IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2022] SGCA 35

Civil Appeal No 33 of 2020

Between

Pannir Selvam a/l Pranthaman

… *Appellant*

And

Attorney-General

… *Respondent*

In the matter of Originating Summons No 807 of 2019

Between

Pannir Selvam a/l Pranthaman

… *Applicant*

And

Attorney-General

… *Respondent*

GROUNDS OF DECISION

[Administrative Law — Judicial review — Application for leave]
[Civil procedure — Extension of time — Application for leave for judicial review]

[Criminal Procedure and Sentencing — Public Prosecutor — Powers — Section 33B(2)(*b*) Misuse of Drugs Act (Cap 185, 2008 Rev Ed) — Issuance of certificate of substantive assistance — Test for "substantively assisted"]

Pannir Selvam a/l Pranthaman
v
Attorney-General

[2022] SGCA 35

Court of Appeal — Civil Appeal No 33 of 2020
Sundaresh Menon CJ, Judith Prakash JCA, Steven Chong JCA
9 March, 26 November 2021

21 April 2022

Judith Prakash JCA (delivering the grounds of decision of the court):

Introduction

1 This appeal concerned the appellant's application for leave to commence judicial review proceedings in respect of decisions made by the Public Prosecutor ("PP"), the Cabinet, and the Singapore Prison Service ("SPS"). Its primary focus, however, was the decision of the PP not to issue the appellant a certificate of substantive assistance ("CSA") pursuant to s 33B(2)(*b*) of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) ("MDA"). The High Court Judge ("the Judge") dismissed the application, finding that the appellant had not established a *prima facie* case of reasonable suspicion in favour of granting the remedies sought (see *Pannir Selvam a/l Pranthaman v Attorney-General* [2020] SGHC 80 ("the GD")). Dissatisfied, the appellant appealed against the Judge's decision.

2 The appeal raised several issues, such as the PP's entitlement to participate in leave applications, how the SPS should deal with requests made by litigants against the State to interview prison inmates, and whether the sitting Attorney-General ("AG") is required to review CSA determinations made by a previous AG. The appeal also provided us with the opportunity to canvass an important issue, namely, the test to be applied by the PP in considering whether information provided by the accused person had substantively assisted the Central Narcotics Bureau ("CNB") within the meaning of s 33B(2)(*b*) of the MDA. We explore these matters below.

3 The appeal was first heard on 9 March 2021. We reserved judgment. Following this, the parties were granted leave to file further affidavits and further written submissions. We heard the appeal again on 26 November 2021. After the hearing, we dismissed the appeal, giving brief grounds. These are our full grounds of decision.

The facts

The appellant's conviction and sentence

4 On 2 May 2017, the appellant was convicted on a capital charge of importing not less than 51.48g of diamorphine into Singapore, an offence under s 7 of the MDA (see *Public Prosecutor v Pannir Selvam Pranthaman* [2017] SGHC 144). On sentence, the High Court observed at [38] that although the appellant's involvement in the offence fell within s 33B(2)(*a*)(i) of the MDA, no CSA had been issued in his favour. Accordingly, the mandatory death sentence was passed on the appellant. The appellant's appeal in CA/CCA 21/2017 against his conviction and sentence was dismissed by this court on 9 February 2018.

Information disclosed by the appellant to the CNB

5 Prior to the appellant's trial in the High Court, the appellant had provided the following information to the CNB by way of four statements recorded after his arrest, specifically, on 9, 10 and 24 September 2014 (see the GD at [51]–[52]):

(a) he was supposed to deliver the drugs to one "Jimmy";

(b) Jimmy was a male Malay working as a security guard at Block 1004 Lorong 8 Toa Payoh Industrial Park ("the Industrial Park") in or around August and September 2014;

(c) Jimmy was dark-skinned, had short hair and did not wear glasses;

(d) Jimmy contacted the appellant using a particular phone number ("the Phone Number"), which the appellant provided to the CNB;

(e) the appellant had delivered bundles to Jimmy on three occasions prior to his arrest, the first being on 22 August 2014; and

(f) on the first occasion, the appellant had placed a plastic bag containing three bundles into the basket of a bicycle chained to a tree at the Industrial Park. From the overhead bridge overlooking the Industrial Park, the appellant had observed Jimmy looking around for 15 to 20 minutes before collecting the plastic bag from the bicycle.

6 Some three years later, following the dismissal of the appellant's appeal against his conviction and sentence, the appellant also provided the CNB with information relating to one "Anand", the person who had allegedly instructed

him to transport the drugs into Singapore on the day of his arrest. The appellant provided the CNB with what he believed to be Anand's full name, identification number, present and previous addresses, vehicle description and registration number, pictures and other related information. According to the appellant, this information could not have been furnished any earlier as it was only uncovered post-appeal through the efforts of the appellant's family (see the GD at [58]).

The clemency application

7 After the dismissal of his appeal against conviction and sentence, the appellant, his family and his solicitors at the time submitted petitions for clemency to the President. On 17 May 2019, the appellant and his family were notified that the President had declined to exercise her power under Art 22P(1) of the Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint) ("the Constitution") to commute the appellant's death sentence. The appellant and his family were informed by the SPS that he would be executed on 24 May 2019 (see the GD at [5]–[6]).

The stay of execution

8 On 21 May 2019, the appellant filed CA/CM 6/2019 seeking a stay of his scheduled execution on the basis that he intended to challenge the rejection of his clemency petition and the PP's decision not to issue him a CSA. The stay of execution was granted by this court on 23 May 2019, and the appellant was given time to prepare and file his intended application.

The appellant's attempts to interview Zamri

9 Subsequently, on 10 June 2019, the appellant's solicitors applied online to the SPS requesting permission to interview one Zamri bin Mohd Tahir

("Zamri"), an inmate of the prison, on 14 June 2019. The stated reason as selected from a drop-down menu was "[i]nterview inmate who may become a defence witness". At this time, Zamri had been convicted on a capital charge and was awaiting execution.

10 On 11 June 2019, the Attorney-General's Chambers ("AGC") wrote to the appellant's solicitors requesting "full particulars as to how, and why, any evidence that Zamri may provide would be relevant to [the appellant's] intended application". The appellant's solicitors replied that they were unable to provide the information requested as (a) they had not yet interviewed Zamri; (b) they were unable to disclose the appellant's instructions as they were confidential; and (c) the contents of the interview with Zamri would be protected by litigation privilege. Further correspondence was exchanged by the parties between 11 June 2019 and 14 June 2019. In this exchange, the AGC took the position that no privilege attached to the information sought. By 14 June 2019, the request to interview Zamri had not been approved, so the appellant's solicitors did not interview him on that date.

11 On 19 June 2019, the appellant's solicitors wrote to the AGC stating that the appellant had authorised them to disclose the relevance of Zamri's potential evidence. Specifically, Zamri was the person identified as Jimmy in the appellant's statements to the CNB, and the appellant believed that the information he provided regarding Jimmy had led to Zamri's arrest. The appellant's solicitors also set out the contents of what Zamri had informed the appellant, explaining that they wished to interview Zamri in order to confirm this information and reduce Zamri's evidence into an affidavit. On this basis, the appellant's solicitors inquired whether the SPS would approve their request to interview Zamri.

12 On 20 June 2019, the AGC again refused the appellant's request on the basis that the appellant was already able to plead his case in respect of his application for leave to commence judicial review.

The application for leave to commence judicial review

13 On 24 June 2019, the appellant filed HC/OS 807/2019 ("OS 807") seeking the leave of the court to commence judicial review proceedings. The appellant's application was based on three main grounds.

14 First, the decision of the PP not to issue him a CSA ("the PP Decision") was contested. The appellant argued that as he had not been served with a notice informing him of the possibility that he could avoid the death penalty by providing substantive assistance (the Mandatory Death Penalty Notice, hereafter abbreviated "the MDP Notice"), the PP Decision was unconstitutional and/or tainted by procedural impropriety. Furthermore, given that he had substantively assisted the CNB by providing information about Jimmy and Anand, the PP Decision was illegal and/or irrational. The appellant also argued that the question of the grant of the CSA to him had to be reviewed by the sitting AG at the time that the appellant was due to be sentenced.

15 Second, the appellant contested the Cabinet's action in advising the President not to commute his death sentence ("the Cabinet Advice"). The appellant contended that the Cabinet had failed to take into account the substantive assistance he had rendered to the CNB.

16 Third, the SPS's refusal to grant him access to interview Zamri ("the SPS Decision") was impugned. The appellant alleged that such refusal was irrational, procedurally improper and motivated by the improper purpose of

seeking the premature disclosure of privileged information and frustrating the appellant's preparation for his case.

