Public Prosecutor *v* Chum Tat Suan and another
[2014] SGCA 59

Case Number	: Criminal Reference Nos 5 and 6 of 2013
Decision Date	: 28 November 2014
Tribunal/Court	: Court of Appeal
Coram	: Chao Hick Tin JA; Woo Bih Li J; Tay Yong Kwang J
Counsel Name(s)	: Aedit Abdullah, SC, Wong Woon Kwong and Suhas Malhotra (Attorney-General's Chambers) for the applicant; Manoj Nandwani Prakash, Eric Liew Hwee Tong and Dew Wong Li-Yen (Gabriel Law Corporation) for the respondent in CRF 5/2013; Johan Ismail (Johan Ismail & Co) and Abdul Rahman bin Mohd Hanipah (Abdul Rahman Law Corporation) for the respondent in CRF 6/2013.
Parties	: Public Prosecutor — Chum Tat Suan and another

Criminal law – Statutory offences – Misuse of Drugs Act

[**LawNet Editorial Note**: These two criminal references arose from the decisions of the High Court in [2014] 1 SLR 336 and [2013] SGHC 222.]

28 November 2014 Judgment reserved.

Chao Hick Tin JA:

Introduction

1 The present criminal references, Criminal Reference Nos 5 and 6 of 2013 (hereafter referred to separately as "CRF 5/2013" and "CRF 6/2013") arise out of two criminal cases heard by the High Court in the exercise of its original criminal jurisdiction. The two cases involve trafficking and importation offences under ss 5(1) and 7 of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) ("the MDA") respectively, for which the punishment was, until very recently, death.

2 From 1 January 2013, following amendments to the MDA, s 33B of the MDA ("s 33B") allows a person convicted of an offence under ss 5(1) and 7 of the MDA to avoid the mandatory death penalty if two conditions are met. The first condition, pursuant to s 33B(2), is that the person convicted must prove, on a balance of probabilities, that:

> (*a*) … his involvement in the offence under section 5(1) or 7 was restricted —
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> (i) to transporting, sending or delivering a controlled drug;
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> (ii) to offering to transport, send or deliver a controlled drug;
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> (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
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> (iv) to any combination of activities in sub-paragraphs (i), (ii) and (iii) …

A person convicted who satisfies the court that he falls within one of sub-paragraphs (i) to (iv) will

be considered a courier. This mitigating scheme under s 33B(2) shall be referred to, for convenience, as "the statutory relief of being a courier", the relief being that the death penalty is not mandatory *if* the person convicted also meets the second condition, which is:

> (*b*) the Public Prosecutor certifies to any court that, in his determination, the person [*ie*, the courier] has substantively assisted the Central Narcotics Bureau in disrupting drug trafficking activities within or outside Singapore.

For ease of reference, this will be referred to as the "s 33B certificate".

3 Even if the two conditions are met, s 33B(1) gives the court the discretion to decide if the person convicted should nevertheless be given the death penalty. If the court decides that the death penalty is not warranted, the court may sentence the person convicted to imprisonment for life and caning of not less than 15 strokes.

4 It suffices to note that Parliament's objective in amending the law was specifically to provide a less harsh sentence for drug couriers who are willing and able to assist the Central Narcotics Bureau ("CNB") in disrupting drug trafficking activities within or outside Singapore.

5 In the two criminal cases before the High Court, the judge there ("the Judge") was asked to determine if the persons convicted in the two cases were couriers within the meaning of s 33B(2)(*a*). Although the Judge held that they were, he observed that there were certain difficulties with the application of that provision. Those observations prompted the Public Prosecutor to seek clarification from this court on three questions of law by way of the present criminal references.

Facts

Background

6 The two cases decided by the Judge are *Public Prosecutor v Chum Tat Suan* [2013] SGHC 221 ("*Chum Tat Suan*") and *Public Prosecutor v Abdul Kahar bin Othman* [2013] SGHC 222 ("*Abdul Kahar*"). The issue before the Judge in both cases was extremely narrow, namely, whether the person convicted in each case (collectively, "the Respondents") was a courier within the meaning of s 33B(2)(*a*). It is important to note that at this stage, the Respondents have already been convicted by the Judge of their respective charges of importation and trafficking in controlled drugs.

Chum Tat Suan

7 The parties in *Chum Tat Suan* agreed that the only issue for the Judge to determine at that stage was whether the person convicted ("Chum") was a courier.

8 If the Judge found that Chum was *not* a courier, s 33B(1) read with s 33B(2)(*a*) would not apply to exempt Chum from the mandatory death penalty. If, however, the Judge found the converse (*ie*, that Chum was a courier), then the Prosecution would take a further statement from Chum for the purposes of determining whether he meets the requirements of s 33B(2)(*b*), that is, whether Chum has substantively assisted the CNB such that the s 33B certificate is deemed by the Public Prosecutor to be justified.

9 Should the Public Prosecutor certify that Chum has substantively assisted the CNB, the court may then exercise its discretion to sentence Chum to life imprisonment and caning. However, the defence counsel indicated that should the Public Prosecutor decline to issue a s 33B certificate

despite a finding that Chum was a courier, Chum's defence would be that he was suffering from an abnormality of mind, which is yet another new exception to the mandatory death penalty pursuant to s 33B(1) read with s 33B(3).

