IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2016] SGCA 67

Criminal Motion No 1 of 2016

Between

Prabagaran a/l Srivijayan

… *Applicant*

And

Public Prosecutor

… *Respondent*

Criminal Motion No 2 of 2016

Between

Nagaenthran a/l Dharmalingam

… *Applicant*

And

Public Prosecutor

… *Respondent*

Criminal Motion No 3 of 2016

Between

Muhammad Ridzuan bin Md Ali

… *Applicant*

And

Public Prosecutor

… *Respondent*

Criminal Motion No 4 of 2016

Between

Mohd Jeefrey bin Jamil

… *Applicant*

And

Public Prosecutor

… *Respondent*

JUDGMENT

[Constitutional Law] — [Remedies]
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Sundaresh Menon CJ, Chao Hick Tin JA and Andrew Phang Boon Leong JA
10 March 2016; 5 July 2016

2 December 2016 Judgment reserved.

Chao Hick Tin JA (delivering the judgment of the court):

Introduction

1 Section 33B ("s 33B") of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) ("the MDA") is, in many ways, *sui generis* in the criminal law of Singapore. Introduced by way of the Misuse of Drugs (Amendment) Act 2012 (Act 30 of 2012) ("the Amendment Act"), it confers upon the court the discretion to sentence a person, who is convicted of offences punishable by death, to suffer the lesser punishment of life imprisonment where certain statutorily prescribed requirements are met. The relevant provisions read as follows:

> **33B.**—(1) Where a person commits or attempts to commit an offence under section 5(1) or 7, being an offence punishable with death under the sixth column of the Second Schedule, and he is convicted thereof, the court —

> (a) may, if the person satisfies the requirements of subsection (2), instead of imposing the death penalty, sentence the person to imprisonment for life and, if the person is sentenced to life imprisonment, he shall also be sentenced to caning of not less than 15 strokes; or
>
> …
>
> (2) The requirements referred to in subsection (1)(a) are as follows:
>
> > (a) the person convicted proves, on a balance of probabilities, that his involvement in the offence under section 5(1) or 7 was restricted —
> >
> > > (i) to transporting, sending or delivering a controlled drug;
> > >
> > > (ii) to offering to transport, send or deliver a controlled drug;
> > >
> > > (iii) to doing or offering to do any act preparatory to or for the purpose of his transporting, sending or delivering a controlled drug; or
> > >
> > > (iv) to any combination of activities in sub-paragraphs (i), (ii) and (iii); and
> >
> > (b) the Public Prosecutor certifies to any court that, in his determination, the person has substantively assisted the Central Narcotics Bureau in disrupting drug trafficking activities within or outside Singapore.

2 Section 33B(2) of the MDA ("s 33B(2)") sets out two requirements. The first is that the person convicted proves, on a balance of probabilities, that his involvement in the offence was restricted to the acts prescribed in s 33B(2)(*a*) of the MDA. That is, his or her involvement was simply that of being a drug courier ("the Courier Requirement"). The second, set out in s 33B(2)(*b*) of the MDA ("s 33B(2)(*b*)"), is that the Public Prosecutor ("the PP") certifies that the person has substantively assisted in "disrupting drug trafficking activities". It is the latter that gives s 33B its distinctive character – it is a legislative prescription for the exercise of judicial power to be conditional upon the exercise of executive power. More pertinently, the

reviewability of the exercise of the PP's discretion is expressly stated in s 33B(4) of the MDA ("s 33B(4)") in the following terms:

> The determination 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 and no action or proceeding shall lie against the Public Prosecutor in relation to any such determination unless it is proved to the court that the determination was done in bad faith or with malice.

3 Section 33B came into effect on 1 January 2013 and it has engendered, it its brief existence, numerous applications by persons convicted of such offences but were unable to satisfy the prescribed requirements. Criminal Motions Nos 1 to 4 of 2016 (collectively, "the Motions" and respectively, "CM 1", "CM 2", "CM 3" and "CM 4") are the latest in a string of such applications. All these challenges raise questions as to the constitutionality of s 33B(2)(*b*) and s 33B(4) (collectively, the "Impugned Provisions"), as well as s 33(1) read with the Second Schedule to the MDA (collectively, "the Second Schedule").

Background

4 Given that the Motions challenge the constitutionality of the relevant provisions of the MDA, the facts relating to each of the applicants' convictions are only of tangential relevance. Nevertheless, it is useful to set out briefly the procedural history of each of the applicants given that they themselves have drawn a distinction between those who were convicted before the Amendment Act came into force, and those who were convicted after.

CM 1

5 On 22 September 2014, the applicant in CM 1 was convicted of importing not less than 22.24g of diamorphine into Singapore on 12 April 2012, well above the 15g attracting the mandatory death penalty. The PP did not issue a certificate of substantive assistance under s 33B(2)(*b*) of the MDA, and the High Court judge accordingly imposed the mandatory sentence of death: *Public Prosecutor v Prabagaran a/l Srivijayan* [2014] SGHC 222 at [16]. No finding was made as to whether the applicant satisfied the Courier Requirement.

6 His appeal against his conviction, premised solely on the issue as to whether he had rebutted the presumptions of knowledge and possession under ss 18(2) and 21 of the MDA respectively, was dismissed on 2 October 2015: *Prabagaran a/l Srivijayan v Public Prosecutor* [2015] SGCA 64.

CM 2

7 On 22 November 2010, the applicant in CM 2 was convicted of having imported not less than 42.72g of diamorphine on 22 April 2009. As the Amendment Act had not come into effect at that time, the judge sentenced the applicant to death as mandated by s 33 read with the Second Schedule: *Public Prosecutor v Nagaenthran A/L Dharmalingam* [2011] 2 SLR 830. His appeal against his conviction, in which he argued that he had rebutted the presumption in s 18(2) of the MDA and had acted under duress, was dismissed on 27 July 2011: *Nagaenthran A/L Dharmalingam v Public Prosecutor* [2011] 4 SLR 1156.

8 Nevertheless, the execution of Nagaenthran was stayed in view of the fact that the government was then reviewing the mandatory death penalty in relation to drug offences, which eventually led to the enactment of the Amendment Act. Other than the introduction of s 33B in the MDA, the Amendment Act also provided a transitional framework for persons who had already been convicted and sentenced to death under the MDA, and had their appeal dismissed, to be resentenced in accordance with s 33B. Section 27(6) of the Amendment Act specifically provides for this scenario and it reads:

> (6) Where on the appointed day, the Court of Appeal has dismissed an appeal brought by a person for a relevant offence, the following provisions shall apply:
>
> (a) the person may apply to the High Court to be re-sentenced in accordance with section 33B of the principal Act;
>
> (b) the High Court shall determine whether the requirements referred to in section 33B of the principal Act are satisfied after hearing any further arguments or admitting any further evidence, and —
>
> (i) if the requirements referred to in section 33B of the principal Act are not satisfied, affirm the sentence of death imposed on the person; or
>
> (ii) if the requirements referred to in section 33B of the principal Act are satisfied, re-sentence the person in accordance with that section;
>
> (c) the decision of the High Court in paragraph (b) shall be deemed to be made in its original jurisdiction and an appeal may lie from such decision;
>
> …

9 The applicant in CM 2 has yet to apply for resentencing under s 27(6) of the Amendment Act. On 10 December 2014, the Deputy Public Prosecutor informed the court and the then-counsel for the applicant that the PP would not be issuing a certificate of substantive assistance to the applicant. As a

consequence, the applicant commenced Originating Summons No 272 of 2015 ("OS 272") on 27 March 2015, seeking judicial review of the PP's decision not to grant the certificate. OS 272 has yet to be heard at the time of this judgment.

CM 3

10 On 10 April 2013, the applicant in CM 3 was convicted together with a co-accused person of trafficking, in furtherance of a common intention, by jointly possessing for the purpose of trafficking not less than 72.5g of diamorphine. The High Court judge found that both the applicant and the co-accused satisfied the Courier Requirement. However, as the PP had only provided a certificate of substantive assistance to the co-accused and not the applicant, the co-accused was sentenced to life imprisonment and 15 strokes of the cane while the applicant was sentenced to death: *Public Prosecutor v Abdul Haleem bin Abdul Karim and another* [2013] 3 SLR 734.

11 The applicant appealed against the decision and at the same time, filed a criminal motion challenging the PP's decision not to issue the certificate. The matters were heard together. The appeal on the grounds that there was no common intention, the presumption of possession had been rebutted, and that the presumption of knowledge had been rebutted, failed. The criminal motion was dismissed on the ground that the correct procedure to initiate that challenge was by way of an application under O 53 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) invoking the High Court's supervisory jurisdiction: *Muhammad Ridzuan bin Md Ali v Public Prosecutor and other matters* [2014] 3 SLR 721.

12 The applicant then applied for leave to commence judicial review proceedings against the PP, which was denied: *Muhammad Ridzuan bin Mohd Ali v Attorney-General* [2014] 4 SLR 773 ("*Ridzuan (HC)*"). The appeal against this decision of the High Court was also dismissed on the ground that the applicant had not established a *prima facie* case of reasonable suspicion that the PP had breached the relevant standard: *Muhammad Ridzuan bin Mohd Ali v Attorney-General* [2015] 5 SLR 1222 ("*Ridzuan (CA)*").

CM 4

13 On 28 November 2014, the applicant in CM 4 was convicted of trafficking, by having in his possession for the purpose of trafficking, not less than 45.26g of diamorphine. While the PP's position was that the applicant had satisfied the Courier Requirement, it declined to issue a certificate of substantive assistance. Accordingly, the sentence of death was pronounced: *Public Prosecutor v Mohd Jeefrey bin Jamil* [2014] SGHC 255 at [32]. His appeal, premised solely on the question of his presumed knowledge of the drugs, was dismissed without a written decision being issued.

The grounds of the applicants' challenge

14 While there is no factual nexus between the Motions, the grounds on which the applicants seek to rely for the purposes of their Motions are identical. They raise no issues of fact but question squarely the constitutionality of the Impugned Provisions, as well as the Second Schedule. There are, broadly speaking, two main points of challenge. First, they argue that the Impugned Provisions are in breach of the constitutional principle of separation of powers embodied in the Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint) ("the Constitution"). Second, they say

that the Impugned Provisions are not "law" capable of depriving the applicants' lives and liberty under Art 9(1) of the Constitution.

15 While the factual positions of the four applicants are different, they have not in their Motions made any point on that account. The primary relief which all of them seek is an "order setting aside [their] sentences of death and substituting the said sentences with sentences of imprisonment for life". Alternatively, they seek an order staying the execution of their sentences pending their resentencing under a constitutionally valid provision. As we see it, the applicants face the same obstacle which the applicant in *Quek Hock Lye v Public Prosecutor* [2015] 2 SLR 563 ("*Quek Hock Lye*") was unable to surmount: if the applicants are correct in their contentions that s 33B is unconstitutional, then this court would have to disregard s 33B as if it was never enacted and each of the applicants would have to be sentenced under the Second Schedule. We could not see how this argument could assist them. This would mean that the original sentence of death imposed on Nagaenthran (the applicant in CM 2) would remain. As regards the sentence imposed on each of the other three applicants, each would also be thrown back to the position as if s 33B was never enacted. This effectively means that each of them would still suffer the punishment of death. Accordingly, we raised this concern at the first hearing and invited the parties to tender their written submissions on this point, which we canvass in greater detail below.

Preliminary Issues

The principle of finality

16 Before we turn to the substantive merits of the Motions, we first consider whether we should hear the applicants on the Motions in light of PP's

submission that that these are blatant attempts at re-opening previous decisions of this court. The applicants share three things in common. First, all of them have been convicted of offences under the MDA carrying the mandatory death penalty and sentenced accordingly. Second, the appeals against their convictions have been heard by this court and dismissed. Third, all of them have been determined by the PP not to have substantively assisted the Central Narcotics Bureau in disrupting drug trafficking activities under s 33B(2)(*b*). It is against this common backdrop that the PP submitted that this court should be slow in exercising its discretion to reopen its previous decisions.

