

Section 33B of the Misuse of Drugs Act:
***Jumadi bin Abdullah v Public Prosecutor and other appeals* [2021] SGCA 113**

I. Executive Summary

Section 33B of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) (“**MDA**”) gives Singapore courts the discretion to impose, on drug couriers, life imprisonment in lieu of the death penalty if the courier offers substantive assistance to enforcement agencies upon their arrest. This provision operates as a “cooperation mechanism,” intended to incentivise early and timeous cooperation so that the information provided is fresh and useful for investigations. That is why, the accused is, upon his arrest, informed of the conditions under which the alternative sentence of life imprisonment may be applicable. This is done through issuance of a “Notice of requirements that would satisfy s 33B(2) of the Misuse of Drugs Act” (“**MDP Notice**”).

In this way, the accused is also properly apprised of the legal effect of section 33B. The MDP Notice includes a disclaimer that the notice is “purely for [the accused’s] information, and should not be construed as a threat, inducement or promise” (the “**Disclaimer**”). This Disclaimer, read with together with amendments made to section 258(3) of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) (“**CPC**”), are part of the measures taken to pre-empt potential legal challenges to the voluntariness of statements obtained after an MDP Notice has been administered. For context, s 258(3) of the CPC requires the courts to disregard any statement made by an accused due to an “inducement, threat or promise having reference to the charge against the accused, proceeding from a person in authority.” However, Explanation 2(aa) of s 258(3) of the CPC preserves the admissibility of statements made where the accused is informed in writing of the circumstances in s 33B of the MDA under which life imprisonment may be imposed in lieu of death.

Despite the Disclaimer in the MDP Notice, as well as Explanation 2(aa) of the CPC, there have been continued attempts by accused persons to challenge the voluntariness, and therefore the admissibility, of their statements obtained after the administration of the MDP Notice. In *Jumadi bin Abdullah v Public Prosecutor and other appeals* [2021] SGCA 113, Jumadi Bin Abdullah (“**Jumadi**”), Shisham Bin Abdul Rahman (“**Shisham**”) and Salzawiyah Binte Latib (“**Salzawiyah**”) (collectively “**the accused persons**”) appealed against the High Court’s (“**HC**”) sentencing decisions in *Public Prosecutor v Salzawiyah bte Latib and others* [2021] SGHC 16 (“**First Judgement**”) and *Public Prosecutor v Salzawiyah bte Latib and others* [2021] SGHC 17 (“**Second Judgement**”). A key issue was whether a promise made by officers from the Central Narcotics Bureau (“**CNB**”) induced Jumadi’s statements, rendering them involuntary and therefore, inadmissible.

The Court of Appeal (“**CA**”) affirmed the HC’s judgment, stating that the MDP Notice was not a “threat, inducement or promise”. It also reiterated the nature of s 33B of the MDA as a mechanism which necessarily incentivises cooperation with the authorities. Ultimately, the CA dismissed the appeal and affirmed the accused persons’ convictions.

II. Material Facts

On the morning of 22 June 2017, Jumadi and Shisham brought about \$11,000 to purchase some drugs before returning to the one-bedroom unit which Jumadi shared with his then-girlfriend, Salzawiyah (the “**Unit**”). At 2.13pm of the same day, CNB officers raided the Unit, finding the drugs variously located in the Unit’s living room and bedroom, as well as a notebook (the “**Notebook**”) detailing how much Jumadi paid per *batu* (unit) of diamorphine. At 2.25pm,

Senior Staff Sergeant Muhammad Fardlie Bin Ramlie (“**SSSgt Fardlie**”) recorded a statement from Jumadi (“**the First Contemporaneous Statement**”).

During the trial in the HC, the accused persons were charged under section 5(1)(a) read with section 5(2) of the MDA and section 34 of the Penal Code (Cap 224, 2008 Rev Ed) for trafficking in not less than 42.27g of diamorphine in furtherance of a common intention. The Prosecution unconditionally reduced the charge against Salzawiyah, based on compassionate grounds, to a non-capital charge of trafficking in diamorphine, charging her for trafficking not less than 14.99g of diamorphine. At the end of the trial, the charges against Jumadi and Shisham were also amended to reflect a lower gross weight and analysed weight of the diamorphine. Nevertheless, they were charged with trafficking not less than 41.86g of diamorphine, an offence punishable by death.

