IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2016] SGHC 84

Magistrate's Appeal No 9136 of 2015

Between

Public Prosecutor

… *Appellant*

And

Wong Wee Keong

… *Respondent*

Magistrate's Appeal No 9137 of 2015

Between

Public Prosecutor

… *Appellant*

And

Kong Hoo Pte Ltd

… *Respondent*

GROUNDS OF DECISION

[Criminal Law] — [Offences] — [Endangered Species Act]

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Introduction

1 Timber of the botanical genus *Dalbergia* – specifically, that from certain species found in Madagascar and commonly known as Madagascan rosewood or, in French, *Bois de rose* – has a rare and alluring beauty. Its heartwood possesses a deep and rich claret hue, making it highly prized by furniture makers the world over. It is also, for that reason, a prime candidate for illegal logging. For its protection, Madagascan rosewood is listed in Appendix II of the Schedule to the Endangered Species (Import and Export) Act (Cap 92A, 2008 Rev Ed) ("ESA") and Appendix II to the Convention on International Trade in Endangered Species of Wild Flora and Flora (3 March 1973) 993 UNTS 243 (entered into force 1 July 1975) ("CITES").

2 On 28 February 2014, a consignment of 29,434 Madagascan rosewood logs, weighing approximately 3,235 metric tonnes and with an estimated market value in excess of US$50m, entered Singapore waters on board the MV Oriental Pride. I will refer to the MV Oriental Pride as "the vessel" and to its cargo of logs (either the whole consignment or a part of it) as "the rosewood logs" or simply "the Rosewood". The cargo manifest stated that the cargo consisted of "*Bois*" – French for wood. In the bills of lading, it was stated that the port of discharge was Singapore and that the consignee was "Kong Hoo Private Limited" ("Kong Hoo"). On 11 March 2014, the vessel berthed at the Free Trade Zone of Jurong Port (the "Jurong FTZ"). Between 12 and 14 March 2014, 6,164 logs were offloaded and moved to a different area of the Jurong FTZ. On 14 March 2014, officers from the Agri-Food and Veterinary Authority of Singapore ("AVA") boarded the vessel and seized the rosewood logs in the hold as well as those which had been offloaded.[1]

3 Subsequently, Kong Hoo was charged with importing a scheduled species without the requisite permit, an offence under s 4(1) of the ESA. Its director, Wong Wee Keong ("Wong"), was charged under s 4(1) of the ESA read with s 20(1)(*a*) of the same on the basis that Kong Hoo's offence had been committed with his consent and connivance. Wong and Kong Hoo were jointly tried before the District Judge and were subsequently the respondents in Magistrate's Appeals No 9136 and 9137 of 2015 respectively (I shall refer to them jointly as "the respondents"). At the close of the prosecution's case, the respondents invited the court to dismiss the matter on the ground that there was no case to answer. The District Judge agreed with the respondents and

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[1] Agreed Statement of Facts ("ASOF") at paras 12–13 (Record of Proceedings ("ROP"), p 333); AVA Inspection Report (ROP, pp 356–364); Bills of lading (ROP, pp 356–366).

acquitted the respondents of the charges. The prosecution appealed to this court.[2]

4 As this matter concerned novel issues of statutory interpretation, particularly the manner in which the ESA was to be interpreted in the light of Singapore's obligations under CITES, Mr Kelvin Koh Li Qun was appointed as *amicus curiae* to assist this court. From the outset, I should record my appreciation to Mr Koh, Mr Kwek Mean Luck, who appeared on behalf of the prosecution, and Mr Muralidharan Pillai, who appeared on behalf of the respondents, for the assistance and guidance they provided through their detailed and helpful submissions. They put forward a wide conspectus of material and while not all of it has been cited in this judgment, I examined it carefully in the course of reaching my decision.

5 After considering the submissions of the parties, I concluded that the District Judge had erred in finding that there was no case to answer. I therefore allowed the appeal, set aside the order of acquittal, and ordered that the matter be remitted to the trial court for the defence to be called. I now set out the grounds for my decision.

Background

6 CITES is a multilateral treaty which aims to regulate the international trade in wildlife to ensure that the trade does not threaten their survival in the wild. Species are listed in the appendices to CITES according to the extent of protection they require. Species listed in Appendix II of CITES are classified as those which may be threatened with extinction unless trade in specimens of such species is subject to regulation to avoid utilisation which is incompatible

[2] Appellant's submissions at paras 11–15.

with their survival (see Art II(1) of CITES). CITES provides a broad framework for the regulation of the trade through a system of permits and certificates, but it leaves the implementation of this to each member state. Each country must designate an agency – known as the "Management Authority" – to administer the grant of CITES permits (Art I(g) of CITES). Madagascar and Singapore are both member states to CITES. The Management Authority in Madagascar is the Ministry of Environment and Forests ("Madagascan Forestry Ministry") while the Management Authority in Singapore is the AVA.[3]

7 Singapore passed the ESA in 1989 to give effect to its obligations under CITES. The species listed in the Schedule to the ESA are known as "scheduled species" and they mirror those which are listed in the appendices to CITES. Under s 4(1) of the ESA, it is an offence to import or export any scheduled species without a permit from the Director-General, Agri-Food and Veterinary Services ("Director-General"). It is a separate offence to bring a scheduled species into Singapore for the purposes of transit without the requisite written permission having first been obtained by the country of export and, where necessary, from the country of import or final destination (s 5(1)).[4] The original charges which were preferred against the respondents were framed under s 5(1) ESA, but they had been amended to s 4(1) charges involving import of the Rosewood by the time of the trial.[5]

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3 ROP, p 66, lines 9–12 (cross-examination of Ms Lye Fong Keng); Factsheet on CITES and its Implementation in Singapore prepared by Ms Lye Fong Keng,("Factsheet on CITES") at para 5 (ROP, p 310).

4 Factsheet on CITES at paras 1, 5 and 6 (ROP, pp 309 and 310).

5 Respondents' submissions at para 6(d).

8 Madagascan rosewood was first listed in Appendix II to CITES in March 2013. On 4 September 2013, the Secretariat to CITES issued a notification to all member states to inform them that the Government of Madagascar had imposed a zero export quota on Madagascan rosewood from 13 August 2013 to 13 February 2014.[6] On 26 February 2014, another notification was sent to the member states to inform them that the Government of Madagascar had extended the zero export quota until 14 April 2014.[7] I pause here to note that one of the disputes which arose at the trial was whether there was any "break" in the zero export quota between 13 February 2014 (the expiry period stated in the 4 September 2013 notification) and 26 February 2014 (when the second notification was sent out).[8] I will return to this subject later but it suffices to note for the present that it is undisputed that Madagascan rosewood has been listed in the appendix to CITES since 2013 and that it remained so at the time of the trial.

The prosecution's case

9 The trial was heard over two days and the prosecution called a total of ten witnesses. Much of the evidence was led through the use of conditioned statements, which attests to the undisputed nature of most of what was presented. The disputes which did exist centred on the appropriate interpretation of the evidence. I will only summarise that which is germane to my decision.

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6 ROP, p 563 at paras 2 and 4.