10 The Judge found the evidence-gathering procedure for the purposes of applying s 33B to be fraught with difficulty. On the one hand, if he allowed new evidence to be introduced, there was a possibility of evidence emerging that might undermine the findings of fact that he had made earlier in convicting Chum. On the other hand, if he did not allow the introduction of new evidence, and premised his decision exclusively on his findings of fact which had resulted in the conviction, Chum might be prejudiced in that his earlier defence for the purposes of conviction might have been conducted in a manner which furnished no occasion for evidence of his being no more than a courier to emerge at trial.

11 In the end, the Judge did not have to resolve the dilemma that he presented as the parties proceeded on the basis that no new evidence would be introduced on the question of whether Chum was no more than a courier. The remaining course open to him, therefore, was to scrutinise the evidence that was adduced at trial. He held (at [7] of *Chum Tat Suan*) that the evidence adduced as to whether Chum was no more than a courier was not unequivocal. Furthermore, there was the possibility that Chum could have but did not give evidence which would have supported a finding that he was no more than a courier. In the circumstances, it was unsafe to rely on the available evidence to find that Chum was more than a courier, and Chum should be given the benefit of the doubt.

Abdul Kahar

12 The outcome in *Abdul Kahar*, which was decided after *Chum Tat Suan*, was the same, namely, that the person convicted ("Abdul Kahar") was found to be no more than a courier. The Judge's reasoning, however, was different. In fact, he found (at [3] of *Abdul Kahar*) that the evidence showed that Abdul Kahar was more than a courier in that his "involvement went beyond transporting, sending or delivering [the drugs]". However, the Judge held (at [4] of *Abdul Kahar*) that Abdul Kahar was effectively a "re-packer" – someone who re-packed drugs into smaller packets – and it was unclear from the wording of s 33B whether Parliament intended for such persons not to have the same benefit as couriers.

13 Nevertheless, the Judge thought it more likely that Parliament had not intended to exclude ancillary acts such as re-packing from the type of acts that define a courier. On that basis, the Judge thought that Abdul Kahar should be given the benefit of the doubt at least until the law on "transporting, delivering or sending", which informs whether or not an accused is a courier, is expressed more clearly.

Questions for this court

14 The questions raised by the Prosecution in both criminal references are identical. They are:

(a) Whether a person convicted of an offence of drug trafficking or importation under ss 5(1) or 7 of the MDA bears the burden of proving on a balance of probabilities that he satisfies the requirements under ss 33B(2)(*a*) and 33B(3)(*a*) (see [2] above). This shall be referred to as "Question 1".

(b) Whether the court must take into account evidence that had been adduced at the trial leading to a conviction under ss 5(1) or 7 of the MDA to determine whether the person convicted satisfies the requirements under ss 33B(2)(*a*) and 33B(3)(*a*). This shall be referred to as

"Question 2".

(c) Whether an accused person, who had intended to sell the controlled drugs which form the subject matter of a charge under ss 5(1) or 7 of the MDA for which he had been convicted, satisfies the requirements under ss 33B(2)(*a*) and 33B(3)(*a*). To paraphrase, the issue is whether an accused person who intended to sell the controlled drugs and is convicted on that basis can nevertheless be considered a courier (that is, his involvement in the offence can be described as falling under one of the grounds in ss 33B(2)(*a*) and 33B(3)(*a*)). This shall be referred to as "Question 3".

15 Although the questions refer to both ss 33B(2)(*a*) and 33B(3)(*a*), the two subsections are identical. Section 33B(3)(*a*) applies to persons convicted who can show that they have such abnormality of mind that substantially impaired their mental responsibility for the offending acts. Hence, unless the context otherwise requires, the remainder of this judgment will make reference to only s 33B(2)(*a*) even though the same interpretation and consequences obviously apply equally to s 33B(3)(*a*).

My decision

Preliminary question of jurisdiction

16 As the sentences for both cases have not yet been pronounced, there is an issue of whether the criminal references are prematurely brought. Mr Aedit Abdullah, SC ("Mr Abdullah"), on behalf of the Prosecution, explained that the criminal references were brought pursuant to s 59(4) of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) ("2007 SCJA") even before sentence was meted out because the difficulties in the application of s 33B mentioned by the Judge had a broad impact, particularly in relation to other pending cases. A clarification from the apex court was therefore desirable.

17 It is true that s 59(4) of the 2007 SCJA does not mandate that a reference may only be brought after sentence has been passed. There is nothing in the express words of the provision to that effect. The provision simply provides that the Public Prosecutor may certify that any points of law arising on a trial before the High Court acting in the exercise of its original criminal jurisdiction in which an accused person has been convicted of an offence ought to be further considered. This is the position in relation to the two cases before us. In fact, the absence, or deliberate omission, of the word "sentence" when contrasted against the use of "conviction" as a marker suggests that the only precondition in s 59(4) of the 2007 SCJA is that the accused person must have been convicted.

18 However, the court obviously retains the discretion to refuse to hear criminal references in appropriate circumstances. An example of a case where a criminal reference may be inappropriately brought and accordingly dismissed is *Mohammad Faizal bin Sabtu and another v Public Prosecutor and another matter* [2013] 2 SLR 141, where this court dismissed two criminal motions on two separate questions of law because, amongst other reasons, the court below had not made a final ruling or imposed a sentence and allowing the motions in those circumstances "would lead to an unnecessary and unacceptable disruption to the final disposal of both matters" (at [27]). Although I do have some reservations with the necessity of the two references now before the court (see [69] below), they do not cause unnecessary or unacceptable disruption to the final disposal of the underlying matters. I will therefore proceed to answer the three questions.