17 In *Kho Jabing v Public Prosecutor* [2016] 3 SLR 135 ("*Kho Jabing*"), a judgment of this court issued prior to the second hearing of the Motions, this court noted the burgeoning number of applications seeking to reopen concluded criminal appeals and while we acknowledged that this court has the inherent power to do so, we stressed that the power should only be exercised where there is "sufficient material on which the court can say there has been a miscarriage of justice": *Kho Jabing* at [44]. The touchstone remains the same regardless of whether the newly raised legal arguments involved constitutional points, and whether the court's inherent power should be exercised would largely depend on the merits of the constitutional challenge and whether they would affect the outcome of the case: *Kho Jabing* at [74] and [76]. A seeming legal point which is dressed up as a constitutional issue may not be given much consideration.

18 The requirement that the new points raised must have an effect on the outcome of the case throws into focus the issue of whether the Motions will make any practical difference to the applicants, which we alluded to at [15] above. But even if they do, we cannot see how the applicants in CM 1, CM 3

and CM 4 can cross the hurdle that that there should be "sufficient material" that is "new" in the sense that it has not been canvassed at any stage of the proceedings prior to the Motions and could not have been adduced in court earlier even with reasonable diligence: *Kho Jabing* at [77(d)]. As we observed in *Kho Jabing* at [58], the criterion of "non-availability" as regards new *legal* arguments will ordinarily be satisfied only if they concern a change in the law. No such change applies to the applicants in CM 1, CM 3 and CM 4, who were convicted and sentenced after the commencement of the Amendment Act.

19 In *Kho Jabing v Attorney-General* [2016] 3 SLR 1273 at [2], we noted that "no court in the world would allow an applicant to prolong matters *ad infinitum* through the filing of multiple applications" and we think it apposite to reiterate that observation here. That CM 1, CM 3 and CM 4 have been filed together with CM 2 should not be allowed to disguise the fact that it was entirely open for the applicants in CM 1, CM 3 and CM 4 to have raised the arguments currently before us in their appeals, which they had failed to do. We take exception to such a drip-feeding approach which clearly squanders valuable judicial time. Strong reasons must be advanced to explain why a point taken later could not have been made earlier. The courts will not allow themselves to be used by either ingenious counsel or a determined applicant as a means for delaying the conclusion of a case.

20 The failure of the applicants in CM 1, CM 3 and CM 4 to have raised the constitutional challenges brought before us in their appeals is therefore sufficient basis for us to decline to hear CM 1, CM 3 and CM 4. In any case, as the following analysis will show, we find that there has been no miscarriage of justice given that the applicants' sentences will remain unchanged even if we were to agree with them on the legal issues raised in the Motions.

Whether the applicants' sentences can be set aside

21 The applicants argue that it would make a difference to their sentences if they should succeed on the merits of their applications because:

(a) The applicants' existing sentences were passed pursuant to a sentencing process ("the Impugned Sentencing Process"), which is unconstitutional and thus this court should quash the sentences imposed on the applicants.

(b) The Impugned Provisions work in "inextricable tandem" with the Second Schedule and if the former should be struck down the latter should similarly suffer the same fate. The applicants' sentences should therefore be set aside and held in abeyance pending Parliament's enactment of another sentencing regime that complies with the Constitution.

(c) Alternatively, the Impugned Provisions should be struck down pursuant to Art 162 read harmoniously with Art 4 of the Constitution, such that the rest of s 33B remains intact.

(d) Further and in the alternative, the unconstitutionality of the Impugned Provisions can be "cured" by amending the Impugned Provisions such that it is the court that determines whether an offender has substantively assisted the Central Narcotics Bureau ("CNB") in disrupting drug trafficking activities within or outside Singapore.

The Impugned Sentencing Process

22 The applicants dispute that they were sentenced under s 33(1) of the MDA read with the Second Schedule, and instead argue that they were

sentenced pursuant to an "undisputable application of the Impugned Provisions". They point to the fact that the applicants in CM1, CM3 and CM4 were sentenced after the respective judges had found that they did not satisfy s 33B(2)(*b*) of the MDA. Their argument is that because the trial judges only felt themselves bound to sentence the accused in accordance with the mandatory death penalty *after* considering the requirements in s 33B, s 33B cannot be characterised as a re-sentencing provision – rather, it is an integral step in the judge's determination that is *causative* of the sentence passed on each applicant. Accordingly, each of the applicants was not sentenced "in accordance with law" under Art 9(1) of the Constitution.

23 The PP's preliminary objection is as to the consequence of finding in favour of the applicants on the basis of the aforesaid argument – that the applicants would in effect be getting off scot-free in the absence of any sentence that could be imposed in lieu of the death penalty. What Art 4 voids, to the extent of the inconsistency, is any *law* which is inconsistent with the Constitution. It is well-established that the punishment prescribed in the Second Schedule is not unconstitutional: see *Ong Ah Chuan and another v Public Prosecutor* [1979-1980] SLR(R) 710 ("*Ong Ah Chuan*") at [40]. Even if we accept the applicants' contention that s 33B is unconstitutional, all that means is that we have to disregard s 33B. What the applicants appear to be doing is to expand the scope of the inquiry to the entire sentencing process and to deem any ensuing decision void as long as any part of that process is unconstitutional. They allude to procedural impropriety but do not elaborate in any way what that constitutes.

24 The applicants cite the decision of the UK Supreme Court in *Regina (Lumba) v Secretary of State for the Home Department (JUSTICE and another*

intervening) [2012] 1 AC 245 ("*Lumba*"), which was followed by this court in *Tan Eng Hong v Attorney-General* [2012] 4 SLR 476 ("*Tan Eng Hong*"). *Lumba* involved claimants who were detained by the Home Secretary pending the making of deportation orders against them, and the orders were later found to be unlawful exercises of power. An argument was raised that the tort of false imprisonment was nonetheless not committed as it was "certain that the claimant could and would have been detained if the power had been exercised lawfully": *Lumba* at [71]. The UK Supreme Court rejected the introduction of a causation test, holding that the question was not whether a lawful decision could and would have been made but *how* the decision in question was in fact made: *Lumba* at [62].

25 The analogy which the applicants seek to draw from *Lumba* is wholly inappropriate. In *Lumba*, the exercise of the power of detention was wrongful and it must follow that the detention was accordingly wrongful. The fact that the detention could have been effected lawfully, would, if at all relevant, be germane in relation to the question of damages for wrongful detention if this latter issue should ever arise: see *Lumba* at [71]. Here the applicants have each committed an offence which attracted the death penalty and that punishment would have to be imposed unless they could show that they satisfy the requirements provided in s 33B. The MDA is not structured such that the application of the mandatory death penalty is conditional upon s 33B; all s 33B provides is an additional sentencing option (provided certain prescribed conditions are satisfied) which conditions the trial judges found were not satisfied by the applicants and thus the additional sentencing option could not apply to the applicants. In respect of each of the applicants, there is clearly a valid basis for the exercise of the trial judges' sentencing powers – the Second Schedule. So even if we should agree with the applicants that s 33B is

unconstitutional (which is not the case as will be discussed later), we cannot see how it follows from that that the provisions of the Second Schedule should cease to be effective. With respect to counsel, this is an unmeritorious argument.

26 The fallacy of the applicants' argument becomes obvious on considering the situation of the applicant in CM 2, who was convicted and sentenced *prior* to the enactment of the Amendment Act. The applicants attempt to address this by drawing parallels between the transitional provisions of the Amendment Act and s 33B, but this serves only to highlight the difficulties in their case. It is evident from the clear parallels that exist between the transitional provisions in the Amendment Act and s 33B that the latter is in fact a "carve-out" from the Second Schedule to the MDA. That was also clearly the intention of Parliament as can be seen from the following Ministerial statement made in Parliament by Deputy Prime Minister Teo Chee Hean ("DPM Teo") (*Singapore Parliamentary Debates, Official Report* (14 November 2012) vol 89):

> … The new measures proposed in this Bill will enable us to help drug abusers who themselves have shown commitment to get off drugs and stay away from drugs. And we are introducing new offences and increasing penalties for those who target the young and vulnerable, so that we do not create another generation who are enslaved to drugs. Offenders have a high certainty of being caught, and of facing severe punishment, including death. *We are maintaining the mandatory death penalty for the drug offences where it currently applies, but are making measured and carefully defined exceptions to allow for the courts to impose life imprisonment* instead for couriers in cases of abnormality of mind or where substantive cooperation has been provided. [emphasis added]

The "inextricable tandem"

27 Turning to the "inextricable tandem" argument, there is substantial overlap between this and the Impugned Sentencing Process argument. Much of the applicants' arguments focus on the Impugned Provisions being inseverable from the Second Schedule, and if the Impugned Provisions are unconstitutional, the Second Schedule would similarly be tainted.

28 The applicants argue that little weight should be placed on the fact that the Impugned Provisions are located in a separate part of the MDA, distinct from the Second Schedule, and was enacted later. Instead, they advocate a holistic assessment as to whether the Impugned Provisions can be characterised as a "carve-out", severable from the Second Schedule. In this regard, they say that there are four factors that show that the Impugned Provisions are inextricably bound with the Second Schedule:

(a) The language of the Impugned Provisions shows that they are meant to work in a "composite indivisible framework" comprising the Second Schedule as well as s 33B because s 33B can only apply to an offender who is convicted of an offence carrying the death penalty as prescribed under the Second Schedule.

(b) In practice, sentencing courts do apply the death penalty provisions together with the s 33B framework, at least in the sense that they consider whether an offender falls to be sentenced under the latter before considering the former.

(c) The Second Schedule was structured as "a compendious tabular framework" simply for convenience, and the court should not draw any inference from the fact that it is located in a distinct part of the MDA.

(d) Parliament has demonstrated a clear intent that the new sentencing framework under the MDA departs from the former framework that provided for the mandatory death penalty.

29 The applicants, in essence, seek to apply the doctrine of severability in the reverse sense. Rather than applying the doctrine to determine if an unconstitutional part of a provision may be severed from the constitutional part, they argue that a constitutionally valid provision (*ie*, the Second Schedule) may be found invalid if it cannot be separated from an unconstitutional provision (*ie*, s 33B). They also point to statements made by several Members of Parliament at the Second Reading of the Misuse of Drugs (Amendment) Bill (No 27 of 2012) ("the Bill"), which alluded to a move away from the mandatory death penalty regime: *Singapore Parliamentary Debates, Official Report* (12 November 2012) vol 89. However, we see a number of problems with this argument.

30 The applicants submit, albeit in respect of the severability of the Impugned Provisions from the MDA, that placing undue emphasis on the fact that the Impugned Provisions were incorporated by way of subsequent amendments to the MDA "w[ould] result in it being all too easy for Parliament to cause unconstitutional legislative provisions to be severable when, in reality, these unconstitutional provisions can only work as a composite whole with other (putatively) constitutionally unobjectionable parts of the legislative framework". With respect, we are unable to see any merit in this submission even if we were to accept that functionality is the yardstick for severance, as the applicants appear to suggest. It seems to us that there is nothing wrong in severing an unconstitutional provision that only works as a composite whole with the remaining constitutional parts of the legislative framework. Rather, it

is where the latter cannot function without the former, at least in a manner that Parliament could not have contemplated, that a constitutionally valid provision may be struck off. However, in the context of the Second Schedule and s 33B, we cannot see how this argument could even be advanced. The Second Schedule was in operation for an appreciable period of time before Parliament decided to enact s 33B to give drug traffickers an opportunity to escape the death penalty where the requirements specified in s 33B are satisfied.

31 As far as Parliament's intention is concerned, the applicants say that the speeches of the Members of Parliament which they refer to show that Parliament had "conceived of the new capital punishment framework as one holistic discretionary death penalty framework", and that s 33B was therefore not a mere carve-out that was "separate and divisible from the mandatory death penalty". In our view, that would be a wholly incorrect characterisation of Parliament's intent. As DPM Teo, on moving that the Bill be read a second time, made clear, the "mandatory death penalty will continue to apply for drug traffickers in most circumstances [and the] changes to the mandatory death penalty will only apply if tightly-defined and specific conditions are met": *Singapore Parliamentary Debates, Official Report* (12 November 2012) vol 89.