7 ROP, p 564 at para 4.

8 Appellant's submissions at para 100; respondents' submissions at paras 97–99.

The circumstances that led to the seizure

10 The first witness to take the stand was Deputy Superintendent Roy Tan of Singapore Customs ("DSP Roy"). He testified that on 19 February 2014, Singapore Customs received information from the Regional Intelligence Liaison Office Asia Pacific ("RILO AP") of the World Customs Organisation that there was a "strong suspicion" that the vessel, which was bound for Singapore, might be carrying an illegal shipment of Madagascan rosewood. On 27 February 2014, Singapore Customs relayed this information to the AVA which requested further details. Pursuant to this, Singapore Customs wrote to RILO AP on the same day to request information on the container numbers in which the wood was stored or the identity of any Singaporean company involved. RILO AP wrote back the same day to state that they did not have the requested information.[9]

11 Meanwhile, Singapore Customs continued to monitor the location of the vessel and it noted that, on 11 March 2014, the vessel berthed at the Jurong FTZ. Singapore Customs proceeded to obtain information on the vessel's schedule and its cargo manifests from an online portal maintained by Jurong Port. In the cargo manifests, it was stated that the consignee was one "Jaguar Express Logistics Pte Ltd" ("Jaguar Express") and that the port of discharge was Singapore.[10] This information was shared with the AVA on the same day.[11] On the morning of 14 March 2014, the AVA wrote twice to Singapore Customs asking, first, for clarification whether "the wood would be imported into Singapore or [whether it was] … meant to be a transhipment"; and,

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9 DSP Roy's conditioned statement at paras 2–5 (ROP, p 301); P9 (ROP, p 377).

10 P6, P7 (ROP, pp 368 and 369).

11 ROP, p 27, line 24 to ROP, p 28, line 5 (examination-in-chief of DSP Roy).

second, for the assistance of Singapore Customs to "target and detain (whether import or transhipment) for our investigations." DSP Roy replied to state that his colleagues from the Risk Assessment Branch of Singapore Customs would follow up with the AVA regarding its request.[12]

12 During cross-examination, DSP Roy explained that what he meant was that his colleagues from the Risk Assessment Branch would assist the AVA with the detention of the shipment.[13] However, he testified that he did not follow up on the AVA's request for clarification concerning the purpose for which the wood was brought to Singapore. He explained that as far as he was aware, this was a matter that fell to be determined by reference to the bills of lading. He explained that if the name of a local consignee were listed in the bill of lading, then the matter would be "taken as an import and not a trans-shipment case."[14]

13 When cross-examined, he confirmed that Singapore Customs had enforcement powers over goods stored in a free trade zone. When his attention was drawn to s 3(2) of the Customs Act (Cap 70, 2004 Rev Ed) ("the Customs Act"), which states that "[f]or the purposes of [the Customs Act], goods shall be deemed to be under customs control while they are deposited or held in any free trade zone", he accepted that goods in a free trade zone were under the control of Singapore Customs.[15]

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12 P9 (ROP, p 370).

13 ROP, p 51, lines 13–21.

14 ROP, p 56, lines 2–16.

15 ROP, p 38, lines 17–24; ROP, p 40, line 17 to p 41, line 2.

Seizure and investigations

14 The next witness to take the stand was Ms Lye Fong Keng ("Ms Lye"), a deputy director in the Import & Export Regulation Department of the AVA. Her testimony was consistent with the account given by DSP Roy – *ie*, that the AVA was only informed that there might be an illegal shipment of Madagascan rosewood on 27 February 2014 when Singapore Customs forwarded the information provided by RILO AP and that the AVA decided to board the vessel on 14 March 2014. She further testified that when officers from the AVA boarded the vessel on 14 March 2014, they shared with her their observations from a cursory visual examination of the exposed heartwood of the exposed logs and also sent her images of the logs. From her colleagues' descriptions and the images she had been given, she formed the view that the logs were Madagascan rosewood.[16] Ms Lye further explained that she also accessed the AVA's online licensing system to ascertain if any CITES import permits issued by the AVA in respect of Madagascan rosewood and found that there were none. She then directed her colleagues to seize the shipment for further investigations on suspicion that scheduled species had been imported without a permit in contravention of s 4(1) of the ESA.[17]

15 During cross-examination, Ms Lye explained there were four factors which led her to suspect that an offence under s 4(1) of the ESA had been committed: (a) first, the tip-off had originated from a credible source, RILO AP; (b) second, the shipment appeared to be unusually large; (c) third, it was evident that there was no valid CITES export permit for the shipment as Madagascar had imposed a zero export quota on Madagascan rosewood since

16 ROP, p 61, lines 4–12; Ms Lye's conditioned statement at paras 4, 6 (ROP, p 307).

17 ROP, p 60, line 21 to p 61, line 3; Ms Lye's conditioned statement at paras 5 and 6 (ROP, p 307).

August 2013;[18] and (d) fourth, there was no application on record for a CITES import permit from the AVA.[19] This gave rise to a series of questions which culminated in a suggestion by Mr Pillai that the offence contemplated by Ms Lye must have been one under s 5(1) of the ESA – a transit offence – instead of one under s 4(1) – an importation offence.[20] Mr Pillai went on to pursue the issue at greater length. Given the prominent role of this line of questioning, and the significance of the answers which emerged therefrom, I will summarise the exchange in some detail.

The regulatory regime

16 The thrust of Mr Pillai's questioning was that the absence of a CITES export permit could only be indicative of an offence under s 5(1) of the ESA, as that provision made specific reference to the necessity that a CITES export permit be obtained even if the goods were in transit.[21] By contrast, s 4(1) of the ESA makes no reference to the need for a valid CITES export permit, since liability would accrue so long as goods were imported into Singapore without a valid CITES import permit issued by the Director-General. Ms Lye disagreed and explained that the absence of a CITES export permit was probative of the commission of *both* offences. She did so by explaining that irrespective of whether one was dealing with an import scenario or a transit scenario, a CITES export permit would still be involved.

17 Where the intention was to import a scheduled species, the usual requirement would be that the foreign CITES export permit would have to be

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18 See also Ms Lye's conditioned statement at para 9 (ROP, p 308).

19 ROP, p 129, line 24 to p 130, line 9; ROP, p 134, line 15 to p 135, line 4.

20 ROP, p 131 at line 3 to p 132 at line 15.

21 ROP, p 135, lines 6–18; ROP, p 128, lines 8–13.

surrendered to the AVA in exchange for a CITES import permit. She described this as a "back-to-back" process. She also explained that where the consignee listed was a local company, the matter would be treated as an import case.[22] By contrast, where the intention was merely to bring the goods into Singapore for the purpose of transit, no permit need be applied for from the AVA. However, the company handling the transhipment would have to submit a "TradeNet" declaration in respect of the goods (an online customs declaration website) *and* attach a copy of the CITES export permit (which would indicate the ultimate destination of the goods) for verification. Ms Lye also testified that in situations where goods were to spend some time in transit in a third country, the consignee listed in the CITES export permit would be the company in the *destination country*, rather than the company handling the transfer in the country of transit.[23]

18 This was consistent with the testimony of Ms Ong Ai Khim, a Senior Executive Manager with the AVA who deposed to the following two matters in her conditioned statement. First, she explained that a CITES import permit would be required for the shipment since the shipment had been consigned by a local company. Second, she explained that in order to obtain a CITES import permit from the AVA, an applicant would first have had to submit a CITES export permit from the country of origin. She explained that this application would have to be made before entry into Singapore waters. She also deposed to the fact that AVA had not received any application for a CITES import permit in respect of this shipment.[24]

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22 ROP, p 167, line 24 to p 168, line 23; ROP, p 171, lines 5–12; ROP, p 169, lines 19–21.