17 On 25 June 2019, the AGC informed the appellant that since he had filed OS 807 and had stated on affidavit his case in relation to Zamri, the SPS had no objections to the appellant's solicitors interviewing Zamri. The appellant's solicitors subsequently interviewed Zamri on 26 June 2019 and 28 June 2019.

The decision below

18 OS 807 was heard on 11 February 2020 and dismissed on 12 February 2020, with the GD released on 24 April 2020. Preliminarily, the Judge held that the respondent was entitled to file reply affidavits in response to the appellant's application. The Judge observed that "[w]here public judicial review is concerned, the AG has a right to attend and to be heard" and that the courts had readily accepted affidavits filed by the AG (see the GD at [21]).

19 In relation to the PP Decision, the Judge found that the appellant's application was time-barred (see the GD at [29], [31]–[35]). In any case, even if the application was not time-barred, the appellant had not shown a *prima facie* case of reasonable suspicion (see the GD at [36]), for the following reasons.

> (a) The Judge did not believe the appellant's claim that the MDP Notice had not been served on him. In any event, the service of the MDP Notice was not a compulsory procedural requisite and the appellant could not support his contention that he had been deliberately and arbitrarily discriminated against in relation to the alleged non-service (see the GD at [39] and [49]).

(b) The Judge noted that the appellant had in fact misidentified "Jimmy" when shown several photographs by the CNB. Furthermore, the question of substantive assistance was a multi-faceted inquiry and the appellant was in no position to speculate as to how the CNB conducted its investigations or how it might have acted on the various sources of information obtained. Accordingly, the appellant had failed to discharge the burden on him of showing that, by refusing to grant the CSA, the PP had acted irrationally or illegally. This was in relation to the information provided by the appellant prior to his trial as well as the information provided after the dismissal of his appeal (see the GD at [54]–[60]).

(c) There was no authority to support the proposition that the grant of a CSA had to be reviewed by the sitting AG at the time the appellant was due to be sentenced (see the GD at [62]).

20 The Judge further rejected the attempt to impugn the Cabinet Advice, finding it "completely devoid of evidential foundation" (see the GD at [67]). Similarly, the Judge rejected the challenge to the SPS Decision. In the Judge's view, this challenge was "plainly unmeritorious" as the appellant "did not seek any substantive or practical relief" (see the GD at [72]). Moreover, the evidence before the court was insufficient to raise a *prima facie* case of reasonable suspicion that the SPS acted in bad faith or for improper purposes (see the GD at [74]).

Issues before this court

21 The issues that arose for this court's consideration were thus as follows:

(a) whether the AG was entitled to participate in the present proceedings, including by filing affidavits;

(b) as regards the PP Decision:

(i) whether the appellant's application was time-barred;

(ii) whether the sitting AG at the time of the appellant's sentencing was required to determine the issuance of the CSA;

(iii) whether the appellant had shown a *prima facie* case of reasonable suspicion that the MDP Notice had not been served on him, such that the PP's Decision was procedurally improper, illegal, in breach of his legitimate expectations and/or in breach of Arts 9 and 12 of the Constitution; and

(iv) whether the appellant had shown a *prima facie* case of reasonable suspicion that he had substantively assisted the CNB, such that the PP Decision was irrational and/or illegal;

(c) as regards the Cabinet Advice, whether this court should grant leave to the appellant to challenge the advice given to the President on the basis that the Cabinet had failed to take into account the substantive assistance allegedly rendered by the appellant to the CNB;

(d) as regards the SPS Decision:

(i) whether the SPS Decision was academic, and therefore, whether challenging it served no purpose; and

(ii) whether the appellant had shown a *prima facie* case of reasonable suspicion that the SPS's initial refusal to grant access to Zamri had been motivated by improper purposes.

Our decision

22 Before turning to the discussion proper, we set out the structure of our analysis and an overview of our holdings in respect of each issue.

(a) We deal first with the preliminary issue of the AG's entitlement to participate in the present proceedings. In our view, the AG was entitled to participate.

(b) Next, we turn to the SPS Decision. In our judgment, the challenge here failed because by the time the matter was heard, the SPS Decision was academic, and, in any case, the evidence before the court was insufficient to raise a *prima facie* case of reasonable suspicion that the actions of SPS had been motivated by improper purposes. Nevertheless, we make a few observations regarding the approach that the SPS and the AGC should take when faced with a request to interview a prison inmate.

(c) We then turn to the PP Decision, beginning with three sub-issues: (i) whether the appellant's application was time-barred; (ii) whether the determination of the issuance of the CSA had to be made by the sitting AG at the time of sentencing; and (iii) whether the alleged non-service of the MDP Notice warranted the grant of leave to commence judicial review. We took the view that although the application was not time-barred, the appellant's arguments in relation to the latter two sub-issues were without merit.

(d) Next, we turn to the crux of the PP Decision, which was whether the appellant had shown a *prima facie* case of reasonable suspicion that he had rendered substantive assistance to the CNB, such that the

PP Decision not to issue him a CSA was irrational and/or illegal. In this regard, we note that several developments took place following the first hearing of the appeal, which led us to consider what test ought to be applied by the PP in considering whether information provided by the accused person had substantively assisted the CNB. Ultimately, in light of the evidence before the court, we took the view that no case of reasonable suspicion had been made out.

(e) Finally, as the validity of the Cabinet Advice stood or fell with the PP Decision, there was no basis to impugn it.

The AG's entitlement to participate

23 We turn first to the question of the respondent's entitlement to participate in the present proceedings. For the sake of clarity, we shall refer to the respondent as the "AG" in this part of the discussion. In our judgment, there was no merit in the contention that the AG should not be allowed to participate in the present proceedings. The practice of the AG appearing and filing affidavits at the leave stage of judicial review proceedings is well-established. In *Chan Hiang Leng Colin and others v Minister for Information and the Arts* [1995] 2 SLR(R) 627 ("*Colin Chan*") at [4]–[5], precisely this question of the AG's entitlement to appear at the leave stage was raised (albeit by the AG himself) and answered in the affirmative. This has remained the position to date.

24 This is, further, a practice supported by principle. The purpose of leave applications such as the present is to filter out "groundless or hopeless cases at an early stage" so as "to prevent a wasteful use of judicial time and to protect public bodies from harassment" (see *Public Service Commission v Lai Swee Lin Linda* [2001] 1 SLR(R) 133 at [23]). In a leave application, the court is not bound to accept at face value everything that an applicant asserts; instead, the

court will consider the evidence and arguments submitted to see if a *prima facie* case of reasonable suspicion has been established (see *Nagaenthran a/l K Dhamalingam v Public Prosecutor and another appeal* [2019] 2 SLR 216 ("*Nagaenthran*") at [76]). In this context, the participation of the AG is useful because there may be occasions when the AG can show that an applicant's contention is manifestly false or misguided as a matter of fact or of law. This is in keeping with the AG's role in safeguarding and advancing the public interest. As Lim Beng Choon J observed in the Malaysian case of *George John v Goh Eng Wah Brothers Filem Sdn Bhd* [1988] 1 MLJ 319 at 320:

> … At any rate, it is idle to challenge the standing of the learned Senior Federal Counsel to appear at this hearing to oppose the application on behalf of the Attorney General for the further reasons as stated hereinafter. It is to be noted that notice of an application for leave to apply for an order of mandamus, prohibition or certiorari must be given to the Attorney General pursuant to O 53 r 1(3). *The reason for this requirement is obvious since the grant of leave to apply for any one of these prerogative orders will invariably have the effect of placing the public officer or authority who made the impugned decision and the member of the public who would benefit from the decision so made in a state of uncertainty as to whether he or it should proceed to implement the administrative decision while proceedings for judicial review of it are pending even though misconceived. It is therefore essential that the Attorney General should be given an opportunity to intervene to remove this uncertainty if there is good ground for him to do so in the interest of the government in particular and the public in general.* On these grounds, I therefore hold that the objection of the applicant is without merit. [emphasis added]

25 The above passage was cited with approval in *Colin Chan* at [4]–[5], with the High Court observing that the relevant civil procedure rules in Singapore and in Malaysia at the time were *in pari materia* and that the reasons to support the attendance of the AG at leave applications in Malaysia were equally applicable in Singapore. To be clear, the participation of the AG is not meant to *immunise* public authorities from review. The standard at the leave stage remains a *prima facie* one, and the purpose of the AG's participation is

ultimately directed towards *assisting the court* in filtering out clearly hopeless or unmeritorious cases.