During the trial, Jumadi argued that he only intended to possess 14.67g of diamorphine for the purpose of trafficking and that the rest of the diamorphine had either been mistakenly delivered (the “**Mistake Defence**”) or belonged to Salzawiyah (the “**Ownership Defence**”). Similarly, Salzawiyah disputed the quantity of diamorphine that she had intended to traffic, claiming that she only had knowledge of certain packets containing a total of 9.81g of diamorphine. Lastly, Shisham claimed that he was merely a passive consumer of drugs at the Unit.

Ultimately, the HC rejected Jumadi’s Mistake and Ownership Defences, as the Prosecution’s evidence contradicted Jumadi’s account. Furthermore, the HC found that Salzawiyah knew and consented to Jumadi’s possession of all the diamorphine in the Unit. Lastly, the HC concluded that Shisham was extensively and actively involved in the drug trafficking operation, more than a passive consumer of drugs at the Unit.

Hence, Jumadi and Shisham were found guilty and sentenced to death. Salzawiyah was also found guilty and sentenced to 29 years’ imprisonment. While Jumadi and Shisham are seeking acquittals on appeal, Salzawiyah is contesting only her sentence.

III. Issues on Appeal

On appeal, the CA addressed four main issues:

- (a) Whether the HC had erred in holding that the eleven statements recorded from Jumadi (“**Jumadi’s Statements**”) were given voluntarily;
- (b) Whether the HC had erred in rejecting Jumadi’s defences at trial;
- (c) Whether the HC had erred in rejecting Shisham’s defence at trial; and
- (d) Whether the HC had imposed a manifestly excessive sentence on Salzawiyah.

A. Voluntariness of Jumadi’s Statements

Jumadi challenged the voluntariness of his statements on two grounds. *Firstly*, he alleged that his statements were made pursuant to a promise made to him by various CNB officers. This promise was to the effect that, if Jumadi cooperated with the CNB and admitted ownership of the drugs, he would not receive the death penalty (“**the Promise**”). *Secondly*, Jumadi claimed that the MDP Notice, read with section 258(3) of the CPC, was both an “independent occasion of promise” and something which reinforced his existing beliefs about his prospects for escaping the gallows. He thus argued that his statements were provided involuntarily and could not be admitted into evidence.

The CA first held that the HC had applied the correct test of voluntariness, namely, that involuntariness must be established on both an objective and a subjective basis. It also highlighted the high threshold for appellate intervention, where findings of fact are based on a trial judge's assessment of the witnesses' credibility and demeanour at trial.

Firstly, with regards to the Promise, the CA agreed with the HC that Jumadi's account of events was unbelievable. Jumadi's narrative rested on a very specific chronology of events. First, a search was conducted and drugs were found. Next, there was the conversation where the Promise was conveyed. And finally, the First Contemporaneous Statement was recorded to capture the supposedly involuntary confession. However, there was no evidence of any search or any conversation prior to the recording of the First Contemporaneous Statement. Rather, contemporaneous evidence suggested that the searches were conducted after the First Contemporaneous Statement had been taken. Furthermore, even if a conversation had taken place first, SSSgt Fardlie would not necessarily have made any promises during the conversation. In fact, there was no reason for a CNB officer to extend such a promise in those circumstances.

Secondly, with regards to the MDP Notice, the CA found that it was objectively not a threat, inducement or promise. Jumadi claimed that the penultimate paragraph of the MDP Notice (the "**Invitation**"), which invited Jumadi to provide information to the CNB, changed the character of the MDP Notice. He claimed it went beyond simply bringing ss 33B(1) to 33B(4) of the MDA to his attention, and was instead an exhortation to provide information to the authorities. This took the MDP Notice out of the statutory exception carved out in Explanation 2(aa) of the CPC.