23 ROP, p 169, lines 13–24; ROP, p 170, lines 20–23.

24 Ms Ong Ai Khim's conditioned statement at paras 4–6 (ROP, p 314).

Investigation into authenticity of export documents

19 Another substantial area of cross-examination concerned a set of nine documents which were marked collectively as D5.[25] These comprised the two bills of lading and documentation issued by various public authorities in Madagascar relating to the export of forest products from Madagascar. Two of these documents were certificates of origin in respect of 30,157 pieces of wood in which one "Zakaria Solihi" was listed as the exporter and Kong Hoo was listed as the consignee.[26] The two certificates were dated 17 February 2014 and 18 February 2014 respectively. These were significant dates for they fell within the "break" in Madagascar's zero export quota in respect of Madagascan rosewood which, on the respondents' case, extended between 13 February 2014 and 26 February 2014 (see [8] above). Ms Lye explained that the documents comprising D5 were given to the AVA by Wong between 14 March 2014 and 19 March 2014 during the course of investigations.[27] She explained that when she received these documents she had doubts as to their authenticity for two reasons. First, in the light of the zero export quota, it was unlikely that export permission would have been granted by the Madagascan authorities. Second, she noted that the documents did not conform to the requirements set out in CITES.[28] Thus, the AVA took steps to verify their authenticity.

20 On 17 March 2014, Wong also provided Mr Raghbir Singh, an investigator with the AVA, with the email address of the Madagascan Forestry

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25 ROP, pp 566–581.

26 ROP, pp 574 and 580.

27 ROP, p 160, lines 2–10.

28 ROP, p 164, lines 20–25.

Ministry in order that the latter might verify the authenticity of the documents.[29] On or about 19 March 2014, Ms Lye wrote to the Madagascan Forestry Ministry to seek clarification on the authenticity of the documents. She received a reply from one Mr Jean Claude, who bore the title of Director-General in the Ministry, that the documents in D5 were not authentic.[30]

21 Separately, Wong wrote to one Ms Sabine Dorothee on 24 March 2014 to explain the situation and to seek clarification that the export documents contained in D5 were authentic.[31] On 28 March 2014, Ms Lye received an unsigned email in which it was stated that "Mr. ZAKARIA Solihi has been exceptionally allowed to export these marchandises [*sic*] under the bill of lading" and that the "export of such good has been officially authorised by the component [*sic*] of Madagascar".[32] Faced with conflicting information, Ms Lye then wrote to the Ms Pia Jonsson of the CITES Secretariat in Geneva on the same day to seek her assistance. Ms Jonsson replied on 4 November 2014 to say that investigations were still going on. During cross-examination, Ms Lye explained that the Madagascan authorities had informed the CITES Secretariat that their email account had been hacked into and so the "investigations" referred to in Ms Jonsson's letter related to investigations into both the authenticity of D5 as well as the alleged hacking incident.[33]

22 Between 3 and 4 December 2014, a delegation from Madagascar visited Singapore. On 9 January 2015, Mr Ramaparany Ramanana of the

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29 D6 (ROP, p 582).

30 ROP, p 91, line 25 to p 93, line 13.

31 D10 (ROP, pp 586 and 587).

32 D11 (ROP, p 588).

33 ROP, p 100, line 19 to p 101, line 23.

Madagascan Forestry Ministry wrote to Ms Lye, referencing the visit by the Madagascan delegation and stating, in the penultimate line, "I confirm that the documents were established in due form by the signatories authorities during the period of transition. I therefore confirm the authenticity of these documents." Ms Lye accepted that the "documents" referred to were D5 and that the "transition" referred to was the period of transition between governments in Madagascar.[34] On 20 January 2015, the same information was relayed to Mr Foo Cheow Ming, the previous solicitors for the respondents, and a copy of the letter sent by Mr Ramanana was enclosed.[35]

Shipping arrangements

23 The next two witnesses whose evidence was critical to this case testified to the circumstances under which the Rosewood came to be brought to Singapore and what was done to it after it had arrived. Mr Alan Tan ("Mr Tan") was the management director of Jaguar Express, which was in the business of providing transportation, haulier, and warehousing services.[36] He explained that Jaguar Express had been engaged by Wong to unload the shipment of wood from the vessel, repack them into containers and truck them to another port, which was managed by the Port of Singapore Authority.[37] He testified that Wong had informed them that the wood was to be shipped to Hong Kong.[38] To that end, he had provided Kong Hoo with two quotations, both of which were entered into evidence. D17 was a quotation for ocean freight charges for Singapore to Hong Kong. D18 was a quotation for the cost

34 ROP, p 111, line 18 to p 113, line 12.

35 D14 (ROP, p 593).

36 ROP, p 184 lines 1–3; 20–25 (examination-in-chief of Mr Tan).

37 ROP, p 185, lines 7–14; p 186, line 23 to p 187, line 1.

38 ROP, p 191, lines 16–19.

of transhipment services and it listed the prices of, *inter alia*, stuffing and handling charges that would be incurred. Both of these quotations were signed by Wong on behalf of Kong Hoo and marked "Confirmed & Accepted".[39] Mr Tan elaborated that he had assisted Kong Hoo by making a "tentative booking" on a container vessel bound for Hong Kong on 13 March 2014. This booking, he explained, was to be the first of several for it was contemplated that the wood would be shipped in several batches on different vessels.[40]

24 Mr Ernest Wee ("Mr Wee") was the managing director of AMMShips Pte Ltd, which provided ship operation and management services. He explained that AMMShips had been engaged by Kong Hoo to convey the cargo from Madagascar to Singapore and that its role would end after the logs had been discharged. He testified that the vessel had sailed to Toamasina in Madagascar where the wood was loaded on board the vessel and that it left on 12 February 2014 for Singapore, arriving on 28 February 2014.[41] He explained that he learnt from his interactions with Jaguar Express that the cargo was to be containerised and shipped out of Singapore but he clarified that this was second-hand reportage because he was not involved in the process at all.[42]

The District Judge's decision

25 After receiving detailed submissions from the parties and reserving the matter to consider it more carefully, the District Judge eventually granted a discharge amounting to an acquittal, holding that the prosecution had failed to

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39 D17 (ROP, pp 647 and 648); D18 (ROP, pp 649 and 650).

40 ROP, p 192, line 17 to p 193, line 23.

41 Mr Wee's conditioned statement at paras 2–5 (ROP, p 325); ROP, p 250, lines 5–13 (examination-in-chief of Mr Wee).

42 ROP, p 254, lines 2–18.

make out a case against the respondents. The grounds of her decision are reported at *Public Prosecutor v Wong Wee Keong and another* [2015] SGDC 300. The District Judge noted that the crux of the dispute was whether there had been an "import" of the rosewood logs within the meaning of s 4(1) of the ESA. She noted that under the ESA any scheduled species which are deemed to be in transit cannot be considered as having been imported and *vice versa* (at [44]). With that in mind, she turned to s 2(2) of the ESA, which defines the scenarios in which goods may be deemed to be in transit.

26 Section 2(2) of the ESA provides that a scheduled species would only be considered to be in transit in three scenarios. However, she only focused on the third, which was provided for in s 2(2)(*c*) of the ESA (at [55]). In order for a scheduled species to be in transit within the meaning of s 2(2)(*c*) of the ESA, two things have to be shown: (a) first, that the scheduled species was "brought into Singapore solely for the purpose of taking it out of Singapore" and (b) second, that the scheduled species was, for the entire period of time it was removed from the conveyance in which it was originally brought, "kept under the control of the Director-General or an authorised officer for a period not exceeding 14 days … pending despatch to a place outside Singapore." Against that background, she held that the Prosecution had to lead some evidence on *both* these points in order to make out a case against the Respondents (at [46]):

> (a) First, that "the rosewood logs were not brought into Singapore solely for the purposes of taking [them] out of Singapore"; and
>
> (b) second, "the rosewood logs did not remain under the control of an authorised officer for a period not exceeding 14 days pending despatch to a place outside Singapore."