26 For completeness, we briefly address the appellant's reliance on the Malaysian case of *Kanawagi a/l Seperumaniam v Dato' Abdul Hamid bin Mohamad* [2004] 5 MLJ 495 at [4], which was referred to by this court in *Deepak Sharma v Law Society of Singapore* [2017] 2 SLR 672 at [31]. In these two cases, there was some discussion regarding when the AG may decide to appear in judicial review proceedings, and whether restrictions could be placed on the scope of the AG's involvement. In our view, the appellant's reliance on these cases was misplaced. We agreed with the Judge that these cases were distinguishable from the present case as they involved *private* judicial review (meaning of decisions of non-governmental organisations), rather than *public* judicial review like the present involving decisions of governmental authorities (see the GD at [21]).

27 For these reasons, we held that the AG was entitled to participate in the present proceedings.

The SPS Decision

28 We turn next to the appellant's argument relating to the SPS's initial refusal to grant his solicitors permission to interview Zamri. In our view, the challenge of the SPS Decision failed on several fronts.

29 First, by the time of the hearing before the Judge, the SPS Decision was, strictly speaking, academic given that the SPS had eventually granted the appellant's solicitors permission to interview Zamri, albeit only after OS 807 was filed. We agreed with the Judge that in these circumstances, the quashing order sought by the appellant against the SPS had no utility (see the GD at [73]).

30 Second, the SPS's conduct in our view did not rise to the level of establishing a *prima facie* case of reasonable suspicion that it had been acting for an improper purpose, specifically, to seek the premature disclosure of privileged information and to frustrate the appellant's preparation for his case. As the Judge observed at [73] of the GD, Zamri was a prisoner awaiting capital punishment at the time, and the appellant's offence was not directly related to Zamri's offence. As such, it was explicable that the AGC (on behalf of the SPS) felt the need to inquire into the purpose of the proposed interview with Zamri. Notwithstanding our view that such inquiry was ultimately misguided (as we explain below), the fact of such inquiry in itself was insufficient to raise a *prima facie* case of reasonable suspicion that the SPS had refused access for the improper purpose alleged by the appellant. For these reasons, we affirmed the Judge's ruling in respect of the SPS Decision.

31 Nevertheless, we set out some observations regarding the manner in which the appellant's request for his solicitors to interview Zamri had been handled. Respectfully, we differed from the Judge's view that the information sought by the AGC was not protected by legal advice privilege and/or litigation privilege (see the GD at [74]). Legal advice privilege covers confidential communications made for the purpose of seeking legal advice, whereas litigation privilege covers information and materials created and collected for the dominant purpose of litigation (see *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd and other appeals* [2007] 2 SLR(R) 367 at [43]–[44]).

32 Here, the AGC sought from the appellant's solicitors "particulars as to how, and why, any evidence that Zamri may provide would be relevant to [the appellant's] intended application". In order to meet this request, the appellant's solicitors would have to explain the nature and grounds of the appellant's

application, as well as the appellant's instructions to them regarding the anticipated content of Zamri's evidence and its relevance to the appellant's application. All of these matters would have been disclosed by the appellant to his solicitors for the purpose of seeking their legal advice, and further, for the purpose of preparing for his application for leave to commence judicial review proceedings. It bears emphasis that at the time that the AGC sought such information from the appellant's solicitors, OS 807 *had not yet been filed*. It was therefore clear that such information was privileged, and that the objections made by the appellant's solicitors to this effect had been well-founded.

33 In these circumstances, we considered that the AGC's insistence on the disclosure of such information before permitting the appellant's solicitors access to interview Zamri was misplaced. We were further concerned by the fact that the State Counsel who liaised with the appellant's solicitors regarding their request to interview Zamri was eventually also one of the State Counsel representing the respondent in this appeal. While the SPS is no doubt entitled to put into place reasonable measures to ensure security as far as interviews with prison inmates are concerned, due regard must also be had to the interests of litigants who are involved in litigation against the State.

34 In our view, once the purpose of an interview has been stated and if such purpose appears to be reasonable on its face (*eg*, in this case the appellant's solicitors had made clear that the interview was for the purpose of the appellant's application), the SPS would *not* be entitled to seek further information of a privileged nature. Furthermore, in the event that it is necessary to seek further clarification, a "Chinese wall" should be erected in the AGC so that there is a separation between the officers who correspond with the litigant's solicitors regarding the proposed interview and the officers who may eventually represent the State against the litigant. Ultimately, steps must be taken to ensure

that the litigation privilege and/or legal advice privilege of the litigant are properly protected.

The PP Decision: subsidiary issues

35 We now turn to several subsidiary issues arising from the challenge to the PP Decision.

Whether the application was time-barred

36 The first issue was whether OS 807 was out of time, and, if so, whether the application should be rejected on that basis. In this regard, O 53 r 1(6) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) provides that:

> Notwithstanding the foregoing, leave shall not be granted to apply for a Quashing Order to remove any judgment, order, conviction or other proceeding for the purpose of its being quashed, unless the application for leave is made within 3 months after the date of the proceeding … or … the delay is accounted for to the satisfaction of the Judge to whom the application for leave is made …

37 The three-month period referred to in O 53 r 1(6) starts to run from "the date on which the right to seek relief arises" (see *Teng Fuh Holdings Pte Ltd v Collector of Land Revenue* [2007] 2 SLR(R) 568 at [17]). In some cases, this may be "the date of the decision sought to be impugned (see *Per Ah Seng Robin and another v Housing and Development Board and another* [2016] 1 SLR 1020 ("*Per Ah Seng Robin*") at [51]). Nevertheless, the court may allow time to be extended where the applicant has satisfactorily accounted for the delay.

38 The appellant contended that his application was not out of time, as time ran from (a) the present AG's determination on 22 May 2019 that the previous AG's decision not to grant a CSA should stand; or (b) the AGC's rejection of

the appellant's representations on 4 April 2019. On the other hand, the respondent contended that time ran from 2 May 2017, the date that the Prosecution informed the High Court in the appellant's and his counsel's presence that no CSA would be issued.

39 The Judge held that the application was out of time and that the appellant had not adequately accounted for such delay. The Judge rejected the appellant's argument that his delay was not unreasonable because the principles surrounding a challenge to the PP's determination under s 33B of the MDA had been unclear prior to the decision of this court in *Nagaenthran* (see the GD at [29]–[35]).

40 We agreed with the Judge that OS 807 had been filed out of time. The right to seek relief against the PP Decision arose once the appellant found out about the decision, rather than upon the rejection of the appellant's subsequent attempts to persuade the PP otherwise. Accordingly, there was a delay of slightly more than two years between the date when the appellant found out about the PP Decision (*ie*, 2 May 2017) and the date when the application in OS 807 was filed (*ie*, 24 June 2019).

41 Nevertheless, the appellant had, in our view, satisfactorily accounted for the delay. Although the Judge correctly rejected the appellant's argument regarding *Nagaenthran*, the Judge's attention had not been drawn to the fact that since 2 May 2017, the appellant had been pursuing *alternative* means of preventing his execution. Between 2017 and 2018, the appellant appealed to this court against his conviction and sentence. Following the dismissal of his appeal, between 2018 and 2019, the appellant and his family sought to provide assistance to the CNB. His solicitors at the time also wrote representations to the AGC. This culminated in the AGC's rejection of the appellant's

representations on 4 April 2019. It was therefore apparent that the appellant's delay in commencing OS 807 was due to the fact that he had been pursuing *other* means of avoiding the death penalty or obtaining a CSA. In this regard, this court's observations in *Per Ah Seng Robin* at [55] are apposite:

> Applicants can also expect a certain measure of latitude from the court where judicial review proceedings have been delayed by serious and genuine attempts to resolve the dispute without litigation. As the English Court of Appeal explained in *Regina v Hammersmith and Fulham London Borough Council, ex parte Burkett* [2001] Env LR 684 at [14]:
>
> > Judicial review is in principle a remedy of last resort. It follows, as it always does when a potential [applicant] for judicial review expeditiously seeks a reasonable way of resolving the issue without litigation, that the court will lean against penalising him for the passage of time and will where appropriate enlarge time if the alternative expedient fails.

42 For these reasons, we held that although OS 807 had been filed out of time, the appellant had satisfactorily accounted for the delay. Accordingly, we granted the appellant an extension of time such that OS 807 was not time-barred.