Question 1: Whether the person convicted bears the burden of proving on a balance of probabilities that he was only a courier

19 The answer to Question 1 is an obvious "yes". The Prosecution and Respondents are in agreement that the person convicted bears the burden of proving on a balance of probabilities that he was only a courier. Question 1 is therefore a non-starter and need not have been raised. The language in s 33B(2) could not be any clearer.

Question 2: Whether the court in deciding whether a person convicted is a courier must take into account evidence at the trial leading to conviction

20 Question 2 is neither here nor there. The dilemma faced by the Judge was not whether the evidence given at the trial leading to the conviction *must* be taken into account. If taking into account simply means having regard to, the answer to Question 2 is an unequivocal "yes" – the court must take into account all the evidence that has been adduced at the trial leading to the conviction. I did not think that this was controversial by any measure. Indeed, midway through his oral submissions, Mr Abdullah agreed that Question 2 could have been better framed.

21 Rather, the real concern or difficulty raised by the Judge was whether the court is *limited* to considering only the evidence presented at the trial leading to the conviction, or whether the court is entitled to hear new evidence at the sentencing stage in relation to the statutory relief of being a courier which was not raised at the trial.

22 There are three related parts to this issue:

(a) First, is an accused person permitted, at the sentencing stage, to raise this alternative statutory relief of being a courier, which may be inconsistent with the original defence at trial of having no knowledge of the existence of the controlled drugs? This is an issue concerning the types of defences that can be considered by the court for the purposes of sentencing. The question of adduction of new evidence for the purpose of satisfying the statutory definition of a courier does not arise here.

(b) Secondly, if the accused person is so permitted to raise the statutory relief of being a courier at the sentencing stage, should the sentencing judge hear new evidence from the accused person?

(c) Third, what is the proper treatment of inconsistent evidence on the record, if any, as a result of the hearing of new evidence at the sentencing stage?

Is an accused person permitted to raise the statutory relief of being a courier at the sentencing stage for the first time?

23 Typically, a person accused of the offence of drug trafficking or importation under ss 5(1) and 7 of the MDA respectively will claim at trial that he had (a) no knowledge of the existence of the controlled drugs or (b) no knowledge of the true nature of the contents of the article that he was told to traffic (Chen Siyuan, "Singapore's New Discretionary Death Penalty for Drug Couriers (2014) 18(3) International Journal of Evidence & Proof 260 at p 264 ("*Chen*")).

24 Under the defence of no knowledge of the existence of the controlled drugs, the accused person generally makes one of the following two claims:

(a) that he did not know of the existence of the article containing the controlled drugs, or

(b) that he knew of the article but thought that the contents were something other than

drugs.

25 Under the defence of no knowledge of the true nature of the contents of the article, the accused person generally admits to knowing that he was carrying drugs but claims that he was told that the drugs were not controlled drugs. For clarity, I shall refer generally to these three broad defences going towards conviction as the "primary defence".

26 As a general proposition, an accused person should raise his full and complete defence, as well as adduce all the relevant evidence, at trial. The issue here is whether, by virtue of s 33B, an accused person has to admit *at trial* that he is a courier in order to engage s 33B at the sentencing stage. On a plain reading of s 33B, I do not think that the statutory scheme mandates such a conclusion. In any case, it seems to me that, in relation to the two primary defences mentioned in [24(b)] and [25] above, the fact of the accused person possibly being a courier in the transaction would have been implicit and obvious. The very basis of those two primary defences would be that the accused person was carrying the article for others, that is, acting as a courier.

27 The real difficulty arises where the primary defence is inherently inconsistent with the statutory relief of being a courier. This occurs when the accused person's primary defence is that he had no knowledge as to the existence of the article containing the controlled drugs. In a sense, and as a matter of logic, this primary defence is inconsistent with an alternative averment of being a courier, because a person must at the very least know of the existence of the article containing the controlled drugs in order to make the claim that he was a courier. It would therefore be neither implicit nor obvious in the pleading of such a primary defence that the accused person might, in the alternative, be a courier.

28 In such exceptional circumstances where the raising of the statutory relief of being a courier at trial would undermine his primary defence, an accused person would be acting reasonably in *not* putting forth a submission that he was a courier. To say that the accused person should raise this latter alternative albeit inconsistent position at trial would place him in an invidious position as he would be required to undermine his primary defence. This is exacerbated by the fact that admitting to be a courier, even on an alternative basis, is not a guarantee to the accused person that he will escape the death penalty. He would still have to be given the s 33B certificate, a matter which is entirely at the discretion of the Public Prosecutor (save where the determination by the Public Prosecutor is done in bad faith or with malice) (see [2] above).

29 As the court cannot rule out the possibility that an accused person may, in very special circumstances, genuinely not know that he was carrying the article containing the controlled drugs, the accused person should be given a fair opportunity to run the aforementioned primary defence as his sole defence without being made to raise the statutory relief of being a courier as an alternative position that is at odds with his primary defence. This is so even if the court eventually rejects the primary defence as spurious. I do not read the legislation as mandating otherwise, although the accused person's liberty to reserve, as it were, the option of running the statutory relief of being a courier, is subject to a myriad of limitations that will invariably affect the proving of the statutory relief subsequently (see [40], [42] and [50]–[56] below). An accused person would therefore not necessarily be better off under this approach.