The Rosewood was in transit

27 Turning, first, to the question whether the Rosewood was brought into Singapore solely for the purposes of taking it out of Singapore, she held that "there was only one conclusion" which could be drawn: the Rosewood had been brought into Singapore "*solely* for the purposes of containerisation to ship to Hong Kong" [emphasis in original] (at [53]). She relied chiefly on the evidence of Mr Tan, which she said revealed that the "whole project" for which Jaguar Express was engaged was the containerisation of the Rosewood for transhipment. There would have been no need to do so, she held, if the intention were to import the logs. This was consistent with the evidence of Wong, who had consistently informed the AVA during the course of investigations that the Rosewood was to be exported to Hong Kong. Furthermore, she noted that both quotations (D17 and D18) had been accepted by Wong on behalf of Kong Hoo and therefore "[had given] rise to binding contractual obligations" which Mr Tan had honoured by offloading the logs pursuant to the contracts until he was stopped by the AVA (at [51]).

28 On the second issue, she held that the nub of the issue centred on whether the Rosewood was kept within the control of an "authorised officer" at all material times. On this issue, she relied heavily on the evidence of DSP Roy. She noted that since the Rosewood remained within the Jurong FTZ at all times, it was always under "customs control" within the meaning of s 3(2) of the Customs Act (see [12] above). Given that customs officers were "authorised officer[s]" under s 2(1) of the ESA, she concluded that it must follow that the rosewood logs were within the control of an authorised officer or officers (specifically, the officers of customs, who had jurisdiction in the Jurong FTZ) at all material times. Further, she also agreed with the respondents' submission that "the fact of Customs control at the material time

is quite clear as even the AVA has to seek the cooperation of Customs to detain the Cargo."

29 Putting together the above considerations, she concluded that even on the prosecution's evidence, it was clear that the Rosewood was "in transit" within the meaning of s 2(2)(*c*) of the ESA (at [61]). She therefore held that the prosecution had failed to make out a case that the rosewood logs had been imported.

The amendment of the charge

30 The District Judge also rejected the prosecution's alternative submission that the court should exercise its power to amend the charge to one under s 5(1) of the ESA. She noted that the charge originally drawn up on 3 October 2014 was one under s 5(1) of the ESA. However, following the confirmation by the Madagascan Forestry Ministry that the documents in D5 were authentic, the charge was amended to one under s 4(1) of the ESA on 1 July 2015. In the circumstances she held that it was "indeed odd that after abandoning the original charge, the prosecution made an alternative submission to revert to the original charge" (at [68]). She held that this was not a "clear case" that warranted the exercise of her powers to amend the charge. She held that the question whether D5 sufficed as a valid "CITES export permit, licence, certificate or written permission" within the meaning of s 5(1) of the ESA involved a "wholly different" inquiry and necessitated "the evidence of an official from the Madagascar management authority", which was unavailable (at [69]).

31 The District Judge also expressed complete agreement with a section of the respondents' submission (which she referenced but did not reproduce)

entitled "The Prosecution's *Volte Face*". Broadly summarised, it was argued that the prosecution had only sought to amend the charge because it was clear that their case on the s 4(1) charge was untenable (in particular, because of the evidence of the Madagascan authorities: see [22] above) and that to permit this to be done would be to visit great prejudice on the respondents. In particular, they noted that the legal and factual bases of a s 4(1) and s 5(1) charge were so different that to permit an amendment would almost certainly require a "relitigation as all the key witnesses would have to be recalled".[43]

The law

32 Having set out the evidence, I now turn to the law. Section 230(1)(*j*) of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) ("CPC") provides that the court must call on the accused to give his defence if it is of the view that "there is some evidence which is not inherently incredible and which satisfies each and every element of the charge as framed by the prosecutor or as altered or framed by the court". In the absence of such evidence, the court is enjoined to order a discharge amounting to an acquittal (see s 230(1)(*k*) of the CPC).

33 As explained by Chan Sek Keong CJ in *Re Nalpon Zero Geraldo Mario* [2012] 3 SLR 440 ("*Re Nalpon*") at [26], this is a statutory codification of the test which was set out in the seminal decision of the Privy Council in *Haw Tua Tau v PP* [1981–1982] SLR(R) 133 ("*Haw Tua Tau*"). The question, Chan CJ explained, was not whether the evidence as it presently stood *had already* established the guilt of the accused beyond a reasonable doubt but whether the evidence – *if* it were all accepted as accurate – *would* do so (at [26]). At a minimum, the evidence put forward has to cover every constituent

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[43] Defence's submissions on no case to answer at paras 48, 52–54 (ROP, p 691, 693 and 694).

element of the offence in question; if it did not, then it would plainly be impossible for a conviction to be lawfully sustained. In deciding whether to call on the accused to enter his defence, regard should be had to the following guiding propositions:

(a) All evidence of primary fact should be accepted as being true, unless it is so inherently incredible that no reasonable person would be able to accept it as being true or if it has been discredited or shown to be wholly unreliable. This may happen, for example, during the course of cross-examination (see *Haw Tua Tau* at [15]; *Re Nalpon* at [25]).

(b) Inferences may be drawn, but only if they are reasonable – it is not enough that the inference may be credible or not inherently incredible. In this regard, there is a different standard which applies to primary facts and inferences insofar as the former should be accepted as true unless it is inherently incredible whereas inferences can only be accepted if they can reasonably be drawn (see *Re Nalpon* at [25]). It is not necessary that the inference be irresistible or that it must be only possible inference that may be drawn from the facts.

(c) The totality of the evidence has to be considered when determining whether evidence is so inherently incredible that it can be accepted or if the inferences sought to be drawn are reasonable enough to pass muster. The court cannot only look to those parts of the evidence which are favourable to the prosecution's case and ignore those which are detrimental: *ie*, it cannot pick out only the plums and leave the duff behind (see *Public Prosecutor v IC Automation (S) Pte Ltd* [1996] 2 SLR(R) 799 at [17]).

34 As the Privy Council explained in *Haw Tua Tau* at [16] and [17], calling for the defence only brought proceedings to the next stage. The evaluation of the evidence was a task that still fell to be performed at the close of the trial. Until then, a Judge must keep an "open mind" as to the accuracy of the evidence of any of the witnesses until both sides have had a chance to present their case and to advance such submissions as they might wish. It was entirely possible, Chan CJ later explained in *Re Nalpon* at [25] that a trial court which had earlier found that there was a case to answer could – even if no evidence had been called for the defendant – eventually decide that the charge had not been proved beyond a reasonable doubt and that the accused should be acquitted.

The elements of the charge

35 With that in mind, I turn to consider the elements of the present charge. Proper consideration of its elements requires consideration of three separate provisions of the ESA. The first is the offence-creating provision in s 4(1) of the ESA, which provides that any person who "imports, exports, re-exports or introduces from the sea any scheduled species without a permit" was guilty of an offence. I was concerned, for present purposes, only with the definition of "import", for that was the limb that the prosecution had relied on. Accordingly, there were three cumulative elements to the offence of importing a scheduled species without a licence which were relevant to this case:

(a) The respondents imported the Rosewood;

(b) The Rosewood belonged to a scheduled species;

(c) There was no import permit issued by the Director-General, Agri-Food and Veterinary Services.

36 I pause here to note that Wong was charged not on the basis that he was personally responsible for the act in question, but because s 20 of the ESA imputes liability to the officer of a body corporate for offences committed by the corporation (in this case, Kong Hoo) where it can be shown that the offence was committed with his "consent or connivance". For that reason, the charge against him would contain the additional element that the primary offence committed by Kong Hoo must have been performed with his consent and connivance. As it is not an issue which arose in these appeals, this requires no further comment or consideration.

