Public Prosecutor *v* Nagaenthran a/l K Dharmalingam
[2011] SGHC 15

Case Number	: Criminal Case No 23 of 2010
Decision Date	: 19 January 2011
Tribunal/Court	: High Court
Coram	: Chan Seng Onn J
Counsel Name(s)	: Toh Shin Hao, Samuel Chua and Serene Seet (Attorney-General's Chambers) for the prosecution; Amolat Singh and Balvir Singh Gill (Assigned) for the defendant.
Parties	: Public Prosecutor — Nagaenthran a/l K Dharmalingam

Criminal Law

19 January 2011

Chan Seng Onn J:

Background

1 The accused was a 22 year old male Indian Malaysian who was charged with the offence of importing, without any authorisation by law, one packet of granular substance containing not less than 42.72 grams of diamorphine under section 7 of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) ("MDA"), punishable under section 33 of the MDA read with the Second Schedule to the MDA.

2 The undisputed facts were as follows. On 22 April 2009, at about 7.45pm, the accused and his friend, one Kumarsen, were stopped at the Woodlands Checkpoint while entering Singapore from Malaysia on a motorcycle. Kumarsen was the rider while the accused rode pillion. A strip search conducted shortly after the accused and Kumarsen were escorted to the Immigration and Checkpoints Authority Car Arrival Secondary Team Office ("ST Office") at Woodlands Checkpoint uncovered a newspaper-wrapped bundle ("the Bundle") secured by yellow tape to the accused's left thigh side of a red pair of boxer briefs which the accused was wearing over his V-shaped underwear. Inside the Bundle was some white granular substance in a transparent plastic bag. The white granular substance was subsequently analysed and found to contain not less than 42.72 grams of diamorphine. Nothing was found on Kumarsen during the strip search.

3 After the discovery of the Bundle, both the accused and Kumarsen were immediately placed under arrest. Their statements were recorded. Kumarsen was subsequently released while the accused was charged with the offence for which he claimed trial.

4 The admissibility of the accused's statements recorded by the Central Narcotics Bureau ("CNB") officers was not disputed at trial. It was also not disputed that at the time of the alleged offence, the accused was living in a shared apartment in Johor Bahru with some of his friends (including Kumarsen and Kumarsen's wife) and one Shalini whom the accused claimed to be his girlfriend.

The Prosecution's case

5 The Prosecution submitted that the accused was guilty of the offence charged because he knew that he was importing the controlled drug heroin into Singapore at the material time. In

particular, the Prosecution argued that the accused already had either actual knowledge or imputed knowledge (in the form of wilful blindness) of the actual contents found in the Bundle when he was stopped at Woodlands Checkpoint on 22 April 2009.

6 The main evidence of the Prosecution to establish actual knowledge were, *inter alia*, the testimony of the CNB officer ("Sergeant Shahrulnizam") who conducted the strip search on the accused and the accused's alleged admission as to his knowledge in his long statement recorded by another CNB officer ("Sergeant Vasanthakumar") shortly after his arrest. Based on Sergeant Shahrulnizam's oral testimony, upon his discovery of the Bundle on the accused's left inner thigh during the strip search and upon retrieval of the Bundle from the accused's body (in the course of which part of the Bundle's newspaper wrapping was torn off, hence exposing parts of the transparent plastic packaging containing the white granular substance), he pointed to the Bundle and asked the accused, "What is this?", to which the accused replied in English, "Heroin". [note: 1] As regards the accused's alleged admission as to his knowledge of the actual contents of the Bundle, the relevant parts of the long statement recorded by Sergeant Vasanthakumar are reproduced here:

> Q1) What is this? (Pointing to a zip lock Bag consisting of 1 big packet of white granular substance, Crushed Newspaper & yellow Tape)
>
> A1) Heroin.
>
> Q2) Whom does it belong to?
>
> A2) It belongs to my Chinese friend who goes by the name of king who strapped it on my left thigh.
>
> Q3) Why did he strapped it on your left Thigh?
>
> A3) He Strapped it on my left thigh is because it was for my safety and no one will find it.
>
> Q4) Whom is it to be delivered to?
>
> A4) It is to be delivered to one Chinese recipient who will be driving a dark blue Camry and he will be meeting me in front of ē 7-11 store at Woodlands Transit.
>
> Q5) Why do you have to deliver the Heroin?
>
> A5) I have to deliver ē Heroin is because I owe king money & he promised to pass me another five hundred dollars after my delivery.
>
> [sic]

