once, by Kho Jabing himself, in a criminal motion he filed on 23 November 2015, two days before his sentence was to have been carried into effect. On that occasion, he argued, among other things, that all instances of murder involve violence and result in death and naturally attract public opprobrium. Thus, to apply this test would be tantamount to consign all persons convicted of murder to death.⁶² This argument was flatly rejected by the court, which said as follows:⁶³

89 ... This test does not entail that the court is to sentence by public opinion, with the sentence of death being imposed for the offence of murder whenever a preponderance of the members of the

public express sufficient distaste for the accused's actions. We *completely* abjure such a suggestion. That is not the way this court or, for that matter, any court elsewhere would administer justice. The test that this court adopted in *CA (Re-sentencing)* sets out, instead, a *reasoned normative standard* which future courts are to apply when deciding whether to impose the death penalty for the offence of murder. ...

90 Determining whether an offender's actions so "outrage the feelings of the community" and are "so grievous an affront to humanity and so abhorrent" that the death penalty is justified is an exercise in ethical judgment in which the sentencing court expresses the collective conscience of the community through the selection of a condign punishment. ...

33 The test is not a magical incantation and it is, as the Court of Appeal stressed, not intended to be applied in a "formulistic" manner.⁶⁴ Instead, it guides the approach of the sentencing court by providing a focal point for analysis and directing the sentencing courts' attention to the key factor in the sentencing of offenders for murder, which is the extent to which the offender had displayed a disregard for human life, without constraining the exercise of the court's sentencing discretion.

34 Should the court have done more – for instance, by setting out a "balance sheet" of aggravating and mitigating factors that should be taken into account? I am not sure it could; or even if it could, that it should. One of the perennial tensions in death penalty jurisprudence is that between individualised justice and consistency in sentencing.⁶⁵ The balance between the two is delicate. Incline too far in favour of the former, and you risk arbitrariness and

capriciousness in sentencing; lean too far in favour of the latter, the benefits of individualised consideration brought about by the amendment act would be lost.⁶⁶

35 The experience of the United States is instructive in this regard. After the decision of the Supreme Court in *Furman v Georgia*,⁶⁷ which held that the imposition of the death penalty without some measure of statutory guidance was unconstitutional, many states rushed to amend their statutes to provide for some form of prospective guidance. The initial legislative enthusiasm was curbed following the decision in *Lockett v Ohio*, where the Supreme Court struck down a statute which provided that the death penalty would be mandatory unless one of three defined mitigating factors was established on the ground that this unconstitutionally restricted the discretion of the sentencing court.⁶⁸ The conclusion of many scholars, after decades of legislative experimentation, is that the demands of consistency and individualised consideration are fundamentally at odds with each other. There are trade-offs involved and any attempt to fashion a perfect solution is quixotic.⁶⁹

36 At the end of the day, it seems to me that the approach taken by the Court of Appeal is, with respect, the right one. The test that has been articulated in *Kho Jabing* provides a useful touchstone that sentencing courts can use to focus their analysis. However, when all is said and done, the court still has to examine all the facts and circumstances of the case to determine whether the sentence of death is the right punishment. This is not an easy task. In *Kho*

Jabing's case, the court agreed on the legal principles to be applied but came to differing conclusions on whether the sentence of death was warranted.⁷⁰ As the Court of Appeal said, this shows that “sentencing is an intensely difficult exercise, and... reasonable persons can, and often do, disagree on what the appropriate sentence ought to be.”⁷¹ Over time, a body of precedent will be built up incrementally and certain key principles can be distilled from the cases. This is the common law method, and I think it should apply both with respect to the offence of murder as well as to cases where courts are to exercise their discretion when called on to decide whether to impose the death penalty under the MDA.⁷²

B. The courier requirement and the evidential bind– the case of Chum Tat Suan

37 I move to the second issue, which concerns the substantive assistance limb of the MDA. To recapitulate, in order to qualify for a sentence of life imprisonment under the substantive assistance limb, two conjunctive requirements have to be satisfied: (a) the accused has to be a courier and (b) the Public Prosecutor must certify that the accused had substantively assisted the Central Narcotics Bureau in disrupting drug trafficking activities within or outside Singapore. As I noted above, of all the areas in the amendment acts, this has attracted the most judicial attention,⁷³ so I will cover it in two parts, beginning first with the requirement that the accused must be a courier.