Whether the sitting AG must determine the issuance of the CSA

43 The next issue was whether the issuance of the CSA was required to be determined by the sitting AG *at the time of the accused person's sentencing*. By way of brief background, the decision not to issue a CSA in this case had first been made by the then AG, Mr V K Rajah ("AG Rajah"), based on information provided to him between 4 May 2015 and 14 March 2016. AG Rajah was no longer the AG at the time of the appellant's conviction and sentencing (*ie*, on 2 May 2017). Furthermore, by then slightly more than a year had elapsed from the last date on which information had been provided to AG Rajah.

44 The appellant argued that this formed sufficient basis for the grant of leave to commence judicial review. According to the appellant, a decision not to issue a CSA under s 33B(2)(*b*) of the MDA must be made by the AG in office at the time of conviction based on up-to-date material. On the other hand, the respondent submitted that in cases involving a change of officeholders, a review by the sitting AG of his predecessor's determination under s 33B(2)(*b*) is required *only* if new material had emerged after the initial decision. However, there was no such new material in this case, and, in any event, AG Rajah's decision not to issue a CSA *had* been reviewed by the sitting AG, Mr Lucien Wong Yuen Kai ("AG Wong").

45 The Judge rejected the appellant's submission that the decision not to issue a CSA had to be reviewed by the AG in office at the time that the appellant was due to be sentenced. The Judge observed that nothing new or material had emerged at trial to warrant a reappraisal of AG Rajah's decision not to issue a CSA, and that the appellant had not offered any novel information to the CNB up to the point when he was due to be sentenced (see the GD at [62]).

46 We agreed with the Judge. There is nothing in the MDA or in the case law to support such a rule. It also bears emphasis that in this case, there was no evidence to suggest that AG Rajah's determination had been rendered outdated or stale. The appellant had not provided any new information between 14 March 2016 and 2 May 2017. In these circumstances, there was no need for AG Wong to review the CSA determination made by AG Rajah.

47 In any event, the facts underlying the appellant's submission were eventually superseded by subsequent developments. Specifically, AG Wong had considered all additional information provided by or on behalf of the appellant as at 22 May 2019 and had determined that AG Rajah's decision not

to grant a CSA should stand. On the appellant's own case, the last time he conveyed any information to the authorities was on 20 February 2019 via his solicitors' written representations to the AGC. Hence, the decision not to grant the appellant a CSA had, in fact, been made by the sitting AG based on up-to-date information. Accordingly, regardless of the state of affairs at the time of the appellant's conviction and sentencing, there was no longer any factual basis for the appellant to impugn the PP's determination not to issue him a CSA on the ground that such a determination had to be made by the sitting AG.

The alleged non-service of the MDP Notice

48 The final subsidiary issue in relation to the PP Decision concerned the appellant's submission that he had not been served the MDP Notice and that, consequently, the PP Decision was procedurally improper, illegal, in breach of his legitimate expectations and/or unconstitutional. The Judge "was not inclined to believe the [appellant's] allegations that the MDP Notice had not been served on him" (see the GD at [39]). In any case, he noted that the service of the MDP Notice was not a compulsory procedural prerequisite, and, the appellant did not show that the alleged differentiated treatment had been carried out deliberately and arbitrarily against him in particular (see the GD at [43] and [49]).

49 On appeal, the appellant relied on the following to show that he had not been served with the MDP Notice:

(a) the appellant's evidence at trial that the MDP Notice had not been read to him;

(b) an affidavit affirmed by the appellant's previous counsel stating that the appellant had informed him during the trial that the appellant had never seen the MDP Notice previously;

(c) the decision of DPP Chua Seng Leng Terence ("DPP Chua") not to refer to the MDP Notice at the trial after the appellant's counsel informed him that the appellant had never seen the MDP Notice;

(d) alleged issues with the evidence of Sergeant Khairul Faiz bin Nasaruddin ("Sgt Khairul") that he had read the MDP Notice to the appellant on 3 September 2014 as well as the omission of Sgt Abdul Samad bin Suleiman ("Sgt Samad") to mention the service of the MDP Notice in his testimony at trial; and

(e) issues with the MDP Notice, specifically, alleged differences between the signatures on the MDP Notice and the appellant's signatures on his other statements, as well as the fact that the appellant's name in the MDP Notice had been written by Sgt Khairul.

50 In our view, the Judge was correct in rejecting the appellant's claim that he had not been served with the MDP Notice. Sgt Khairul had given evidence that on 3 September 2014, he read the MDP Notice to the appellant in English, following which the appellant confirmed that he understood what had been read to him and that he did not have any information to provide. This was recorded by Sgt Khairul in the MDP Notice, which was signed by both the appellant and Sgt Khairul. A copy of this MDP Notice was also produced for the court's perusal. We did not find any of the points raised by the appellant sufficient to displace Sgt Khairul's clear testimony which was supported by documentary evidence. We observed further that:

(a) Understood in context, the appellant's evidence at trial was that Investigation Officer Tien Shiong Herman ("IO Lee") had not read him the MDP Notice. This did not preclude the possibility that a different officer had read him the MDP Notice. Indeed, this was consistent with Sgt Khairul's evidence that he had read the MDP Notice to the appellant (see the GD at [40]–[41]).

(b) DPP Chua's decision not to refer to the MDP Notice at trial did not necessarily amount to a concession that no MDP Notice had been served on the appellant. DPP Chua explained that such decision had been made because the MDP Notice was not a fact in issue or a relevant fact for the Prosecution's case against the appellant.

(c) Similarly, Sgt Khairul's and Sgt Samad's omission to mention the service of the MDP Notice in their conditioned statements or trial testimony was explicable on the basis that the MDP Notice was not a fact in issue or a relevant fact for the Prosecution's case.

(d) There were no perceptible differences between the appellant's signatures on the MDP Notice and the appellant's signatures on his other statements (see the GD at [42]). The fact that Sgt Khairul wrote the appellant's name on the MDP Notice was also immaterial.

51 For these reasons, we agreed with the Judge that the appellant had failed to establish, as a matter of fact, that he had not been served the MDP Notice. It was therefore unnecessary for us to determine the question of whether the non-service of the MDP Notice would justify the grant of leave to commence judicial review proceedings. We observe that, even taking the appellant's case at its highest and *assuming* that the MDP Notice had not been served on him, the appellant had not alleged that he suffered any prejudice as a result, and thus, any

complaint would seem be of an arid technical breach only. As the appellant's counsel clarified at the hearing before us, the appellant's case was *not* that the alleged non-service of the MDP Notice had caused him to withhold certain information or that it had resulted in the information ultimately provided being stale. On the contrary, the appellant's case was that he had provided *all* the information he possessed and that this constituted substantive assistance warranting the grant of a CSA. In other words, the alleged non-service of the MDP Notice had no impact whatsoever on the appellant in terms of the information which he eventually provided to the CNB. The real question was whether the provision of such information amounted to substantive assistance. Our views on that question are set out in the next section.

The PP Decision: substantive assistance

52 In the proceedings below and on appeal, the appellant's case was that by providing information regarding Jimmy and Anand (see [5]–[6] above), he had substantively assisted the CNB in disrupting drug trafficking activities. Hence, there was a *prima facie* case of reasonable suspicion that the PP's decision not to issue him a CSA was irrational and/or illegal.

53 We could not agree with the appellant's submission. Our decision in this regard turned largely on the answer to the following question ("the Question") which we had posed to the parties in the course of the proceedings:

> What is the test to be applied by the Public Prosecutor in considering whether any information provided by the accused person has substantively assisted the Central Narcotics Bureau within the meaning of s 33B(2)(*b*) of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed)?

54 Before setting out our legal analysis of the Question, it is useful to provide an overview of the parties' cases and evidence as they stood at the end

of the first hearing on 9 March 2021, as well as the developments that took place thereafter. This will set the context for how the Question came to be posed and answered. We explain how we applied the answer to the Question to the facts of the present case.

The parties' cases and the evidence

(1) The state of affairs as at the end of the first hearing

55 In the proceedings below and on appeal, the appellant's case was that the person he knew as Jimmy was, in fact, Zamri. Furthermore, the appellant contended that there was a *prima facie* case of reasonable suspicion that the information he had provided to the CNB regarding Jimmy subsequently assisted in Zamri's arrest. This was based on the following.

(a) It was undisputed that, following his arrest, the appellant had provided to the CNB certain information regarding Jimmy (see [5] above).

(b) On 14 October 2014, three weeks after the last of the appellant's recorded statements, Zamri was arrested. Zamri was eventually prosecuted, convicted and sentenced to death for drug trafficking.