7 With regard to the Prosecution's alternative submission that there was wilful blindness on the part of the accused as to the actual contents of the Bundle, the Prosecution argued that although the accused had reason to suspect that the Bundle contained illegal material when King strapped the Bundle to the accused's left inner thigh, the accused person failed to take reasonable steps to inquire further about the Bundle's contents despite having sufficient time and opportunity to do so. As such, the accused was prepared to deliver the Bundle, as instructed by King, to Singapore regardless of whether it contained heroin. Relying on the cases of *Iwuchukwu Amara Tochi and another v Public Prosecutor* [2006] 2 SLR(R) 503 and *Tan Kiam Peng v Public Prosecutor* [2008] 1 SLR(R) 1, the Prosecution contended that the accused was in fact wilfully blind to the actual contents of the

Bundle.

8 The Prosecution also submitted that, in any event, the accused failed to rebut the presumption of knowledge imposed under section 18(2) of the MDA.

The Defence's case

9 The Defence raised two main points. The first was that the accused did not have any knowledge of the actual contents of the Bundle. The second was that the accused had delivered the Bundle under duress by King, a person whom the accused had got acquainted with in Johor Bahru some four to five months before the accused's arrest and who had been, *inter alia*, regularly paying for the accused's food and drinks when they met up in Johor Bahru. According to the accused, he had also accepted loans from King on several past occasions. [note: 2]

10 In support of the plea of duress, the accused claimed that he had delivered the Bundle out of fear that his girlfriend, Shalini (whom he was deeply in love with and whom he had intended to marry), would be killed by King if he refused to do so. The version of the facts put forth by the accused in this regard was that he had met King at a food shop in Johor Bahru after his work at about 6pm on 22 April 2009, a day after the accused had asked King to lend him RM500 as the accused's father had to undergo a heart operation on 23 April 2009 in Kuala Lumpur. At the food shop, King handed the accused what was believed to be a packet of food together with a transparent plastic packet of curry, telling the accused to deliver those items to King's "brother" in Woodlands, Singapore. King told the accused he had to complete the delivery before any arrangement for the RM500 loan that the accused had requested could be done. Just as the accused was about to leave with those items, King suddenly called the accused back and invited him into King's car. In the car, King told the accused that he had changed his mind and now needed the accused to deliver something else to King's "brother" instead. At this point, King handed the accused a packet wrapped in newspaper (*ie*, the Bundle) which King said contained "company product", or more particularly "company spares", and told the accused that the Bundle had to be tied to the accused's thigh for the delivery. [note: 3] The accused resisted, but King slapped and punched the accused, threatening that if he refused to deliver the Bundle, King would "finish" and "kill" the accused's girlfriend, Shalini, whom the accused had introduced to King previously in the course of their relatively short acquaintance. [note: 4] That was when the accused capitulated at which point King proceeded to strap the Bundle onto the accused's left inner thigh side of his red boxer briefs using yellow tape.

11 On the Defence's contention that the accused had no knowledge of the actual contents of the Bundle, the accused claimed that he did ask King what was in the Bundle when King initially showed it to him in the car but, as mentioned above, was swiftly rebuffed by King with violence and the death threat against Shalini. Although the accused was subsequently sent back to his apartment to arrange for his own transport for the delivery of the Bundle, the accused explained that he did not take any steps to ascertain the actual contents of the Bundle for the following reasons. First, King had told the accused after strapping the Bundle on the accused's thigh, "Don't tell anyone about this product. If not, see what happens to you". [note: 5] Second, the accused claimed he could not open the Bundle as it had been taped onto his red boxer briefs securely. The accused also lamented that he could not simply throw the Bundle away or report the entire incident to the police as Shalini's life was under threat and he did not have much faith in the effectiveness of the Malaysian police force. [note: 6]