37 It was common ground that the second and third elements had been made out.[44] The dispute lay with the first. The respondents contended that the Rosewood was at all times in "transit" and therefore could not have been imported within the meaning of the ESA and so they could not be liable under s 4(1) of the ESA.[45] In contrast, the prosecution submitted that the respondents had failed with bring themselves within the "transit exception" set out in s 2(2) of the ESA.[46] In order to understand the scope of the disagreement, I will first set out the relevant parts of ss 2(1) and 2(2) of the ESA, which define "import" and "transit" respectively:

> 2(1) ***"import"*** means to *bring or cause to be brought into Singapore by land, sea or air any scheduled species other than any scheduled species in transit* in Singapore; …
>
> …
>
> 2(2) For the purposes of this Act, *a scheduled species shall be considered to be* ***in transit*** *if, and only if, it is brought into Singapore solely for the purpose of taking it out of Singapore and —*

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44 Respondents' submissions at para 5.

45 Respondents' submissions at para 5.

46 Appellant's submissions at para 51.

> (*a*) it remains at all times in or on the conveyance in or on which it is brought into Singapore;
>
> (*b*) it is removed from the conveyance in or on which it was brought into Singapore and either returned to the same conveyance or transferred directly to another conveyance before being despatched to a place outside Singapore, and is kept under the control of the Director-General or an authorised officer while being so removed, returned or transferred; *or*
>
> (*c*) it is removed from the conveyance in or on which it was brought into Singapore and ***kept under the control of the Director-General or an authorised officer for a period not exceeding 14 days, or such longer period as the Director-General may approve, pending despatch to a place outside Singapore***.

[emphasis added in italics and bold italics]

38 As the District Judge recognised, under the schema of the ESA, a scheduled species can either have been imported or it may be in transit, but it cannot be both. So long as the scheduled species was brought or caused to be brought into Singapore by land, sea, or air then it will be considered to have been imported unless it is deemed to only have been in transit. There is no *tertium quid*. It was common ground that the respondents had caused the Rosewood to be brought into Singapore: this was the entirety of the unchallenged evidence of Mr Wee, who described how he had been engaged by Kong Hoo to sail the vessel to Madagascar to load the Rosewood and then to convey it to Singapore (see [24] above). Thus, it would be considered to have been imported *unless* it was shown that it was merely in transit.

39 Referring to s 2(2) of the ESA, it was plain to me that in order for a scheduled species to be considered to be in transit, two *cumulative* conditions had to be satisfied:

> (a) The first, which is found in the *chapeau* of the subsection, is that the scheduled species must have been brought into Singapore

"solely for the purpose of taking it out of Singapore." This is a statement of the potential accused person's *motive* for bringing the scheduled species to Singapore.

(b) The second condition is that the case must fall within one of the three mutually exclusive scenarios set out in paras (*a*) to (*c*) of s 2(2) of the ESA. These three scenarios deal with what *actually happens* to the scheduled species after it finds its way to Singapore. Scenario (a) only applies to situations where the scheduled species never leave the conveyance on which they were brought into Singapore. Scenarios (b) and (c) apply where the scheduled species leave the conveyance.

40 Scenarios (a) and (b) both provide relatively unambiguous indicia in support of the potential accused person's motive for bringing in the scheduled species to Singapore. There either is no movement of the scheduled species at all upon arrival or merely a temporary movement followed by a return to the same conveyance or another conveyance. In scenario (b), the "control" element would seem to operate to undermine a possible suggestion that the scheduled species had been imported on account of it having been removed from its conveyance. The existence of control would seem to be more consistent with an intention that the goods remain in transit. Neither scenario (a) nor (b) was applicable here because it was common ground that 6,164 logs of Rosewood had been offloaded from the vessel and they had yet to be returned to the vessel.[47]

41 That left only scenario (c), which applies to situations where the scheduled species leaves the conveyance on which it was carried in and does

[47] Appellant's submissions at paras 47 and 48; respondents' submissions at paras 13 and 65.

not return. So what, then, did the prosecution have to do in order to make out a case against the respondents? Owing to the structure of the provisions, it would appear that the prosecution essentially had to put forward evidence to prove two negatives. They had to lead evidence to show that the two cumulative conditions set out in s 2(2)(*c*) of the ESA had *not* been satisfied and therefore, the Rosewood was imported rather than merely in transit. To use the language of the statutory scheme, in order for the defence to be called the court must be satisfied that there was some evidence, not inherently incredible, to show either that:

(a) the Rosewood was *not* brought into Singapore "solely for the purpose of taking it out of Singapore"; *or*

(b) the Rosewood was *not* under the "control of the Director-General or an authorised officer" for the duration of its absence from the vessel.

42 I shall refer to these as the "sole purpose" and the "control" conditions respectively. The District Judge held that the prosecution had to lead evidence in respect of *both* in order for the defence to be called (see [26] above). I will sound a note of caution about this. To my understanding, the District Judge did not purport to lay this down as a general rule but had merely specified this approach based on the facts in the present case. As a matter of substantive law, the prosecution need only show *either* that the sole purpose *or* that the control condition had not been satisfied to make out a case that the Rosewood was not in transit. They need not do both, since proof of either would mean that the Rosewood cannot be considered to have been in transit within the meaning of s 2(2)(*c*) of the ESA and must therefore have been imported.

43 In my view, a useful rule of thumb for the court is this. If it is clear that the accused persons had caused the scheduled species to be brought into Singapore and if it is also clear that they did not have the requisite permit, then the defence should be called, unless the manner in which the accused persons had brought the scheduled species into Singapore was such that it was incontrovertibly plain and obvious that *both* the sole purpose and the control conditions had been satisfied and so it could not possibly have been imported.

Burden of proof

44 In their submissions, the prosecution contended that the carve-out for scheduled species in transit was in the nature of an exception to an offence and so the burden of proving that this so-called "transit exception" had been satisfied fell on the respondents. This point was not addressed by the respondents but it had no bearing on the outcome of the appeal in any event. The significance of this submission, for present purposes, would seem to be this. Given that it was common ground that the respondents had caused the Rosewood to be brought to Singapore, there was a *prima facie* case of importation and the defence ought to have been called to make out their case that this was an instance of transit.[48] In support of this submission, the prosecution cited s 107 of the Evidence Act (Cap 97, 1997 Rev Ed) ("Evidence Act"), which states:

> When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the general exceptions in the Penal Code (Cap. 224), or within any special exception or proviso contained in any other part of the Penal Code, or in any law defining the offence, is upon him, and the court shall presume the absence of such circumstances.

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[48] Appellant's submissions at paras 48–51.

45 It did not seem to me that s 107 applied here. The provision makes specific reference to "general exceptions" or "special exception[s]" or "proviso[s]" to criminal liability. As the illustrations to s 107 of the Evidence Act go on to show, what is contemplated are *bona fide* defences such as those found in Chapter IV of the Penal Code (Cap 224, 2008 Rev Ed) which either go towards justifying or excusing conduct which would otherwise attract criminal sanction. Section 2(2) of the ESA does not operate in this way. Instead, it is a provision which defines a *state of affairs* (*viz*, when a scheduled species that has been caused to be brought or brought into Singapore will be considered to be "in transit").