(c) Zamri had affirmed an affidavit stating that:

(i) he had been told by one "Abang" that he would be identified as "Jimmy", which would serve as a code word for him to know that he was talking to the person who was supposed to make the drug deliveries;

(ii) he was the person who used the Phone Number and exchanged SMS messages with the appellant;

(iii) on 7 September 2014, after hearing from Abang that the person he was supposed to receive a delivery from had been arrested, he left Singapore for Batam in order to avoid the CNB and remained there until 19 September 2014;

(iv) after he was arrested, one "Faizal" from the Intelligence Department of the CNB told him that the CNB knew that Zamri dealt with drugs at the Industrial Park because they had arrested someone a month before who told them about this, and that the CNB had been observing Zamri since then; and

(v) in or about 2015, while he was remanded in Changi Prison, Zamri told the appellant that he was Jimmy and revealed to the appellant what Faizal had told him after his arrest.

(d) The CNB had actively questioned the appellant on SMS messages he exchanged with Jimmy and had access to the Phone Number which they could trace. The respondent did not deny having the trace records of the Phone Number but instead refused to disclose these records. This raised a reasonable suspicion that the CNB did trace the Phone Number, which would have led it to Zamri.

56 On the other hand, the respondent denied that the appellant had, by disclosing information regarding Jimmy, substantively assisted the CNB. Among other things, the respondent relied on the following.

(a) When shown a series of photographs by the CNB, the appellant failed to identify Zamri but identified another individual as Jimmy. This would have hindered rather than helped the CNB. Furthermore, the appellant did not explain why he only informed the CNB about his

mistaken identification of Jimmy in 2018, some three years after he learned of his mistake from Zamri in 2015.

(b) The respondent filed two affidavits affirmed by Superintendent Tan William ("Supt Tan") stating that the information provided by the appellant did not assist in Zamri's arrest on 14 October 2014. On Supt Tan's account, the CNB did not need to, nor did it, act on any such information in order to arrest Zamri.

(c) The respondent also filed an affidavit affirmed by Assistant Superintendent Muhammad Faizal bin Baharin ("ASP Faizal") refuting Zamri's account of what ASP Faizal had purportedly told him. ASP Faizal stated that he was "unable to recall whether [he] spoke to Zamri on 14 October 2014 or at any other time". However, even if he had spoken to Zamri, he would not have done so inside a toilet as described by Zamri. Furthermore, he would not have told Zamri any of what Zamri alleged he had said, because these were matters concerning intelligence which could potentially compromise the CNB's enforcement effectiveness, and, in any event, were not true.

57 During the first hearing of the appeal, the respondent confirmed that the Phone Number had indeed been used by Zamri, although the respondent did not take a position as to the existence of the trace records for the Phone Number. We also told the respondent's counsel, Mr Ng Yong Kiat Francis SC ("Mr Ng"), of our preliminary view that the affidavits filed on behalf of the respondent were vague and did not appear to adequately address the contentions raised by the appellant.

(2) The parties' further affidavits

58 Following the first hearing, the respondent sought the leave of the court to file a further affidavit concerning the information that the appellant had provided to the CNB. Finding the circumstances of the present case to be sufficiently exceptional (see *Syed Suhail bin Syed Zin v Attorney-General* [2021] 1 SLR 809 at [78]), we granted this application. In particular, we had regard to the fact that the respondent was already participating in the proceedings and had indicated a willingness to disclose further information directed towards addressing the concerns we had raised at the first hearing. It would be expedient if all relevant materials were placed before us for our consideration, so that we could properly determine the appeal. Thus, we granted the respondent leave to file a further affidavit, and similarly granted the appellant leave to file an affidavit in reply. We also directed the parties to file further written submissions in respect of these further affidavits.

59 Consequently, the respondent filed a further affidavit affirmed by Supt Tang Zhixiong Aaron ("Supt Tang") on behalf of the CNB ("Supt Tang's First Affidavit"). In his affidavit, Supt Tang explained that prior to 3 September 2014 (the date of the appellant's arrest), the CNB was already in possession of all the information regarding Jimmy that the appellant subsequently provided in his statements. This included information regarding Jimmy's true identity as Zamri, his occupation and workplace, *modus operandi*, and that he was using the Phone Number to communicate in connection with drug activities. Supt Tang further stated that the person whom the appellant misidentified as Jimmy during the photo identification procedure had, in fact, been in prison since 2 May 2013. The CNB therefore knew that this person could not have been the intended recipient of the drugs in the appellant's possession. For these reasons, the information about Jimmy which the appellant provided to the CNB

"was not new information, was not useful to the CNB, and was not used or relied on by the CNB to arrest Zamri on 14 October 2014".

60 In reply, the appellant filed a second affidavit affirmed by Zamri ("Zamri's Second Affidavit"). In this affidavit, Zamri disputed Supt Tang's assertion that, prior to 3 September 2014, the CNB had already been in possession of all the information regarding Jimmy which the appellant subsequently provided. Zamri contended that he had only started trafficking in drugs at the end of August 2014 (shortly before the appellant was arrested) and that Supt Tang's account was inconsistent with what ASP Faizal had told him. To Zamri's knowledge, the appellant was the only person he dealt with who had been arrested by the CNB. Moreover, he had travelled out of Singapore on two occasions prior to his arrest. According to Zamri, the CNB would not have permitted him to do so if they already had all the information required to identify and arrest him as a drug trafficker.

61 In his further written submissions, the appellant argued that even if the CNB had already been in possession of the information he provided regarding Jimmy, this was not determinative of the usefulness of such information. In deciding whether to issue him a CSA, the PP ought to have taken into account other considerations including the fact that the information was true and accurate. On the other hand, the respondent maintained that the appellant's case fell short of establishing a *prima facie* case of reasonable suspicion that the PP's decision not to issue him a CSA was illegal and/or irrational.

(3) The Question posed by this court

62 In these circumstances, it appeared to us that the primary bone of contention between the parties concerned what factors the PP ought to take into

account when assessing the usefulness of the information provided by the appellant and relatedly, whether the appellant had rendered substantive assistance to the CNB by the provision of such information. We therefore directed the parties to file written submissions in respect of the Question (see [52] above).

63 After these directions were issued, the respondent was granted leave to file a further affidavit in order to address two new assertions of fact which had been raised in the appellant's further written submissions. In a second affidavit ("Supt Tang's Second Affidavit"), Supt Tang stated that "there was nothing in relation to Zamri or his drug activities that the CNB needed corroboration about as at 3 September 2014" and that none of the information provided by the appellant "was needed for the purposes of verifying, or used to verify, anything concerning Zamri's drug trafficking activities, or was valuable to the CNB in relation to such drug trafficking activities". Furthermore, "when making recommendations to the PP on charges to be preferred against Zamri … the CNB did not refer to, or rely on" or use the information provided by the appellant regarding Jimmy. Although the appellant was granted leave to file an affidavit in reply to Supt Tang's Second Affidavit, he did not do so.

64 The parties then filed written submissions on the Question. The appellant submitted that the applicable test was "[w]hether the information provided by the accused person is objectively (i) reliable; and (ii) of inherent practical value in disrupting drug trafficking activities within or outside Singapore" [emphasis in original omitted]. On the other hand, the respondent submitted that the appropriate test was "whether the [PP] is of the opinion that the information provided by the accused person has enhanced the operational or enforcement effectiveness of the [CNB]".

65 After hearing the parties' oral submissions on 26 November 2021, we dismissed the appeal. We now set out our full reasoning in respect of the Question and the parties' arguments thereon.

The answer to the Question

66 In our view, given the evidence of the CNB as set out at [63] above, the nub of the issue was whether it was sufficient for the purposes of the PP's assessment of substantive assistance that the information provided by the appellant was *capable* of being useful to disrupt drug trafficking operations, even if that information had not *in fact* been used. Applying the framework for statutory interpretation set out in *Tan Cheng Bock v Attorney-General* [2017] 2 SLR 850 ("*Tan Cheng Bock*") at [37], we concluded that Parliament had not intended such an approach. In other words, in the context of information provided by an accused person to the CNB, it is *not* sufficient for the purposes of s 33B(2)(*b*) of the MDA that the information was *inherently capable* of being useful; such information must have *actually* been used by the CNB in disrupting drug trafficking activities within or outside Singapore. We explain.