12 In his defence, the accused also claimed that his statement to Sergeant Vasanthakumar was not properly recorded and was not read back to him before he was asked to sign the statement. [note: 7] In particular, he claimed that he did not make any admission as to his knowledge of the

contents of the Bundle to any of the CNB officers present during his arrest. The accused also alleged that Sergeant Shahrulnizam had used vulgarities and violence on him during the strip search and, upon finding the white granular substance in the Bundle, had presumptuously suggested to the accused that the Bundle contained "*thool*", a Tamil word colloquially used to mean "powder" or, more precisely, drugs. [note: 8]

13 Lastly, the accused also explained that the reason why he was wearing a pair of red boxer briefs over his V-shaped underwear on the day of his arrest was because he was then working as a welder and needed to protect himself during welding from abrasions and lacerations to the sides of his thighs. [note: 9]

The decision

Was there a factual threat amounting to duress in law?

14 I will deal first with the issue of whether the defence of duress was made out both in evidence and in law before addressing the issue of the accused's knowledge (or lack thereof) of the actual contents of the Bundle.

15 The general defence of duress is provided for in section 94 of the Penal Code (Cap 224, 2008 Rev Ed) ("Penal Code") which reads:

> **Act to which a person is compelled by threats**
>
> **94**. Except murder and offences against the State punishable with death, nothing is an offence which is done by a person who is compelled to do it by threats, which, at the time of doing it, reasonably cause the apprehension that instant death to that person or any other person will otherwise be the consequence:
>
> Provided that the person doing the act did not of his own accord, or from a reasonable apprehension of harm to himself short of instant death, place himself in the situation by which he became subject to such constraint.
>
> *Explanation 1*.—A person who, of his own accord, or by reason of a threat of being beaten, joins gang-robbers knowing their character, is not entitled to the benefit of this exception on the ground of his having been compelled by his associates to do anything that is an offence by law.
>
> Explanation 2.—A person seized by gang-robbers, and forced by threat of instant death to do a thing which is an offence by law — for example, a smith compelled to take his tools and to force the door of a house for the gang-robbers to enter and plunder it — is entitled to the benefit of this exception.

16 The ingredients of the defence of duress has been recently explained in the case of *Public Prosecutor v Ng Pen Tine and Another* [2009] SGHC 230 at [154] ("*Ng Pen Tine*"):

> Accordingly, the following requirements must be satisfied before the 2nd accused's plea of duress may be successful: (i) the harm that the accused was threatened with was death; (ii) the threat was directed at the accused or other persons which would include any of his family members; (iii) the threat was of "instant" death; (iv) the accused reasonably apprehended that the threat will be carried out; and (v) the accused had not, voluntarily or from a reasonable apprehension of

harm to himself short of instant death, placed himself in that situation.

17 It is trite law that the standard of proof necessary for the defence of duress to succeed is that of a balance of probabilities (see, *eg*, *Chu Tak Fai v Public Prosecutor* [1998] 4 MLJ 246). Duress under section 94 of the Penal Code must be "imminent, persistent and extreme" (see, *eg*, *Public Prosecutor v Goh Hock Huat* [1994] 3 SLR(R) 375; *Wong Yoke Wah v Public Prosecutor* [1995] 3 SLR(R) 776; *Shaiful Edham bin Adam and another v Public Prosecutor* [1999] 1 SLR(R) 442; *Teo Hee Heng v Public Prosecutor* [2000] 2 SLR(R) 351), with the word "imminent" suggesting that the threatened harm need not be carried out immediately or within a very short time span (see *Ng Pen Tine* at [155]).

18 Having set out the principles governing the defence of duress, I now turn first to the evidence relied upon by the Defence in support of the defence of duress. Having heard the evidence, I found it difficult to accept that the defence of duress was evidentially substantiated on a balance of probabilities. I was not sufficiently satisfied on the evidence that the accused had successfully discharged his burden in proving that the character named "King" did in fact coerce the accused into delivering the Bundle by threatening to "finish" and "kill" Shalini. Indeed, I would have been more prepared to accept the truth of the existence of King's threat had there been some cogent evidence adduced to show any harassment or physical harm being visited upon Shalini after the accused failed to deliver the Bundle because of the accused's arrest. In fact, it was brought to my attention by the parties at trial that nothing untoward seemed to have happened to Shalini after the accused's attempt to deliver the Bundle to King's "brother" failed. This, while admittedly not in itself conclusive, nevertheless would still go some way in demonstrating that the entire episode of King's threat could have been a fabrication or afterthought by the accused after all. More importantly, when the accused was first asked by the CNB officers why he had to deliver the Bundle to Woodlands, there was no mention at all by the accused of any threat made by King on Shalini's life. In his long statement recorded by Sergeant Vasanthakumar, the accused merely stated in response to the question asked of him: [note: 10]