46 Perhaps a more plausible line of argument is to say that whether or not the scheduled species was brought into Singapore "solely for the purpose of taking it out of Singapore" is a fact which is especially within the knowledge of the respondents and so the respondents bear the burden of proving that fact in accordance with s 108 of the Evidence Act. This would seem to be consistent with the *obiter* remarks of the Court of Appeal in *Attorney-General v Transmax Pte Ltd* [1996] 3 SLR(R) 90 ("*Transmax*"), which the prosecution cited in their submissions. There, the provision in question was s 3(1) of the Customs Act (Cap 70, 1995 Rev Ed), the relevant provisions of which state:

> '**import**', with its grammatical variations and cognate expressions, means to bring or cause to be brought into the customs territory by any means from any place including a free trade zone:
>
> *Provided that goods* bona fide *in transit*, including goods which have been taken into any free trade zone from outside the customs territory or transhipped, shall not, for the purpose of the levy of customs duties, *be deemed to be imported* unless they are or become uncustomed goods;
>
> **'in transit'** means taken out or sent from any country and brought into Singapore by land, sea or air (whether or not landed or transhipped in Singapore) for the sole purpose of

> being carried to another country either by the same or another conveyance.
>
> [emphasis added in original judgment]

47 Commenting on this, the Court of Appeal in *Transmax* remarked at [20] that "the proviso to the definition of "import" in s 3(1) of the Customs Act (Cap 70, 1995 Ed) would seem to place the burden of proof on the respondent to prove that the goods were bona fide in transit". Like s 2(2) of the ESA, a constitutive element of the definition of "in transit" in s 3(1) of the Customs Act is the purpose for which the goods were brought – this is a subjective fact which is especially within the respondent's knowledge. However, unlike s 2(2) of the ESA, the definition of "in transit" in s 3(1) of the Customs Act does not contain any additional element that the goods in question remain under the control of a specified person at all times.

48 Hence, it seemed to me that even if *Transmax* were accepted at authority for the proposition that the burden of proving that a scheduled species was brought into Singapore solely for the purpose of taking it out of Singapore (*ie*, the sole purpose condition) shifts to the respondents, the same cannot be said for the control condition. Whether or not the Rosewood was within the control of an authorised officer at all times is a mixed question of fact and law which falls to be decided based on objective facts which are largely independent of the respondents' knowledge or motive. The burden of proving that the control condition had not been satisfied, it seemed to me, remains with the prosecution at all times. I will say more of this later.

The application to admit further evidence

49 The hearing of this appeal took place over two days, with the first session on 12 February 2016 and the second on 19 February 2016. At the

commencement of the second hearing day, the prosecution tendered a letter from the Prime Minister of the Government of Madagascar dated 10 February 2016 in which it was stated that the position which had previously been taken on the authenticity of D5 on 20 January 2015 (see [22] above) "should be considered as repudiated and rejected". Mr Kwek explained that the prosecution had not tendered the letter, which arrived unsolicited, at the first hearing because they needed some time to confirm its authenticity.

50 Mr Pillai, quite understandably, objected to the admission of the letter into evidence. He contended that the requirements for the admission of new evidence on appeal set out in *Ladd v Marshall* [1954] 1 WLR 1489 had not been satisfied. He argued, in particular, that the letter would only be relevant if the charge were framed under s 5(1) of the ESA (which would require proof of a valid CITES export permit) but that it was irrelevant to the charges as presently framed. In response, Mr Kwek accepted that the letter was not strictly germane to the present appeal. However, he informed me that he had placed this before the court for two reasons: first, because the Government of Madagascar had asked for their position to be made known; and second, because they wanted to give notice to the defendant that they might seek to admit this piece of evidence should the appeal be allowed and an order made for the defence to be called.

51 It was clear to me that the purpose of the letter was to show that the documents in D5 were not authentic. I agreed that the letter would only be relevant if it were held that (a) the charge under s 4(1) was not made out *and* (b) the prosecution's application for the charge to be amended to one under s 5(1) of the ESA was granted. In the premises, it seemed to me that it would be premature for the letter to be admitted at this juncture. I therefore declined to

make an order on the admissibility of the letter and held that I would not be making reference to its contents in the course of arriving at my decision.

My decision on the appeal

52 When I reviewed the evidence and the arguments presented by the parties, I came to the following two conclusions. First, the evidence did not point irresistibly to the one conclusion found by the District Judge – *ie,* that the Rosewood had been brought into Singapore *solely* for the purposes of containerisation to ship to Hong Kong. Second, I was not persuaded that it was incontrovertible that the Rosewood was within the control of an authorised officer at all material times. I will discuss each in turn.

The sole purpose condition

53 While there was no direct evidence that the respondents intended the Rosewood to be retained in Singapore for sale or local distribution, it seemed to me that there was a substantial body of circumstantial evidence which the prosecution marshalled in support of their case which did not feature in the District Judge's grounds. Instead, the District Judge focused almost exclusively on the evidence of Mr Tan, which pertained to the nature and purpose of his engagement, and did not say much more about the evidence put forward by the other prosecution witnesses. In so doing, it seemed to me, with respect, that the District Judge had thereby not adequately considered the full body of evidence which had been placed before her.

The District Judge's assessment of the prosecution's case

54 The District Judge had characterised the prosecution's case as being "anchored solely on the fact that the consignee named in the two bills of

lading was a local company." She reached this conclusion after citing the following exchange from the re-examination of Ms Lye (at [47]):

> Q: Ms Lye, one final point. Assuming this shipment of cargo was bound for Hong Kong as Mr Wong claimed, would there be any AVA permits required before it leaves Singapore?
>
> A: Definitely yes.
>
> Q: Can you explain?
>
> A: *Because the company is a local consignee, so as I explained earlier, the foreign CITES permit has to be surrendered to AVA in exchange for the CITES import permit.* Subsequently, when Mr Wong re-export to Hong Kong, he has to apply for a CITES re-export permit from us, indicating Kong Hoo as the Singapore exporter and Hong Kong, the importer in Hong Kong as the final -- the consignee. *So it's back-to-back.*
>
> [emphasis added in italics]

55 There was no mention of the bills of lading at all, which is already a strong indication that the District Judge had misapprehended the nature of Ms Lye's evidence on this point. To be fair to the District Judge, the evidence on this issue is somewhat confusing, but careful reading of the transcript will reveal that Ms Lye made reference to *two* different sets of documents in her evidence. The first set was what she referred to as the "shipping documents" (*ie*, chiefly, the bills of lading, the cargo manifests and other documents relating to the shipment)[49]; the second set was the CITES export permits, which would be obtained from the country of export (in this case, Madagascar). Her evidence was that the listing of a local company as the consignee in *either* would form an independent basis for concluding that the Rosewood was not meant to be brought into Singapore solely for the purposes of taking it out again.

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[49] ROP, p 61, lines 13–25; Ms Lye's conditioned statement at para 5 (ROP, p 307).

56 In respect of the shipping documents, she explained that as a general matter, if the consignee listed on the shipping documents was a local company, then the AVA would treat the shipment as one meant for import.[50] This is consistent with the evidence of DSP Roy, who testified that if then name of a local consignee were listed in the bill of lading, then Singapore Customs would treat the matter as an import case rather than one involving transhipment. In relation to this, I was prepared to accept, as the District Judge held at [48] of the GD, that the mere fact that the consignee is a local company is not necessarily probative of the purpose of the shipment. As Mr Wee testified, a bill of lading merely serves (for present purposes) as a document of title: it allows the shipper to identify the person to whom the goods should be handed up to.[51] Alone, the bills of lading did not shed much light about whether it was intended that the Rosewood would only pass through Singapore or whether it was intended that at least a portion of the shipment remain here.

57 In respect of the CITES export permit, however, I thought the matter to be quite different. In the course of her oral evidence, Ms Lye explained that the consignee listed in a CITES export permit is always the recipient of the shipment in the *destination country*, and never the name of the third party handling the goods in transit. She explained that this was due to the structure of the CITES permit regime, under which permits were always issued on a point to point basis – from the country of export to the country of import, even if it were intended that the scheduled species would spend some time in transit. She explained it in these terms:[52]

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50 ROP, p 116, lines 7–14; Ms Lye's conditioned statement at para 5 (ROP, p 307).

