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Escape from the Hangman's Noose? Singapore's Discretionary Death Penalty for Drug Traffickers

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After nearly fifty years of the mandatory death penalty for drug offences, Singapore amended its law in 2012 to give judges a choice in certain situations to impose a sentence of death or life imprisonment instead. However, this change should not be misunderstood as an alteration in Singapore's zero-tolerance approach towards illegal drugs. Escaping the mandatory death penalty regime under the new law requires fulfilment of strict conditions. This article reviews the exceptional circumstances that are required before judges are given the discretion to impose the death penalty or not and the application of the new law by the Singapore courts.

The Singapore government has steadfastly held on to the death penalty as part of its approach towards illegal drugs (Mirpuri, 2018; Yap and Tan, 2020; Iau, 2022).[1] It has claimed that there is strong support for the death penalty in Singapore (Oh, 2020; Tham, 2022; but see Chan *et al*, 2018 for a more nuanced view) and that its own studies show the death penalty's deterrent effect on would-be traffickers (Chia, 2020 and 2021; Kaur *et al*, 2020). Even Pritam Singh, the Leader of the Opposition, has unquestioningly endorsed the death penalty's deterrent effect and called for its continued use, although he did not think that it should be mandatory (Singh, 2022).[2] International calls for reconsideration of the death penalty by Singapore have been rebuffed as foreign interference in a domestic matter (Bhatia, 2022a, 2022b).

Yet despite the Singapore government's rhetoric, the number executed for drug offences fell from a high of 54 persons in 1994 to single digits each year for most of the last two decades (Chan, 2016; Devaraj, 2023). In 2012, the law was significantly changed to give judges the discretion to impose the death penalty or not, encouraging speculation that the Singapore government was finally moving away from the death penalty, at least as a mandatory sentence (Johnson, 2013). However, as will be shown in this article,[3] the conditions that need to be satisfied before a judge is allowed to depart from the mandatory death regime are extremely rigorous, and these conditions have been interpreted strictly by the Singapore courts. In other words, any departure from Singapore's stance on the mandatory use of the death penalty has been minor in practice.

Change in the Law

The trajectory of drug laws in modern Singapore has been one of expanding punitiveness.[4] Singapore's mandatory death penalty for drug offences was first imposed in 1975 for those convicted of the manufacture, import and export or trafficking of diamorphine (heroin) and morphine above a stipulated quantity (Misuse of Drugs (Amendment) Act 1975).[5] The application of the mandatory death penalty has since then been extended to opium, cannabis, cannabis resin and cocaine by the

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1 Executions for drug offences accounted for 7 in 10 of all executions in Singapore between 1991 and 2014, see Chan, 2016: 182.

2 Compare with Degenhardt *et al*, 2008, who dispute a link between punitive drug policies and illegal drug use. There is also a problem with drug abusers being diverted to other drugs, see Lee, 2006; Chan *et al*, 2020.

3 For earlier articles reviewing the 2012 law, see Chen, 2014, 2015 and 2016; Morgan, 2016; Amirthalingam, 2018.

4 Singapore's 'war on drugs', which began in the 1970s, is a far cry from the approach of regulation and tolerance exhibited up to the 1930s, see Noorman, 2005.

5 In fact, the death penalty is not mandatory for everyone. It can be substituted with life imprisonment if the convicted person was under 18 years old at the time when the offence was committed or if pregnant at the time of conviction, see Criminal Procedure Code 2010: sections 314 and 315.

Misuse of Drugs (Amendment) Act 1989 and to methamphetamine (ice) in 1998 by the Misuse of Drugs (Amendment) Act 1998).

In 2012, sentencing of drug offenders appeared to change course. The change in the law was explained to be in order to 'draw a very careful, calibrated distinction between the different levels of accountability' of persons working for drug syndicates and to 'temper and mitigate the harsh drug laws with compassion' (Tong, 2012: 1076). The change was also said to be partly due to an alteration in 'society's norms and expectations' such that 'where appropriate, more sentencing discretion should be vested in the courts' (Teo, 2012a: 264).

A new section 33B was added to the Misuse of Drugs Act 1973 to give judges discretion to avoid imposing the death penalty even if the offender is convicted of import, export or trafficking of drugs, provided the offender proved, on a balance of probabilities, that certain sentencing criteria are satisfied (Misuse of Drugs (Amendment) Act 2012).[6] Although the scheme has some similarity with legislation in other countries, foreign case law is not applicable because of the different legislative framework applicable in Singapore (*Pannir Selvam a/l Pranthaman v Attorney General* (2022): para 91).[7]

The sentencing criteria in Singapore require proof that the offender was acting as a 'courier' ('condition 1')[8] **and** either:

(a) the Public Prosecutor has certified that the offender has substantively assisted the Central Narcotics Bureau[9] in disrupting drug trafficking activities within or outside Singapore ('condition 2'), **or**
(b) the offender was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts or omissions in relation to the offence ('condition 3').