32 Further, while this was not argued before us, it seems to us that the applicants have misunderstood the application of the doctrine of severability in the context of amendments to pre-existing statutes: it is the *amending* Act and not the *amended* statute that the court looks to in determining if the unconstitutional portions can be severed from the remainder of the Act. As a general proposition, it will ordinarily be the case that an unconstitutional amendment will result in no change to the pre-existing statute, which remains

in the same form as it existed prior to the purported amendment. This is because if the amending Act is itself unconstitutional it cannot effect legislative change: *Corpus Juris Secundum* vol 82 (August 2016 Update) at § 111. We would underscore the fact that in enacting s 33B Parliament never intended a "major sea-change" to the mandatory death penalty regime. The change intended was a narrow and specific one. If, for whatever reason, that change is unconstitutional, then that change will not be effective and nothing in the existing law will be affected.

Severing the Impugned Provisions

33 The applicants' alternative argument is that the unconstitutional part of the Impugned Provisions can and should be severed from the rest of s 33B and struck down, leaving the rest of s 33B intact. This would mean that once the applicants satisfy the Courier Requirement, they would be eligible to be sentenced to life imprisonment. As the applicant in CM 3 has already been found to satisfy the Courier Requirement, and the PP took the position in CM 4 that the applicant satisfies the Courier Requirement, they should be eligible to be sentenced to life imprisonment. With regard to the applicant in CM 1, no finding has yet been made on whether he satisfies the Courier Requirement. In the case of the applicant in CM 2, having already been sentenced to suffer the punishment of death under the Second Schedule of the then MDA, and for the reasons mentioned at [9] above, he has yet to undergo resentencing under the s 27(6) of the Amendment Act. Accordingly what counsel for the applicants are suggesting is that potentially, all of them may be sentenced or resentenced (for the applicant in CM 2) to life imprisonment if s 33B is upheld *without* s 33B(2)(*b*). The question is whether such an interpretation is sustainable and sound in law. Art 4 of the Constitution

establishes the supremacy of the Constitution over all other laws of the land. It reads:

> This Constitution is the supreme law of the Republic of Singapore and any law enacted by the Legislature after the commencement of this Constitution which is inconsistent with this Constitution shall, *to the extent of the inconsistency*, be void. [emphasis added]

34 As this court observed in *Tan Eng Hong* at [59], Art 4 of the Constitution provides for the unconstitutional portion of a law to be severed while retaining the remaining part in the statute – what is commonly termed as the doctrine of severability. In *Public Prosecutor v Dato' Yap Peng* [1987] 2 MLJ 311 ("*Dato Yap*"), the Supreme Court of Malaysia considered the application of Art 4(1) of the Federal Constitution of Malaysia 1963 ("the Malaysian Constitution"), which is *in pari materia* to Art 4 of the Constitution, and the principles governing the doctrine of severability in that context. In *Dato Yap*, the Supreme Court of Malaysia dismissed an appeal against the lower court's decision that s 418A of the Criminal Procedure Code (FMS Cap 6, enacted in 1935) (Malaysia), which allowed the PP to require any case to be transferred from a Subordinate Court to the High Court, was inconsistent with Art 121(1) of the Malaysian Constitution vesting judicial power in the courts. Of particular relevance to this inquiry is the manner in which Abdoolcader SCJ dealt with the PP's arguments that only the offending part of s 418A be declared invalid:

> Deputy then suggested that it might be possible to declare only that part of that subsection applying s 417(4) as bad, in effect invoking the doctrine of severability. The doctrine of severability cannot in my view apply in respect of s 418A as that section operates as a totality and there is no bad part which can be effectively severed from the good without affecting the whole. Subsection (1) of the section refers to any particular pending case triable by a subordinate court and sub-s (3) provides for the manner of disposal of such cases in

> the High Court. *Any form of severance if it can be effected at all would emasculate and abort the section as a whole and defeat and negate the teleological purpose of the provision …* [emphasis added]

35 The leading case in the United States on the doctrine of severability is the decision of the Supreme Court of the United States in *Alaska Airlines, Inc v Brock* 480 US 678 ("*Alaska Airlines*"), in which the court considered the standard for determining the severability of an unconstitutional provision to be well-established. This comprises two parts. First, the court considers whether the truncated statute, with the unconstitutional portion excised, will operate in the manner that the legislature intended. Second, even if the first part is satisfied, the court must determine if the legislature would have enacted the truncated statute with only the remaining provisions. The position is similar in Australia, where the severability of a provision in breach of the Commonwealth of Australia Constitution Act (Cth) is governed by s 15A of the Acts Interpretation Act 1901 (Cth). Section 15A is substantially similar to Art 4 of the Constitution, and states that an enactment made in excess of legislative power "shall nevertheless be a valid enactment to the extent to which it is not in excess of that power". The limits to the application of s 15A were succinctly summarised by Kirby J in his dissenting judgment (in respect of which statement the majority in the coram was not in disagreement) in *New South Wales v Commonwealth* (2006) 231 ALR 1 ("*NSW v Commonwealth*") at [595]-[598] (footnotes omitted):

> [595] So far as s 15A of the Acts Interpretation Act is concerned, there are limits upon the power of the parliament to direct the courts, in effect, to make a new law or to choose what a remade law should be. The limit is reached where, faced with a conclusion of apparent constitutional invalidity of particular provisions, a court "cannot separate the woof from the warp and manufacture a new web". From time to time, this court has invoked other metaphors to explain when the court has arrived at that limit. Thus, it has indicated a

> willingness to undertake amputation and excision, where necessary, but not to perform judicial "plastic surgery" upon the challenged law. *By inference, this is a reference to judicial excisions that would substantially alter the appearance of the law, presenting a law that looks quite different from that which was made by the parliament.*
>
> …
>
> [597] As to s 15A of the Acts Interpretation Act, the provision can save the validity of a federal law generally where the law itself indicates a standard or test that may be applied for the purpose of limiting its operation and preserving the validity of the law thus limited, *so long as the outcome has not been changed so as to make it something different from the law enacted by the parliament.* If the court concludes that the challenged law "was intended to operate fully and completely according to its terms, or not at all", the court will not, under the guise of interpretation and severance, uphold what would effectively be a new and different law.
>
> [598] If the invalidated portions are relatively few and specific, surgery involving particular invalidation and reading down will be available and appropriate … *Where, however, the resulting invalidation is substantial and would strike down key provisions of a comprehensive and integrated legislative measure, the invocation of statutory or constitutional principles of severance will be inappropriate.* They will be unavailing to save the parts of the new law that are not specifically struck down as invalid for constitutional reasons.
>
> [emphasis added]

36 The authorities therefore speak with one voice – in the exercise of severance, legislative intent is paramount. The reason for this is clear: to allow the courts to do so in a manner that is contrary to the intent underlying the passage of the provision in question would effectively confer upon the judiciary legislative powers and violate the principle of separation of powers. As Kirby J noted in *NSW v Commonwealth* at [596]:

> The reason why this court will not undertake such a task is ultimately based on the proper function of the Judicature established by the Constitution and on the principle of the separation of the judicial from other governmental powers. Thus, in the guise of construing a challenged federal law, the

> court cannot be required to perform a feat that is, in essence, legislative and not judicial.

37 It is clear from these cases that central to the severability of the invalid portion of an Act is the effect of such excisions on the operation of the Act as a whole. Essentially, it must be shown to be Parliament's intention behind the enactment of an Act that is found to be partially in breach of the Constitution that it should nevertheless continue to be given effect even after the severance and invalidity of some portions. Viewed in this light, any argument that s 33B(2)(*b*) can be severed and the remainder of that provision should be allowed to be operative, cannot be sustained. As this court has observed in *Quek Hock Lye* at [35] and *Ridzuan (CA)* at [46], the amendments are not primarily intended to spare certain couriers from the death penalty, but to disrupt the activities of drug trafficking syndicates by providing an incentive for offenders to provide information which would enhance the capabilities of law enforcement agencies in the war against drugs. DPM Teo explained in his speech during the Second Reading of the Bill (see *Singapore Parliamentary Debates, Official Report* (12 November 2012) vol 89):

> … The policy intent of this substantive cooperation amendment to our mandatory death penalty regime is to maintain a tight regime – while giving ourselves an additional avenue to help us in our fight against drugs, and not to undermine it.
>
> …
>
> We cannot be sure how exactly couriers or the syndicates will respond to this new provision. But we have weighed the matter carefully, and are prepared to make this limited exception if it provides an additional avenue for our enforcement agencies to reach further into the networks, and save lives from being destroyed by drugs and hence make our society safer.

38 The Minister for Law, Mr K Shanmugam, was equally forceful in conveying the message that the Bill was not born of mere compassion to couriers and an intention that they be treated less harshly. More specifically, he was unequivocal in his clarification that mere satisfaction of the Courier Requirement would not be sufficient to escape the death penalty (see *Singapore Parliamentary Debates, Official Report* (14 November 2012) vol 89):

> The issue is not what we can do to help couriers avoid capital punishment. It is about what we can do to enhance the effectiveness of the Act in a non-capricious and fair way without affecting our underlying fight against drugs. Discretionary sentencing for those who offer substantive assistance is the approach we have taken. For those who cannot offer substantive assistance, then the position is as it is now.

39 In view of Parliament's clear and express intention against the result of the applicants' proposed severance of the Impugned Provision, this cannot be a proper basis for setting aside their respective sentences.

"Curing" s 33B

40 The applicants' final ground of argument as regards the setting aside of their sentences is that Art 162 of the Constitution ("Art 162") confers on the court the power to amend s 33B by deleting s 33B(4) and the phrase "the Public Prosecutor certifies to any court that, in his determination" in s 33B(2)(*b*), such that it is the *court*, and not the PP, that determines if an offender has substantively assisted the CNB in disrupting drug trafficking activities. Art 162 reads:

> Subject to this Article, all existing laws shall continue in force on and after the commencement of this Constitution and all laws which have not been brought into force by the date of the commencement of this Constitution may, subject as aforesaid,

> be brought into force on or after its commencement, but all such laws shall, subject to this Article, be construed as from the commencement of this Constitution *with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with this Constitution*. [emphasis added]

41 This argument is off the mark. Art 162, which falls under Part XIV of the Constitution titled "Transitional Provisions", applies only to an existing law or a law which had already been enacted but not yet brought into force at the commencement of the Constitution. Section 33B is not such a law and it therefore cannot fall within the ambit of Art 162. Having said that, the Amendment Act would fall to be governed by Art 4 of the Constitution where the doctrine of severability, subject to the considerations mentioned in [37] above, could apply.

42 This was also the view taken by the High Court in *Attorney-General v Wain Barry J and others* [1991] 1 SLR(R) 85 ("*Wain Barry*"), which related to an article released by the Asian Wall Street Journal ("AWSJ") covering a separate libel case and quoting comments criticising the judge's decision. In response to the article, the applicant applied for leave to move the High Court for orders of committal against the respondents, who were the editor, publisher, proprietors, printers and distributors of the AWSJ respectively. It was alleged that the article was in contempt of court, the jurisdiction in respect of which was conferred on the High Court, Court of Appeal and Court of Criminal Appeal by way of s 8(1) of the Supreme Court of Judicature Act (Cap 322, 1985 Rev Ed) ("SCJA 1985"). As part of their defence, the respondents submitted that the common law offence of scandalising the court did not conform to Art 14(1), and s 8(1) of the SCJA 1985 had to be read down accordingly. This was dismissed by T S Sinnathuray J, who stated at [60]:

> … In my view, it is not open to the respondents to seek in aid Art 162 to read down the offence of contempt of court provided in s 8(1). Article 162, which is the last article in the Constitution, is a saving provision which preserves, as provided therein, "all existing laws" after the commencement of the Constitution. The Supreme Court of Judicature Act, however, was not an existing law at the time of the enactment of the Constitution. It was enacted in 1969, some six years after the Constitution, and Art 162 can have no application to it whatsoever. The final word on this is that Mr Robertson did not argue that scandalising the court had been abolished by the Constitution.