30 Ultimately, it is a question of justice. The accused person claiming to have no knowledge of the article containing the controlled drugs is mounting a factual defence – he is putting forward a particular state of affairs. If the court disbelieves his version of events and convicts him as a result, this simply means that the court rejects the factual state of affairs claimed by the accused person in favour of another state of affairs. The statutory relief of being a courier then becomes relevant at

this point because the court has to decide what the appropriate sentence ought to be in the context of what it has found to be the true state of affairs.

31 I should add that even though an accused person may have claimed that he had no knowledge as to the existence of the article that was eventually found to have contained the controlled drugs, it is not impossible that an accused person could, on the basis of the factual state of affairs which the court finds to be true, meet the requirements set out in s 33B(2) and hence qualify to be a courier. This is the critical distinction between an accused person's factual defence at trial and the positions in law that are still available to the accused person during sentencing, whether on the facts claimed by the accused or the contrary facts found by the court. The accused person should therefore be permitted to raise the statutory relief of being a courier for the purposes of sentencing in this circumstance.

32 Whether the accused person is able to show or prove that he meets the definition of a courier on the facts as found by the court is, I stress, a separate question altogether. Likewise, whether the accused person is permitted during sentencing to adduce new evidence to support the statutory relief of being a courier is also a separate question altogether (see [49]–[56] below).

33 As far as this first part of Question 2 posed at [22(a)] above is concerned, the sole issue is whether the accused person ought to be able to raise the statutory relief of being a courier at the sentencing stage for the first time. For the above reasons, the answer to this part of Question 2, in my view, is a "yes", whichever is the primary defence run by the accused person.

34 I am cognisant that there is a view that an accused person has a choice between coming clean and stating from the beginning that he was a courier (not just in the sense that he was a courier of a generic parcel but that he was a courier of the controlled drugs), and "playing games" with the Prosecution by sticking to one of the three primary defences without admitting that he was a courier. Under this view, if the court disbelieves his primary defence, he should not be allowed to invoke the statutory relief of being a courier. The accused person has to live or die, literally, by his or her decision.

35 This view is not devoid of support. As was pointed out in *Chen* (at p 265), the Minister of Law stated during the Second Reading of the Misuse of Drugs (Amendment) Bill (*Singapore Parliamentary Debates, Official Report* (14 November 2012) vol 89 (K Shanmugam, Minister for Foreign Affairs and Minister for Law) ("*Official Report (14 Nov)*") at p 36) that:

> [I]f the accused knows something, and has to decide between trying to run a false defence that he knows nothing, and telling the truth and assisting the CNB – I do not think Members will argue against giving him an incentive to tell the truth, to help us, and to help himself.

36 However, the context in which the Minister made the above statement is important. The Minister was *not* proposing that accused persons had to make their own bed *at trial* and lie in it throughout. He was responding to a concern raised by a Nominated Member of Parliament, Assistant Prof Eugene Tan ("Asst Prof Tan"), that the difficulty with providing substantial assistance as well as the potential for abuse by CNB officers may result in an accused person incriminating himself of a capital charge in the hope that he would be spared the ultimate sanction (see *Singapore Parliamentary Debates, Official Report* (12 November 2012) vol 89 ("*Official Report (12 Nov)*") at p 48). The above excerpt was a development of the Minister's initial response which was (*Official Report (14 Nov)* at p 35):

> Asst Prof Eugene Tan asked whether the mechanism *creates a risk of self-incrimination? There is*

that risk. But let me throw back the question: what does that mean? Should we therefore not have this exception? [emphasis added]

37 The Minister's riposte must therefore be viewed in context. He agreed with Asst Prof Tan that the way s 33B was structured carried some risk that an accused person may cave in and simply admit to being a courier. What is of significance is that the Minister could have stated, but did not, that the whole point of this new regime was to make it mandatory for accused persons who were *in truth* couriers to incriminate themselves, and that if they chose to run a defence at trial that was inconsistent with being a courier, they would not, under any circumstances, be permitted later during sentencing to raise the point that they were only couriers. If that were the objective, the Minister would have clarified the concern raised by Asst Prof Tan in that way. But he did not.

38 I would hasten to add that in adopting the aforesaid approach of permitting the accused person to raise the statutory relief of being a courier for the first time during sentencing, I am mindful that Parliament has reaffirmed its tough stance against drugs. That said, the court should still apply the new avenue available to a person convicted of drug trafficking (to avoid the death penalty) in a fair and sensible way. In these cases involving specified drugs under the sixth column of the Second Schedule to the MDA, the issue is not so much whether a lenient or strict reading of s 33B should be preferred but rather what is just, having regard to what is expressly stated in the legislation and Parliament's intention in so far as it can be discerned from the relevant parliamentary materials.

Whether new evidence can be heard by the sentencing judge

39 This leads me to the main controversy in these criminal references: in addition to canvassing the statutory relief of being a courier at the sentencing stage, can an accused person introduce new evidence to bolster his claim to being a courier?

40 As stated in [26] above, the general proposition is that, an accused person should raise his entire defence *and* adduce all his evidence at trial. I do not think that Parliament, in enacting s 33B, contemplated that there should be two separate trials, one for the purpose of establishing the charge and the other for the purpose of determining sentence.