51 ROP, p 252, line 14 to p 253, line 9.

52 ROP, p 169, lines 7–24.

> Then for the transit or trans-shipment, he has to submit the TradeNet declaration declaring the consignment *and also attach a copy of the CITES export permit from the country of export. And we will also verify the foreign CITES permit first before we approve the TradeNet declaration.*
>
> Whenever if there are doubts, we also check with the CITES authority in the exporting country who has issued the -- whether they have issued the CITES permit for the transit or trans-shipment. *And* ***the permit, the difference is the consignee will not be the local consignee, it has to be the company in the final destination, the ultimate destination. If the consignee is the local consignee, we consider that as an import****, import yes.* ***Because CITES permits are issued back-to-back, so from A to B, B to C, and transit it will be like direct from A to C. So we are just the intermediate country.***
>
> [emphasis added in italics and bold italics]

58 The purport of Ms Lye's evidence, therefore, is that if the Rosewood was meant to be exported from Madagascar to Hong Kong (with Singapore only as a transit destination) then the name of the consignee on the CITES export documents would be the name of the intended recipient in *Hong Kong*, and not the local company handling the shipment in Singapore. While Ms Lye was cross-examined extensively, it was never suggested that she was mistaken on this. In fact, the respondents, through their counsel, Mr Pillai, recognised that she was a "subject matter expert" in the area of the CITES regulations.[53]

59 It is notable that *all* the documents in D5 – which the respondents contended were valid national export documents and which were issued by the Madagascan Forestry Ministry, the Management Authority responsible for the implementation of CITES in Madagascar[54] – list Kong Hoo as the consignee of the shipment of Rosewood. I put aside, for present purposes, the dispute over

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53 ROP, p 135, line 24.

54 Respondents' submissions at para 112.

the authenticity of these documents and whether the zero export quota had ever been lifted (see [8] and [19]–[22] above). What is undisputed is that almost all of these documents were issued either on 17 February 2014 or 18 February 2014, *after* Madagascan rosewood had been listed as a scheduled species in Appendix II of CITES.[55] If it were inferred, as I think is reasonable, that D5 had been issued in accordance with usual CITES procedure, then it would follow that the fact that a Singaporean company (Kong Hoo) was listed as the consignee in D5 suggests that Singapore was the destination country for the shipment.

Absence of particulars of Hong Kong buyer

60 Another aspect of the evidence which I found relevant was the absence of any information of a foreign buyer. Ms Lye testified that when Wong was interviewed, he was asked to disclose the identity of the buyer in Hong Kong who was to receive the shipment of Rosewood but he "refused" to do so.[56] When he took the stand, Mr Tan also testified that while his understanding was that the Rosewood was meant for on-shipment to Hong Kong, he was not given the particulars of the consignee in Hong Kong who was to receive the cargo nor was he given the name of the buyer in Hong Kong who had purchased the shipment. The prosecution submitted that these points suggested that the Rosewood might not have been brought into Singapore solely for the purpose of being brought out again.[57]

61 This was also an argument which was advanced before the District Judge. However, she noted that Madagascan rosewood had yet to be listed as a

55 ROP, p 75, lines 16–22 (cross-examination of Ms Lye).

56 ROP, p 126, line 19 to p 127, line 3.

57 Appellant's case at para 54(e).

scheduled species in Hong Kong at the time. For that reason, she held that the "fact that [Wong] did not wish to disclose the buyer was irrelevant as there was no requirement to obtain an import permit in Hong Kong" (at [52]). With respect, I cannot agree. It appears that what the District Judge had in mind was s 5(1) of the ESA, which states that every species in transit must be accompanied by (a) valid export documentation issued by the country of export *and* (b) valid import documentation "where [it is] required by the country of import". (I have used the expression "documentation" as a compendious term to refer to a "permit, licence, certificate or written permission issued by the competent authority" of the country in question).

62 If the argument being advanced was that the respondents could not have intended to ship the goods to Hong Kong because they did not obtain the requisite Hong Kong import permits, then I would agree with the District Judge that the fact that Hong Kong did not require an import permit at the time is a complete answer to this contention. If no import permit was required, then one cannot infer, from the absence of such a permit, that the respondents did not intend to ship the Rosewood to Hong Kong.

63 However, I think that the point being made here is a broader one. It might reasonably be inferred, from the respondents' refusal to disclose the name of their Hong Kong buyer and from the absence of any documentation of sale or any confirmed bookings for the on-shipment of the Rosewood, that the respondents did not have any confirmed buyer in Hong Kong. If they did, there would have been no reason for them to withhold this information from the AVA or from the court, particularly since it would go a long way towards absolving them of legal liability. Following from this, the proper interpretation of the evidence would seem to be that the respondents had brought the Rosewood into Singapore in the hope that it *might* be shipped to Hong Kong if

a suitable Hong Kong buyer could be found but with the intention that until and unless this came to pass, the Rosewood was to remain within Singapore.

64 These two aspects – the fact that Kong Hoo was listed as the consignee in D5 and the absence of any information of a buyer in Hong Kong – militated against the District Judge's assessment that the Rosewood "was brought into Singapore *solely* for the purposes of containerisation to ship to Hong Kong" (see the GD at [53]). The respondents might well be able to satisfactorily explain these matters away but they were matters which called out for an explanation. I was of the view that they provided at least some evidence, albeit circumstantial, that was not inherently incredible and which went towards showing that the Rosewood had not been sent to Singapore *solely* for the purpose of being taken out again.

65 I accepted that there was evidence (chiefly, the testimony of Mr Alan Tan) which supported the respondents' case that the sole purpose for which the Rosewood was brought to Singapore was for it to be containerised before being shipped to another port.[58] However, the question was whether this evidence was of such a convincing and conclusive character that it meant that when the totality of the evidence was considered, a court would have to say that it so discredited the prosecution's evidence or showed it to be so manifestly unreliable that it would not be possible to convict on it.

66 In my judgment, the available evidence did not go that far. While it was common ground that part of the Rosewood had been offloaded, there was no clarity from the evidence thus far that the ultimate destination for the Rosewood was always meant to be Hong Kong or, for that matter, *any* other

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[58] Respondents' submissions at para 75.

place outside Singapore. For the above reasons, I concluded that there was sufficient evidence to show that the Rosewood had not been brought into Singapore *solely* for the purpose of being taken out again and that, therefore, this might not be a transit case but a case involving the import of the Rosewood. I therefore concluded that there was sufficient evidence to satisfy each and every single element of the offence under s 4(1) of the ESA and so the defence ought therefore to have been called.

The COP Resolutions

67 Reference was also made by the prosecution and Mr Koh (the *amicus*) to the Resolutions passed at the Conference of the Parties of the CITES ("the COP Resolutions").[59] By way of background, the member states to CITES are collectively referred to as the Conference of the Parties and they meet every two to three years under the provisions of Art XI of CITES. At these meetings, the parties review the implementation of the treaty and make such provisions as may be necessary to advance its goals. These include amendments to the appendices (Art XI(3)(b)) and, crucially for present purposes, the making of recommendations for improving the effectiveness of CITES (Art XI(4)(e)). These recommendations often come in the form of COP Resolutions, which are non-binding but nevertheless useful sources which shed light on the continuing development of CITES in the face of global challenges in curbing the international trade in endangered species.

68 In particular, they drew my attention to Resolution Conf 9.7 ("Conf 9.7"), which was adopted at the ninth meeting of the Conference of Parties in 1994. The subject matter of Conf 9.7 was the control of scheduled species in

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[59] Appellant's submissions at paras 42 and 43; *amicus curiae*'s submissions at para 29.

transit and a brief perusal of its recitals reveals that the concern lay in the fact that Art VII of CITES, which allows the transit of specimens without the need to obtain CITES permits, could be abused. One specific worry was that middlemen could take advantage of the exception carved out by Art VII by keeping specimens in the transit country (where it remained, in a manner of speaking, in a form of regulatory limbo) while seeking a buyer in another state. In order to tackle this problem, two key recommendations were made:

> (a) First, the definition of transit was narrowed. It was recommended that specimens in transit refer only to specimens which "are in the process of shipment to a *named consignee* when any interruption in the movement arises only from the arrangements necessitated by this form of traffic" (Conf 9.7 at para (a)).
>
> (b) Second, it was proposed that all export documentation "clearly show the ultimate destination of the shipment" (Conf 9.7 at para (c)).