43 By finding that Art 162 had no application to the SCJA 1985, the court in *Wain Barry* implicitly held that the phrase "all laws which have not been brought into force by the date of the commencement of this Constitution" must be construed to apply only to laws which were already enacted before the commencement of the Constitution, and not simply any law. However, the applicants refer to comments made by this court in *Tan Eng Hong*, which appear to suggest otherwise. The court in *Tan Eng Hong* compared Art 162 against the equivalent provision of the Malaysian Constitution, noting four major differences between the two. Of particular relevance is the comparison between the scope of the operation of Art 162 of the Constitution and its Malaysian counterpart at [46]:

> … The fourth difference is that the Singapore courts' power of modification, *etc*, under Art 162 of the Constitution of Singapore applies to *all* laws, and is thus broader than the Malaysian courts' corresponding power under Art 162(6) of the Constitution of Malaysia, which is expressly limited to "*existing* law" [emphasis added]. For our purposes, the relevance of this fourth difference is that it shows that under the Constitution of Singapore, there is no stark dichotomy between the Singapore courts' power to deal with, respectively, unconstitutional *existing* laws and unconstitutional laws enacted *after* the commencement of the Constitution. Both types of laws fall under Art 162 and can be construed with the appropriate modifications, *etc*, to bring them into conformity with the Constitution. … [emphasis in original]

44 *Tan Eng Hong* does not discuss *Wain Barry*, but the observation in the former that Art 162 applies to *all* laws is fundamentally incongruent with the views expressed in the latter. While the court in *Tan Eng Hong* acknowledged that the legislative intent behind Art 162 was to provide a mechanism for the continued application of laws pre-dating the Constitution after its commencement, as the court understood it, the purport of Art 162 is not really that different from Art 4 in respect of the laws to which they apply, but only in respect of the *manner* in which they apply. Art 162 allows the court to construe *all* laws in conformity with the Constitution while Art 4 provides the power to void such laws (*Tan Eng Hong* at [61]):

> … Article 162 is clearly a transitional provision which specifically deals with existing laws (in the Constitution, Art 162 is found under Part XIV, which is headed "Transitional Provisions"). The purpose of Art 162 was to expressly provide for the continuity of existing laws in order to: (a) prevent lacunas in the law from arising as a result of the doctrine of implied repeal; and (b) eliminate the need to re-enact the entire corpus of existing laws when Singapore became an independent republic. At the time when the Constitution of Malaysia and the Constitution of Singapore were respectively enacted, the two States already each had a system of law in place: an existing corpus of legislation as well as the common law. While the respective Constitutions vested the legislative power of the States in their respective newly-constituted Legislatures, these new legislative organs could not, within a reasonable period of time, provide the respective States with the complete framework of law necessary for the functioning of the States. Therefore, it was necessary to provide that the existing laws remained in force, and Art 162 was enacted in Singapore for this purpose. *In addition to preserving existing laws, Art 162 also provides for the supremacy of the Constitution to be upheld by stipulating that* ***all laws*** *(including existing laws) shall be construed in conformity with the Constitution.* Given that Art 162 is concerned with preserving existing laws while keeping them in line with the Constitution through implementing the necessary modifications, *etc*, there is no need for it to also provide for the power to *void* unconstitutional existing laws as this is not within the ambit of its subject matter … [original emphasis omitted; emphasis added in italics and bold italics]

45 Nevertheless, the applicability of Art 162 was not in issue in *Tan Eng Hong*. In *Tan Eng Hong*, the applicant ("Tan") was charged under s 377A of the Penal Code (Cap 224, 2008 Rev Ed) ("the Penal Code") and brought an application to challenge the constitutionality of that provision. The following declarations were prayed for (see *Tan Eng Hong* at [6]):

> (a) s 377A is inconsistent with Art 9 of the Constitution and therefore void by virtue of Art 4;
>
> (b) s 377A is inconsistent with Arts 12 and 14 of the Constitution and therefore void by virtue of Art 4; and
>
> (c) for these reasons, the charge brought against Tan under s 377A is void.

46 Shortly after bringing his application, the s 377A charge against Tan was substituted with one under s 294(*a*) of the Penal Code, and the Attorney-General ("the AG") then applied to strike out the application, which was allowed by the assistant registrar ("the AR"). At around this time, Tan pleaded guilty to the substituted charge but notwithstanding this, Tan appealed against the AR's decision but his appeal was also dismissed by the High Court judge. The High Court judge held that although Tan had *locus standi* and that his case was not bound to fail, there was no real controversy to be adjudicated (see *Tan Eng Hong* at [14]). On appeal from the High Court judge's decision, the AG disputed that Tan had a reasonable cause of action under Art 4 of the Constitution as it only applies to "any law enacted by the Legislature after the commencement of this Constitution". Section 377A, however, was already in force prior to the commencement of the Constitution. All that the court had to consider, therefore, was whether Art 4 could apply to laws which predate the

Constitution. The court found that it could, read with Art 162. But whether Art 162 could apply to laws enacted after the commencement of the Constitution was not in issue before the court and was not argued by the parties.

47 Indeed, as counsel for the applicants candidly conceded in the hearing before us, the plain interpretation of Art 162 is that it refers only to laws that *had been passed prior to the commencement of the Constitution* but had yet to be brought into force. To construe it otherwise means that Art 162 would effectively apply to *all* laws, and there would be no need to draw a distinction between "all existing laws" and "all laws which have not been brought into force by the date of the commencement of this Constitution". This interpretation is not only consistent with the purpose underlying Art 162 as identified in *Tan Eng Hong*, but is also consonant with the historical context of Art 162. As observed in *Review Publishing Co Ltd and another v Lee Hsien Loong and another appeal* [2010] 1 SLR 52 at [249], the origins of Art 162 can be traced to Art 105(1) of the Constitution of the State of Singapore set out in Schedule 3 of the Sabah, Sarawak and Singapore (State Constitutions) Order in Council 1963 (GN No S 1 of 1963) ("the State Constitution"). This in turn was immediately preceded by s 121 of the Singapore (Constitution) Order in Council 1958 (Statutory Instruments No 1956 of 1958) ("the 1958 Order"), the relevant parts of which read:

> 121.—(1) Without prejudice to the provisions of sections 112 and 118 of this Order, all laws to which this section applies and which are in force immediately before the appointed day shall, subject to amendment or repeal by the competent authority, continue in force as from that day and *all laws to which this section applies and which have not been brought into force* by the beginning of the appointed day may, subject as aforesaid, be brought into force on or after that day, but all such laws shall, subject to the provisions of this section, be construed as from the appointed day with any adaptations

> and modifications which may be necessary to bring them into conformity with the Act and this Order.
>
> …
>
> (7) The laws to which this section applies are any enactments of any legislature in Singapore *enacted before the appointed day and any instruments made before the appointed day* by virtue of any such enactment.
>
> [emphasis added]

48 As the PP points out, s 121 of the 1958 Order draws a distinction between laws which "have not been brought into force" and laws which have not been "enacted". This suggests that the former refers to laws which have been enacted but have yet to take effect and in the absence of any evidence indicating that the framers of the State Constitution had intended to fundamentally alter the nature of s 121 of the 1958 Order, the phrase "laws which have not been brought into force" in Art 162 should be construed in a similar manner. We agree. While it could be argued that the absence of any equivalent of s 121(7) in the State Constitution could be indicative of an intention that Art 105(1) of the State Constitution would apply to laws enacted after the commencement of the State Constitution, we think it more likely that the framers were similarly of the view that the phrase "law which have been not brought into force" was sufficient to convey that Art 105(1) did not includes laws which had not been enacted, particularly as it fell within Part VII of the State Constitution titled "Temporary and Transitional Provisions".

49 Although counsel for the applicants did not pursue Art 162 as a means for "curing" s 33B, he argued that the court nonetheless had the inherent power to construe unconstitutional legislation in a manner that would render it constitutional and in this regard, Art 162 could be used as a guide for determining the scope of this power. He referred us to the decision of the

Court of Final Appeal of the Hong Kong Special Administrative Region in *HKSAR v Lam Kwong Wai and another* (2006) 9 HKCFAR 574 ("*Lam Kwong Wai*"). *Lam Kwong Wai* concerned primarily the issue of whether s 20 of the Firearms and Ammunition Ordinance (Cap 238) (HK) was consistent with the presumption of innocence (which is protected by Art 87(2) of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (HK) ("Basic Law") and Art 11(1) of Hong Kong Bill of Rights Ordinance (Cap 383) ("Bill of Rights")) and the right to a fair trial (which is protected by Art 87(2) of the Basic Law and Art 10 of the Bill of Rights). Sir Anthony Mason NPJ, delivering the leading judgment, held in the context of the Basic Law that the court had the power to conduct "remedial interpretation", which involves "the well-known techniques of severance, reading in, reading down and striking out": *Lam Kwong Wai* at [71] and [73]. However, it is critical to note that the court was persuaded by the absence of any provision in the Basic Law setting out the powers of the courts or the remedies which they may grant:

> [68] The Basic Law neither sets out the powers of the courts nor the remedies which they may grant. The absence of provisions in the Basic Law dealing with these matters is not surprising. Article 83 of the Basic Law provides that the powers and functions of the courts "shall be prescribed by law". No doubt this provision enables the legislature to confer powers and functions on the courts but it does not exclude the implication of powers and functions from the Basic Law itself.
>
> [69] In common law systems, courts enjoy wide-ranging inherent and implied powers and there is no reason to think that the courts of the HKSAR stand as an exception to the generality of this statement. The Basic Law recognizes that the courts of the Region (including this Court) are equipped with powers to grant appropriate remedies. In this respect, there is a distinction between inherent jurisdiction and jurisdiction by implication. When a statute sets up a court with a jurisdiction, it acquires by implication from the statute all powers necessary for its exercise (*Grassby v. The Queen* (1989)

> 168 CLR 1 at 16-17, per Dawson J). As the courts are established by the Basic Law, the powers which they possess and the remedies which they may grant should be characterized primarily as implied, though some powers to be implied under the Basic Law may be ultimately traced back to the common law.
>
> [70] The grant of judicial power and, for that matter, the investing of jurisdiction in a court, carry with them all those powers that are necessary to make effective the exercise of judicial power and jurisdiction so granted. "Necessary", in this context, means "reasonably required" (*PCCW-HKT Telephone Ltd v. Telecommunications Authority* (2005) 8 HKCFAR 337 at 357G-H, per Bokhary PJ). These powers will include power to grant and employ such remedies as may be appropriate …

50 It is apparent that these considerations do not apply to the interpretation of the Constitution – there is no need for the implication of remedial powers as they are expressly provided for under Arts 4 and 162. Further, even if this court had the power to conduct a remedial interpretation of the Constitution that allowed it to depart from the legislative intention underlying an unconstitutional provision, it is unclear if the scope of the power can extend to overriding the *fundamental* purpose of that provision. *Lam Kwong Wai* at [66] cites the decision of *Sheldrake v Director of Public Prosecutions (Attorney General's Reference (No 4 of 2002))* [2005] 1 AC 264, in which Lord Bingham of Cornhill succinctly summarised the principles governing the interpretation of legislation under s 3 of the Human Rights Act 1998 (c 42) (UK) ("the HRA"). He stated at [28]:

> … [T]here is a limit beyond which a Convention-compliant interpretation is not possible, such limit being illustrated by *R (Anderson) v Secretary of State for the Home Department* [2003] 1 AC 837 and *Bellinger v Bellinger (Lord Chancellor intervening)* [2003] 2 AC 467. In explaining why a Convention-compliant interpretation may not be possible, members of the committee used differing expressions: such an interpretation would be incompatible with the underlying thrust of the legislation, or would not go with the grain of it, or would call for legislative deliberation, or would change the substance of a provision completely, or would remove its pith and substance, or would

> violate a cardinal principle of the legislation (paras 33, 49, 110-113, 116). All of these expressions, as I respectfully think, yield valuable insights, but none of them should be allowed to supplant the simple test enacted in the Act: "So far as it is possible to do so …" While the House declined to try to formulate precise rules (para 50), it was thought that cases in which section 3 could not be used would in practice be fairly easy to identify.

