

IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE
Criminal Motion No. 56 of 2013

In the matter of Criminal Appeal No. 13 of 2008 – Yong Vui Kong *v* Public Prosecutor

And

In the matter of Section 33B (2) (a) (b) of the Misuse of Drugs Act Cap.185

Between

Yong Vui Kong

(Fin No. G0623288X/Malaysian)

... Applicant

and

Public Prosecutor

... Respondent

APPLICANT'S SKELETAL ARGUMENTS

1. This is an application to the Court for re-sentencing under *section 33B (2) (b) of the Misuse of Drugs Act ("the Act")*¹. It is accepted that the burden of proof is on the Applicant, Mr Yong, to show the Court that on the balance of probabilities, the death penalty should not be applied to him.
2. The Applicant's Criminal Appeal No. 13 of 2010 was dismissed on 13th May 2010 by the Court of Appeal. The Applicant was arrested on 13 June 2007 and convicted of trafficking in 47.27g of diamorphine under s 5(1) (a) of the Misuse of Drugs Act

¹ Applicant's Bundle of Authorities ("ABA") Tab 1

(Cap 185, 2001 Rev Ed) and sentenced to death by the High Court on 14 November 2008 (*PP v Yong Vui Kong* [2009] SGHC 4)².

3. The application is to the Court to exercise its discretion not to impose a sentence of death on the Applicant given that he meets the requirements of section 33B (2) of the Act. Under the amendments to the Act which came into effect in January, he must satisfy the dual requirements of having only played the role of transporting as a basis under section 33B (2) for the application of the discretion of the court not to impose sentence of death (“the courier status”) and also that he provided “substantive assistance” (“the certificate requirement”).
4. It is appreciated this is not the first application to have been made to the Court for the exercise of the Court’s discretion not to impose the death penalty and the Court will already be familiar with the essential pre-requisites. However, in the interests of clarity, and to provide the appropriate legislative basis for this supervening authority, a brief recap of essential requirements may be helpful.

The Act

5. I refer to section 33B of the Act³ which is the essential provision. The relevant provision of the Act provides:

Discretion of Court not to impose sentence of death in certain circumstances

33B.

² ABA Tab 3

³ ABA Tab 1

- (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;

(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 purposes 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.

(3) 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.

Certificate Granted

6. The Public Prosecutor has certified to the Court in this case that, in his determination, the Applicant has substantively assisted the Central Narcotics Bureau in disrupting drug trafficking activities within or outside Singapore (“the Certificate”)⁴. Accordingly, the Applicant satisfies the certificate requirement of section 33B (2) and the Applicant will be seeking to establish a “courier” basis for the application of the discretion of court not to impose the sentence of death. He does not rely on the mental abnormality test under section 33B (3) of the Act.
7. In summary, the only part of section 33B that applies today is the part that gives the Court a discretion not to apply the death penalty where the Applicant has a certificate of co-operation and proves he is a mere courier (and the Court will appreciate I am paraphrasing for brevity at this point.)

The Applicant’s Involvement

8. The Applicant’s involvement in this case was restricted to these activities. His involvement is evident from:-
 - (a) the charges laid and finally pursued against him;

⁴ Exhibit marked “MR-1” in the Applicant’s Affidavit dated 26 September 2013

- (b) from the evidence adduced in Court against him;
- (c) from the findings of the trial Judge and
- (d) from the summary of evidence accepted by the Court of Appeal.

9. It is the burden of these submissions that the above evidence goes no further than to establish that the involvement of the Applicant throughout has been restricted to transporting and delivering a controlled drug. Inferences may perhaps be drawn regarding the possibility of his also being involved in preparatory acts although first hand evidence was not adduced to this effect.
10. Evident from the cross-examination of the Applicant by the Prosecution based on the unchallenged testimony of Yong where ⁵;
- a. The Prosecution repeatedly used the word 'boss' when describing the person (Chia) from whom the Applicant received instructions. This was done for a total of 33 times as follows:

I. Page 21, line 8-10;

Q: Now, was it in May 2007 that you agreed and thereafter started to make trips to Singapore to collect debts for your **boss**?

A: Yes

II. Page 24, line 7-9;

⁵ Exhibit marked "MR-2" in the Applicant's Affidavit dated 26 September 2013

Q: Right. Would you – would you regard this person who asked you to take on this job of collecting debts your **boss**?

A: Yes

III. Page 24, line 31;

Q: "...you would be given a different mobile phone by your **boss** for the purpose of the debt collection?"

IV. Page 25, line 10-11;

Q: "...and you told the taxi driver you are going to Singapore to collect debts for your **boss**?"

V. Page 28, line 10-19;

Q: You call the **boss**, and then?

A: Just like the same, and we will meet at certain locations. But I'm not familiar with Johor.

Q: All right. So are you saying that you would arrange with the **boss**, meet up with him, and then hand over the money you collected to him?

A: Yes.

Q: So would every time you had returned to Malaysia after collecting the debts be the same, you would meet up with your **boss** face to face, and you would hand the monies to him?