41 Notwithstanding that, there is no rule which absolutely precludes the adduction of new evidence at the sentencing stage. Although Mr Abdullah's submissions seem to concede that the legislation is silent as to the "correct procedure" in relation to s 33B, all the parties are in agreement on this crucial point that further evidence *can* be taken during sentencing.

42 In my view, that must be correct even if it is equally right that there must be limits to the ability of parties to adduce further evidence at the sentencing stage. The fundamental principle of justice requires that every offender be, as far as possible, sentenced on the basis of accurate facts (see *Ng Chun Hian v Public Prosecutor* [2014] 2 SLR 783 ("*Ng Chun Hian*") at [24]; and *Public Prosecutor v Aniza bte Essa* [2009] 3 SLR(R) 327). In the present context, if the accused person upon conviction but before sentence wishes to adduce further evidence to show that he was only a courier, he must satisfy the trial judge why the further evidence was not and could not be adduced earlier at the trial leading to the conviction. Furthermore, whatever new evidence that is sought to be adduced must not contradict the finding of the court that the accused person is guilty of the charge and must only relate to the sentence to be imposed, that is, to show that he was just a courier in the transaction.

43 Indeed, it is an established practice in criminal process that new evidence is sometimes introduced at the sentencing stage through a Newton hearing, a procedure that is entirely at the

discretion of the court. The paradigm situation that calls for a Newton hearing is when the accused person makes a claim or assertion relevant to the sentence to be imposed which is disputed by the Prosecution. A recent example of a Newton hearing is the case of *Public Prosecutor v Azuar Bin Ahamad* [2014] SGHC 149 ("*Azuar*").

44 The accused in *Azuar* pleaded guilty to charges pertaining to, amongst other things, rape and outrage of modesty and was convicted accordingly. However, for the purposes of sentencing, he contested the Prosecution's position that he had surreptitiously administered stupefying drugs to the victims by spiking their alcoholic beverages in order to render them unconscious (or incognisant) before sexually violating them. The trial judge therefore conducted a Newton hearing to determine this factual issue of whether the accused had spiked his victims' drinks.

45 Although Newton hearings are generally conducted in cases where the accused person had pleaded guilty and was convicted on that basis, they are not restricted to such cases. Locally, a Newton hearing was sought by the Prosecution at the sentencing stage in at least one case where the accused person had claimed trial, although the district judge there decided that the hearing was inappropriate on the facts: see *Public Prosecutor v Andrew Sivanesan s/o Balakrishnan* [2011] SGDC 66 at [141]. Reference may also be had to Leveson LJ's judgment in *R v Cairns* [2013] 2 Cr App R (S) 73 at [9] where he stated that a Newton hearing after a trial might be necessary in circumstances where the disputed fact which was not canvassed at trial is not relevant to guilt but relevant to sentence.

46 Counsel for Chum, Mr Manoj Nandwani Prakash ("Mr Nandwani"), helpfully pointed out that a Newton hearing is not anomalous under the current rules governing criminal procedure in Singapore. Indeed, ss 228(5)(*a*) and (*b*) of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) ("the CPC") very clearly contemplate that new evidence may be heard and weighed by the court for the purposes of sentencing:

> (5) After the court has heard the plea in mitigation, it may —
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> (*a*) at its discretion or on the application of the prosecution or the accused *hear any evidence to determine the truth or otherwise of the matters raised before the court which may materially affect the sentence;and*
>
> (*b*) *attach such weight to the matter raised as it considers appropriate after hearing the evidence.*
>
> [emphasis added]

47 I pause here to mention that I agree with See Kee Oon SDJ's (as he then was) description in *Public Prosecutor v Shaw Chai Li Howard* [2012] SGDC 319 at [39] of s 228(5)(*a*) of the CPC as encapsulating the concept of a Newton hearing.

48 Mr Abdullah highlighted that although the CPC now has s 228(5), there was no such equivalent provision in the old Criminal Procedure Code (Cap 68, 1985 Rev Ed) ("the old CPC"), which is the regime governing these proceedings. If by this it was suggested that Parliament had intended to preclude the taking of further evidence post-conviction under the old CPC, I disagree. Although there is no statutory mechanism under the old CPC for taking evidence post-conviction, the Newton hearing is an established procedure and has been applied by countless courts determining cases governed by the old CPC regime: see *eg*, *Biplob Hossain Younus Akan and others v Public Prosecutor and another matter* [2011] 3 SLR 217; *Public Prosecutor v Soh Song Soon* [2010] 1 SLR 857 and *Public Prosecutor*

v McCrea Michael [2006] 3 SLR(R) 677. Further, Mr Abdullah at another part of his submissions agreed that "the judicial practice of receiving evidence during sentencing had developed even prior to the introduction of [the CPC]."

49 Thus, broadly speaking, it is proper in my view that new evidence *may*, under the right conditions, be adduced and heard at any stage of proceedings, including at the sentencing stage.

50 The key question is what conditions warrant the adduction of new evidence at the sentencing stage. A Newton hearing is, after all, an exception rather than the norm even for cases where the accused person had pleaded guilty, much less cases where the accused person has claimed trial and has given his evidence during the trial. It is not a further opportunity for the accused person (or more accurately, the person convicted) to adduce evidence to contradict or cast doubts on the conviction.