38 In *Chum Tat Suan*,⁷⁴ the accused was the sole passenger in a

taxi which left Johor Bahru for Singapore. At the Woodlands checkpoint, the taxi was stopped and searched and a bag containing controlled drugs was found. At trial, he claimed that the bag was not his, and that the bag he owned contained duck eggs and not drugs. Choo Han Teck J disbelieved him and convicted him. At the sentencing stage, Choo J expressed grave misgivings about the architecture of s 33B of the MDA. He said that as matters stood, there were two ways in which the matter could proceed. First, the accused could be given a chance to adduce further evidence to show that he was merely acting as a courier. However, this would give rise to the danger of inconsistent findings, as the evidence that is led could even cast doubt on the propriety of the conviction. Second, the accused could be sentenced on the evidence as it stood. However, he opined that this would place accused persons in an “evidential bind”. In order to make good the argument that he was merely acting as a courier, an accused would first have had to admit that he was trafficking in drugs, which would seem to preclude him from relying on his primary defence that he did not know that he was in the possession of controlled drugs to begin with. Otherwise, if the accused fails in his primary defence, as Chum Tat Suan did, then it might be difficult for him to later assert at the sentencing stage that he was only acting as a courier.

39 Faced with this apparent dilemma, Choo J decided to cut the Gordian knot. He eliminated the first option, and declined to allow the accused to lead further evidence on the basis that to do so might lead to a risk of inconsistent findings. However, he also rejected

the second option by declining to make a determination on whether the accused was a courier based on the available evidence altogether, holding that any such determination could potentially be “unsafe”. He postulated that “but for the manner in which the accused conducted his defence, he would have been able to give and adduce evidence tending to show that he was no more than a ‘courier’”.⁷⁵ He therefore concluded that the “benefit of the doubt” should be given to the accused and found, without an examination of the evidence, that he was a courier.

40 Given the wide ramifications of this ruling, the Prosecution filed a criminal reference to the Court of Appeal. The three questions which were posed to the court did not trouble the court at all and I will not cover them today. However, embedded within the second question was a further, implicit, question which divided the court: this was whether an accused who had been convicted of drug trafficking or importation was permitted to introduce new evidence at the sentencing stage to bolster his claim to being a courier.

41 Chao JA, who was in the minority on this issue, accepted that as a general rule, an accused should raise his full and complete defence and adduce all relevant evidence at trial. However, he noted that there was no absolute rule that precluded the running of alternative inconsistent defences. Thus, he held that it should also be open for an accused to admit further evidence in support of that alternative argument, even if his primary defence fails, provided it is “necessary” to do so.⁷⁶ The majority, comprising Tay Yong

Kwang J and Woo Bih Li J, did not dispute that it was open for an accused to run inconsistent cases in the alternative. However, their point was that the accused had to *accept the consequences* of his decision. In the event that the accused opts to run a primary defence which is inconsistent with the assertion that he is merely a courier, then he has to elect which course he will take since all evidence – including that relating to the issue of whether the accused was a courier – had to be adduced at trial. They rejected the notion that this placed accused persons in an invidious position because even before the amendment act was passed, an accused had to elect whether he wished to give evidence and, if so, what evidence to give. The object of the amendment act was to give accused persons an incentive to come clean and to cooperate, and not to give them an opportunity to conduct their cases strategically by first running a completely exculpatory defence and then falling back on the alternative argument that they are only a courier when the primary defence fails.⁷⁷

42 Some misgivings have been expressed about the position taken by the majority. It has been said that “the onus is not on the accused to take positions”.⁷⁸ It has also been posited that if a factually guilty accused person elects to run a false defence of non-involvement and that defence is eventually rejected, he might then have difficulty persuading the court at the sentencing stage that he was a courier and thereby avoid a capital sentence. This has been described as an “inordinately severe penalty for lying”.⁷⁹

43 This is a complex issue, but it seems to me that the difficulty might be more apparent than real. At the end of the day, it is always possible for an accused person to deny any involvement with the drugs and if that fails, to then rely on the evidence already before the court to claim, at the sentencing stage, that his involvement was restricted to that of a courier. This in fact happened in *Chum Tat Suan*. Although the Court of Appeal held that the accused was precluded from adducing fresh evidence to fortify his case that he was merely a courier, at the re-sentencing stage before Choo J, he was nonetheless found to be a courier. This is because the evidence which was led *only* went so far as to show that the accused was involved in the transportation of drugs.⁸⁰

44 The point, it seems to me, is this. The question of whether an accused is a courier is an inquiry that goes to the *actus reus* of the offence. This is a matter which would have been canvassed at the trial since the transportation of drugs from one point to another is a constitutive element of the offence of trafficking. If the evidence led only goes so far as to show that the involvement of the accused was “restricted to transporting, sending or delivering a controlled drug” then all the accused needs to do at the sentencing stage is to point to the evidence and submit that it shows that he was only a courier. He does not need to lead more evidence. If the accused fails to prove at the sentencing stage that he was only a courier, that will invariably be because the evidence led by the Prosecution during the liability stage of proceedings showed that the extent of his involvement was in fact greater than that of a mere courier. It

will not be because the accused did not have the opportunity to lead further evidence.