> Q5) Why do you have to deliver the Heroin?
>
> A5) I have to deliver ē Heroin is because I owe king money & he promised to pass me another five hundred dollars after my delivery.
>
> [sic]

19 During cross-examination, the accused sought to explain that he had omitted to mention King's threat to Sergeant Vasanthakumar because he was "frightened" and not in the "right state of mind", and he "could not think". [note: 11] I did not believe the accused, given that the accused did in fact provide an explanation in his statement to Sergeant Vasanthakumar in the end as to why he delivered the Bundle, albeit one that was of no help whatsoever to his defence as compared to his subsequent explanation that he was delivering the Bundle under King's threat. That such a paramount explanation of duress was not provided at all when the accused was first questioned by Sergeant Vasanthakumar rendered the accused's story of King's threat unbelievable given that (1) the threat directly concerned Shalini with whom the accused claimed he was deeply in love; [note: 12] (2) the accused had through his own evidence accepted that he was at all times aware of the dire legal consequences one could potentially face if one was charged and convicted for bringing illicit drugs into Singapore; [note: 13] (3) King's threat, if true would have gone some way to exonerate the accused and it was not something that the accused would readily forget or omit to mention even under stressful conditions as a result of being arrested; and (4) an accused person would generally be far more likely,

upon being questioned soon after his arrest, to mention facts to establish his innocence or to establish some form of defence (such as duress) to the possible offences that he might be faced with. I found it highly improbable that the accused who claimed to have been mistreated, assaulted and wrongly accused by CNB officers (see [12] above) despite his own belief as to his innocence would fail to explain himself more fully in his statement to Sergeant Vasanthakumar. Indeed, one would have thought that a person who genuinely believed himself to be wronged by the authorities would all the more have protested his innocence with the greatest of resolve and rigour possible. Yet, that did not happen in this case.

20 For the sake of completeness, even if I were to accept the accused's version of facts to be credible, the defence of duress would still not succeed in law. According to the accused's own evidence, he was driven back to his apartment after the alleged threatening episode in King's car. At the apartment, the accused met Shalini and, without relating to her (or, for that matter, anyone) what had happened in King's car, told her to stay in the apartment at all times. When the accused was finally ready to leave for Woodlands with the help of Kumarsen, there was no sight of anyone suspicious in the vicinity around the apartment. [note: 14]

21 In my judgment, the ingredients of the defence of duress would not be sufficiently made out even on the accused's own evidence because the accused could not be said to have reasonably apprehended that King's threat would actually be carried out if he refused to deliver the Bundle. As correctly pointed out by the Prosecution in its submissions, it would be easy to make a verbal threat to kill someone else without actually intending to execute that threat issued. Here, King had merely made a verbal threat to kill Shalini if the accused refused to deliver the Bundle. Unlike in the case of *Ng Pen Tine* (see [16] above), there was no indication whatsoever that King was a very influential and powerful gangster who had a team of followers capable of keeping watch over the accused and Shalini at all times, as well as to carry out the threats made by King upon King's command; there was hardly any basis for the accused to claim that there was reasonable apprehension that King's threat would be put into action at all. Furthermore, the accused under cross-examination had actually expressed his general opinion that King "doesn't look like" and was "not such a person" who would engage in illicit activities such as drug dealing, let alone commit murder: [note: 15]

> [After being asked whether the accused was suspicious of the actual contents in the Bundle when King strapped the Bundle onto his thigh...]
>
> Q Yes, because you're suspicious, right? King strapped it to your thigh. So you are suspicious and bec---and that is because you think that it could be illicit drugs, right?
>
> A I never thought it could be drugs.
>
> Q Oh, so why---why is that so?
>
> A Because King is not---not such a person. He doesn't look like that.