51 In this regard, I agree with the principle articulated by Sundaresh Menon CJ in *Ng Chun Hian* (at [24]) that a Newton hearing is called for only if the court is satisfied that "it is *necessary* to do so in order to resolve a *difficult question of fact* that is *material* to the court's determination of the appropriate sentence [emphasis added]".

52 Whether a question of fact is material to the court's determination of the statutory relief of being a courier, and if so, whether hearing new evidence is necessary and ought to be allowed, are all matters for the sentencing judge exercising his discretion to decide, having regard to all the circumstances of the case, including the considerations mentioned in [42] above.

53 In the context of s 33B(2)(*a*) (as well as s 33B(3)(*a*)), clear examples where a Newton hearing would be *unnecessary* and should not be called include:

(a) where the accused person's case in relation to the statutory relief of being a courier is "absurd or obviously untenable" (see *Ng Chun Hian* at [24]);

(b) where the question of fact in dispute bears *no relation* to sentencing, that is, the evidence sought to be adduced is irrelevant to establishing the accused person's role as a courier;

(c) where the new evidence sought to be adduced relates directly to conviction, for instance, if it pertains to whether the accused person is guilty of drug trafficking or importation under ss 5(1) and (7) of the MDA respectively); and

(d) where the specific issue of the accused person's role in transporting, delivering or otherwise moving the drugs was in issue at trial (irrespective of whether the statutory relief of being a courier was formally canvassed), and consequently, evidence was already adduced on the issue.

54 To elaborate on the last example, where the statutory relief of being a courier was already implicit or evident in relation to a primary defence, no further evidence ought to be adduced for the purposes of sentencing because all the relevant evidence ought to have been produced at trial and the accused person should be sentenced on that basis. Where the accused person ought to have adduced all relevant evidence of being a courier at trial (because it was not inconsistent with his primary defence) but did not, the accused person, if convicted, should not be permitted to adduce further evidence and if at sentencing he should claim to be only a courier in the transaction, the trial judge would, subject to the most exceptional circumstances, have to decide the question based on

the evidence already adduced.

55 I should add that in most, if not all, cases, including cases where the accused person claims not to have knowledge of the existence of the article containing the controlled drugs, the court would in the course of trial have heard evidence relating to the transportation, delivery or movement of the controlled drugs, and made findings in relation to the same, which findings would ordinarily be sufficient for the court to decide whether the accused person's involvement was limited to that of being a courier. Thus, the accused person would, in practical terms, have to demonstrate how the new evidence, if any, would be germane to the question of his involvement as a courier and give good reasons why the new evidence should be adduced now even though it was not adduced earlier at the trial.

56 Accordingly, the likelihood of the accused person being able to meet the test of necessity that additional evidence not already before the court should be allowed to be adduced, would be remote. The range of possibilities where further evidence should be permitted to be adduced during sentencing is thus extremely narrow. However, even though I am skeptical that there will even be cases which would meet these stringent conditions for the adduction of new evidence, I simply do not think it can or should be ruled out completely. I am, therefore, unwilling to shut the door fully. To disallow absolutely the adduction of new evidence could, in particular situation, give rise to injustice. Subject to the perimeters which I have sought to delineate above, the trial judge would be in the best position to assess whether the adduction of new evidence should be allowed. While I recognise that this could be seen to introduce some uncertainty, such discretion is nothing new in the trial process where the trial judge has to make judgment calls all the time on a variety of circumstances and issues.

57 In passing, and for completeness, I should add that s 27(2) of the Misuse of Drugs (Amendment) Act 2012 (No 30 of 2012) ("Amendment Act"), which introduced the new s 33B, does not advance the Respondents' argument that the court is permitted to take further evidence. While the wording of s 27 of the Amendment Act expressly permits the hearing of further arguments or admission of further evidence, that section only applies to persons convicted before the day that the amendments came into force, that is, 1 January 2013. In the two cases before us, Chum and Abdul Kahar were convicted on 5 August 2013 and 27 August 2013 respectively. Section 27 of the Amendment Act is accordingly inapplicable.

58 In summary, if a person convicted fails to show that permission should be granted to him to adduce new evidence, the court will assess the merits of his submission in relation to the statutory relief of being a courier against the factual state of affairs that has been found to be true by the court at trial.

Treatment of potentially inconsistent evidence

59 I note the Judge's concern that if an accused person is permitted to give new evidence at the sentencing stage, there is a possibility that the new evidence may cast doubt on the safeness of the conviction of the accused (see *Chum Tat Suan* at [5]).As I have stated at [54]–[55] above, since the new evidence should not be inconsistent with the conviction recorded against the accused person and should only be germane to establishing that the accused person was a courier, I think that the concern expressed by the Judge is most unlikely to arise.

60 In my view, whatever new evidence to be adduced is most unlikely to cast doubt on the conviction. Even in cases where the accused person's primary defence at trial was that he had no knowledge of the existence of the article containing the controlled drugs – which as I have explained

is the only situation where the courier relief may be raised for the first time at sentencing (see [27]–[32] above) – any new evidence that goes towards demonstrating the accused person's limited involvement as a courier would not conflict with or undermine the court's conclusion that he knew of the existence of the article containing the controlled drugs. If anything, any new evidence that the accused person might give to obtain the courier relief is instead likely to corroborate the earlier findings upon which the conviction was based, because evidence that the accused person was a courier would necessarily buttress the factual finding that he knew of the existence of the article.