VI. Page 30, line 18-22;

Q: Mr Yong, earlier we - - you talked about telephone calls that your **boss** had made to you: First time sometime about Chinese New Year of last year, then the second time sometime in May last year. Now for the first time about Chinese New Year last year when your **boss** telephoned you, where were you when he telephoned you?

And line 26-27;

Q: When you said that your **boss** called you then about Chinese New Year last year, was that in February 2007?

VII. Page 32, line 15;

Q: "...the second time which you received from your **boss** and the same evening..."

VIII. Page 33, line 7;

Q: So this person who looked for you, was he someone who was also working for your **boss**?

And line 28;

Q: "Now, this **boss** that you had agreed to work for in collecting debts..."

IX. Page 34, line 8;

Q: So you have met this **boss** before and you had seen him driving his car?

And line 19;

Q: "... the only additional thing you knew about your **boss** that he drove a Singapore registered car?..."

X. Page 35, line 7;

Q: "...were these all that you knew about your **boss** before your arrest?..."

Line 15;

Q: "...So these were all you knew about your **boss**?..."

Line 19;

Q: "...you did not know anything else about your **boss**."

Line 26;

Q: "All along he knew your phone number, your **boss**. Is that right?"

XI. Page 36, line 2;

Q: So is it correct that you do not know whether your **boss** knew you were living in Sabah?

Line 31;

Q: "...and in Malaysia, you would meet up with your **boss** to hand the debts you collected to him, right?"

XII. Page 37, line 2;

Q: "...you'd meet him, your **boss**, and him the money over to him?"

Line 7;

Q: "...when you had to meet either your **boss** or his subordinate..."

Line 32;

Q: "...did you get paid by your **boss** as well after each trip..."

XIII. Page 38, line 3;

Q: "...you would meet up with your **boss**, hand him over the debts you collected..."

XIV. Page 39, line 7;

Q: "...collect monetary debts from people as instructed by your **boss**..."

XV. Page 40, line 24;

Q: "...you then received a few instructions from your **boss**..."

XVI. Page 41, line 17;

Q: "...you also delivered certain other things for your **boss**?"

Line 22;

Q: "...what was your **boss's** instruction to you on delivering gifts..."

XVII. Page 42, line 23;

Q: And he also did not tell you what was inside the package, your **boss**?

XVIII. Page 44. Line 4;

Q: "...and you were going to be paid by your **boss** for delivering those packets..."

Line 9;

Q: Yes, from the **boss**.

Line 15-17;

Q: Yes. Prior to when you were given these gifts by your **boss** and on each of these occasions, before bringing them into Singapore, were you told by your **boss** that you had to hide these gifts?

(Emphasis added)

- b. The Applicant repeatedly indicates that it was his 'boss' who gave him instructions and provided him with the 'gifts', which he was to deliver(cross-examination by Koy), as follows:

I. Page 25, line 8;

A: No because the **boss** would ask me to change.

II. Page 28, line 9;

A: I would call the **boss**

III. Page 33, line 9-10;

A: I think he was a subordinate of the boss. From what I can think of it now, I think he was a subordinate of the **boss**.

Line 24;

A: Half of the rental is paid by me, half is paid by the **boss**.

IV. Page 35, line 21;

A: One more thing I knew about him is that he is my **boss**.

V. Page 36, line 32;

A: Yes. After collecting the money, I would then pass it to him. (Him referring to the boss)

VI. Page 41, line 23;

A: "...what my **boss** actually spoken to me..."

(Emphasis added)

11. Evident from the statement made to the police by the Applicant in which Chia's involvement is meticulously described;⁶

c. Page 163, para 11;

"I called him 'lao ban' because I am working for him. I have never seen him before at all."

Para 12;

"I was instructed by my boss to go to Yishun most of the time"

b. Page 165, para 16;

"I have to return calls to who ever that called me on my Malaysian phone given to me by my debt collecting boss."

12. Evident from the Evidence-in-Chief given by the Applicant at trial which was not challenged by the Prosecution.

The Applicant's Restricted Involvement

13. It is submitted that none of the evidence in the case points to an involvement that is not restricted to transport or delivery (or perhaps acts preparatory to the aforementioned). There is, for example, no evidence that the Applicant was involved:-

⁶ Exhibit marked "MR-3" in the Applicant's Affidavit dated 26 September 2013

- (a) in the **manufacture or processing** of drugs;
- (b) in the **marketing or advertising** of drugs;
- (c) in the **identification or introduction of wholesalers or end-users** of drugs;
- (d) in the **sale or distribution** of drugs to wholesalers or end-users of drugs;
- (e) in **the receipt of proceeds** from the sale or distribution of drugs to wholesalers or end-users;
- (f) in **financing** of the drug business;
- (g) in **banking** operations;
- (h) in **outsourcing** production;
- (i) in coordinating **global operations**; and
- (j) in accessing **supplies and raw materials**

His utility to his handlers was evidently viewed as restricted to being a transporter- in short, as so described, to being a mule.