C. Challenging the Public Prosecutor's decision on non-certification: the case of Mohammad Ridzuan

45 Finally, I turn to the third issue, which concerns the certification process. Under s 33B(4) of the MDA, the decision of whether or not any person has substantively assisted the Central Narcotics Bureau in disrupting drug trafficking activities shall be at the sole discretion of the Public Prosecutor. Given that this determination is one which is made by the Executive, challenges invariably proceed by way of an application for judicial review.⁸¹ Two principal questions arise in this context. First, what are the grounds upon which the Public Prosecutor's decision may be challenged? Second, what evidence does an accused person have to do to put forward in order to make good his case?

Grounds of challenge

46 I begin with the grounds of challenge. Section 33(4) of the MDA states that the decision of the Public Prosecutor on the issue of certification may only be reviewed on two grounds: (a) if the determination was done in bad faith or (b) if the decision was made with malice. In this context, "bad faith" refers to the knowing use of a discretionary power for extraneous purposes – that is to say it was used "for purposes other than those for which the [Public Prosecutor] was granted the power."⁸² Thus, it may be argued that the Public Prosecutor exercised his power of certification for an

extraneous purpose if he deliberately withheld the issuance of the certificate on a person who had rendered substantive assistance in order to prevent the court from exercising its sentencing discretion and not because no substantive assistance had in fact been rendered.⁸³ The expression “malice” has not been defined in the cases, but it would seem to refer to the use of a discretionary power with the subjective intention of causing harm or injury to a person, usually because of personal animosity or some other improper motive.⁸⁴

47 In *Muhammad Ridzuan’s* case, the Court of Appeal held that in addition to these two statutory grounds, there was a third: the Public Prosecutor’s decision may be challenged if it is shown to be unconstitutional. Even though this is not explicitly stipulated in the MDA, this ground of review flows from the doctrine of constitutional supremacy, which provides that all exercises of power have to comply with the provisions of the Constitution.⁸⁵

What evidence does the applicant need to put forward?

48 I turn to consider what the applicant would have to show in order to make good his case. In *Ridzuan’s* case, the Court of Appeal clarified that since the application was one for judicial review, the usual two-stage process would apply. At the first stage, the applicant has to “establish a *prima facie* case of reasonable suspicion that the Public Prosecutor had breached the relevant standard” – that is to say, that the Public Prosecutor had acted in bad faith, with malice, or unconstitutionally. It is only when this

threshold is crossed that the applicant will be granted leave to commence judicial review proceedings. At the second stage, the *evidential* burden shifts to the Public Prosecutor to justify his decision. The court held that this approach was “normatively sensible”. The Public Prosecutor is protected from having to disclose sensitive information about the operations and intelligence gathering processes of the Central Narcotics Bureau each time an application is filed. Instead, the Public Prosecutor will only be required to do so if a *prima facie* case for relief can be shown. This strikes the right balance between the competing interests of the applicants and wider society.

49 In making out a case for relief, direct evidence is not necessary. Instead, circumstantial evidence will suffice. The court gave the example of an applicant who sought to bring a challenge under Article 12 of the Constitution. To make out a *prima facie* case that the Public Prosecutor had breached Article 12, it would suffice for him to show the following two things:⁸⁶ (a) first, “that his level of involvement in the offence and the consequent knowledge he acquired of the drug syndicate he was dealing with was practically identical to a co-offender’s level of involvement and the knowledge the co-offender could have acquired”; and (b) second, “he and his co-offender had provided practically the same information to CNB – yet only his co-offender had been given the certificate of substantive assistance.”