51 While Sir Anthony NPJ noted that these were insights and not prescriptions (at [66] of *Lam Kwong Wai*), he was also cognisant of the intrusion of the courts into legislative activity. In identifying the justification for the exercise of remedial interpretation as enabling the courts to uphold the validity of legislation in alternate forms rather than strike it down, he stated that "it can be safely assumed that the legislature intends its legislative provision to have a valid, even if reduced, operation than to have no operation at all, *so long as the valid operation is not fundamentally or essentially different from what it enacted*" [emphasis added]: *Lam Kwong Wai* at [77]. This is analogous to the decision in *Regina (Anderson) v Secretary of State for the Home Department* [2003] 1 AC 837 ("*Anderson*"), which we discuss in detail below in respect of the applicants' argument on the separation of powers. The House of Lords declared a provision conferring judicial power on the Home Secretary to be incompatible with Art 6(1) of the European Convention on Human Rights ("the ECHR"), which provided that the imposition of a sentence had to be made by a tribunal independent of the executive. It held that Parliament had deliberately intended that the power lie with the Home Secretary, and to interpret the offending provision in a manner such that it would be the judiciary and not the Home Secretary exercising that power "would not be judicial interpretation but judicial vandalism [as] it would give the section an effect quite different from that which Parliament intended": *Anderson* at 883.

52 In *Ridzuan (CA)*, we considered the issue of whether it should be the court or the PP that determines if an offender had substantively assisted the CNB in disrupting drug trafficking activities. We held at [66] that it was the latter, in view of the express stipulation in s 33B(2)(*b*) and the fact that it would seriously undermine the operational capability of the CNB and jeopardise our war on drugs. That it should be the PP that makes the assessment is fully borne out by the Parliamentary debates and in particular, the speech of the Minister for Law. In addressing concerns raised that there should be greater judicial discretion in the application of the death penalty, he stated (see *Singapore Parliamentary Debates, Official Report* (14 November 2012) vol 89):

> Next, on the issue of who decides cooperation and by what criteria. The Bill provides for the Public Prosecutor to assess whether the courier has substantively assisted CNB.
>
> I think Ms Sylvia Lim, Mr Pritam Singh, Mrs Chiam and Ms Faizah Jamal have concerns here. Their view is: it is an issue of life and death – the discretion should lie with the courts to decide on cooperation.
>
> First, the cooperation mechanism is neither novel nor unusual. Other jurisdictions, like the US and UK, have similar provisions, operated by prosecutors, to recognise cooperation for the purposes of sentencing. …
>
> The Courts decide questions of guilt and culpability. *As for the operational value of assistance provided by the accused, the Public Prosecutor is better placed to decide.* The Public Prosecutor is independent and at the same time, works closely with law enforcement agencies and has a good understanding of operational concerns. An additional important consideration is protecting the confidentiality of operational information.
>
> The very phrase "substantive assistance" is an operational question and turns on the operational parameters and demands of each case. Too precise a definition may limit and hamper the operational latitude of the Public Prosecutor, as well as the CNB. It may also discourage couriers from offering useful assistance which falls outside of the statutory definition.

> Ms Lim suggested that if there are concerns about confidentiality, why not have it *in camera*, although I am not quite sure she used that phrase. The real point is this. Just imagine the scenario. In a case, the defendant argues that he rendered substantial assistance – it is CNB's fault for not dismantling some organisation overseas, it is something which CNB did or did not do, what intelligence agencies and officers did and did not do. And you put the officers on the stand and cross-examine them on their methods, their sources, their thinking. Ask yourself whether that is the best way of dealing with this question. Is that helpful?

53 In view of the above, particularly [37]–[38], we think that the amendments which the applicants seek would render s 33B so fundamentally different from what Parliament intended that it would fall outside the scope of the power to exercise remedial interpretation as conceived in *Lam Kwong Wai* even if such a power could be inferred.

Conclusion on the preliminary issues

54 We therefore conclude that even if we were with the applicants on the substantive grounds of their applications, there is no basis for us to grant the primary relief which they seek. Putting aside the fact that the arguments raised are arguments which the applicants in CM 1, CM 3 and CM 4 could have raised earlier (see [18] above), and bearing in mind our finding as to the incontrovertibility of their sentences, we hold that they have suffered no miscarriage of justice that warrants a relook into their respective cases.

55 From a practical perspective, our findings above are equally determinative of the application to set aside the sentence of the applicant in CM 2. However, we acknowledge that the applicant in CM 2 stands in a different position from that of the rest of the applicants. Not only was he convicted and sentenced prior to the enactment of the Amendment Act, there was no opportunity for him to have raised the arguments made in his Motion

given that s 33B had not come into existence at the time of his first-instance hearing and his appeal. In these circumstances, we do not think that the finality principle applies to him such that the court will decline to hear his application. Nevertheless, as will be seen later, we find the substantive merits of his application (and that of the remaining applicants) to be lacking.

The first substantive issue – the principle of separation of powers

56 It is undisputed that the Constitution, based on the Westminster model of constitutional government, incorporates as part of its basic structure the principle of separation of powers: *Mohammad Faizal bin Sabtu v Public Prosecutor* [2012] 4 SLR 947 ("*Faizal*") at [11]. By way of Arts 23(1), 38 and 93 of the Constitution, the executive, legislative and judicial powers of Singapore vest in their respective organs of state. It is Art 93 which is the focus of the Motions; as noted in *Faizal* at [16]–[17], the judicial power of Singapore vests *exclusively* in the Supreme Court and "such subordinate courts as may be provided by any written law for the time being in force". This entails that the legislative and executive branches may not interfere with the exercise of the judicial power by the judicial branch (see *Faizal* at [19]), and such acts of interference may be struck down as unconstitutional. The act which the applicants say infringes the principle of separation of powers is in relation to the certification by the PP that an accused person has substantively assisted the CNB under s 33B(2)(*b*), which is exacerbated by the fact that the PP's decision on whether to grant a certificate of substantive assistance may be challenged only on the grounds of bad faith and malice as prescribed in s 33B(4). For the reasons that follow, we are unable to accept this contention.

The power to impose punishment is not exclusively judicial

57 The issue of whether the power to sentence is exclusively a judicial power was canvassed extensively in *Faizal*, in which two separate questions of law were referred to the High Court for its determination. *Faizal* concerned a constitutional challenge to ss 33A(1)(*a*), 33A(1)(*d*) and 33A(1)(*e*) of the MDA on the ground that they violated the principle of separation of powers by requiring the court to impose a mandatory minimum sentence on drug offenders who had not less than:

(a) two previous admissions to an "approved institution" (*ie*, a drug rehabilitation centre);

(b) one previous admission to a drug rehabilitation centre and a prior conviction for the offence of consuming a specified drug under s 8(*b*) of the MDA; or

(c) one previous admission to a drug rehabilitation centre and a previous conviction for the offence of failing to provide a urine specimen under s 31(2) of the MDA.

58 Admissions to drug rehabilitation centres are directed by the Director of the CNB under s 34(2)(*b*) of the MDA where it appears to him necessary that a person should undergo treatment and/or rehabilitation. On account of that, the petitioner contended that this legislative direction intruded into the sentencing function of the courts, which is part of the judicial power. Chan Sek Keong CJ rejected the argument that there had been an infringement of the principle of separation of powers, holding that "the legislative prescription of factors for our courts to take into account in sentencing offenders cannot and does not intrude into the judicial power": *Faizal* at [49]. The fact that one

of the factors could be an executive decision was irrelevant and did not amount to an act of interference by the Executive in the sentencing function of the courts: *Faizal* at [48]. The parallels to the present applications are obvious. Section 33B similarly concerns a legislative prescription that the court's discretion to sentence particular offenders be conditioned by an executive decision – certification by the PP as to whether an offender has "substantively assisted the [CNB] in disrupting drug trafficking activities within or outside Singapore".

59 The applicants accept that the legislative prescription of rules of *general application* restricting the range or types of punishment which a sentencing judge can impose does not violate the principle of separation of powers. However, they take objection to the more general proposition that Chan CJ appeared to endorse at [64] of *Faizal*: that "the principle of separation of powers has *no* application to the sentencing function because … it is a function delegated by the legislative branch to the judicial branch" [emphasis added]. The reason for the applicants' objection is clear: to hold that *any* matter concerning the exercise of sentencing powers cannot constitute a breach of the principle of separation of powers would be fatal to their applications. Two reasons were proffered by Chan CJ for that proposition. First, the determination of the appropriate sentence to impose on an offender, involving a discretionary assessment of what is fair and just in the circumstances, is distinct from the exercise of fact-finding and application of legal rules and need not be performed exclusively by judges: *Faizal* at [62]–[63]. Second, "the judicial discretion to determine the sentence to impose on an offender is a relatively modern *legislative* development" [emphasis in original]: *Faizal* at [40].

60 We note that *Faizal* does not bind us, though we observe that this court had acknowledged the "holistic and comprehensive treatment" accorded by Chan CJ in refusing leave to refer certain questions to the Court of Appeal: *Mohammad Faizal bin Sabtu and another v Public Prosecutor and another matter* [2013] 2 SLR 141 at [20]. Be that as it may, looking at the judgment in *Faizal* as the whole, we do not think that Chan CJ intended to say that the *entire* sentencing function, including the determination of the appropriate punishment to be meted out to a particular offender, could be subject to intrusion by the other organs of state. Indeed, what immediately precedes the extract of *Faizal* at [64], set out above, relates only to the *prescription* of punishment by the legislature. The PP does not contend otherwise, and it is common ground that the *ratio decidendi* of *Faizal* is as set out at [45] thereof. That is, the power to prescribe punishment is part of the legislative power while the courts' power is to exercise its sentencing discretion as conferred by statute to select the appropriate punishment:

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

61 This is entirely consistent with the reasoning of Lord Diplock in *Moses Hinds and Others v The Queen* [1977] AC 195 ("*Hinds*") at 226–227, which is cited in full at [43] of *Faizal*, endorsing the decision of the Supreme Court of Ireland in *Deaton v. Attorney-General and the Revenue Commissioners* [1963] IR 170 ("*Deaton*"). Lord Diplock recognised Parliament's power under the

Jamaican Constitution to enact offences and prescribe punishments for such offences, but nonetheless emphasised that it was not within Parliament's remit to transfer from the judiciary to an executive body the discretion to determine the appropriate punishment for a particular offender:

> Thus Parliament, in the exercise of its legislative power, may make a law imposing limits upon the discretion of the judges who preside over the courts by whom offences against that law are tried to inflict on an individual offender a custodial sentence the length of which reflects the judge's own assessment of the gravity of the offender's conduct in the particular circumstance of his case. *What Parliament cannot do, consistently with the separation of powers, is to transfer from the judiciary to any executive body whose members are not appointed under Chapter VII of the Constitution, a discretion to determine the severity of the punishment to be inflicted upon an individual member of a class of offenders.* … In this connection their Lordships would not seek to improve on what was said by the Supreme Court of Ireland in *Deaton v. Attorney-General and the Revenue Commissioners* [1963] I.R. 170, 182–183, a case which concerned a law in which the choice of alternative penalties was left to the executive.
>
> > There is a clear distinction between the prescription of a fixed penalty and the selection of a penalty for a particular case. The prescription of a fixed penalty is the statement of a general rule, which is one of the characteristics of legislation; this is wholly different from the selection of a penalty to be imposed in a particular case. … The legislature does not prescribe the penalty to be imposed in an individual citizen's case; it states the general rule, and the application of that rule is for the courts … the selection of punishment is an integral part of the administration of justice and, as such, cannot be committed to the hands of the executive …
>
> [emphasis added]

62 In fact, as observed in *Faizal* at [51], although Parliament may legitimately prescribe the factors to be taken into consideration in the sentencing of offenders, there have been cases in which legislative provisions conferring powers upon the Executive were found to have intruded into the

sentencing power of the court and violated the principle of separation of powers. The cases can be divided into three classes:

(a) Legislation which enabled the Executive to select the sentence to be imposed in a particular case after the accused person was convicted: *eg*, *Deaton*, *Hinds* and *Palling v Corfield* (1970) 123 CLR 52 ("*Palling*").