61 Incidentally, the Prosecution, who should be concerned with any re-opening of findings of fact leading to the conviction or the casting of any doubts on such findings, does not share the Judge's concerns. Referring to Chum's case, Mr Abdullah argued that it was "unclear why the Judge apprehended that calling new evidence may undermine the facts already found at the trial". This reinforces my view above that the Prosecution countenances the possibility and arguably desirability in some exceptional situations of the calling of new evidence at the sentencing stage. Mr Abdullah further observed that as the precise role of Chum was not in issue at the trial, any evidence which Chum might seek to introduce at the sentencing hearing would be limited to his role, and as such, would not have any impact on the court's finding in relation to Chum's knowledge of the drugs that eventually supported the conviction.

Question 3: Whether a person who had intended to sell the controlled drugs can be considered a courier

62 The answer to Question 3 is a clear "no". If the person convicted has been found to have the intent to sell the controlled drugs, then he is evidently not merely a courier.

63 Sections 33B(2) and (3) of the MDA were intended to be "tightly-defined" conditions (see *Official Report (12 Nov)* at p 37). The narrowness of the definition of a courier in s 33B(2)(*a*) was recognised by the High Court in *Public Prosecutor v Abdul Haleem bin Abdul Karim and another* [2013] 3 SLR 734 ("*Abdul Haleem*") at [51]. In that case, the court, in concluding that a courier is one whose involvement is limited to delivering or conveying drugs from point A to point B, referred to an exchange in Parliament which deserves replication here (see *Official Report (14 Nov)* at pp 45–46):

> **Mrs Lina Chiam (Non-Constituency Member)**: Thank you, Mr Speaker. I would like the Minister to clarify the point I made yesterday about one section – that is, *whether section 33B(2)(a) of the Bill covers offenders who are found to have participated in acts such as* ***packing, storing or safekeeping drugs*** *, as their culpability may be similar to those who are involved in transporting, sending or delivering the drugs and should not be excluded for consideration for discretionary sentencing*. Can I get his clarification?
>
> **Mr Teo Chee Hean**: ***They are not couriers*** *, so they are not covered by the exception that is provided*, unless Mrs Chiam thinks that they are couriers.
>
> **Mrs Lina Chiam**: *No, they are not couriers*.
>
> [emphasis added in italics and bold italics]

64 In addition to the above clarification, Mr Teo Chee Hean, Deputy Prime Minister and

Coordinating Minister for National Security and Minister for Home Affairs ("DPM Teo"), had also previously explained that to bring themselves within the statutory relief of being a courier, accused persons must "only have been involved as a courier and not in any other type of activity associated with drug supply and distribution" (see *Singapore Parliamentary Debates, Official Report* (9 July 2012) vol 89 at p 21).

65 It is also pertinent to note the language used by the Minister of Law during the Second Reading of the Misuse of Drugs (Amendment) Bill to describe the transportational function of couriers – "[t]hey hide the drugs in secret compartments, all sorts of places, and try and traffic through our check points" (see *Official Report (14 Nov)* at p 33).

66 It is therefore abundantly clear that the statutory relief afforded under s 33B does not apply to those whose involvement with drugs extends beyond that of transporting, sending or delivering the drugs. As the exchanges in Parliament above show, it does not matter that the accused person's involvement is of an ancillary nature. In Parliament's view, an accused person is either involved *only* in the transporting, sending or delivering of the drugs and can therefore avail himself of the statutory relief of being a courier, or he is involved in more than those activities, in which case he cannot avail himself of the statutory relief of being a courier.

67 There is, however, one clarification which ought to be added. As was noted in *Abdul Haleem* at [55], if it is clear that the accused person's involvement was truly that of a courier, the mere incidental act of storage or safe-keeping by the accused person in the course of transporting, sending or delivering the drugs, should not take him outside of the definition of a courier. This is so notwithstanding the clarification from DPM Teo in the excerpt cited above at [63], which should be read as directed at persons whose role is not – or at least not *only* – restricted to transporting, sending or delivering the drugs.

68 While the question of whether a particular act is necessary for couriering, so to speak, is fact-specific, in keeping with legislative intention, this caveat has to be construed strictly. Acts necessary for transporting, sending or delivering the drugs cannot include packing, for instance, as packing is not a necessary element of moving an object from one point to another. Simply put, a courier is someone who receives the drugs and transmits them in exactly the same form in which they were received without any alteration or adulteration.

Conclusion

69 Criminal references should concern genuine questions of law that are of public interest and upon which guidance from the apex court is necessary. While the law gives the Public Prosecutor a wide latitude to bring questions of law to this court's attention, that right should be exercised judiciously. Factors that ought to be considered include whether there is a genuine controversy, and if so, whether it is imperative for that controversy to be resolved at that stage of the proceedings. Suffice it to say that it seems to me there are questions in this reference which are not altogether necessary. Furthermore, the questions could have been better framed to flesh out the real issues for which clarifications were sought.

70 In the light of my answer to Question 3, it follows that the Judge's decision in relation to Abdul Kahar was incorrect. The Judge was wrong to have held that Abdul Kahar was a courier when the Judge was "satisfied that [Abdul Kahar's] involvement in trafficking *went beyond transporting, sending or delivering* [the drugs]" (see *Abdul Kahar* at [3]). His justification, that "re-packing and collecting payment" are ancillary acts which are not excluded from the definition of courier, is inconsistent with the extracts of the parliamentary debates excerpted at [63] to [65] above.