50 In *Ridzuan*’s case, the applicant argued that he was the target

of unfair discrimination because his accomplice had received a certificate of substantive assistance but he had not. However, on analysis, it was shown that he and his accomplice were *not* similarly situated. His accomplice had interacted with a member of the drug syndicate and had ridden with the member of the syndicate on a delivery run. This was an important point of differentiation, for it was clear that the accomplice would be in a much better position to provide useful information.⁸⁷ As for the nature of the information provided, the applicant relied mostly on the statements which were admitted during their trial, which showed that he and his accomplice provided a similar account to the CNB. However, the court observed that this did not represent the full details of the information given by both of them to the CNB. At the initial hearing of the matter, the court suggested that the accomplice could be subpoenaed to give evidence on the information he provided by the CNB, in order that the court might make a determination on whether the information provided by the applicant and the accomplice were identical.

51 However, this was resisted by the Prosecution on two grounds. First, it was argued that the courts would be ill-equipped to assess whether an offender had rendered substantive assistance since it was an inquiry which engaged a variety of operational considerations which the Executive was best placed to assess. Second, it was contended that to allow the open cross-examination of the accomplice would compromise the CNB's operational effectiveness, since it would lead to the release of confidential

information into the public domain, particularly if CNB officers were called as rebuttal witnesses.⁸⁸

52 The first consideration, as the court rightly pointed out, was neither here nor there. The court would not be receiving the accomplice's evidence in order to make a determination of whether it sufficed to render the CNB substantive assistance – that was clearly a matter which the Public Prosecutor was statutorily charged with determining. Rather, the court was proposing to receive the evidence in order to determine if the applicant and the accomplice had provided the same information. Such a determination was plainly within the competence of the court and it would not require any operational expertise nor would it intrude into the Public Prosecutor's statutory prerogatives. However, the second objection is more difficult to answer. During the Parliamentary debates, one Member of Parliament adverted to the fact that publicising the nature and contents of a person's assistance might discourage them from speaking up. The reason was not given, but I can well imagine that it could be founded on a fear of reprisal, whether against themselves or their families.⁸⁹

53 In *Ridzuan*, the matter was eventually resolved after the Deputy Public Prosecutors in charge of the matter filed a number of affidavits to set out both the procedural history of the matter as well as to apprise the court of the materials the Public Prosecutor took into account in making the decision on certification. They also categorically deposed that the information provided by the

applicant and his accomplice were materially different, and that after having considered the material carefully, the Public Prosecutor had determined that the accomplice had rendered substantive assistance whereas the applicant had not. When this was considered alongside the fact that the applicant and the accomplice were differently situated, the court concluded that the applicant had not established a reasonable case of reasonable suspicion that the non-certification decision was unconstitutional.⁹⁰

V. Conclusion

54 In conclusion, I hope that this lecture has given you a broad overview of the nature and scope of the amendments to the death penalty regime. If nothing else, it can be seen that the criminal justice system is not static, but dynamic. It has changed dramatically over the years to cope with the needs and expectations of an evolving society and I have no doubt that it will continue to do so. The full impact of the recalibration remains to be seen. But for now, it will appear from the very issuance of certificates of substantive assistance that our law enforcement agencies are making good progress in their on-going war against the scourge of drug trafficking.

55 Thank you very much.

¹ *Singapore Parliamentary Debates, Official Report* (9 July 2012) vol 89, “Enhancing Our Drug Control Framework and Review of the Death Penalty” (Teo Chee Hean, Deputy Prime Minister and Minister for Home Affairs) (“Ministerial Statement on Amendments to

MDA”). Since July 2011, when the review began, a moratorium had been placed on all execution.

² These were the Penal Code (Amendment) Act 2012 (Act No 32 of 2012) (“PC Amendment Act 2012”) and the Misuse of Drugs (Amendment) Act 2012 (Act 30 of 2012) (“MDA Amendment Act 2012”).

³ I derived this three-fold classification of legal scholarship from Richard A Posner, “The Present Situation in Legal Scholarship” (1981) 90 YLJ 1113.

⁴ In Chan Wing Cheong, “The Death Penalty in Singapore: in Decline but Still Too Soon for Optimism” (2016) 11 Asian Criminology 179 (“The DP in Singapore”), the author points out that for the period between 1991 to 2014, these two offences accounted for 98% of all executions carried out were carried out in respect of these two offences, though it was noted that the statistics for “murder” probably include all homicide-related offences such as gang robbery.

⁵ Andrew Phang Boon Leong, “Reception of English Law in Singapore: Problems and Proposed Solutions” (1990) 2 SAcLJ 20 at pp 22–28.