A convicted drug offender who satisfies conditions 1 and 2 could be sentenced to either death or life imprisonment. In the case of the latter, they must also be sentenced to caning of not less than 15 strokes.[10] Although the court is given a discretion to impose the death penalty or life imprisonment, the latter has inevitably been given when these conditions are satisfied. In *Public Prosecutor v Chum Tat Suan* (2016),[11] it was said that 'compelling reasons' would be needed to impose the death penalty if the offender is only a courier and had rendered substantive assistance to the Central Narcotics Bureau. In the case of a convicted drug offender who satisfies conditions 1 and 3, they can only be sentenced to life imprisonment. No caning is possible.[12]

On the other hand, convicted drug offenders who cannot satisfy both required conditions (that is, either conditions 1 and 2, or conditions 1 and 3) are not eligible for the new sentencing framework (see for example, *Zamri bin Mohd Tahir v Public Prosecutor* (2019); *Mohammad Farid bin Batra v Public Prosecutor* (2020)). This strict interpretation of the requirements has been made consistently in case law. In *Rosman bin Abdullah v Public Prosecutor* (2017), for example, the Court of Appeal

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6 The new law came into effect on 1 January 2013 but convicted persons are allowed to be 're-sentenced' if their case had been dealt with already under the old law. There have also been case law developments about when a person can be said to 'traffic' drugs if they merely keep the drugs for a short time before returning them to the person who asked them to keep the drugs, see for example *Ramesh a/l Perumal v Public Prosecutor* (2019); *Roshdi bin Abdullah Altway v Public Prosecutor* (2022).

7 It was mentioned in parliament that the UK and US have similar 'cooperation provisions', such as US Code Title 18, section 3553(e), see Shanmugam, 2012: 1232. It is interesting to note that the US Code and condition 3 use the adverb 'substantial', but 'substantive' was chosen for condition 2.

8 The words 'courier', 'condition 1', 'condition 2', 'condition 3' and 'exclusion clause' are not used in the legislation but have been adopted here for ease of expression.

9 The Central Narcotics Bureau was established in 1971 as the primary drug enforcement agency in Singapore. See <https://www.cnb.gov.sg/>.

10 The maximum number of strokes of the cane that can be imposed in a single trial is 24, even if the person is convicted of multiple charges, Criminal Procedure Code 2010: section 328. Women and men who are more than 50 years old cannot be caned, Criminal Procedure Code 2010: section 325.

11 It is also not up to the offender to express a preference as to whether he wants life imprisonment or death, see *Public Prosecutor v Chum Tat Suan* (2016): para 8.

12 Abnormality of mind (also known as 'diminished responsibility' in criminal law) is also a partial defence to murder in Singapore. However, a person whose charge for murder is lowered to culpable homicide not amounting to murder due to diminished responsibility can be sentenced to caning, see Penal Code 1871: section 304.

noted that parliament did not intend to extend the benefit of the new sentencing regime to those 'whose involvement in the offence concerned went beyond that of a courier, regardless of their mental condition'. The new provisions thus had to be 'construed narrowly'.

The term 'courier' is not actually used in the legislation but has been adopted in case law[13] and in parliament to describe the requirement under the Misuse of Drugs Act 1973 that the offender's involvement must be restricted to:[14]

(i) transporting, sending or delivering a controlled drug;
(ii) offering to transport, send or deliver a controlled drug;
(iii) doing or offering to do any act preparatory to or for the purpose of his or her transporting, sending or delivering a controlled drug; or
(iv) any combination of activities in sub-paragraphs (i), (ii) and (iii).

Under section 33B(4) of the Misuse of Drugs Act 1973, it is further stated that:

> 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 ('exclusion clause').

In the following sections, the Singapore courts' understanding of condition 1 (acting as courier), condition 2 (certificate of substantive assistance), condition 3 (diminished responsibility), and the exclusion clause will be analysed.