71 As for Chum's case, the Judge was also incorrect in holding that it was "an unsafe course" to scrutinise the evidence adduced at trial in determining whether Chum was a courier (see *Chum* at [7]). As stated at the outset in relation to Question 2, the court must take into account all evidence that has been adduced at the trial leading to the conviction in considering whether a person convicted is a courier for the purposes of s 33B.

72 In the circumstances, pursuant to the court's power under s 59(5) of the 2007 SCJA, the Judge's findings that Abdul Kahar's and Chum's involvement in committing the offences under ss 5(1) and 7 of the MDA respectively fell within the ambit of ss 33B(2)(*a*) and 33B(3)(*a*) ought to be quashed.

73 Consequently, the Prosecution's prayer, for an order that the cases concerning Abdul Kahar and Chum be remitted to the Judge, who shall determine whether Abdul Kahar's and Chum's involvement in the offences under ss 5(1) and 7 of the MDA respectively was restricted to the activities under ss 33B(2)(*a*) and 33B(3)(*a*), is granted. The Judge shall make that determination based on the evidence adduced at the trial and having regard to the determination of this court on Question 1 and Question 3 as well as the majority's determination on Question 2 (see [77]–[83] below).

74 Lastly, Mr Nandwani has indicated that Chum may wish to rely on s 33B(3)(*b*) of the MDA (relating to abnormality of mind), and may, for that reason, wish to adduce further evidence. Under the approach adopted by the majority, that would be impermissible as all evidence relating to an accused's mental state ought to have been adduced during the trial. Under the approach that I have adopted, it would also be impermissible for Chum to adduce further evidence. As I have stated at [26] above, the general rule is that all defences and evidence should be raised and adduced by the accused person at trial, save where there are special reasons not to do so. There are no special reasons (such as those described at [27]–[28] above) for Chum not to have adduced evidence in relation to his mental state at trial. Nevertheless, as this is the first time that s 33B has been interpreted and clarified in this manner, we are all of the view that, as an exceptional measure, the Judge should permit Chum to adduce evidence relating to his mental state.

Woo Bih Li J and Tay Yong Kwang J:

75 We have read the judgment of Chao Hick Tin JA and use the same nomenclature as in his judgment. We share his reservations about the necessity of the references before the court. However, as he proceeded to answer the three questions pursuant to the references, we will state our answers too.

76 We agree with the answers of Chao JA to Questions 1 and 3. As regards Question 2, we agree that a court must take into account all evidence adduced at the trial in deciding whether a convicted accused person is a courier.

77 However, we express reservation on his view that, subject to some conditions, an accused person may give evidence about his being a courier at the sentencing stage even though he deliberately withheld such evidence at trial on the ground that such evidence would be inconsistent with his primary defence. As this issue was not, strictly speaking, part of the three questions, we state our brief reasons below.

78 Even as regards a situation where an accused person's primary defence is that he has no knowledge of the existence of the article containing the controlled drugs, it is possible for him to give evidence showing that he was in any event an unknowing courier.

79 However, in the event that there is evidence that he is a courier which will indeed be inconsistent with his primary defence, he is to elect what his evidence will be, as all the evidence should be given at the same trial.

80 This is not putting him in an invidious position. Before the recent amendments to the MDA, an accused person already had to elect whether or not to give evidence and, if so, what evidence to give. He also had to elect whether or not to cooperate and come clean with the authorities by providing information. If he did, he might persuade the Prosecution not to press a capital charge against him. There was no suggestion then that he was being put in an invidious position.

81 The purpose of the recent amendments to the MDA is to state formally that if he provides substantive assistance to the authorities (if he is a courier) and if he obtains the relevant certificate stating the fact of such assistance, the court may decide not to impose capital punishment. The accused person does not have to avail himself of this opportunity. The purpose of the amendments is therefore to give him an incentive to come clean. There is no suggestion in the parliamentary debates that the amendments will result in changing the trial process and give the accused person a chance to deliberately stifle evidence to gain an advantage and then to speak the truth when that strategy fails. If he were allowed to do so, it may even be said that the court is condoning such a strategy which it should be discouraging instead. Furthermore, if the trial process is changed for capital offences under the MDA, then one may argue that it should also be changed for the offence of murder for the same reason, *ie*, not to put the accused person in an invidious position where the evidence withheld would be inconsistent with his primary defence.

82 A Newton hearing is for a different purpose. It gives an accused person a chance to adduce evidence on a material fact for the purposes of sentencing which he had no or insufficient opportunity to address earlier. It arises from a bona fide omission and not a deliberate one to stifle evidence to gain an advantage.

83 Furthermore, it is at the discretion of the trial judge whether or not to have a Newton hearing. Any suggestion that an accused person will be allowed to adduce new evidence at the sentencing stage, because he believed he had a valid reason to deliberately withhold such evidence and even though this is subject to conditions, should be avoided.

84 Likewise, any evidence about an accused person's mental disability for the purpose of s 33B(3)(*b*) of the MDA should be given at the same trial.

85 We agree with the consequential orders of Chao JA for Abdul Kahar and Chum.