The CA disagreed. *First*, based on the language of the MDP Notice and the circumstances under which it was administered, the CA found that the MDP Notice was ultimately an informational document intended to give fair notice of the law to accused persons. The MDP Notice was largely couched in explanatory language. If understood in the larger linguistic schema and tone of the MDP Notice, the Invitation was just an extension of the explanations which the MDP Notice seeks to provide. The document itself is titled "Notice of requirements that would satisfy s 33B(2) of the Misuse of Drugs Act". It begins by bringing section 33B of the MDA to the accused person's attention, outlining in broad strokes the discretion that it gives to the courts to sentence a drug trafficker to life imprisonment rather than death. The specific requirements are then set out. Namely, the accused person must (i) be involved in some sort of less culpable activity such as being a courier or doing preparatory work for the trafficking operation (even if it legally amounts to trafficking), and (ii) have received a certificate of substantial assistance from the Public Prosecutor. It is in that context that the "offending" invitation is extended: "You are hereby invited to provide information to the Central Narcotics Bureau for the purposes of disrupting drug trafficking activities within or outside Singapore."

Furthermore, the MDP Notice is administered shortly after arrest, intended to give the accused fair notice of the law. Hence, it is more informational than invitational, more explanation than exhortation.

In addition, while the MDP Notice may be a literal inducement, the CA explained that Explanation 2(aa) and the Disclaimer in the MDP Notice take the MDP Notice outside the scope of s 258(3) of the CPC. Section 33B of the MDA was part of a very specific system of incentives designed to promote cooperation with the authorities, and the role of Explanation

2(aa) to maintain that system's efficacy and objective. Thus, statements recorded after the MDP Notice is issued are not inadmissible. Finally, the CA explained the conceptual impossibility of construing the MDP Notice as a threat, inducement or promise. The CA stated that both conditions of s 33B of the MDA – that the accused person is a courier and that they have offered substantive assistance to the CNB – are beyond the control of the CNB or any of its officers. Hence, the accused person is the only one in a position to assess whether they may take advantage of s 33B of the MDA, and the MDP Notice by itself cannot represent a threat, inducement or promise. The CA thereby affirmed the HC's finding that Jumadi's statements were made voluntarily.

B. Jumadi's defences at trial

For completeness, the CA considered Jumadi's twin defences, finding them meritless and affirming the HC's rejection of the same.

(1) The Mistake Defence

Jumadi's Mistake Defence was that some of the drugs found in the Unit were received by mistake and he intended to return them. He argued that pursuant to section 291(3) of the CPC, Shisham's failure to take the stand allowed the court to draw circumstantial inferences construed in his favour. He further argued that since Shisham chose not to take the stand, he was the only one who could have spoken to what his calls with Shisham meant, and hence, the court should only accept his testimony.

The CA rejected the first argument because section 291(3) of the CPC can only be used to draw inferences about the accused person who has elected to remain silent – in this case Shisham, not Jumadi. The CA rejected the second argument because Jumadi's testimony was internally inconsistent and ultimately against the weight of the objective evidence (the Notebook, the text messages between him and Shisham, Salzawiyah's testimony and contemporaneous phone records).

(2) The Ownership Defence

Jumadi's Ownership Defence was that some of the drugs found in the bedroom (the “**Bedroom Bundles**”) of the Unit were not his, but rather belonged to Salzawiyah and were intended for her customers. This defence centred on the claim that he and Salzawiyah were running separate drug trafficking operations. To support this argument, Jumadi made four points. *First*, certain pages of the Notebook only contained his handwriting and none of Salzawiyah's, supposedly evidencing Salzawiyah's independent drug business. *Second*, he argued that the HC erred in disregarding the importance of the customer's identities as it demonstrated whose customers they were and hence, supported the claim that Salzawiyah was running an independent drug business. *Third*, there was no evidence of Jumadi's DNA in most of the Bedroom Bundles. *Lastly*, Salzawiyah's statements corroborated Jumadi's claim that he did not know about the Bedroom Bundles.

However, the CA rejected Jumadi's Ownership Defence. *First*, regarding the Notebook, Jumadi's argument selectively relied on a single page in the Notebook which was written in his handwriting. Subsequent entries contained Salzawiyah's handwriting, contradicting Jumadi's account. *Second*, while Salzawiyah and Jumadi may have had their own customers, they ultimately worked together to serve these customers. *Third*, the lack of DNA evidence could be explained by an insufficient deposit of DNA or its degradation over time. Hence, the absence of the Jumadi's DNA on the Bedroom Bundles was not evidence that he did not come handle

it. *Finally*, the fact that Jumadi informed Salzawiyah about the six *batu* purchased could equally go towards showing that they were working jointly for their trafficking operations.