Condition 1 (Acting as Courier)

A person who intends to distribute or sell the illegal drugs is not a 'courier', whose involvement must be limited to transporting, sending or delivering the drugs. In *Public Prosecutor v Chum Tat Suan* (2015), the Court of Appeal said that 'a courier is someone who receives the drugs and transmits them in exactly the same form in which they were received without any alteration or adulteration'. However, subsequent case law has widened the scope slightly by holding that persons could still be considered couriers if they perform acts that are 'incidental', 'necessary' or 'facilitative' of the acts of 'transporting, sending or delivering' the drugs (*Public Prosecutor v Abdul Haleem bin Abdul Karim* (2013): para 55; *Zainudin bin Mohamed v Public Prosecutor* (2018): paras 3 and 82).

Whether an offender is a courier is a 'fact-sensitive [decision] in which the court must pay close attention to both the facts as well as the context of the case' (*Rosman bin Abdullah v Public Prosecutor* (2017): para 30). From the past cases decided by the Singapore courts, the following acts do not disqualify an offender from being a courier:

- keeping the drugs for a short period of time before delivering the drugs to the customers (*Public Prosecutor v Abdul Haleem bin Abdul Karim* (2013); *Public Prosecutor v Azahari bin Ahmad* (2016));
- collecting the drugs if they intend to subsequently transport, send or deliver the drugs to another (*Public Prosecutor v Abdul Haleem bin Abdul Karim* (2013));
- collecting money for payment of the drugs delivered (*Public Prosecutor v Christeen d/o Jayamany* (2015));
- passing messages about the drug deliveries (*Public Prosecutor v Christeen d/o Jayamany* (2015)).

On the other hand, the following acts have been found to be inconsistent with being a courier:

- recruiting drug couriers and arranging payment for each job (*Public Prosecutor v Christeen d/o Jayamany* (2015));
- sourcing for drug supply and negotiating the terms of the drug transaction (*Rosman bin Abdullah v Public Prosecutor* (2017): para 36);

[13] See for example *Public Prosecutor v Chum Tat Suan* (2015).

[14] Under Misuse of Drugs Act 1973: section 33B(2)(a) and (3)(a).

- repacking drugs into smaller packages for the purpose of wider distribution (*Public Prosecutor v Ranjit Singh Gil Manjeet Singh* (2017); *Zainudin bin Mohamed v Public Prosecutor* (2018): paras 101 and 112(d));[15] and
- repacking drugs to ensure that they are of the right type and quantity as a matter of routine (*Public Prosecutor v Yogaras Poongavanam* (2015): para 28).[16]

Condition 2 (Certificate of Substantive Assistance)

In order to satisfy condition 2, the public prosecutor[17] must determine that: (i) the offender had provided substantive assistance to the Central Narcotics Bureau, and (ii) that such assistance resulted in the disruption of drug trafficking activities in Singapore or elsewhere. Without coming to an exhaustive definition, the Court of Appeal has explained that condition 2 extends beyond assisting in the arrest, apprehension, prosecution or conviction of drug traffickers. It could even extend to the making of wider strategic decisions such as when to launch an enforcement action (*Pannir Selvam a/l Pranthaman v Attorney-General* (2022): para 89).

However, what is required is still a high threshold that is unlikely to be met by couriers who typically do not have operational knowledge of the drug network they are part of. On the other hand, those who do have such knowledge are likely to be more deeply involved in the drug operations and therefore unlikely to qualify as couriers.

The objective of condition 2 has been said to be 'not only to incentivise co-operation but to incentivise *early* and *timeous* co-operation to ensure that the information provided is fresh and useful for investigations' (*Jumadi bin Abdullah v Public Prosecutor* (2022): para 1 (original emphasis)). Pressure is put on the offender such that 'the longer he delays [the furnishing of relevant and useful information], the more likely the information would lose its usefulness' (*Muhammad bin Abdullah v Public Prosecutor* (2017): para 59) and '[w]ith the passage of time, the information … may become worthless as it may be outdated and possible leads may have gone "cold"' (*Muhammad bin Abdullah v Public Prosecutor* (2017): para 61).

This approach is in line with statements given by the Singapore government in the parliamentary debates leading to the amendments of the Misuse of Drugs Act 1973:

> The aim of the 'substantive assistance' condition is to enhance the operational effectiveness of the [Central Narcotics Bureau], by allowing investigators to reach higher into the hierarchy of drug syndicates … Assistance which does not enhance the effectiveness of the [Central Narcotics Bureau] will not be sufficient (Teo, 2012b: 1074).
>
> 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 [Misuse of Drugs] Act in a non-capricious and fair way without affecting our underlying fight against drugs (Shanmugam, 2012: 1231).
>
> 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

[15] However, merely collecting drugs and placing them into a plastic bag is not considered 'repacking' the drugs, see *Mohammad Azli bin Mohammad Salleh v Public Prosecutor* (2020): para 28. Similarly, if the repacking of the drugs was only to ensure that they are compact enough to be concealed on a motorcycle, the acts were only 'incidental' to delivering the drugs, see *Public Prosecutor v Yogaras Poongavanam* (2015): para 28. An offender who was awaiting instructions as to whether he should deliver the drugs or to repack them would still be considered a courier if he had not yet resolved or committed to do the latter, see *Zamri bin Mohd Tahir v Public Prosecutor* (2019).