(1) The possible interpretations of the provision

67 We first set out the relevant provisions of s 33B of the MDA:

> **Discretion of court not to impose sentence of death in certain circumstances**
>
> **33B.**—(1) Where a person commits or attempts to commit an offence under section 5(1) or 7, being an offence punishable with death under the sixth column of the Second Schedule, and he is convicted thereof, the court —
>
> (*a*) may, if the person satisfies the requirements of subsection (2), instead of imposing the death penalty, sentence the person to imprisonment for life and, if the person is sentenced to life

> imprisonment, he shall also be sentenced to caning of not less than 15 strokes; or
>
> …
>
> (2) The requirements referred to in subsection (1)(*a*) are as follows:
>
> (*a*) the person convicted proves, on a balance of probabilities, that his involvement in the offence under section 5(1) or 7 was restricted —
>
> (i) to transporting, sending or delivering a controlled drug;
>
> (ii) to offering to transport, send or deliver a controlled drug;
>
> (iii) to doing or offering to do any act preparatory to or for the purpose of his transporting, sending or delivering a controlled drug; or
>
> (iv) to any combination of activities in sub-paragraphs (i), (ii) and (iii); and
>
> (*b*) *the Public Prosecutor certifies to any court that, in his determination, the person has substantively assisted the Central Narcotics Bureau in disrupting drug trafficking activities within or outside Singapore.*
>
> …
>
> (4) *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.
>
> [emphasis added]

68 As we mentioned at [64] above, the parties put forward opposing approaches to be applied by the PP in exercising his discretion under s 33B(2)(*b*) of the MDA.

(a) According to the appellant, the PP need only consider whether the information provided by the accused person was inherently capable of being useful in disrupting drug trafficking activities. This approach adopted primarily the perspective of the accused person, focusing on the inherent nature of the information provided.

(b) According to the respondent, the PP had to consider whether the information provided by the accused person had enhanced the operational or enforcement effectiveness of the CNB in disrupting drug trafficking activities. This approach adopted primarily the perspective of the enforcement authorities, focusing on the outcome of the provision of information.

(2) The legislative purpose of the provision

69 Next, we consider the legislative purpose of the provision. As we observed in *Tan Cheng Bock* at [42], Parliament's intention may be gleaned from the text of the statutory provision, its statutory context, as well as extraneous material.

70 Turning first to the text of the provision, s 33B(2)(*b*) of the MDA refers to the PP's certification that "in his determination, the person has substantively assisted the [CNB] in disrupting drug trafficking activities within or outside Singapore". We make a few observations in this regard.

(a) On its face, the plain language of the provision refers to the accused person *having substantively assisted* the CNB. The tense of the phrase "has substantively assisted" suggests that the statute contemplates, in the context of information, that such information must have actually been used by the CNB in some way prior to the time of

sentencing. Information which may be *capable* of being useful would not substantively assist the CNB if it is not *in fact* used.

(b) At the second hearing before us, the appellant's counsel, Mr Too Xing Ji ("Mr Too"), sought to draw a distinction between the accused person having *substantively assisted* the CNB in disrupting drug trafficking activities, and, the accused person having *disrupted* drug trafficking activities. Mr Too submitted that, given the adoption of the former phrasing in s 33B(2)(*b*), actual disruption was not necessary as long as the information provided by the accused person related to the disruption of drug trafficking activities. We were unable to agree with this submission. In our judgment, the language of s 33B(2)(*b*) was framed in terms of assistance rendered to the CNB for the simple reason that ultimately, it is the CNB that is responsible for disrupting drug trafficking activities.

71 Turning next to the statutory context, it is notable that s 33B(4) of the MDA provides that the "determination of whether or not any person has substantively assisted the [CNB] in disrupting drug trafficking activities shall be at the sole discretion of the Public Prosecutor". This hints at the type of considerations involved in the determination, that is, they are likely to involve extra-legal considerations. As we observed in *Nagaenthran* at [58] and [67], Parliament's decision to vest the PP (and not the courts) with the power to make a determination on the issuance of the CSA was "entirely logical" because the inquiry "contemplates an assessment of these [drug trafficking] activities that transcends the disruption of particular and individual operations and … entails a wide-ranging assessment that goes beyond our geographic boundaries". Further, it would "likely require the consideration of at least some materials that do not meet the definition of admissible evidence, and that would likely entail

the weighing of consideration and trade-offs". This supports the view that when considering whether an accused person has rendered substantive assistance, the dominant perspective is that of the enforcement authorities and/or the PP, rather than that of the accused person.

72 We now turn to the extraneous material. The Explanatory Statement to the Misuse of Drugs (Amendment) Bill (No 27 of 2012) ("the Amendment Bill") states as follows:

> Substantive assistance to the [CNB] 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. Any information which does not enhance the effective enforcement of the provisions of the Act will not suffice.

73 Notably, the Explanatory Statement expressly states that "information which does not enhance the effective enforcement of the provisions of the Act will not suffice". This is borne out by the example given in the Explanatory Statement, which refers to the provision of information which *leads to* an arrest, detention, or prosecution. While the Explanatory Statement is by no means exhaustive or definitive, it does point towards an outcome-centric approach, rather than to an approach which depends solely on the inherent nature and quality of the information provided.

74 This view is reinforced by the parliamentary debates regarding the Amendment Bill. At the beginning of the Second Reading of the Amendment Bill, the purpose of s 33B of the MDA was clearly set out by the then Deputy Prime Minister and Minister for Home Affairs, Mr Teo Chee Hean ("Mr Teo"), as follows (see *Singapore Parliamentary Debates, Official Report* (12 November 2012) vol 89 ("the 12 November Debates") at p 1074):

> *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. *Assistance which does not enhance the enforcement effectiveness of the CNB will not be sufficient.* … [emphasis added]

75 At a later stage of the debate, the Minister for Law, Mr K Shanmugam ("Mr Shanmugam"), also explained the purpose of s 33B(2)(*b*), as follows (see *Singapore Parliamentary Debates, Official Report* (14 November 2012) vol 89 ("the 14 November Debates") at p 1231):

> *The issue is not what we can do to help couriers avoid capital punishment. It is about what we can do to enhance the effectiveness of the Act in a non-capricious and fair way without affecting our underlying fight against drugs.* Discretionary sentencing for those who offer substantive assistance is the approach we have taken. For those who cannot offer substantive assistance, then the position is as it is now.
>
> …
>
> … Also, the very existence of the mechanism adds friction to the entire drug trafficking network. Every arrested courier is now potentially a lead back to the syndicate. That will make it difficult for the entire organisation. …
>
> [emphasis added]

76 These observations were subsequently reiterated by Mr Teo, who stated that (see the 14 November Debates at p 1243):

> As Mr Shanmugam said, we must be clear about what the policy intent is. *The policy intent of this substantive cooperation amendment to our mandatory death penalty regime is to maintain a tight regime – while giving ourselves an additional avenue to help us in our fight against drugs*, and not to undermine it.
>
> …
>
> We cannot be sure how exactly couriers or the syndicates will respond to this new provision. But we have weighed the matter

> carefully and are prepared to make this limited exception *if it provides an additional avenue for our enforcement agencies to reach further into the networks, and save lives from being destroyed by drugs and, hence, make our society safer.*
>
> … All in all, it will create an atmosphere of risk and uncertainty in the organisation, because they do not know if one of them gets caught, whether he will reveal secrets that will then cause problems for all of them. Our intent is to make things as difficult as possible for the syndicates and to keep them and drugs out of Singapore.
>
> [emphasis added]

77 The above passages have been thoroughly canvassed in the case law. In *Ridzuan (CA)*, we made the following observations at [46] and [66]:

> 46 … [*T*]*he purpose* of giving the court the discretion to sentence 'couriers' … who have rendered substantive assistance to CNB to life imprisonment and caning instead of death *is to enhance the operational effectiveness of CNB*. It was thought that providing an incentive for offenders to come forward with information would enhance the operational effectiveness of CNB in two ways. First, it would give CNB an additional source of intelligence to clamp down on drug trafficking activities. Second, it would disrupt drug trafficking syndicates' established practices and create an atmosphere of risk for the members of these syndicates as there would be uncertainty as to whether an apprehended courier would reveal all their secrets.
>
> …
>
> 66 … The statements in Parliament show quite clearly that *the object of s 33B of the MDA is not to send a message that society has gone soft on drug traffickers; on the contrary, it is another string to our bow, perhaps in a different way, to combat drug trafficking* – to get at the real kingpins behind the couriers.
> …
>
> [emphasis added]

78 In *Prabagaran a/l Srivijayan v Public Prosecutor and other matters* [2017] 1 SLR 173 ("*Prabagaran*"), we similarly observed at [37] that:

> … [T]he amendments are *not primarily intended to spare certain couriers from the death penalty*, but to disrupt the activities of drug trafficking syndicates by *providing an incentive for*

> *offenders to provide information which would enhance the capabilities of law enforcement agencies* in the war against drugs. [emphasis added]

79 The legislative intent in relation to s 33B of the MDA is therefore clear – to enhance the operational effectiveness of the CNB. It bears emphasis that, as we observed in *Ridzuan (CA)* and *Prabagaran*, it was *not* Parliament's objective in enacting s 33B to relax the existing drug regime in Singapore by providing couriers with a means to avoid capital punishment. While that may have been the *incentive* offered to couriers in exchange for their providing substantive assistance, the underlying reason for doing so was to provide the CNB with an *additional* tool for dealing with the drug scourge in Singapore, which would in turn *enhance the CNB's operational effectiveness*. This is a critical distinction, as we explain in greater detail below.