(b) Legislation which enabled the Executive to make administrative decisions which were directly related to the charges brought against a particular accused person at the time of those decisions, and which had an impact on the actual sentence eventually imposed by a court of law: *eg*, *Mohammed Muktar Ali v The Queen* [1992] 2 AC 93 ("*Muktar Ali*").

(c) Legislation which enabled the Executive to make administrative decisions which were not directly related to any charges brought against a particular accused person, but which had an impact on the actual sentence eventually imposed by a court of law pursuant to legislative directions that the Executive's administrative decisions were a condition which limited or eliminated the court's sentencing discretion: *eg*, *State of South Australia v Totani* (2010) 242 CLR 1 ("*Totani*").

63 The applicants do not specify under which of the above classes is s 33B(2)(*b*) said to fall within, and their case is that s 33B(2)(*b*) effectively enables the Executive to directly or indirectly select the sentence to be imposed. They argue that regard must be had to the substance, and not the form, of the legislative framework in question, citing *Hinds*, *Anderson* and

Muktar Ali as illustrations. We note that *Muktar Ali* was cited as an example of the second class in *Faizal* at [53], and it appears that the applicants have unified the classes by the broader proposition on which their case is based (*ie*, that they all involve cases in which the Executive was impermissibly allowed to select the punishment to be imposed on an offender, either directly or indirectly). Regardless, we do not find any of the cases to be persuasive in relation to s 33B(2)(*b*).

*The nature of the PP's discretion under s 33B(2)(*b*)*

*The principles underlying s 33B(2)(*b*)*

64 Before we begin our analysis, it is necessary for us to set out the principles underlying s 33B(2)(*b*). The provision sets out a rule of *general* application that offenders who have substantively assisted the CNB in disrupting drug trafficking activities within or outside Singapore can qualify to be sentenced to life imprisonment in lieu of death if they are also able to satisfy the Courier Requirement. As we held in *Ridzuan (CA)* at [45], the basis on which this assessment is conducted is not whether an offender had cooperated in good faith with the CNB, but whether the offender's assistance had yielded actual results in disrupting drug trafficking activities. This focus on the outcome of assistance rendered, independent of an offender's ability to provide such assistance, means that an offender will *generally* not be in a position to say much about the PP's determination under s 33B(2)(*b*).

65 Nevertheless, as the PP submits, the discretion of the PP to certify whether an offender has substantively assisted the CNB in disrupting drug trafficking activities is not an unfettered one. Much like ss 33A(1)(*a*), 33A(1)(*d*) and 33A(1)(*e*) of the MDA that were subject to challenge in *Faizal*,

ss 33B(2)(*b*) prescribes a subjective assessment of an *objective* condition for the triggering of an alternative sentence. We note that the risk that the PP may refuse to issue a certificate even where substantive assistance has been provided was raised during the Parliamentary debates; while noting that risk, the Minister for Law took comfort in the availability of judicial review and the institutional incentives for the PP to exercise its discretion properly: *Singapore Parliamentary Debates, Official Report* (14 November 2012) vol 89. Certainly the Minister did not mean to suggest that an exercise of the PP's discretion in that manner would be in accordance with s 33B(2)(*b*); indeed, his reference to judicial review as a recourse clearly indicates otherwise. In this regard, we think there is great merit to the observations of Choo Han Teck J in *Public Prosecutor v Chum Tat Suan* [2016] SGHC 27 at [9]. That is, the PP is *duty-bound* to so certify if the facts justify it:

> … I pause here to observe that the Public Prosecutor may be duty bound to certify that a person convicted had rendered substantive assistance if the facts so justify. That certificate may not be a matter for the Public Prosecutor to grant or withhold at will. Although s 33B(4) of the Act provides that the determination of whether or not a person has substantively assisted the CNB in disrupting drug trafficking activities is within the sole discretion of the Public Prosecutor, the Public Prosecutor's determination can be challenged on the basis of unconstitutionality, or if it was made in bad faith or with malice: [*Ridzuan (CA)*] at [34] – [35]. The Court of Appeal in [*Ridzuan (CA)*] was further of the view (at [71]) that "bad faith" within the meaning of s 33B(4) should be understood to refer to the "knowing use of a discretionary power for extraneous purposes (ie, for purposes other than those for which the decision maker was granted the power)". The Public Prosecutor would have exercised his discretionary power for an "extraneous purpose" if, for instance, he is satisfied that a convicted person had substantively assisted the CNB in disrupting drug trafficking activities, but deliberately withheld the issuance of the certificate because he feels that the person nonetheless deserves to be sentenced to death and so wants to prevent the court from exercising its discretion under s 33B of the Act to impose a sentence of life imprisonment *in lieu* of the death penalty. In such a situation, if the Public Prosecutor is

> of the view that the death penalty is the more appropriate punishment for the person convicted, the proper course will be for him to issue the certificate, but to make the relevant submissions to convince the court to exercise its discretion under s 33B to still impose the death penalty. …

66 Therefore, an offender may challenge the PP's refusal to grant a certificate of substantive assistance where he or she is able to raise a *prima facie* case of reasonable suspicion of breach of the relevant standard: *Ridzuan (CA)* at [51]–[52].

67 It is because of this outcome-driven approach, which is based on similar provisions in the United States and the United Kingdom that take into account the cooperation of the offender in sentencing, that Parliament decided that it should be the PP who undertakes the determination under s 33B(2)(*b*). We again highlight the observations of the Minister for Law set out at [52] above: the inquiry as to whether there has been disruption to the drug trade within and/or outside Singapore is an operational one that is dependent on CNB's, the drug enforcement agency's, intelligence and wider considerations, which may not be appropriate or even possible to determine in court. The distinctive expertise of the CNB and the PP in this regard is a salient consideration in determining the constitutionality of s 33B(2)(*b*).

The PP's discretion is not unfettered

68 We now go on to the analysis proper. *Hinds* concerned the enactment of the Gun Court Act 1974 ("the Gun Act") by the Parliament of Jamaica. Under ss 8(2) and 22 of the Gun Act, certain firearm offences carried a mandatory sentence of "hard labour during the Governor-General's pleasure" and an offender serving such a sentence could only be discharged under the direction of the Governor-General, acting on the advice of a Review Board

composed of a judge or former judge of the Supreme Court or the Court of Appeal and four other members who were not members of the judiciary. Sections 8(2) and 22 of the Gun Act were held to be in breach of the principle of separation of powers as they effectively allowed the Review Board to determine the duration of the offender's custodial term.

69 Similarly, in *Anderson*, judicial power was found to have been impermissibly vested in the Executive and therefore in violation of Art 6(1) of the ECHR. Under s 1(1) of the Murder (Abolition of Death Penalty) Act 1965 (c 71) (UK), offenders convicted of murder would be sentenced to mandatory life imprisonment. Notwithstanding this, s 29 of the Crime (Sentences) Act 1997 (c 43) (UK) conferred upon the Home Secretary the power to release such prisoners. It read:

> (1) If recommended to do so by the Parole Board, the Secretary of State may, after consultation with the Lord Chief Justice together with the trial judge if available, release on licence a [prisoner sentenced to mandatory life imprisonment].
>
> (2) The Parole Board shall not make a recommendation under subsection (1) above unless the Secretary of State has referred the particular case, or the class of case to which that case belongs, to the Board for its advice.

70 This regime constituted an inquiry conducted in two stages: *Anderson* at 884–5. First, the Home Secretary would determine the "tariff" (*ie*, the minimum period of imprisonment considered necessary to satisfy the requirements of retribution and deterrence) for each of these offenders. Second, upon the lapse of the tariff period, the Home Secretary would assess the suitability of the prisoner for release based on the risk he or she posed to the public. It was the former that was said to constitute the exercise of a judicial function. The House of Lords rejected the argument that it was merely

the administrative implementation of a sentence passed by the courts. Because the Home Secretary was not bound by the advice of the Judiciary, the exercise of the Home Secretary's discretion in determining the tariff was, in substance, the fixing of a sentence – it conclusively determines the minimum period of imprisonment that the offender must serve before he or she can even be considered for release.

71 *Muktar Ali*, on the other hand, was a case in which the nexus between the act of the Executive and the sentence imposed on the offender was more remote. It concerned a legislation which allowed the Director of Public Prosecutions of Mauritius ("Mauritius DPP") the discretion to prosecute an individual for drug trafficking in a court of his choosing. One of the options – for the individual to be tried in the Supreme Court without a jury – would lead to the imposition of the mandatory death penalty on the offender if convicted. The Privy Council, hearing the matter on appeal from the decision of the Supreme Court of Mauritius, held that the offending provision effectively allowed a member of the Executive to select the punishment to be imposed on an offender convicted of drug trafficking since the sentencing court had no discretion to determine the appropriate sentence upon the decision of the Mauritius DPP.

72 It is significant, in our view, that none of these cases deal with the subjective assessment by the Executive of an *objective* condition for the exercise of the court's sentencing powers (see [65] above). It is this characteristic that distinguishes the cases set out above. As noted in *Faizal* at [57], the legislation in *Muktar Ali* empowered a member of the Executive "to *choose* the court in which to try an offender so as to obtain a *particular* sentencing result on the facts" [emphasis added]. But that is not the nature of

s 33B(2)(*b*). Unlike the discretion exercised by the Executive in the cases cited by the applicants, the discretion exercised by the PP under s 33B(2)(*b*) is circumscribed by the legislative purpose underlying the MDA Amendments and specifically, the provision itself. It is a general provision applying with equal force in an equal manner to all offenders who have been convicted of an offence under the MDA and are liable to be sentenced to suffer the punishment of death. In this regard, we find the applicants' comparisons of the PP's function under s 33B(2)(*b*) with the clemency power, which is granted to a particular individual on a case-by-case basis, to be misguided.

73 The constitutionality of legislative provisions providing for an act of the Executive as a condition-precedent to the exercise of sentencing powers by the courts is not a novel issue. In *Palling*, a unanimous decision of the High Court of Australia, Barwick CJ held (at 58–59):

> Also it is within the competence of the Parliament to determine and provide in the statute a contingency on the occurrence of which the court shall come under a duty to impose a particular penalty or punishment. *The event or the happening on which a duty arises or for that matter a discretion becomes available to a court in relation to the imposition of penalties or punishments may be objective and necessary to have occurred in fact or it may be the formation of an opinion by the court or, in my opinion, by some specified or identifiable person not being a court.* The circumstance that on this happening or contingency, the court is given or is denied as the case may be any discretion as to the penalty or punishment to be exacted or imposed will not mean, in my opinion, that judicial power has been invalidly invaded or that judicial power is attempted to be made exercisable by some person other than a court within the Constitution. The fact that the happening of the event or the formation of the opinion is in reality determinative of the penalty or imprisonment to be ordered does not make the bringing about of the event or the formation or communication of the relevant opinion by some person or body other than a court an exercise of judicial power. *There may be limits to the choice of the Parliament in respect of such contingencies* but the nature of the contingency

> in this case does not require any examination or discussion as to the existence and, if they exist, the nature of such limits.
>
> Further, the Parliament may leave it to the executive to choose one of two alternative procedures for the prosecution of an offence, the penalty or punishment being determined either absolutely or within prescribed limits by the process of prosecution …

74 The applicants argue, as Barwick CJ suggests, that there *may* be limits to legislatively–prescribed preconditions to sentencing, but the applicants do not direct us to, or indicate, where such limits (if any) lie save to say that s 33B(2)(*b*) falls outside those limits. It has been suggested that "such contingencies could not include a legislative assertion that a particular aggravating or mitigating factor was satisfied when this would compromise the judicial sentencing role": Arie Freiberg and Sarah Murray, *Constitutional Perspectives on Sentencing: Some Challenging Issues*, Federal Crime and Sentencing Conference, Canberra, Australia (11 and 12 February 2012) at p 11 (unpublished, archived at the National Judicial College of Australia) ("*Constitutional Perspectives*"). However, this sheds no light as to the circumstances under which or when the judicial sentencing role is compromised.