[16] Ong (2014) makes the point that since the word 'courier' does not appear in the Misuse of Drugs Act 1973, the focus should not be on whether a person who repacks drugs is or is not a courier, but whether such a person falls within the criteria in Misuse of Drugs Act 1973: section 33B(2)(a). Repacking drugs may arguably be 'preparatory to or for the purpose of … transporting, sending or delivering' drugs.

[17] The role given to the Public Prosecutor in issuing the certificate of substantive assistance can be criticised for almost determining the sentence to be imposed, which role rightfully belongs to the judiciary. A similar scheme was introduced in 2017 in Malaysia for avoiding the death penalty for drug trafficking but it is the court that decides if the offender had assisted an enforcement agency in disrupting drug trafficking activities within or outside Malaysia, see Dangerous Drugs Act 1952: section 39B(2A). Note that on 11 April 2023 two bills were passed in Malaysia to reform the death penalty. The Abolition of Mandatory Death Penalty Bill 2023 removed the mandatory death penalty for 12 offences, including drug trafficking. The Revision of Sentence of Death and Imprisonment for Natural Life (Temporary Jurisdiction of the Federal Court) Bill 2023, which will allow prisoners sentenced to death or life imprisonment to apply for resentencing within 90 days of the law being formally published (Human Rights Watch, 2023).

> against drugs, and not to undermine it … [It is] an additional avenue for our enforcement agencies to reach further into the networks … (Teo, 2012b: 1243).

In *Muhammad bin Abdullah v Public Prosecutor* (2017), the operation of the mechanism has been described as follows:

> … the [Central Narcotics Bureau] is entitled to take an operational perspective of how important the information is and whether it is likely to bear fruit … For instance, the [Central Narcotics Bureau] cannot be expected to traverse the globe to investigate merely because an accused person mentions the names of different persons in different countries … The [public prosecutor] is not required to disclose his reasons every time an applicant challenges his decision not to issue the Certificate as this could result in information relating to [Central Narcotics Bureau's] *modus operandi* ending up in the public domain. This would have severe detrimental effects on [Central Narcotic Bureau's] enforcement capabilities …

Furthermore, neither good faith cooperation, or a subjective belief by the offender that he had rendered reliable and inherently useful information, is sufficient to fulfil condition 2. The information provided must, in fact, be used to enhance the operational effectiveness of the Central Narcotics Bureau (*Pannir Selvam a/l Pranthaman v Attorney General* (2022): para 92). Whether this condition is satisfied is to be determined from the perspective of the enforcement authorities (*Muhammad Ridzuan bin Mohd Ali v Attorney-General* (2015): para 46; *Rosman bin Abdullah v Public Prosecutor* (2017): para 39; *Pannir Selvam a/l Pranthaman v Attorney General* (2022): para 71).

The reason why a court will not 'second guess' the public prosecutor's determination of substantive assistance is, first, because of the need to safeguard from disclosure confidential information, intelligence and operational details of the Central Narcotics Bureau (*Muhammad Ridzuan bin Mohd Ali* (2015): para 66; *Prabagaran a/l Srivijayan v Public Prosecutor* (2017): para 52; *Nagaenthran a/l K Dharmalingam v Public Prosecutor* (2019): para 57); and, second, because such determination requires a wide-ranging assessment that goes beyond Singapore's geographical boundaries and entails the weighing of considerations and trade-offs that are outside the court's institutional competence (*Nagaenthran a/l K Dharmalingam v Public Prosecutor* (2019): para 58).

Unfortunately, the practical effect of this stance is that even if an offender has provided accurate information that arguably led to the arrest of others involved in drug trafficking, the offender will not satisfy condition 2 if the Central Narcotics Bureau say that the information was not 'used' in their drug enforcement activities because the information was already in their possession (*Pannir Selvam a/l Pranthaman v Attorney-General* (2022): para 99).