(3) The 4pm Call

The CA also recorded some further observations about a call allegedly made at 4pm on 21 June 2017 (“**the 4pm Call**”). The Prosecution claimed that Jumadi and Shisham had made the 4pm Call to their supplier, Vishnu, to place an order for five *batu* of diamorphine. Jumadi, however, claimed that the call never connected and that during a later call with Vishu, he only ordered two *batu* of diamorphine, thereby supporting his Mistake Defence that the three additional *batu* were mistakenly delivered.

To determine whether the 4pm Call had connected, the HC authorised the Prosecution to break the sealed envelope containing Shisham’s mobile phone in the presence of the co-accused and their respective counsel. On appeal, Jumadi challenged this decision claiming it was impermissible, and that the contents of the call records should have been proven by a witness summoned under s 281(3) of the CPC. While noting that the 4pm Call was not material, the CA stated that the HC’s approach, while practical, ultimately treated the phone and its contents as one and the same: the admission of one into evidence, necessitated the admission of the other. However, the CA noted that there may, at least on a conceptual level, be a difference between the phone and its contents. One is physical and tangible, while the other is digital and intangible. One is also a mere object, representing to the world nothing more than the physical properties which are perceptible by the five senses. The other may involve records, logs or other data that can speak to other events that have occurred. As such, there might be some possible competing considerations when determining whether approaches like the one taken in proceedings below are ultimately permissible, including the possibility of contamination of evidence when digital receptacles such as phones are turned on. Nevertheless, the CA stressed that these were passing observations only.

C. *Shisham’s Defence*

Shisham’s defence was that he was a mere addict who stayed with Jumadi and Salzawiyah at the Unit. On appeal, he claimed the HC ought to have regarded Jumadi’s statements with caution since Jumadi had admitted to fabricating parts of it and had gone as far as to challenge their voluntariness. Therefore, his conviction, which relied on Jumadi’s statements, ought to be set aside.

However, the CA found that the HC had rightly rejected Shisham’s defence. Jumadi’s testimony, though inconsistent at points, was broadly consistent in describing Shisham’s role in the trafficking operations. He worked with Malaysian suppliers, split the profits with Jumadi and was in every sense, Jumadi’s business partner. Moreover, there was ample objective evidence that supported Shisham’s conviction, even without reference to Jumadi’s statements. Objective evidence such as Shisham’s text messages and the Notebook, respectively showed Shisham’s involvement in drug transactions and/or drug suppliers, and the fact that he shared in the profits of the operation with Jumadi. Finally, Shisham’s defence was inherently incredible, and he offered no credible explanation for why Jumadi would have been so magnanimous, making him the happy recipient of free lodging and drugs, even though he had only known Jumadi for three weeks prior.

D. *Salzawiyah’s Sentence*

Lastly, the CA rejected Salzawiyah’s appeal against her sentence. *Firstly*, her criminal behaviour had worsened after her last period of incarceration, professing from mere possession

and consumption to trafficking in drugs. *Furthermore*, the facts which she tried to rely on in mitigation were not accepted at trial, and having accepted her conviction, she could not challenge them on appeal. *Finally*, the fact that she had a young child and would not be able to secure employment after prison were examples of hardship that are part and parcel of conviction – absent any exceptional circumstances, they could not be mitigating.

IV. Conclusion

The CA affirmed the HC's decisions in both the First and Second Judgments. Their sentences were accordingly affirmed.

V. Lessons Learnt

The MDP Notice here, with its inclusion of the Invitation, arguably takes it further away from the carveout in Explanation 2(*aa*) of the CPC. However, it is not enough that the MDP Notice is notionally an invitation to provide information. After all, section 33B of the MDA operates as a mechanism designed to incentivise cooperation, to invite accused persons to provide information that could assist the authorities. That is precisely why Explanation 2(*aa*) to s 258(3) of the CPC exists. It recognises that although the law – due to the punishments and attendant reliefs available – may well solicit cooperation from accused persons, it cannot be that every mention of such a law would be unacceptable; every cooperation secured consequentially, impermissible; and every statement thereby acquired, involuntary.

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