80 Apart from clarifying the general objective of s 33B of the MDA, the parliamentary debates also shed light on what Parliament had intended by the phrase "substantive assistance". During the parliamentary debates, some Members of Parliament ("MPs") had expressed concerns regarding the meaning of "substantive assistance" and how the phrase appeared to require an actual outcome in relation to the disruption of drug trafficking. Some MPs suggested that instead of substantive assistance, good faith or cooperation should be the touchstone for the issuance of the CSA. For instance, Mr Edwin Tong ("Mr Tong") commented that (see the 12 November Debates at pp 1079–1080):

> … [*I*]*t appears necessary that the assistance of the offender must lead to some tangible and effective outcome in relation to the disruption of drug trafficking activities.* Hence, whether one has substantively assisted or not could really be the difference between life and death. It is therefore important that we are very clear as to what needs to be satisfied.
>
> …

> Further, Sir, as the section is presently drafted, the certification is only issued where CNB grants substantive assistance from the offender leading to the disruption. That could potentially discriminate between the different offenders who commit the same crime but who may for all sorts of reasons have different levels of knowledge and insight into the syndicate's activities. Put another way, that certification which could be the difference between life and death would be dependent on factors which may not necessarily be in the offender's control … *The sub-section could perhaps be revised so that the touchstone for the issue of a certificate is determined by whether or not CNB forms the view that the offender has done all that he or she possibly can in the circumstances to assist in the disruption of the drug trafficking activities.*
>
> [emphasis added]

81 Similarly, Ms Sylvia Lim ("Ms Lim") observed that (see the 12 November Debates at p 1083):

> In addition, *the phrase 'substantially assisted the CNB in disrupting drug trafficking activities' suggests that the CNB should show some success in its drug operations based on the accused's information.* Is this what is intended? This would not be fair to the accused, as operations may fail due to the information being outdated or due to law enforcement incompetence. *Why not simply require full co-operation, without the additional requirement of substantial assistance to disrupt drug trafficking activities?* [emphasis added]

82 Assistant Prof Tan Kheng Boon Eugene also stated that (see the 12 November Debates at pp 1090–1091):

> … In short, is the threshold of substantive cooperation or assistance set too high such as to be illusory? *Should not substantive cooperation be judged according to whether the person has done all that he can to assist, rather than requiring the assistance to have a tangible outcome?*
>
> …
>
> Sir, I would appreciate [sic] if the Deputy Prime Minister could also explain what is his Ministry's understanding of 'disrupting drug trafficking activities' in the proposed section 33B? Not all good information would necessarily lead to disruption of drug trafficking activities but the information can certainly provide the law enforcement agencies with a better understanding of

> the ground situation. Given that there are varying degrees of disruption to drug trafficking activities, it would be appropriate and for the avoidance of any doubt [to] spell out the meaning and extent of disruption vis-a-vis the substantive cooperation provision before an accused person has a legitimate claim to a 'Certificate of Cooperation'.
>
> [emphasis added]

83 It is apparent from the above that in the course of the parliamentary debates, the question of the standard to be met by an accused person before he would be issued a CSA had been expressly raised and discussed. The relevant provisions of the Amendment Bill were viewed as requiring an actual outcome in relation to the disruption of drug trafficking activities, and some MPs expressed concerns as to the fairness of such an approach. For instance, Mr Tong highlighted that this would make the issuance of the CSA "dependent on factors which may not necessarily be in the offender's control". Ms Lim also raised the hypothetical situation where "operations may fail due to the information being outdated". The alternative of using a lower threshold of good faith or cooperation was thus put forward.

84 What is critical for present purposes, however, is that *none of these suggestions were eventually adopted*. Instead, Parliament decided to enact the provision with its original wording intact. It accepted the rationale given by Mr Shanmugam in response to the MPs' speeches, as follows (see the 14 November Debates at p 1231):

> Some Members have asked: would it be better to say that the courier has done his best that he has acted in good faith – should he not qualify? …
>
> The short answer is that it is not a realistic option because every courier, once he is primed, will seem to cooperate. Remember we are dealing not with an offence committed on the spur of the moment. We are dealing with offences instigated by criminal organisations which do not play by the rules, which will look at what you need, what your criteria are and send it to you. So, if

> you say just cooperate, just do your best, all your couriers will be primed with beautiful stories, most of which will be unverifiable but on the face of it, they have cooperated, they did their best. And the death penalty will then not be imposed and you know what will happen to the deterrent value. *Operational effectiveness will not be enhanced.* …
>
> …
>
> [emphasis added]

85 In other words, the lower threshold of good faith and cooperation was viewed as susceptible to manipulation by drug syndicates, who could "prime" their couriers with unverifiable accounts which would nevertheless earn them a CSA. The present wording of the provision (which was understood as requiring an actual outcome in relation to the disruption of drug trafficking activities) was considered to be better suited to achieving the purpose of s 33B, that is, to enhance the CNB's operational effectiveness.

(3) The preferred interpretation

86 In light of Parliament's intention as elicited above, we turn to consider the test to be applied by the PP in determining whether information provided by the accused person has substantively assisted the CNB in disrupting drug trafficking activities within or outside Singapore.

87 In our judgment, the plain language of s 33B read in light of the parliamentary debates drives us to the conclusion that, in the context of information, the overarching test to be applied by the PP is whether the information provided by the accused person has *enhanced the operational effectiveness of the CNB*. This aligns with the views we expressed in previous cases. In *Ridzuan (CA)*, we observed at [45] that it was "abundantly clear" from the parliamentary debates that a CSA "would only be granted where the offender's assistance yields actual results in relation to the disruption of drug

trafficking". This was reiterated in *Prabagaran*, where we observed at [64] and [94] that "enforcement effectiveness must be enhanced by the assistance rendered by an offender before it is deemed substantive". This approach places the "focus on the outcome of assistance rendered" and is thus an "outcome-driven approach" and an "outcome-oriented test" (see *Prabagaran* at [67] and [76]).

88 Consequently, s 33B of the MDA contemplates that, at a minimum, the information provided by the accused person must have been used by the CNB in some way before the accused person may be regarded as having substantively assisted the CNB. We were unable to agree with Mr Too's submission that it was sufficient for the information simply to be reliable and of inherent practical value. Having regard to the underlying objective of s 33B and not merely the incentive used to achieve this objective (see [79] above), Parliament could not have intended this to be the case.

89 The concept of "use" in this context should, however, be interpreted broadly. It would extend to arrest, apprehension, prosecution or conviction, as set out in the Explanatory Statement. Furthermore, as we pointed out to Mr Ng at the first hearing, "use" should be assessed not only in relation to the arrest operation itself, but also in relation to the events and developments leading up and contributing to such arrest. The concept of "use" could even, in our view, extend to the making of wider strategic decisions such as when to launch an enforcement action. Nevertheless, we do not purport to prescribe an exhaustive definition of "use", nor would it be desirable to do so. In this regard, we are cognisant that Parliament had deliberately avoided providing a statutory definition of the phrase "substantive assistance" because it is ultimately "an operational question and turns on the operational parameters and demands of each case" (see the 14 November Debates at p 1233).

90 It is apposite at this juncture to deal with some of the foreign cases that the appellant had relied on. As we highlighted to Mr Too at the second hearing, we found these decisions to be of little assistance in the present case because they concerned the question of the court's sentencing discretion, specifically, when and how the court may give a discount on sentence based on information that had been provided by the accused person.

(a) In *R v Cartwright* (1989) 17 NSWR 243, the applicant applied for leave to appeal against his sentences imposed in respect of two charges of conspiring to import heroin. Allowing the leave application and the appeal, the New South Wales Court of Criminal Appeal held that a sentencing discount could be given if the offender had genuinely cooperated with the authorities and if the information had the potential to assist the authorities, whether or not the information supplied turned out in fact to have been effective (at 253).