⁶ It was thought that the punishment of death by hanging was first introduced by the Saxons in the 6th century AD and its use expanded considerably in the 18th century. In 1688, there were 50 offences which were punishable by death; by 1815, this number had risen to a staggering 288: see Julian Knowles QC, *The Abolition of the Death Penalty in the United Kingdom: How it Happened and Why it Still Matters* <<http://www.deathpenaltyproject.org/wp-content/uploads/2015/11/DPP-50-Years-on-pp1-68-1.pdf>> (“Abolition of DP in UK”) at p 10 (accessed 20 October 2016).

⁷ Abolition of DP in UK at p 11.

⁸ Martin Wiener, *Reconstructing the Criminal: Culture, Law, and Policy in England, 1830–1914* (Cambridge University Press, 1990), p 61.

⁹ David Skuy, “Macaulay and the Indian Penal Code of 1862: The Myth of the Inherent Superiority and Modernity of the English Legal System Compared to India’s Legal System in the Nineteenth Century” (1998) 32 Modern Asian Studies 513 at pp 545–546.

¹⁰ *Ibid* at 546.

¹¹ T.B. Macaulay, J.M. Macleod, G.W. Anderson and F. Millett, *A Penal Code Prepared by the Indian Law Commissioners* (The Lawbook Exchange, Ltd, 2002) at Note A.

¹² Penal Code (Act No 45 of 1860) (India) at ss 132 and 396. One notable exception was s 303, which provided that a sentence of death would be mandatory in cases where murder was committed by a person who was already serving a life sentence of transportation. This provision was struck down the Indian Supreme Court in *Mithu v State of Punjab* (1983) 2 SCR 690 for being unconstitutional and is therefore no longer in use, even though it has not formally been repealed.

¹³ Straits Settlement Penal Code (Ordinance No 4 of 1871) (“SS PC 1871”), s 302.

¹⁴ Judgment of Death Act 1823 (4 Geo. 4, c 48)

¹⁵ Forgery, Abolition of Punishment of Death Act 1832 (2 & 3 Will. 4, c 123).

¹⁶ Abolition of DP in UK at p 13.

¹⁷ Penal Code (Amendment) Ordinance 1883 (Ord II of 1883).

¹⁸ *Straits Settlements Short-hand Report of the Proceedings of the Legislative Council* (28 February 1883) at p 3 (F A Harwood, Acting Attorney General).

¹⁹ Misuse of Drugs Act (Act 5 of 1973).

²⁰ The MDA has a schema of punishments for drug trafficking set out in the second schedule under which punishments of increasing levels of severity are imposed depending on (a) the classification and (b) the weight of the drugs in question.

²¹ *Singapore Parliamentary Debates, Official Report* (16 February 1972) vol 32 at col 416 (Chua Sian Chin, Minister for Home Affairs).

²² These were, in the main, the unauthorised import, export, or trafficking of Class A drugs, where the weight of the drugs exceeded the amount specified in the statute. The

manufacture of certain Class A drugs, such as heroin, was punishable by death regardless of the actual quantity of drugs manufactured.

²³ *Singapore Parliamentary Debates, Official Report* (20 November 1975) vol 34 at cols 1381–1382 (Chua Sian Chin, Minister for Home Affairs).

²⁴ *Ibid* at col 1385.

²⁵ Peggy Pai-Keerthi Pei Yu, “Looking Beyond Prospective Guidance: Sentencing Discretion in Capital Drug Framework and Lessons from the US” (2014) 26 SAclJ 520 (“Looking Beyond Prospective Guidance”) at para 16.

²⁶ Ministerial Statement on Amendments to MDA.

²⁷ The expression “courier” is not actually used in the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) (“MDA”), but it was used in the relevant Parliamentary debates. It is a convenient shorthand reference to a person whose role is limited only to one of the defined list of activities set out in s 33B(2)(a) of the MDA. Also, if an accused only (a) offered to do any of these activities, (b) did an act preparatory to these activities, or (c) offered to do any preparatory act to them then he/she will also be considered a courier and will be eligible for an alternative sentence. .

²⁸ Misuse of Drugs Act (Cap 185, 2008 Rev Ed) (“MDA”) at s 33B(2)

²⁹ *Ibid* at s 33B(3).

³⁰ Misuse of Drugs (Amendment) Bill 2012 (Bill 27 of 2012); Penal Code (Amendment) Bill 2012 (Bill 33 of 2012).

³¹ Chan Sek Keong, “The criminal process—The Singapore model” (1996) 17 Sing LR 433.