Co-operative Evidence Given

14. Further evidence that the Applicant's involvement was restricted to transport and sending (and possibly acts preparatory to the aforementioned) can be inferred from the degree of information available to the Applicant.

14.1 Even though at a very early stage, (from the moment of his arrest) the Applicant indicated a willingness to be of assistance to the authorities, and even though he evidently formed the view that it would be in his best interests to co-operate fully, the amount of intelligence he was able to provide appears to have been restricted to

his first-hand observations of the events just prior to collection of the drugs and just after hand-over of the drugs.

- 14.2 No evidence was adduced in Court against the Applicant of an involvement that went above and beyond what any mule could reasonably be expected to have known. It is appreciated that tactical considerations may inhibit the authorities from revealing operational details of intelligence that may have been supplied by the Applicant, however if he was a bigger player, presumably he would have been charged with additional involvement based on his own evidence.
- 14.3 In any event, it would be contrary to the spirit of the alleviating nature of section 33B for the Court of its own volition to make assumptions as to a possibly greater involvement merely on the basis of the naturally taciturn approach of the authorities to the operational details of intelligence that may have been provided by the Applicant. We simply do not know and presumably never will know of these matters.
15. The Applicant understands he must prove, on a balance of probabilities, that his involvement in the offence was restricted to transporting, sending or delivering a controlled drug, or to offering to transport, send or deliver a controlled drug, or to doing or offering to do any act preparatory to or for the purpose of his transporting, sending or delivering a controlled drug, or to any combination of the activities described above.
16. It is respectfully submitted that the Applicant fulfills the requirements of section 33B in letter and in spirit.

17. The Applicant has presented cogent material on the Court records that he was at all material times a subservient courier. At the same time, as the Certificate of Co-operation confirms, he has provided material assistance to the authorities.

The Law

18. The spirit underlying the amendments to section 33B is directed towards recalibrating the death penalty regime for drug trafficking. As was stated during the *Second Reading of the Bill*⁷:

23. *"The aim of the "substantive assistance" condition is to enhance the operational effectiveness of the CNB, by allowing investigators to reach higher into the hierarchy of drug syndicates. "Substantive assistance" in disrupting drug trafficking activities may include, for example, the provision of information leading to the arrest or detention or prosecution of any person involved in any drug trafficking activity. ..." ..*

"32. At the same time, the Bill will introduce an element of discretion in the sentencing of drug couriers. The mandatory death penalty will continue to apply for drug traffickers in most circumstances. The changes to the mandatory death penalty will only apply if tightly-defined and specific conditions are met. We believe that the measures strike the right balance given the current operating environment. However, we will continue to monitor the effectiveness of the Misuse of Drugs Act and make other changes or tighten the provisions, if necessary."

http://www.mha.gov.sg/news_details.aspx?nid=MjcyNQ%3D%3DmxiqPUWOkTk%3D

⁷ ABA Tab 4

19. This Court can derive some assistance in determining the way in which the new Section 33B is to be applied from *Public Prosecutor v Abdul Haleem bin Abdul Karim and another* [2013] SGHC 110⁸. Tay Yong Kwang J said:

“The requirements under s 33B (2) (a) are defined with some specificity and intended to apply only to a person who plays the role of a courier and is not involved in any other role within the drug syndicate: see the speech of the Minister for Home Affairs, Mr Teo Chee Hean, during the second reading of the Misuse of Drugs Amendment Bill 2012 (“the Bill”) at Singapore Parliamentary Debates, Official Report (12 November 2012) vol 89.

51 Section 33B was introduced by the Misuse of Drugs (Amendment) Act 2012 (No 30 of 2012). During the passage of the Bill in Parliament, a number of Members of Parliament expressed concern that the list in s 33B(2)(a) may be too narrow to encompass other acts that are arguably of a similar level of culpability. One Member of Parliament queried whether certain types of acts would also fall within the scope of s 33B(2)(a) (see Singapore Parliamentary Debates, Official Report (14 November 2012) vol 89):

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.

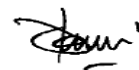
⁸ ABA Tab 2

20. The Bill was subsequently passed without amendment and Parliament's intent in this respect must be that the exception in s 33B(2)(a) is confined solely to those who are typically referred to as "drug mules" and whose involvement is limited to delivering or conveying drugs from point A to point B.

Conclusion

21. It is respectfully submitted that the evidence shows the Applicant was not engaged in acts other than those of transport and delivery. He was not alleged to or shown to have engaged in acts relating to manufacture, production, packaging, sale, distribution or marketing.
22. The observation of the learned Judge that section 33B (2) should not be construed pedantically reflects what is the legislative purpose in enabling the Court to not impose the death sentence where the activities are restricted to that of transport and similar activities.
23. In the circumstances, it is respectfully submitted that the Applicant meets the conditions of section 33B (2) and this Honourable Court is invited to exercise its discretion not to impose a death sentence.

DATED THIS 4 DAY OF NOVEMBER 2013



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