(b) Similarly, in *HKSAR v Kilima Abubakar Abbas* [2018] 5 HKLRD 88, the applicant appealed against his sentence in respect of an offence of unlawfully trafficking in dangerous drugs. It was in this context that the Hong Kong Court of Appeal considered the mitigating value of the applicant's assistance to the authorities and rejected the "must bear fruit" approach, on the basis that it undermined the judicial policy of encouraging defendants to assist the authorities (at [193]).

91 Unlike the courts in the abovementioned cases, we were not concerned here with the question of the court's sentencing discretion, but with the very narrow question of what the statute required. Put simply, we were concerned primarily with *legislative* policy in respect of the *statutory concept of substantive assistance*, rather than *judicial* policy developed by the courts in

respect of *sentencing*. As such, the foreign authorities relied upon by the appellant were not relevant.

92 For the above reasons, we concluded that (a) the touchstone for substantive assistance is that there must have been some enhancement to the operational effectiveness of the CNB; and (b) information provided by the accused person must have been used by the CNB before the accused person may be regarded as having substantively assisted the CNB.

Application to the facts

93 We now explain how we applied the above principles to the facts of the present case. We address first the information provided by the appellant regarding Jimmy, before turning to the information provided by the appellant regarding Anand.

(1) Information regarding Jimmy

94 As the evidence stood immediately after the first hearing of the appeal, it appeared to us that a *prima facie* case of reasonable suspicion had been made out. The appellant had presented to us a coherent series of facts:

(a) he provided comprehensive information to the CNB regarding Jimmy;

(b) the information he provided was accurate and contemporaneous (as the respondent later confirmed);

(c) Zamri was arrested a few weeks after he provided this information to the CNB; and

(d) Zamri confirmed that he was Jimmy, that he used the Phone Number, and that he was informed by ASP Faizal that his arrest had been based on information obtained from an Indian arrestee (see [55] above).

95 Taken in totality, these facts raised a plausible question as to whether the appellant had indeed rendered substantive assistance, such that the PP's decision not to issue the appellant a CSA was illegal and/or irrational. This *prima facie* inference could not be displaced simply by Supt Tan's ambiguously-worded statement that the information provided by the appellant had not assisted in Zamri's arrest on 14 October 2014, or, by ASP Faizal's statement that he could not recall whether he spoke to Zamri (see [56]–[57] above).

96 The affidavits filed *after* the first hearing, however, revealed a different state of affairs. These affidavits made clear that ultimately, the information the appellant provided to the CNB had *not* been useful. In particular, Supt Tang's Second Affidavit clarified that:

> 7 Prior to 3 September 2014, the CNB had already conducted investigations and knew that Zamri was dealing in drugs as well as the *modus operandi* Zamri used. In the circumstances, nothing in the information that the Appellant provided to the CNB was needed for the purposes of verifying, or used to verify, anything concerning Zamri's drug trafficking activities, or was valuable to the CNB in relation to such drug trafficking activities.
>
> 8 For the avoidance of doubt, nothing in the information that the Appellant provided to the CNB was needed for the purposes of verifying or corroborating, or used to verify or corroborate, anything concerning the drug trafficking activities of any other person, or was valuable to the CNB in relation to such drug trafficking activities.

97 The affidavit also emphasised that all the information that the appellant provided about "Jimmy" involved drug transactions in the latter's workplace in Toa Payoh while Zamri was arrested in Clementi on 14 October 2014 in Clementi after collecting a consignment of drugs there. At the time the appellant had not identified Zamri as Jimmy, having pointed to another person's photograph. We did not see any reason to disbelieve the CNB's account as set out in Supt Tang's affidavits.

98 The appellant's main basis for disputing the CNB's account was Zamri's Second Affidavit, which set out several reasons why he did not believe Supt Tang's evidence to be true (see [60] above). However, we did not find any of his attempted rebuttals persuasive. In relation to Zamri's alleged conversation with ASP Faizal, we found this implausible to begin with. As ASP Faizal stated, it was highly unlikely that a CNB officer would inform an accused person of matters concerning the CNB's operations and intelligence. Furthermore, although ASP Faizal's evidence was that he could not recall whether such a conversation took place, this did not amount to an acceptance of Zamri's allegations. In these circumstances, the critical question was this – given Supt Tang's evidence that the CNB already possessed the information in question, did the appellant's allegation of what ASP Faizal had told Zamri suffice to create a *prima facie* case of reasonable suspicion? In our judgment, it did not. As for the other reasons set out in Zamri's Second Affidavit, we found them to be either inconclusive or speculative in refuting Supt Tang's evidence that, prior to 3 September 2014, the CNB already had the information subsequently provided by the appellant regarding Jimmy. Indeed, the reliability of Zamri's assertions was in doubt as he claimed that he had only started dealing in drugs at the end of August 2014, and had received just one consignment from the appellant while the appellant's own statement after his arrest disclosed that

from 22 August 2014 up to the date of his arrest he had made three deliveries to Jimmy.

99 The evidence therefore showed that the information provided by the appellant regarding Jimmy had no effect whatsoever on the CNB's operations, notwithstanding that it was accurate. The CNB was already in possession of such information prior to the appellant's arrest, and the appellant's information was not needed or used for verification or corroborative purposes. In these circumstances, it could not be said that the appellant had substantively assisted the CNB. As we have observed above, substantive assistance requires an enhancement to the CNB's operational effectiveness, which means that the information provided by the accused person must at the very least have been used by the CNB. However, this was not the case here.

100 For these reasons, we held that the appellant had failed to establish a *prima facie* case of reasonable suspicion that the information he had provided regarding Jimmy enhanced the CNB's operational effectiveness, such that the PP's decision not to issue him a CSA was illegal and/or irrational.

(2) Information regarding Anand

101 We turn now to the appellant's case in relation to the information he provided regarding Anand. To briefly recapitulate, the appellant had provided the CNB with information about Anand *after* the dismissal of the appeal against his conviction and sentence. The appellant submitted that this amounted to substantive assistance, such that the PP's decision not to grant him a CSA was illegal and/or irrational (see [6] above).

102 In the proceedings below, the Judge found that post-appeal assistance rendered by the appellant could not be taken into consideration for the purpose

of determining whether the PP should have issued the appellant a CSA. This was because "the latest time at which an accused may provide information to assist the CNB (and avail himself of the sentencing regime under s 33B of the MDA) is *during his trial*" [emphasis in original] (see the GD at [59] and [60]). The Judge further found that, in any case, the appellant had not adduced any evidence to challenge the respondent's evidence that the appellant's post-appeal assistance was not useful to the CNB (see GD at [60]).

103 We agreed with the Judge that the appellant had not established that the information he provided regarding Anand was useful to the CNB. Unlike the appellant's case regarding Zamri (where the appellant could point to a series of facts upon which the court was invited to draw certain inferences), there was scant evidence to show that any of the information provided by the appellant regarding Anand was true or otherwise helpful to the CNB. All the appellant could point to was the information itself and the fact that he had provided such information. On the other hand, ASP Neo Zhan Wei gave evidence on behalf of the respondent that none of the post-appeal information provided by the appellant proved useful to the CNB. In these circumstances, there was no *factual basis* for the appellant's contention that the PP's decision not to issue him a CSA was illegal and/or irrational.

104 In light of this, it was not necessary for us to deal with the question of whether, in reviewing the PP's determination under s 33B of the MDA, the court could take into account information provided by an offender *after* the dismissal of the appeal against his conviction and sentence. We therefore leave it an open question to be addressed in the future when it arises squarely for consideration.

The Cabinet Advice

105 Given the views we have expressed above, the challenge to the Cabinet may be disposed of briefly. To recapitulate, this was founded on the appellant's assertion that the Cabinet's action in advising the President not to commute his death sentence provided grounds for review. The appellant asserted that the Cabinet Advice had failed to take into account the substantive assistance rendered by the appellant to the CNB (see [15] above).

106 As the appellant acknowledged, the success of this challenge was contingent on the success of the challenge to the PP Decision, specifically, a finding that the appellant *had* rendered substantive assistance to the CNB. Since that ground failed, the Cabinet Advice could not be impugned.

Conclusion

107 For all of the above reasons, we dismissed the appeal.

Sundaresh Menon
Chief Justice

Judith Prakash
Justice of the Court of Appeal

Steven Chong
Justice of the Court of Appeal

Lee Ji En (Ascendant Legal LLC) (instructed) and Too Xing Ji (BMS Law LLC) for the appellant;
Ng Yong Kiat Francis SC, Loo Yu Hao Adrian and Teo Siu Ming (Attorney-General's Chambers) for the respondent.