³² Chan Sek Keong, “Rethinking the Criminal Justice System of Singapore for the 21st Century” in *The Singapore Conference: Leading the Law and Lawyers into the New Millennium @ 2020* (Butterworths, 2000), pp 49-50.

³³ *Ibid* at paras 5–9.

³⁴ *Ibid* at para 45.

³⁵ Ministerial Statement on Amendments to the MDA; *Singapore Parliamentary Debates, Official Report* (14 November 2012) vol 89 (Teo Chee Hean, Deputy Prime Minister and Minister for Home Affairs).

³⁶ Ministerial Statement on Amendments to Penal Code

³⁷ *Singapore Parliamentary Debates, Official Report* (14 November 2012) vol 89 (K Shanmugam, Minister for Law) “Changes to the Application of the Death Penalty to Homicide Offences” (“Ministerial Statement on Penal Code”).

³⁸ *PP v Govindasamy s/o Nallaiah* [2016] 3 SLR 374 at [39].

³⁹ As a general point, this is hardly controversial. Lord Bingham pressed this point forcefully in *Reyes v The Queen* [2002] 2 WLR 1034 (“*Reyes*”) at [11].

⁴⁰ See, eg, Michael Hor, “The Death Penalty in Singapore and International Law” (2004) 8 SYBIL 105 (“DP in Singapore and Intl Law”); KS Rajah, “Inside the Bar – The Mandatory Death Sentence”, *Singapore Law Gazette* (April 2005)

⁴¹ Penal Code (Cap 224, 2008 Rev Ed), s 300(c). For a small sample of the critical articles, see, eg, Victor V Ramraj, “Murder without an Intention to Kill” [2000] SJLS 560; Alan Tan Khee Jin, “Revisiting Section 300(c) Murder in Singapore” [2005] 17 SAclJ 693; and Chan Wing Cheong, “No Punishment Without Fault” (2013) 25 SAclJ 801.

⁴² The example used here is drawn from the decision of the Court of Appeal in *PP v Lim Poh Lye* [2005] 4 SLR(R) 582. See, also, M Sornarajah, “The Definition of Murder in the Penal Code” [1994] SJLS 1 at 14.

⁴³ See DP in Singapore and Intl Law at p 107.

⁴⁴ Ministerial Statement on Amendments to Penal Code.

⁴⁵ See para 8 above.

⁴⁶ Minister Shanmugam put the point plainly during the debates following the second reading of the 2012 MDA Amendment Bill, where he said (see MDA Amendment Bill 2012 Debates (Day 2) (K Shanmugam, Minister for Law):

[The MPs who spoke] have also asked: are drug couriers in a position to provide substantive assistance? Fair point. It is a point that was raised extensively during our consultations. Let me throw back the question. Assume the couriers are not able to help, what should be the penalty? That goes back to the fundamental question: should there be the death penalty for couriers? That is the first hurdle you have to cross. It is a difficult question, but I think Members other than Mr Lien have agreed that there should be the death penalty for couriers. Once you say that, then you will see this change as making an exception to that position. So only those who qualify for that exception can be spared the death penalty.

⁴⁷ See the Ministerial Statement on Amendments to MDA. The obverse point was made by a during the debates following the second reading of the MDA Amendment Bill 2012, where he said (see *Singapore Parliamentary Debates, Official Report* (12 November 2012) vol 89 (MDA Amendment Bill 2012 Debates (Day 1)”) (Edwin Tong, Chun Fai, Member of Parliament for Moulmein-Kallang,):

Sir, I understand the logic and rationale of the amendments which are being proposed to the MDA. They seek to draw a very careful, calibrated distinction between the different levels of accountability. It seeks to temper and mitigate the harsh drug laws with compassion. So for those who are found to be less culpable and involved only in the transportation of the drugs, the death penalty would not be mandatory.

⁴⁸ The expression “criminal process” is wider than the expression “criminal justice system”. The former refers to “all the complexes of activity that operate to bring the substantive law of crime to bear (or avoid bringing it to bear) on persons who are suspected of having committed crimes”: see Herbert Packer, “Two Models of the Criminal Process” (1964) 113 *University of Pennsylvania Law Review* 113 at 2. The latter is more restricted, and is usually used in relation to the legal process leading to the determination of legal guilt and the imposition of an appropriate sentence.

⁴⁹ *Mohammad Faizal* at [44]–[45].