Condition 3 (Diminished Responsibility)

One of court decisions that influenced the Singapore government's decision to amend the drugs law was *Public Prosecutor v Rozman bin Jusoh* (1995). That case involved an intellectually disabled drug trafficker who was easily induced into committing the offence. Unfortunately, the law at the time did not accord a defence to him because he knew what he was doing and also that selling drugs was illegal. The Court of Appeal imposed the mandatory death penalty on him. When the amendments to the Misuse of Drugs Act 1973 were debated in parliament in 2012, it was suggested that the courts could have imposed life imprisonment on him instead under the new law (Shanmugam, 2012: 1249). In this section, the question of how easy it is to qualify under condition 3 will be examined.

In *Ilechukwu Uchechukwu Chukwudi v Public Prosecutor* (2021),[18] the inquiry under section 33B(3) of the Misuse of Drugs Act 1973 was said to be 'a narrow and binary inquiry', that is, either the accused is suffering from diminished responsibility or he is not. The wording of this provision is the same as the partial defence of diminished responsibility found in Exception 7 of the Penal Code 1871 before the latter was amended in 2019. Although the provision must be applied in the context

[18] Presence of a psychiatric disorder could have implications for whether the drug trafficking offence is made out in the first place. In this case, the offender suffered from post-traumatic stress disorder (PTSD) as a result of being nearly killed as a child and witnessing the killing of others in his hometown in Nigeria. PTSD symptoms were triggered when he was informed that he was facing the death penalty for drug trafficking and prompted him to tell lies in order to save himself. He was therefore able to give an explanation for telling lies and no adverse inference could be made against him. His acquittal of charges of drug trafficking by the High Court was affirmed by a majority of the Court of Appeal.

of the Misuse of Drugs Act 1973 (*Rosman bin Abdullah v Public Prosecutor* (2017): para 46), courts have generally followed the same three-limb test as set out in the cases on murder under the Penal Code 1871 (*Nagaenthran a/l K Dharmalingam v Public Prosecutor* (2019): para 21):[19]

(a) that [the offender] was suffering from an abnormality of mind;
(b) that the abnormality of mind: (i) arose from a condition of arrested or retarded development of mind; (ii) arose from any inherent cause; or (iii) was induced by disease or injury; and
(c) the abnormality of mind substantially impaired his mental responsibility for his acts and omissions in relation to his offence.

The first and second limbs are determined by the judge as a trier of fact but the second limb, dealing with the aetiology of the abnormality, is largely determined based on expert evidence (*Nagaenthran a/l K Dharmalingam v Public Prosecutor* (2019): para 22).

In terms of the first limb, an abnormality of mind includes the mind's capacity to understand events, judge right from wrong, and exercise self-control. But these indicia are not exhaustive although 'they are likely to be the most relevant and oft-used' to decide the 'ultimate question of whether the offender's mental responsibility for his acts was substantially impaired' (*Nagaenthran a/l K Dharmalingam v Public Prosecutor* (2019): paras 25–26). Moreover, the mental condition of the offender must be severe enough to be considered an abnormality of mind (*Nagaenthran a/l K Dharmalingam v Public Prosecutor* (2017): para 77). Thus, even if the offender was suffering from hallucinations telling him what to do, if he had the ability to resist such commands, condition 3 will not be satisfied (*Public Prosecutor v Choo Peng Kuen* (2018)).

The aetiology limb has been said to show that the provision is not meant to apply to 'offenders suffering from transient or even self-induced illnesses that have no firm basis in an established psychiatric condition' (*Nagaenthran a/l K Dharmalingam v Public Prosecutor* (2019): para 31). This limb also requires showing which of the prescribed causes applies. Failure to do so will mean that the condition is not made out (*Nagaenthran a/l K Dharmalingam v Public Prosecutor* (2017): para 83).

An interesting issue debated by the Singapore courts is whether substance abuse falls within one of the prescribed causes of abnormality of mind. Substance abuse is arguably transient in nature and is self-induced. It was decided that this is possible if the chronic substance abuse operated in a 'synergistic' manner with a recognised psychiatric condition to affect the offender's mental state (*Roszaidi bin Osman v PP* (2022): paras 63, 174). For example, in *Phua Han Chuan Jeffery v Public Prosecutor* (2016), the offender abused Ketamine in order to self-medicate his persistent depressive disorder (which was accepted as an abnormality of mind arising from an inherent cause). Similarly, in *Roszaidi bin Osman v PP* (2022), the offender used drugs to help him cope with his major depressive disorder. In cases where the conditions were 'inextricably intertwined', the Court of Appeal found that it would be 'impractical and artificial to attempt to ascertain the aetiology [of the substance use disorder] in isolation from his [major depressive disorder]' (*Roszaidi bin Osman v PP* (2022): para 78). But whether the substance use disorder on its own could satisfy the aetiology limb was left open (*Roszaidi bin Osman v PP* (2022): para 81).[20]