75 *Constitutional Perspectives* refers to the example raised in Kirby J's dissenting judgment in *Baker v The Queen* (2004) 223 CLR 513 ("*Baker*") at [116]. *Baker* concerned a constitutional challenge to s 13A of the Sentencing Act 1989 (NSW), which allowed an offender serving an indeterminate term of imprisonment under an "existing life sentence" to apply to court to fix a minimum term of imprisonment that had to be served, and to have the term of imprisonment determined. Unlike the general class of offenders serving "existing life sentences", offenders who were the subject of a "non-release recommendation" could only make such an application 20 years after the

commencement of their respective sentences. A "non-release recommendation" was defined at [2] as a "recommendation or observation, or an expression of opinion, by that original sentencing court that (or to the effect that) the person should never be released from imprisonment". This is notwithstanding that at the time such "non-release recommendations" were made, there was no statutory basis for such recommendations and such recommendations had no legal effect. Kirby J was of the view that to rely on such a judicial remark, which had no legal effect at the time it was made, as the legislative trigger for sentencing would be "arbitrary and discriminatory" but we note that the majority of the High Court of Australia, comprising McHugh, Gummow, Hayne and Heydon JJ, endorsed at [43] the proposition that "in general, a legislature can select whatever factum it wishes as the 'trigger' of a particular legislative consequence". This, however, appeared to have been qualified in *Totani* at [71], where French CJ held that the legislature could not enact a law which "subjects a court in reality or appearance to direction from the executive as to the content of judicial decisions".

76 Regardless of where these limits may lie, we are satisfied that a determination by the Executive under s 33B(2)(*b*) does not violate the principle of separation of powers. We stress that the exercise of the PP's discretion is not tailored to the punishment it thinks should be imposed on a particular offender but is circumscribed to the limited question of whether the prescribed criterion – that the offender has substantively assisted in disrupting drug trafficking activities within and/or outside Singapore – has been satisfied. As a precondition to the exercise of the court's sentencing powers, we find that limited question to be neither arbitrary nor discriminatory; on the contrary, there are good reasons as to why the test is outcome-oriented rather than premised purely on the cooperation of an offender (see [37]–[38] above),

and why the assessment should be made by the PP and not the courts (see [52] above).

77 The applicants' argument, as we understand it, is really premised on French CJ's holding in *Totani* which is set out at [75] above. But the facts in *Totani* are far removed from the present. In *Totani*, legislation was passed compelling the court to impose control orders on an individual upon a finding that he was a member of an organisation declared by the Executive to be a risk to public safety and order. These control orders, which imposed restrictions on the personal freedom of such individuals, could be made without any assessment by the court as to whether the defendant himself posed a risk to public safety and order, or whether he had previously engaged, was engaging or would engage in serious criminal activity: *Totani* at [434]. As *Faizal* notes at [57], it is significant that the legislative scheme in *Totani* involved the imposition of a sentence absent a finding of guilt. That is, the imposition of the control orders was in fact executive, and not judicial, in nature. Section 33B(2)(*b*) does not give rise to such concerns; it is the court that determines the guilt of the party and imposes the sentence prescribed under the Second Schedule of the MDA. Where the requirements of s 33B(2) are made out, it is the court that may sentence the offender to imprisonment for life where s 33B(1)(*a*) applies. The independence and impartiality of our courts are left intact.

The PP is uniquely suited to conduct the assessment under s 33B(2)(b)

78 Furthermore, the unique qualities of the PP that render that office most suited to conduct the assessment under s 33B(2)(*b*) (see [52] above) weigh very much in favour of a finding of constitutional validity of that provision. In the decision of the US Court of Appeals for the Second Circuit in *United*

States of America v Robert Huerta 878 F 2d 89 (2nd Cir, 1989) ("*Huerta*"), a constitutional challenge was made to Title 18, s 3553(e) of the United States Code ("s 3553(e)"), which s 33B was expressly acknowledged to be modelled after: *Singapore Parliamentary Debates, Official Report* (14 November 2012), vol 89 (K Shanmugam, Minister for Law). Section 3553(e) similarly prescribes that the substantial assistance rendered by an offender in the investigation or prosecution of another person be taken into consideration for the purpose of sentencing, and reads:

> Limited Authority To Impose a Sentence Below a Statutory Minimum.—Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.

79 The Court of Appeals for the Second Circuit dismissed the argument that s 3553(e) violated the principle of separation of powers for reasons similar to what we have stated above, holding at 91–93 (footnotes omitted):

> Huerta's separation of powers argument is based on the premise that sentencing is a judicial prerogative and necessarily includes the power to consider all relevant factors. From this premise, he concludes that a scheme which delegates to the prosecutorial arm of the Executive Branch the authority to control when a judge may consider cooperation with the government as a mitigating factor interferes with or usurps a constitutionally assigned judicial function. We disagree.
>
> …
>
> We note first that the statute does not permit the government to engage in "adjudication." *To be sure, the decision whether to make a motion for departure affects whether a defendant will be eligible to be considered for a sentence below the prescribed*

> *range. The power to decide the motion and to pronounce the sentence, however, remain with the court …*
>
> …
>
> Another relevant factor in weighing the validity of a statutory scheme that commingles governmental functions is the relative expertise of the branches involved. In [*Morrison v Olson*, 487 US 654 (1988)], the Supreme Court found no incongruity in empowering { "pageset": "S53 the judiciary to appoint independent prosecutors in part because "in light of judicial experience with prosecutors in criminal cases, it could be said that courts are especially well qualified to appoint prosecutors." … *We believe that whether a defendant's cooperation has risen to the level of "substantial assistance" to the government is self-evidently a question that the prosecution is uniquely fit to resolve.* Nor do we perceive any danger of misuse of this power. There are significant institutional incentives for the prosecution to exercise sound judgment and to act in good faith in deciding whether to make a Section 3553(e) motion. The government has an interest in encouraging defendants to cooperate with law enforcement efforts. The reasonable use of substantial assistance motions for those who cooperate will make others more likely to do so in the future. In addition, because promises to make such motions are analogous to plea agreements, a defendant would likely not be without recourse in the case of a breach by the government …
>
> For similar reasons, Section 3553(e) does not usurp an inherently judicial function by preventing sentencing judges from exercising their constitutional prerogatives. "[S]entencing is not inherently or exclusively a judicial function," … and "the sentencing function long has been a peculiarly shared responsibility among the Branches of government and has never been thought of as the exclusive constitutional province of any one Branch." …
>
> [emphasis added]

80 All of the reasons given in *Huerta* apply equally to the present case. We have canvassed at length in *Ridzuan (CA)* the reasons why the PP is best placed to make the assessment under s 33B(2)(*b*): [52] above. Further, as is the case for s 3553(e), while it is the PP who certifies whether an offender has provided substantive assistance to the CNB, the court retains the discretion not

to sentence an offender to life imprisonment under s 33B(1)(*a*). Like the court in *Huerta*, we do not think s 33B(2)(*b*) infringes the principle of separation of powers.

The second substantive issue – Art 9(1) of the Constitution

81 The applicants' second substantive ground is that s 33B(2) breaches Art 9(1) of the Constitution ("Art 9(1)"), which provides that "[n]o person shall be deprived of his life or personal liberty save in accordance with the law". There are three strands to this argument:

(a) s 33B(2)(*b*) breaches the fundamental rules of natural justice;

(b) the Impugned Provisions are absurd and arbitrary and are therefore not "law" under Art 9(1) of the Constitution; and

(c) the Impugned Provisions are contrary to the rule of law.

Natural justice

82 The expression "law" is defined in Art 2(1) of the Constitution, which states:

> "law" includes written law and any legislation of the United Kingdom or other enactment or instrument whatsoever which is in operation in Singapore and the common law in so far as it is in operation in Singapore and any custom or usage having the force of law in Singapore …

83 As part of the MDA, legislation that is currently in force in Singapore, the Impugned Provisions are *prima facie* "law" for the purposes of Art 9(1). But the decision of the Privy Council in *Ong Ah Chuan* at [26], which was endorsed by this court in *Yong Vui Kong v Attorney-General* [2011] 2 SLR

1189 ("*Yong Vui Kong (Clemency)*") at [101], rejects a literal approach to the interpretation of "law" as far as Arts 9(1) and 12(1) of the Constitution are concerned:

> In a Constitution founded on the Westminster model and particularly in that part of it that purports to assure to all individual citizens the continued enjoyment of fundamental liberties or rights, *references to "law" in such contexts as "in accordance with law", "equality before the law", "protection of the law" and the like, in their Lordships' view, refer to a system of law which incorporates those fundamental rules of natural justice that had formed part and parcel of the common law of England that was in operation in Singapore at the commencement of the Constitution*. It would have been taken for granted by the makers of the Constitution that the "law" to which citizens could have recourse for the protection of fundamental liberties assured to them by the Constitution would be a system of law that did not flout those fundamental rules. If it were otherwise it would be misuse of language to speak of law as something which affords "protection" for the individual in the enjoyment of his fundamental liberties, and the purported entrenchment (by Art 5) of Arts 9(1) and 12(1) would be little better than a mockery. [emphasis added]

84 In *Yong Vui Kong (Clemency)*, this court held at [105] that there is no substantive difference between fundamental and administrative rules of natural justice; they are "the same in nature and function, except that they operate at different levels of our legal order, one to invalidate legislation on the ground of unconstitutionality, and the other to invalidate administrative decisions on the ground of administrative law principles". It is on this basis that the applicants seek to rely on the hearing rule and the rule against apparent bias as grounds to challenge the validity of s 33B(2)(*b*).

85 With regard to the former, we reiterate what was held in *Manjit Singh s/o Kirpal Singh and another v Attorney-General* [2013] 2 SLR 844 at [88]: what fairness demands in relation to the hearing rule will depend on the subject matter and context. The applicants argue that the process of

determining whether they had provided substantive assistance is opaque to them – they received no notice of the factual allegations on which the determination was made and had no opportunity to dispute the decision of the PP save for challenges on the grounds of bad faith and/or malice under s 33B(4). What the applicants seek, in essence, is an adjudicative process by which they may contest the factors which the PP takes into account in deciding whether or not to issue the certificate of substantive assistance.

86 While the nature of the challenge in *Ridzuan (CA)* was not quite the same, we think the holdings made therein to be equally relevant. First, our observation at [52] as to the PP being uniquely suited to assess the operational value of the assistance rendered (echoing the speech of the Minister for Law) applies equally to the determination of the content of the hearing rule. In this light, we do not see why the hearing rule requires that an offender be given a chance to address the PP on extra-legal factors which the offender would be in no position to comment on. Like the appellant in *Ridzuan (CA)*, it is not the case that the applicants have not been given the chance to be heard at all; they have been given an opportunity (and in respect of the applicant in CM 3, numerous opportunities) to provide information to the CNB.