22 It is apposite to pause here to consider one of the Prosecution's submissions made. In the course of its submissions, the Prosecution seemed to have adopted an extremely narrow and literal approach in interpreting section 94 of the Penal Code. In particular, the Prosecution submitted, *inter alia*, that:

> First and foremost, there must have been **a threat of instant death** to Shalini, as required explicitly in section 94 of the Penal Code. As stated in *Mohd Sairi bin Suri v PP*, the defence is not made out if it was a threat to ***cause death at a later date or time*** . Assuming that the

accused's version is believed – while there may be a threat of death, the verbal utterances of King at about 6.40 p.m. at Hamid's Corner that Shalini would be killed if he did not make the delivery – could not, by any stretch of imagination – be tantamount to a threat of instant death to Shalini. In the first place, King was with the accused at the vicinity of Hamid's Corner when the threat was made, and Shalini was not with them at the time the threat was made. If the accused refused to allow King to strap the bundle on him, there is no basis for having a reasonable apprehension that Shalini would be instantly killed by doing so. There is no evidence to show that King would somehow have mobilised a hit squad to assassinate Shalini ***immediately*** at their home if the accused defied King at Hamid's Corner. [emphasis in original]

The material part of the Court of Appeal's decision in *Mohd Sairi bin Suri v Public Prosecutor* [1997] SGCA 57 ("*Mohd Sairi*"), which was relied upon by the Prosecution in its submission, read as follows:

Even accepting the evidence of the appellant the defence of duress would still fail. The learned trial judge held that the defence of duress under s 94 of the Penal Code was available only to a person who at the time of committing the offence was labouring under reasonable fear that instant death would otherwise be the consequence. *The defence would not succeed if the threat was that death would be caused at a later date or time*. In particular, where a person had an opportunity of seeking relief or help, or where he had the time to remove himself physically from the possibility of instant death he could not claim the protection under that provision. The learned trial judge said in 10 of his grounds of judgment:

> Thus, it is not open to the defence to say that a threat comes within that section if it was a threat to cause death at a later date or time. When a person had the opportunity of seeking relief or help, or where he had the time to remove himself physically from the possibility of instant death he cannot claim protection under this provision. The evidence of the accused himself was that he took the drugs in his boat and returned to Singapore alone. He then took a bath, waited for further communication from his alleged tormentor, changed his clothes, and then walked to the bus-stop to catch a bus. In these circumstances, the s 94 defence was clearly not available to him. If there was any threat of instant death made at Teluk Jawa [*ie*, the place where the drugs were handed to the accused by the alleged coercer], it might have absolved him from blame for taking possession of the drugs at Teluk Jawa onto his boat, but once he had put a reasonable distance between himself and Joe, any threat of instant death was over.

Given the wording of s 94 of the Penal Code, the learned trial judge on the evidence before him was entitled to come to this conclusion. What he has held is consistent with authorities. [emphasis added]

23 I had some reservations as to whether the Prosecution's submission (as quoted at [22] above) was accurate as a matter of law. The defence of duress under section 94 of the Penal Code was amended by the Penal Code (Amendment) Act 2007 (No 51 of 2007) to its current form. On the Second Reading of the Penal Code (Amendment) Bill in 2007, the Senior Minister of State for Home Affairs Associate Professor Ho Peng Kee stated:

Sir, another suggestion arising from the consultation which we have taken on board, this time from Ms Sylvia Lim, is to expand the scope of the defence of duress under section 94, to include the threat of instant death to any other person other than the person himself. This makes sense as when a person is compelled to do something by a threat which reasonably causes the apprehension that instant death to any other person will otherwise be the consequence, the person should be allowed to raise the defence of duress.