The term 'mental responsibility' in the third limb has been said to be a broader concept than the mental element required for the offence (*Phua Han Chuan Jeffery v Public Prosecutor* (2016): para 16) and what amounts to a substantial impairment of mental responsibility is a 'largely question of commonsense' (*Nagaenthran a/l K Dharmalingam v Public Prosecutor* (2019): para 33). Substantial impairment does not require 'total impairment', but 'trivial or minimal impairment' will not suffice (*Nagaenthran a/l K Dharmalingam v Public Prosecutor* (2019): para 33). What is required is 'impairment of the mental state that is real and material but which need not rise to the level of … the defence of unsoundness of mind' (*Nagaenthran a/l K Dharmalingam v Public Prosecutor* (2019):

[19] Owing to the similarity between this provision and diminished responsibility, cases on the latter are said to apply 'with equal force' to the Misuse of Drugs Act 1973 (*Nagaenthran a/l K Dharmalingam v Public Prosecutor* (2019): para 31). The term 'diminished responsibility' is therefore used to describe condition 3 as well.

[20] In *Syed Suhail bin Syed Zin v Public Prosecutor* (2021) at para 36, it was pointed out that opoid dependence does not necessarily mean the offender was suffering from abnormality of mind. A link between the two must be shown by medical evidence.

para 33). The substantial impairment also does not need to be 'the *cause* of his offending … the question is whether the abnormality of mind had an *influence* on the offender's actions' (*Nagaenthran a/l K Dharmalingam v Public Prosecutor* (2019): para 33 (original emphasis)). However, there must be clear connections between the diagnosis and the impact of the mental disorder on the commission of the offence.

In *Roszaidi bin Osman v PP* (2022), the Court of Appeal noted that drug trafficking offences are most likely carried out with some degree of planning and premeditation. Nevertheless, diminished responsibility can still apply when an offender carries out a premediated plan if the decision to commit the offence is a product of his disordered mind. In the case of substance use disorder, for example, it 'may make the acquisition of drugs for consumption his overriding preoccupation and the central focus of his life' such that the offender's 'ability to resist doing what he did was significantly impaired and compromised' (*Roszaidi bin Osman v PP* (2022): paras 96 and 179).[21]

On the other hand, in *Rosman bin Abdullah v Public Prosecutor* (2017), the defence psychiatrist diagnosed the offender as suffering from attention deficit hyperactivity disorder (ADHD), which contributed to the commission of the offences. The report also concluded that his heavy methamphetamine use and dependence at the time of the offences 'would have' affected his judgment and impulse control. The Court of Appeal criticised the medical report as being extremely general, vague and speculative, and showing no clear connection between the diagnosis of ADHD on the one hand, and stimulant use disorder and sedative use disorder on the other. The court also rejected a causal link between the ADHD and the offences he committed.

The difficulty in proving condition 3 can be seen in *Nagaenthran a/l K Dharmalingam v Public Prosecutor* (2019). The Court of Appeal agreed with the trial court that even if the offender suffered from an abnormality of mind, this did not have the effect of substantially impairing his mental responsibility for his acts. The facts showed that he delivered the drugs because he needed the money, he took precautions to conceal the drugs on him, he tricked someone else into giving him a ride into Singapore and attempted to manipulate the Central Narcotic Bureau officers into not searching him (*Nagaenthran a/l K Dharmalingam v Public Prosecutor* (2017): para 92).

Similarly, in *Public Prosecutor v Dzulkarnain bin Khamis* (2021), both the prosecution and defence psychiatrists diagnosed the offender to be suffering from an adjustment disorder (a stress related reaction to a traumatic event where a person is unable to cope) with depressed mood and a history of substance abuse. But in the prosecution psychiatrist's view, the condition did not impair the offender's 'thinking process' and so did not substantially impair his mental responsibility for the offence. The High Court agreed. Therefore, what is central to determining if a mental condition had substantially impaired an offender's mental responsibility is whether his acts showed an inability to think in a logical and organised manner or not.