⁵⁰ Criminal Procedure Code (Cap 68, 2012 Rev Ed) at s 228(6). There are two aspects to this: first, the sentence must be within the ambit of the applicable punishment section; second, it must be assessed and passed in accordance with established judicial principles: see *PP v Tan Fook Sum* [1999] 2 SLR 523 at [14].

⁵¹ Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint), Art 35(8).

⁵² *Yong Vui Kong v Attorney General* [2011] 2 SLR 1189 (“*Yong Vui Kong (clemency)*”) at [74(c)].

⁵³ *Mohammad Faiza* at [62] and [63].

⁵⁴ In the case of the offence of murder, it was explained that although all forms of murder were serious, there were “additional considerations” which may come into play when the Public Prosecutor decides whether a capital charge should be preferred. Specifically, Minister Shanmugam mentioned: “the precise intention of the accused, the manner in which the homicide occurred, and the deterrent effect a charge may have on others” (see Ministerial Statement on Amendments to the Penal Code). It was thought that it would be desirable that the courts could be given the discretion also take these factors into account in the sentencing process.

Where the diminished responsibility limb of the MDA is concerned, it was explained that there had been cases where offenders committed offences because they laboured under a mental disability that impaired their appreciation for the gravity of the act. In deciding what charge to frame, the Public Prosecutor would take into account, among other things, the extent of the offender’s mental disability and whether it had a significant impact on his culpability. It

was thought that this was a matter which the courts should also likewise be “legislatively vested with the discretion to consider” at the sentencing stage (see Ministerial Statement on Amendments to the MDA).

⁵⁵ For example, the “diminished responsibility” limb of the MDA was modeled after Exception 7 to s 300 of the Penal Code. Thus, the courts are familiar both with the concept of diminished responsibility as well as the findings of fact that have to be made: see *Ong Pang Siew v PP* [2010] 1 SLR 606 at [59]–[64].

⁵⁶ The DP in Singapore at 189.

⁵⁷ Chandra Mohan and Priscilla Chia, “The Death Penalty and the Desirability of Judicial Discretion”, *Singapore Law Gazette* (March, 2013) pp 11–19 at p 12.

⁵⁸ *PP v Kho Jabing* [2015] 2 SLR 112 (“*Kho Jabing (CA Re-sentencing)*”)

⁵⁹ *Ibid* at [44], [83], and [203]. The Court of Appeal relied on its previous decisions in *Sia Ah Kew v PP* [1974–1976] SLR(R) 54 (which concerned kidnapping) and *Panya Martmontree v PP* [1995] 2 SLR(R) 806 (which concerned gang robbery. The court rejected the approach favoured by the Indian and Caribbean courts, which was to confine the death penalty only to cases which could be considered the “rarest of the rare”, where the alternative sentence of life imprisonment was “unquestionably foreclosed” (see *Bachan Singh v The State of Punjab* (1980) 2 SCC 684 at [209]). To do so, the court said, would be to “artificially confine and sequester the imposition of the death penalty”, which was inconsistent with principle and Parliamentary intent (see *Kho Jabing (CA Re-sentencing)* at [41] and [43]).

⁶⁰ *Ibid* at [45].

⁶¹ *Ibid* at [48].

⁶² *Kho Jabing v PP* [2016] 3 SLR 135 (“*Kho Jabing (CM (No 1))*”) at [87].

⁶³ *Ibid* at [89]–[90].

⁶⁴ *Kho Jabing (CA Re-sentencing)* at [15].

⁶⁵ Looking Beyond Prospective Guidance at para 67.

⁶⁶ DP in Singapore and Intl Law at 112.

⁶⁷ *Furman v Georgia* 408 US 238 (1972). In the space of little over a year, the Supreme Court of the United States went from affirming in *McGautha v California* 402 US 183 (1971) that “we find it quite impossible to say that committing to the untrammelled discretion of the jury the power to pronounce life or death in capital cases is offensive to anything in the Constitution” (at 207) to saying, in *Furman v Georgia*, that “[t]hese death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual... the Eighth and Fourteenth Amendments cannot tolerate the infliction of death under legal systems that permit this penalty to be so wantonly and freakishly imposed” (at 310 *per* Stewart J).

⁶⁸ *Lockett v Ohio* 438 US 586 (1978) at 604 *per* Bu

⁶⁹ Looking Beyond Prospective Guidance at paras 79–82.