87 Second, as we stated in *Ridzuan (CA)* at [66], the grant of a certificate of substantive assistance is not a matter that should be dealt with at trial:

> … Having regard to what was clear Parliamentary intention underlying the scheme set out in s 33B of the MDA (see [46] above), and in order to ensure that the effectiveness of CNB is not undermined, we are in agreement with the Respondent that if we were to treat the issue of the grant of a certificate of substantive assistance as if it were a matter to be proven and justified at trial, our entire battle against drug trafficking, which we have relentlessly pursued for more than 40 years, would be seriously jeopardised and along with it so would the general interest of society. It is for this reason (the need to

> avoid jeopardising the operational capability of CNB) that we accept the submission of the Respondent (referred to at [56] above) that the Judge is not the appropriate person to determine the question of whether a convicted drug trafficker has rendered substantive assistance. Section 33B expressly confers upon the PP the discretion to make the decision on substantive assistance. …

88 As for the argument that conferring upon the PP the discretion to certify if an offender has provided substantive assistance raises concerns of apparent bias, that appears to us to be predicated on the assumption that the PP would only exercise his prosecutorial powers wholly with a view to obtaining the maximum permissible sentence. That is hardly an accurate characterisation of the PP's role – we refer to the remarks made by Sundaresh Menon CJ in the Opening Address delivered at the Sentencing Conference 2014 on 9 October 2014 on the duty of the PP in relation to sentencing. He stated at para 35:

> It is perhaps possible to extrapolate from those principles that are widely accepted and to arrive at some thoughts about the prosecutorial role in sentencing. First, the Prosecution acts only in the public interest. That immediately distinguishes it from those who appear in a private law suit to pursue the interest of a private client. On this basis, there would generally be no need for the Prosecution to adopt a strictly adversarial position. Second, that public interest extends not only to securing the conviction in a lawful and ethical manner of those who are factually guilty, but also to securing the appropriate sentence.

89 This is consonant with the observation of this court in *Ramalingam Ravinthran v Attorney-General* [2012] 2 SLR 49 at [53] that the Attorney-General as the PP uses his prosecutorial power in the public interest and as the speech of the Minister for Law (set out at [52] above) indicates, the independence of the PP and the institutional incentives for him to operate with integrity are the primary reasons why it has been selected to make the assessment under s 33B(2)(*b*). Indeed, the number of offenders who have been

certified to have provided substantive assistance to the CNB attests to the non-partisan manner (in the general sense) in which the PP has undertaken this function thus far.

Absurd and arbitrary

90 The applicants' second head of argument in respect of Art 9(1) relies on *Yong Vui Kong v Public Prosecutor and another matter* [2010] 3 SLR 489 ("*Yong Vui Kong (MDP)*") at [16], where it was suggested that a piece of legislation must not be absurd or arbitrary in order to constitute "law" for the purposes of Art 9(1):

> However, beyond what was actually decided in *Ong Ah Chuan* itself, it is not clear what the Privy Council had in mind vis-à-vis the kind of legislation that would not qualify as "law" for the purposes of Art 9(1). Perhaps, the Privy Council had in mind colourable legislation which purported to enact a "law" as generally understood (*ie*, a legislative rule of general application), but which in effect was a legislative judgment, that is to say, legislation directed at securing the conviction of particular known individuals (see *Don John Francis Douglas Liyanage v The Queen* [1967] 1 AC 259 at 291), *or legislation of so absurd or arbitrary a nature that it could not possibly have been contemplated by our constitutional framers as being "law" when they crafted the constitutional provisions protecting fundamental liberties* (*ie*, the provisions now set out in Pt IV of the Singapore Constitution). [emphasis added]

91 The applicants submit that s 33B(2)(*b*) is so absurd or arbitrary in nature that it cannot constitute "law" because:

(a) For offenders convicted prior to the Amendment Act (such as the applicant in CM 2), any assistance they could have rendered would have been before there was an obligation of the PP to consider if substantive assistance had been rendered.

(b) Assistance rendered by an offender, such as information or leads given, may take some time to be appreciated.

(c) The fact that no reasons have to be provided by the PP for his refusal to issue a certificate of substantive assistance makes it impossible to challenge the exercise of the PP's discretion under s 33B(4).

(d) Couriers, who will be at the bottom rung of any syndicate, are unlikely to be able to provide substantive assistance.

(e) The requirement that there must be a disruption to drug trafficking activities within or outside Singapore may lead to an absurd result, whereby an offender who is in the lower rungs of the hierarchy (and is therefore less culpable) is sentenced more severely than an offender who is higher up the hierarchy (and is therefore more likely to be able to provide substantive assistance).

(f) It puts offenders in an unenviable position of having to choose between providing substantive assistance and waiving any defences that may be inconsistent, and raising those defences and facing the prospect of the death penalty.

92 Some of these points have already been addressed by this court and we see no cause to revisit them. For instance, this court has contemplated in *Public Prosecutor v Chum Tat Suan and another* [2015] 1 SLR 834 ("*Chum Tat Suan*") at [31] and [78] the possibility that an offender could run a completely exculpatory defence and still be found to satisfy the Courier Requirement. In any case, it was held in *Chum Tat Suan* at [80] that there is

nothing invidious about an offender having to elect between whether to cooperate and whether to give evidence in his defence. As for challenges to the exercise of the PP's discretion, *Ridzuan (CA)* at [51]-[52] makes clear that it is not impossible to challenge the exercise of the PP's discretion; an offender can discharge the evidentiary burden he bears by highlighting circumstances that raise a *prima facie* case of reasonable suspicion of breach of the relevant standard, which shifts the evidentiary burden to the PP.

93 Ultimately, there is nothing in our minds to indicate that s 33B(2)(*b*) is absurd or arbitrary. As Quentin Loh J held in *Tan Eng Hong v Attorney-General* [2013] 4 SLR 1059 at [39], where it is argued that a law is in breach of Art 9(1) for arbitrariness, the assessment is directed at the *purpose* of the law. This is an inquiry that is, in substance, no different from that under Art 12(1) of the Constitution and in this regard, the analysis undertaken in *Quek Hock Lye* is instructive. Not only is s 33B(2)(*b*) rational but as stated in *Quek Hock Lye* at [36], there is a clear purpose of the law, targeted at enhancing law enforcement capabilities in the war against drugs:

> … [T]here is an obvious relation between this differentia and the object sought to be achieved, which is to reach further into drug networks by obtaining assistance in disrupting drug trafficking activities from offenders who have performed a "key role", *viz*, that of "courier", in drug operations, and who could furnish a lead to the CNB to identify the "suppliers and kingpins outside Singapore".

94 As the Minister for Law explained, there are compelling reasons why s 33B(2)(*b*) requires that enforcement effectiveness must be enhanced by the assistance rendered by an offender before it is deemed substantive (*Singapore Parliamentary Debates, Official Report* (14 November 2012) vol 89):

> The short answer is that it is not a realistic option because every courier, once he is primed, will seem to cooperate.

> Remember we are dealing not with an offence committed on the spur of the moment. We are dealing with offences instigated by criminal organisations which do not play by the rules, which will look at what you need, what your criteria are and send it to you. So if you say just cooperate, just do your best, all your couriers will be primed with beautiful stories, most of which will be unverifiable but on the face of it, they have cooperated, they did their best. And the death penalty will then not be imposed and you know what will happen to the deterrent value. Operational effectiveness will not be enhanced. Will we be better off? Will we be worse off?

95 We note that the argument at [91(a)] above, relating to the difficulties offenders sentenced prior to the commencement of the Amendment Act face, is similar to that advanced by the applicant in *Quek Hock Lye*, who argued that he could not avail himself of mitigating factors which would have qualified him for re-sentencing as he would not have known at the time of the offence that the Amendment Act would be enacted. As was the case in *Quek Hock Lye*, the finding of a rational relation between the differentia and the purpose of s 33B(2)(*b*) is sufficient to dispose of this aspect of the applicants' arguments. The reason for the outcome-centric approach that Parliament has adopted has been fully explained and the fact that some couriers may not be able to provide substantive assistance by virtue of their role in the syndicate does not render the provision absurd or arbitrary. It is not necessary that it must be the best means of furthering the object and purpose of the statute: *Quek Hock Lye* at [37], citing *Yong Vui Kong (MDP)* at [113]. We would also add that in respect of the applicants' argument on information possibly bearing fruit only after a long while, given that such offenders are generally convicted years after their initial arrest and CNB would have followed up on any information furnished to them until there is no realistic prospect of any further progress, chances of this occurring are speculative and highly unlikely. Section 33B(2)(*b*) cannot be absurd or arbitrary simply because of this remote possibility.

Contrary to the rule of law

96 The applicants argue that the Impugned Provisions are contrary to the rule of law for the following reasons:

> (a) The concept of "substantive assistance in disrupting drug trafficking" in s 33B(2)(*b*) is contrary to the rule of law as it does not provide reasonable certainty in its application given that it is determined by "unstable and uncertain standards". This is because it may depend on the "operational necessities" of the CNB, as well as other factors which an offender would not know of and may not be within his control, and which bear no relation to the gravity of the offences committed.
>
> (b) Section 33B(4) is contrary to the rule of law given that it curtails the court's power to review the exercise of discretionary power. This breaches the basic principle that all legal powers, even constitutional powers, have legal limits.

97 With respect to the former, it seems to us there is nothing uncertain or unstable about the standards that an offender has to meet – he or she has to provide substantive assistance in disrupting drug trafficking activities, either within or outside Singapore. What the applicants appear to take issue with is the assessment of whether a trafficker has provided substantive assistance, which Tay Yong Kwang J (as he then was) had found in *Ridzuan (HC)* at [50] to involve a "multi-faceted inquiry" taking into account a multitude of factors such as the upstream and downstream effects of any information provided, the operational value of any information provided to existing intelligence, and the veracity of any information provided when counterchecked against other

intelligence sources. Tay J did not suggest, as the applicants do, that the CNB's operational capabilities are a valid consideration. To the extent that they are suggesting that the finding of substantive assistance is arbitrary because operational limitations of CNB may result in insufficient resources being allocated to following up on information offered by an offender, we find this to be purely speculative.

98 As for the latter, s 33B(4) itself provides that the PP's decision can be reviewed on the grounds of bad faith and malice aside from grounds of unconstitutionality, and it is still an open question as to whether the court's power of review extends further: *Ridzuan (CA)* at [76]. It is therefore untrue to suggest that there are no legal limits to the PP's discretion in this regard; indeed, our observation at [65] above as to the possibility of a *duty* being imposed on the PP under s 33B(2)(*b*) suggests that it may be more limited than the applicants make it out to be. It appears to us that the applicants' argument really is that s 33B(4) ousts the jurisdiction of the court to review justiciable matters and we accept the PP's submission that this is not a matter that needs to be addressed in relation to the Motions. Putting aside the fact that CM 1, CM 3 and CM 4 can be dismissed on the preliminary issues alone, there is no live issue before this court as to the scope of s 33B(4) in respect of these applications. The applicants in CM 1 and CM 4 have not sought to challenge the PP's failure to certify on the ground that they have substantively assisted the CNB, while the application of the applicant in CM 3 for leave to commence judicial review proceedings against the PP has already been dismissed by the High Court, and the appeal against that decision was also dismissed by this court in *Ridzuan (CA)*.

99 As for the applicant in CM 2, OS 272 has yet to be heard, and the validity of s 33B(4) makes no difference to his sentence at this stage. Further, given that the scope of s 33B(4) – an issue on which we expressed no concluded view in *Ridzuan (CA)* and which is inextricably linked to the question of whether s 33B(4) impermissibly ousts the jurisdiction of the court – may be canvassed in OS 272, we think it would be premature to consider at this juncture the constitutionality of s 33B(4) on the ground raised by the applicants.

Conclusion

100 For the reasons given above, we dismiss the Motions.

101 As a concluding remark of this judgment, we would like to return to what we mentioned in [19] above in relation to drip-feeding and/or last minute applications. In line with what we have earlier observed, in future, when an application is made after the appeal process has been completed, we expect counsel for the applicant to swear or affirm an affidavit setting out the reasons why the points or matters raised in the application could not have been raised earlier in the appeal proper.

Sundaresh Menon Chief Justice	Chao Hick Tin Judge of Appeal	Andrew Phang Boon Leong Judge of Appeal

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