Persons with low IQ have also tried to come within the scope of condition 3. The Singapore courts have dismissed a simplistic connection between the two, commenting that '[a] low IQ level alone is not evidence of an abnormality of mind' (*Roslan bin Bakar v Public Prosecutor* (2017): para 6). In *Nagaenthran a/l K Dharmalingam v Public Prosecutor* (2019), the offender was assessed to have an IQ of 69 and borderline intellectual functioning with cognitive deficits, but he:

> … clearly understood the nature of his acts and did not lose his sense of judgment of the rightness or wrongness of what he was doing … he knew it was unlawful for him to be transporting drugs. That was why he candidly admitted concealing the bundle by strapping it to his left thigh and then attempting to conceal this under the large pair of trousers he wore … [He] evidenced a deliberate, purposeful and calculated decision … in the hope that the endeavour would pay off, despite the obvious risks that [he] himself had appreciated. The appellant had considered the risks, balanced it against the reward he hoped he would get, and decided to take the chance.[22]

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[21] Other cases where condition 3 was successfully proved are *Phua Han Chuan Jeffery v Public Prosecutor* (2016) and *Public Prosecutor v Tan Swim Hong* (2019).

[22] See also *Roslan bin Bakar v Public Prosecutor* (2017 and 2022), where the two applicants had IQs of 74 and 67. The question was whether the reduced intellectual functioning had an impact on their competence and comprehension of what they were doing. They were both found to have been actively participating in the drug trafficking operations.

Thus, even those with a low IQ may make a conscious and informed, albeit risky, decision to commit the drug offence (*Rosman bin Abdullah v Public Prosecutor* (2017): paras 54–56; *Nagaenthran a/l K Dharmalingam v Public Prosecutor* (2019): paras 40–41). A deficiency in risk assessment may make an offender 'more prone to engage in risky behaviour' but that 'does not in any way diminish his culpability' (*Nagaenthran a/l K Dharmalingam v Public Prosecutor* (2019): para 41). This approach was said to be in line with the legislative intent not to extend condition 3 to all vulnerable persons in general but only '[g]enuine cases of mental disability are recognised, while errors of judgments will not afford a defence' (Shanmugam, 2012: 1235).

Exclusion Clause

In relation to section 33B(4) of the Misuse of Drugs Act 1973, the court in *Muhammad Ridzuan bin Mohd Ali v Attorney General* (2014) held that the prosecution's decision can also be challenged on the ground of unconstitutionality such as violating the protection against unequal treatment, even though this was not expressly provided for.[23] The clause also does not prevent a court from exercising judicial review on the usual grounds of illegality, irrationality and procedural impropriety (*Nagaenthran a/l K Dharmalingam v Public Prosecutor* (2019): para 51). However, the effect of section 33B(4) is to immunise the public prosecutor from suit save for certain narrow exceptions. These exceptions relate to the propriety of the public prosecutor's conduct and not the merits of the public prosecutor's determination (*Nagaenthran a/l K Dharmalingam v Public Prosecutor* (2019): paras 67 and 74).

'Bad faith' in the context of the Misuse of Drugs Act 1973 has been explained to mean the '*knowing* use of the discretionary power for extraneous purposes' (*Muhammad Ridzuan bin Mohd Ali v Attorney-General* (2015): para 71 (original emphasis)), such as exercising the discretion to give a certificate of substantive assistance even if the information given by the offender did not lead to the actual disruption of drug trafficking activities, or deliberately withholding the certificate even though the offender had substantively assisted the disrupting of drug trafficking activities (*Public Prosecutor v Chum Tat Suan* (2016): para 9; *Abdul Kahar bin Othman v Public Prosecutor* (2018): para 40). In *Public Prosecutor v Chum Tat Suan* (2016), the High Court commented that the public prosecutor is 'duty bound' to furnish the certificate of substantive assistance if the facts justify it and that the 'certificate may not be a matter for the public prosecutor to grant or withhold at will'.

In practice, however, an applicant faces an almost impossible task to show even a reasonable suspicion that the public prosecutor had failed to consider the information given by the applicant since no reasons are given as to why the information did not substantively assist in disrupting drug trafficking activities.[24]

Conclusion

It was revealed in parliament that of 104 convicted persons whom the court found to be couriers from 1 January 2013 to 11 February 2022, 82 were granted a certificate of substantive assistance by the public prosecutor. For the remaining 22 couriers not granted the certificate, eight avoided the death penalty because they were found to be suffering from abnormality of mind (Shanmugam, 2022). In other words, although all the 104 persons convicted over a span of nine years would have been executed under the mandatory death regime in the past, only 14 of them (or 13 per cent) were sentenced to death under the new law.

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[23] See for example: *Nazeri bin Lajim v Attorney-General* (2022), where it was argued that his right to equal treatment was breached by maintaining a capital charge against him, even though other offenders who trafficked drugs above the capital threshold had their charges reduced to a non-capital charge; and *Muhammad Ridzuan bin Mohd Ali v Attorney-General* (2015), where it was argued that that the right to equal treatment was breached where the public prosecutor granted a certificate of substantive assistance to one person but not to the defendant, even though they were involved in the same criminal enterprise to traffic drugs.