24 Quite clearly, the Senior Minister of State in his speech appeared to have only intended to address the proposed extension of the defence of duress to situations otherwise previously not covered by the Penal Code (*ie*, where a threat reasonably caused the apprehension that instant death to *any other person* would otherwise be the consequence) without actually commenting on the *substance* of the defence itself (one aspect of which involves the question of how the words "instant death" are to be interpreted in the context of section 94). I could find nothing in the Minister's speech to satisfy myself that the defence of duress is available *only* in "instant death" situations as illustrated by the Prosecution in its submission (as quoted at [22] above). This was because the Minister did not elucidate the meaning and real context in which "instant" death was meant to apply. The question hence remains whether the defence of duress is still available where the interval between the time at which the coercer's threat was made to the accused (see point A in diagram below at [28]) and the time at or by which execution of the coercer's threat would have otherwise been the consequence of the accused's failure to commit the crime as instructed (see point C in diagram below at [28]) is significantly longer than what a plain and ordinary construction of the word "instant" would normally suggest. As this aspect of the *legal construction* of section 94 of the Penal Code has never been free from interpretational controversy historically, it might be useful in my opinion to delve into the jurisprudence on section 94 of the Penal Code for further and better guidance.

25 Historically, the controversy over the proper legal parameters of section 94 of the Penal Code had always been centred on the perceived struggle between two competing schools of thought. The first school of thought held that "instant death" connoted *immediacy* of death that would follow had the accused person refused to break the law, whereas the second school of thought preferred a more liberal construction of section 94 so that *imminence* of death would be sufficient to attract a good defence of duress. In Stanley Yeo *et al*, *Criminal Law in Malaysia and Singapore: a Casebook Companion* (LexisNexis, 2009) at p 547 ("Stanley Yeo *et al*"), the authors wrote:

> In spite of the clear invocation under s 94 that the coercer must have threatened to kill the accused *instantly* should he or she refuse to break the law, the term 'imminent' has crept into the judicial authorities on the subject. The difference between the words 'instant' and 'imminent' is not a mere matter of semantics. The former requires the threatened harm to be carried out within a very short time and is synonymous with the word 'immediate'. In contrast, the term 'imminent' is synonymous with 'impending' and it permits a longer time interval to occur between the accused's refusal to break the law and the coercer's carrying out of the threat. [emphasis in original]

For the sake of clarity, "instant" had been defined in the English language to mean "[t]he point of time now present, or regarded as present with reference to some action or event" and "[a]n infinitely short space of time", while the word "imminent" was defined as "[i]mpending threateningly, hanging over one's head; ready to befall or overtake one; close at hand in its incidence; coming on shortly": see *The Oxford English Dictionary* vol VII (Clarendon Press, 2nd Ed, 1989). The meanings of these words have largely remained unchanged in the English language today.

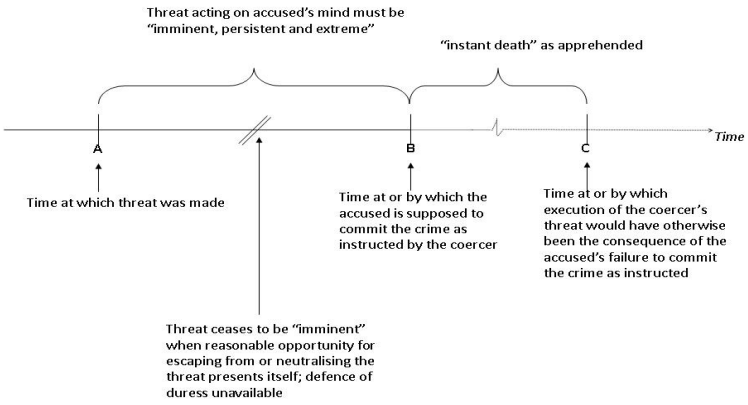
26 According to the authors in Stanley Yeo *et al*, the 'creeping' into the judicial authorities of the term "imminent" was, as far as the legal history of Singapore's Penal Code was concerned, probably first witnessed in an old Malayan Court of Criminal Appeal decision of *Tan Seng Ann v Public Prosecutor* [1949] MLJ 87 ("*Tan Seng Ann*") where it was held:

> Counsel for the appellant attacked that part of the learned Judge's directions to the Assessors on the ground that he had directed them that only fear of immediate death would be a sufficient excuse.