⁷⁰ The majority held that the following three critical factors were cumulatively sufficient to establish that Kho Jabing had shown a blatant disregard for human life: (a) he had struck the deceased from behind without warning; (b) he inflicted at least one more blow on the deceased while he lay defenceless on the ground; and (c) the blows were of such force that they caused extensive fractures and weakened it to the extent that a further blow by the co-accused and/or the deceased’s fall caused further fractures when ordinarily they would not. They concluded that the “savagery of the attack... was characterized by needless violence that went beyond the pale (see *Kho Jabing (CA-Re-sentencing)* at [77] and [78]).

The minority did not think that these factors were sufficient to warrant the imposition of the death penalty. In the minority’s opinion, the threshold would only have been crossed if it could be concluded that the Applicant had inflicted three or more blows on the deceased which, alone, were responsible for the multiple fractures of the latter’s skull (see *Kho Jabing (CA-Re-sentencing)* at [199] *per* Lee Seiu Kin J; and at [215] *per* Woo Bih Li J).

⁷¹ *Kho Jabing (CM (No 1))* at [102].

⁷² In *PP v Chum Tat Suan* [2016] SGHC 27 (“*Chum Tat Suan (HC) (No 4)*”) the offender satisfied the conjunctive requirements for an alternative sentence under the substantive assistance limb but nevertheless requested to be sentenced to death. The High Court declined the request and held that the decision as to sentence was within the discretion of the court. See, generally, *Looking Beyond Prospective Guidance* at paras 83–86.

⁷³ See, eg, *Cheong Chin Yin v AG* [2014] 3 SLR 1124; *Muhammad Ridzuan bin Mohd Ali v Attorney-General* [2014] 4 SLR 773 (HC); *Muhammad Ridzuan bin Mohd Ali v Attorney-General* [2015] 5 SLR 1222 (CA) (“*Muhammad Ridzuan v AG (CA)*”); *Rosman bin Abdullah v PP* [2015] SGHC 287; *Quek Hock Lye v Public Prosecutor* [2015] 2 SLR 563.

⁷⁴ *PP v Chum Tat Suan* [2014] 1 SLR 336 (“*Chum Tat Suan (HC) (No 2)*”)

⁷⁵ *Ibid* at [7].

⁷⁶ *PP v Chum Tat Suan* [2015] 1 SLR 834 (“*Chum Tat Suan (CA)*”) at [27]–[30]; [40]–[42]; [49]–[52].

⁷⁷ *Ibid* at [79]–[81].

⁷⁸ *Chum Tat Suan (HC) (No 2)* at [6]. See also, Chen Siyuan, “Discretionary Death Penalty for Convicted Drug Couriers in Singapore: Reflections on the High Court Jurisprudence Thus Far” (2015) 23 ILUMLJ 31 at pp 41–44.

⁷⁹ *PP v Obeng Comfort* [2015] SGHC 309 at [34].

⁸⁰ *PP v Chum Tat Suan* [2015] 4 SLR 591 at [6]. In *PP v Christeen d/o Jayamany and another* [2015] SGHC 126, where the accused ran the defence that she did not know that what she was carrying were drugs. The court disbelieved her, but nevertheless found that she was a courier. In *PP v Agbozo Billy* [2016] SGHC 122, the accused ran the defence that he did not know that the suitcase he was carrying (which he claimed had been given to him by another person) contained drugs. The court disbelieved him but nevertheless held that “[a]s the Prosecution adduced no evidence which shows that [the accused], in committing the offence, did anything more than the activities listed in s 33B(2)(a) of the MDA, namely transporting, sending or delivering drugs and/or offering to transport, send or deliver drugs and/or doing or offering to do any act preparatory to or for the purpose of transporting, I find that [the accused] was acting no more than as a courier.”

⁸¹ *Muhammad Ridzuan bin Md Ali v PP and other matters* [2014] 3 SLR 721 at [102].

⁸² *Muhammad Ridzuan v AG (CA)* at [71].

⁸³ *Ibid* at [9].

⁸⁴ *De Smith’s Judicial Review* (Lord Woolf *et al* eds) (Sweet & Maxwell, 7th Ed, 2013) at paras 5-088 to 5-090.

⁸⁵ *Muhammad Ridzuan v AG (CA)* at [35].

⁸⁶ *Ibid* at [51].

⁸⁷ *Ibid* at [53].

⁸⁸ *Ibid* at [56]–[57].

⁸⁹ MDA Amendment Bill Debates (Edwin Tong, Chun Fai, Member of Parliament for Moulmein-Kallang)

⁹⁰ *Muhammad Ridzuan v AG (CA)* at [60], [64], and [66].