[24] See for example the statement given by the then attorney-general in *Nagaenthran a/l K Dharmalingam v Public Prosecutor* (2019): para 79.

Does the fact that 87 per cent out of the 104 convicted persons above escaped the gallows show a weakening of Singapore's use of the death penalty?[25] I do not think so. As can be seen in the discussion above, each of the three requirements that must be satisfied before a judge is granted the discretion to avoid imposing the death penalty is strictly construed. Furthermore, the public prosecutor's discretion to grant the certificate of substantive assistance is largely shielded from attack. The statistics given above are for those who have been found to be couriers. We do not know how many were prosecuted for drug offences and not found to be couriers. As explained above, a key requisite of the new discretionary sentencing regime is proof that the offender was only a courier and nothing more. Moreover, recent statistics show a rise in executions. In 2022, Singapore re-started executions by hanging 11 drug traffickers after recording none in the preceding two years.[26]

Singapore's approach can be seen in the following statement in parliament by Mr Teo Chee Hean, the then Deputy Prime Minister and Minister for Home Affairs (Teo, 2012b: 1244):

> Let me state categorically that we are maintaining our 'zero tolerance' stance against drugs. Taken in totality, these amendments will … enhance the effectiveness of the death penalty regime.

The purpose of the amendments to the Misuse of Drugs Act 1973 is therefore not to show greater compassion to all persons holding low level positions in drug syndicates in general or to reinstate proportionate sentencing. There is also no change in the government's belief that the death penalty works as an effective deterrent against drug trafficking. The only change is that there has been a de facto abolition of the death penalty for two narrow groups of drug couriers: those who receive a certificate of substantive assistance from the Public Prosecutor; and those who suffer from diminished responsibility. On the government's assessment, the information provided by drug couriers has led to the arrest of more than 40 drug traffickers (Teo, 2015).

Under the present regime, there is no possibility for a court to consider other mitigating circumstances such as drug addiction, issues of vulnerability due to family or socio-economic status, willingness to assist law enforcement authorities (even if such information does not lead to concrete results), likelihood of rehabilitation, state of mental health,[27] and so on.

The Singapore courts have adopted the government's stance by interpreting the words of section 33B of the Misuse of Drugs Act 1973 restrictively, rather than in favour of the offender, by not providing couriers with means to avoid capital punishment in general (*Pannir Selvam a/l Pranthaman v Attorney General* (2022): para 79). In *Nagaenthran a/l K Dharmalingam v Attorney-General* (2022), the Court of Appeal emphatically said that '[a]part from [section 33B of the Misuse of Drugs Act 1973], it is not open to us to imply or create new carve-outs that empower us to avoid imposing the prescribed mandatory death penalty'.

In sum, Singapore may well be an outlier in the general trend towards abolition of the death penalty worldwide if the number of executions continue to rebound. Johnson and Zimring (2009) suggest that Singapore may not be a 'high-rate outlier for long' due to the tendency of developed nations to democratize, softening of its commitment to the mandatory death penalty, and the growing association of high rates of executions with communist political culture. On the other hand, as this review of the change in sentencing regime for drug offenders has sought to show, there has been little alteration to Singapore's approach towards the use of the death penalty. For most drug traffickers, the death penalty, unfortunately, remains mandatory.[28]

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[25] The high 'success' rate may explain the number of late and repeated court applications seeking to overturn concluded court cases. See, for example, the court proceedings traced in *Syed Suhail bin Syed Zin v Public Prosecutor* (2021) and *Nagaenthran a/l K Dharmalingam v Attorney-General* (2022). Such last-minute court challenges are unlikely to be accepted when the new Post-appeal Applications in Capital Cases Act 2022 comes into force.

[26] There were no executions in 2020 and 2021 because of court challenges, see Death Penalty Information Center (2022); Amnesty International (2022); Amnesty International Malaysia (n.d.); Devaraj (2023).

[27] In *Nagaenthran a/l K Dharmalingam v Attorney-General* (2022), it emerged that there was no internal policy in the Singapore Prison Service against executing death row inmates found to have developed mental disorders after committing the offence. An interesting question arises as to whether a court would still sanction the execution of an inmate if their mental condition had deteriorated significantly in prison.

[28] The minimum quantity of trafficked drugs that triggers the mandatory death penalty is arguably too low, such as more than 15 grammes of diamorphine, 500 grammes of cannabis, or 250 grammes of methamphetamine. See Misuse of Drugs Act 1973: Second Schedule.

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