> We can find nothing wrong in these directions. It is clear from s 94 itself and from decided cases e.g. *M'Growther's Case* and *R v Stratton*, that duress to be pleaded successfully must be imminent, extreme and persistent. There is nothing on the record in this case to suggest that duress was present or continued when the appellant went out in the car with the other Chinese on 18 July, 1948.

27 The question thus arose as to what the court's aim was in introducing the term "imminent" in its legal analysis in *Tan Seng Ann* in spite of the fact that section 94 had already expressly provided for "instant death". From the outset, I think it would be too presumptuous of anyone to think that the court by introducing the term "imminent" had actually meant for it to eclipse the ordinary English meaning of the word "instant" such that the word "instant" is rendered totally redundant under section 94 of the Penal Code. This was especially so in light of the absence of any express words to such effect found in the judgment itself (in any event, too, that would be an unjustified judicial re-writing of what had been expressly provided for by the drafters of the Penal Code decades ago, having in mind the doctrine of separation of powers between the legislature and the judiciary in our legal system). Neither could it be reasonably reckoned that the court in *Tan Seng Ann* had used the term "imminent" erroneously thinking that it was synonymous with "instant" or "immediate".

28 In my opinion, the most sensible explanation that would account for the use of the term "imminent" in *Tan Seng Ann* was the court in *Tan Seng Ann* had actually intended to *synthesise* both the notions of immediacy and imminence of death in the defence of duress so that, in order for the defence to succeed, a threat must both be "imminent, persistent and extreme" in its character *and* capable of impressing upon the accused person (and did in fact impress or was still impressing upon the accused person at the time of the commission of the offence) a reasonable apprehension that "instant death" would otherwise be the consequence of the accused's failure to commit the crime. In other words, the requirement of "instant death" as contemplated by the accused governs the time permitted to elapse between the time at or by which an accused is supposed to commit the crime as instructed by the coercer (see point B in diagram below) and the time at or by which the contemplated execution of the coercer's threat would have otherwise been the consequence of the accused's failure to commit the crime as instructed (see point C in diagram below), whereas the requirement of "imminent, persistent and extreme" went towards the causality between the threat acting on the mind of the accused and the breaking of the law by the accused person. Where the accused person had a reasonable opportunity to escape from or neutralise the threat made by the coercer, the causation link would be broken and the defence of duress would then not be available to the accused. The diagram below (not drawn to scale) illustrates the thought or mental processes going on within the accused's mind that have to be examined for the purpose of the defence of duress:



29 In my view, such a conception of the law of duress would not be at odds with the Court of Appeal's holding in *Mohd Sairi* (see [22] above) notwithstanding the Court of Appeal's declaration that "[t]he defence would not succeed if the threat was that death would be caused at a later date or time". This was because of the sentence which immediately followed from that particular declaration:

> In particular, where a person had an opportunity of seeking relief or help, or where he had the time to remove himself physically from the possibility of instant death he could not claim the protection under that provision.

30 I was further fortified in holding the view that the declaration was not an absolute and unqualified one because the Court of Appeal in *Mohd Sairi* had also referred to *Tan Seng Ann* which, as discussed earlier, introduced the use of the word "imminent" in the court's legal analysis and reasoning (see [26] above). That the Court of Appeal went on in the same judgment to express that the Malaysian court in *Mohamed Yusof bin Haji Ahmad v Public Prosecutor* [1983] 2 MLJ 97 had found that "at the time the accused committed the offence there was no longer *any imminent danger of instant death* to the accused" [emphasis added] further supported my view that the declaration in *Mohd Sairi* (*ie*, that the defence would be unavailable if the threat was that death would be caused at a later date or time) was not meant to be read in an absolutist manner at all.

31 Based on the foregoing analysis, I therefore formed the view that for the purposes of the defence of duress, the law permitted an interval to exist between the time at which the coercer's threat was made to the accused (see point A in diagram above at [28]) and the time at or by which execution of the coercer's threat would have otherwise been the consequence of the accused's failure to commit the crime as instructed (see point C in diagram above at [28]).

32 Before leaving the issue of duress entirely, I would deal briefly with the accused's allegations regarding Sergeant Shahrulnizam's assault during the strip search (see [12] above). In the accused's own evidence, Sergeant Shahrulnizam's punches had landed on exactly the same spot where King had previously assaulted him in King's car. [note: 16] At one point, the accused also testified that as a result of Sergeant Shahrulnizam's assault, the accused had suffered some bleeding from his mouth. [note: 17] Suffice it for me to say that if the accused's allegations against Sergeant Shahrulnizam were indeed true, the post-statement recording medical examination conducted on the accused would have detected at least some physical injuries on the accused sustained from not just one but two episodes of violence which had occurred within a relatively short time interval. However, nothing unusual was detected at the medical examination as evidenced by the medical report admitted in evidence. [note:

[18] In the absence of any further cogent explanation from the accused, I therefore dismissed the accused's allegations against Sergeant Shahrulnizam.

The accused's knowledge of the actual contents found in the Bundle

33 From the outset of this case, it was not in dispute between the parties that the accused was in possession of the Bundle when he was stopped at Woodlands Checkpoint in Singapore. However, the degree or extent of the accused's knowledge of what exactly was inside the Bundle wrapped in newspaper was disputed. In the course of its submissions, the Prosecution endeavoured to make out a positive case, beyond reasonable doubt based on the available evidence, that the accused did have actual knowledge or imputed knowledge (by virtue of wilful blindness) of the actual contents of the Bundle at the material time of the offence. I accepted that the statements made to the CNB officers had been accurately recorded. The statements, admitted by the accused to be voluntarily given to the CNB officers, showed that the accused had actual knowledge that the Bundle contained heroin, and not merely some kind of controlled drug the nature of which was unknown to him. If I was wrong, then I would find that the accused failed to rebut the presumption – also relied upon by the Prosecution as its alternative submission – provided under section 18(2) of the MDA which reads:

> (2) Any person who is proved or presumed to have had a controlled drug in his possession shall, until the contrary is proved, be presumed to have known the nature of that drug.

34 My reasons are as follows. The version of facts that the Defence had put forth in support of the accused's defence of duress were inextricably the same alleged facts relied upon to show that the accused lacked knowledge of the actual contents found in the Bundle. The accused alleged that he was forced by King to deliver the Bundle containing "company spares" or "company product" (not heroin) to King's brother in Singapore as he feared for Shalini's life. For reasons already given, I did not accept the accused's version of facts to be true, in particular the alleged fact that King had assaulted the accused and threatened to kill Shalini if the accused refused to (1) let King strap onto his left thigh the Bundle, which King told him contained "company spares" or "company product" and (2) deliver the strapped Bundle to King's "brother" in Singapore. On this basis alone, the Defence was therefore left with no other credible evidence upon which to discharge the burden of proof placed on the accused to rebut the presumption imposed by section 18(2) of the MDA, *ie*, that the accused knew that the Bundle found in his possession in fact contained heroin.

Conclusion

35 For all the reasons stated above, I therefore found that the accused was guilty of the offence charged. Accordingly, the accused was convicted and sentenced to death as mandated by section 33 of the MDA read together with the Second Schedule to the MDA.

[note: 1] Notes of Evidence, Day 2, p 63; Agreed Bundle, p 84.

[note: 2] Notes of Evidence, Day 3, p 10.

[note: 3] Notes of Evidence, Day 3, p 20.

[note: 4] Notes of Evidence, Day 3, p 19.

[note: 5] Notes of Evidence, Day 3, p 21.

[note: 6] Notes of Evidence, Day 4, pp 51, 53.

[note: 7] Defence Closing Submissions, p 26.

[note: 8] Notes of Evidence, Day 3, p 26.

[note: 9] Notes of Evidence, Day 3, p 21.

[note: 10] Agreed Bundle, p 101.

[note: 11] Notes of Evidence, Day 5, p 46.

[note: 12] Defence Closing Submissions, p 9.

[note: 13] Notes of Evidence, Day 4, p 76.

[note: 14] Notes of Evidence, Day 4, pp 48-9.

[note: 15] Notes of Evidence, Day 4, pp 82-3.

[note: 16] Notes of Evidence, Day 5, pp 52-3.

[note: 17] Notes of Evidence, Day 5, pp 55-6.

[note: 18] Agreed Bundle, pp 43-4.