69 As explained in Cyrille de Klemm, *Guidelines for Legislation to Implement CITES* (IUCN, 1993) ("*Guidelines for CITES*") at p 18, these two recommendations were intended to weed out cases in which export documents were obtained for shipments to no named consignee or cases where the shipments were made to a consignee in the country of transit. It was thought that both these situations presented themselves as potential sources of abuse, for they were most likely to be situations in which middlemen intended to keep goods in limbo in a transit country while they shopped for buyers, which was the concern which animated the Conference of the Parties.

70 Pointing to this, the prosecution submitted that if the export documents accompanying the shipment do not contain details of (a) the ultimate destination of the shipment; and (b) a named consignee in that destination

country (both of which are lacking in this case), then the shipment must be considered to have been imported and therefore subject to the regulation under s 4(1) of the ESA.[60] With respect, I could not accept this submission. In essence, this would amount to re-writing the terms of the statute. While I recognised the force of the policy arguments they advanced, I was constrained by the wording of the ESA, which clearly states that a scheduled species will be considered to be in transit if the sole purpose and control conditions are satisfied (see [39] above). This court cannot set out a test for "transit" which is *contra legem* the express words of the ESA.

71 However, I accepted – in agreement with Mr Koh – that while the recommendations made in the COP Resolutions are not legally binding and are certainly not dispositive, they present relevant considerations to take into account in determining whether the sole purpose condition has been satisfied.[61] On that basis, I accepted the submission that the absence of a named Hong Kong consignee and the absence of any indication that Hong Kong was the final destination for the shipment provided some evidence to show that the respondents might not have brought the Rosewood solely for the purpose of bringing it out again. This further fortified the conclusions I had reached earlier purely on a consideration of the evidence, without reference to the COP Resolutions.

The control condition

72 I now turn to the control condition. The dispute here, unlike that in the previous section, turns on a pure question of law: *viz*, what is the meaning of

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60 Appellant's submissions at paras 44 and 55.

61 *Amicus curiae*'s submissions at para 45.

"control" in s 2(2)(*c*) of the ESA? The specific question to be answered is whether goods which are deemed to be under "customs control" within the meaning of the Customs Act must *ipso facto* be deemed to be under the "control" of an "authorised officer" (this authorised officer being an officer of customs) within the meaning of s 2(2)(*c*) of the ESA. This was the position adopted by the District Judge, who reasoned as follows (see the GD at [59] and [60]):

> (a) The Rosewood was at all times within the Jurong FTZ.
>
> (b) Section 2(1) of the ESA defines an "authorised officer" includes "any officer of customs within the meaning of the Customs Act (Cap. 70)".
>
> (c) Section 3(2) of the Customs Act provides that goods which are within a free trade zone are "deemed to be under customs control".
>
> (d) In conclusion, the Rosewood was within the control of an authorised officer (this being an officer of customs) since it was in an FTZ and therefore "under customs control".

73 The prosecution did not dispute that the Rosewood was within "customs control" within the meaning of s 3(2) of the Customs Act. However, it was submitted that the District Judge had erred in conflating the notion of "customs control" within the meaning of the Customs Act with the more specific notion of "control" which is used in s 2(2)(*c*) of the ESA. They contended that each expression must be understood within the context and in the light of the purposes of the statutory scheme in which it is found. In the case of the Customs Act, the notion of "customs control" refers to a scheme of "passive control" over goods which are stored in a particular geographical

locality for the purpose of facilitating the collection of customs and excise duties. In the case of the ESA, however, the notion of "control" bears its "plain and ordinary meaning" and refers either to "actual physical control" or to a form of "*active* legal control" that allows the Director-General or any authorised officer to take such measures as are necessary to prevent the illicit trade in wildlife.[62]

74 In contrast, the respondents, defending the position taken by the District Judge, submitted that Parliament could not have intended the ESA and the Customs Act to operate in "splendid isolation". They contended that in defining an "authorised officer" to include an officer of customs, Parliament must also have intended that the expression "control", which appears in in both pieces of legislation be read harmoniously such that "the phrase 'kept under the control of the Director-General or an authorised person' may, in these circumstances, be interpreted as 'kept under the control of officers of customs'" [emphasis in original removed]. Elaborating, they point out that Ms Lye enlisted the assistance of Singapore Customs in seizing the Rosewood. This would not have been possible, they submitted, if Singapore Customs did not have control over the cargo.[63]

75 After considering the arguments presented, I agreed with the prosecution that the notion of "control" under the ESA could not be equated with the concept of "customs control" within the meaning of the Customs Act. Second, I also agreed that, as a matter of statutory interpretation, the notion of control contemplated by the ESA is that of an "active" form of control and that it cannot merely be the passive control such as that contemplated by the

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62 Appellant's submissions at paras 62–64; 72 (quotes from paras 64 and 72).

63 Respondents' submissions at paras 87–90; 92(b) (quote from para 88).

Customs Act. Finally, I accepted, on the evidence as presented, that there was sufficient basis to conclude that the control condition had not been satisfied. I propose to explain each of these conclusions in turn.

The textual argument

76 Section 3(2) of the Customs Act reads:

> *For the purposes of this Act*, goods shall be deemed to be under customs control while they are deposited or held in any free trade zone, Government warehouse, licensed warehouse, or bottling warehouse or post office or in any vessel, train, vehicle or aircraft or any place from which they may not be removed except with the permission of the proper officer of customs. [emphasis added]

77 The inclusion of the proviso "[f]or the purposes of this Act" provides the first, and to my mind the clearest, indication of the persuasiveness of the prosecution's arguments. It is plain that Parliament had intended that the scope of the deeming provision be limited only to matters which fall within the Customs Act and not to other Acts, such as the ESA. For that reason alone, s 3(2) of the Customs Act was not relevant to the question whether the Rosewood was under the control of an authorised officer within the meaning of s 2(2)(*c*) of the ESA.

78 I had no difficulty in rejecting the respondents' submission that if the Customs Act is relevant for defining who an "officer of customs" is, then it must likewise be relevant for determining the meaning of "control" in s 2(2)(*c*) of the ESA.[64] In my judgment, this submission was plainly misconceived. Section 2(1) of the ESA provides what is called a "referential definition" (see Oliver Jones, *Bennion on Statutory Interpretation* (LexisNexis, 6th Ed, 2013)

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64 Respondents' submissions at paras 87 and 88.

at p 526). In other words, it defines a term ("officer of customs") by giving it a meaning which is set out in another statute (in this case, s 3(1) of the Customs Act). It is plain that if Parliament had intended that the expression "control" was to bear the meaning ascribed to it under s 3(2) of the Customs Act then a similarly worded referential definition would have been included, but this was not done.

79 Second, I disagreed with the District Judge's interpretation of the composite expression "customs control". It is evident from [59] of her GD that the District Judge approached the issue by dividing the expression "customs control" into two parts. The first part of the phrase, the word "customs", she read to refer to the subject who was exercising control: *viz*, "an officer of Customs". The second, the word "control", she read to refer to the activity which was being performed: *ie*, the exercise of control over goods. And it is only by approaching the matter in this manner that she was able to conclude that goods which are "deemed to be under customs control" by virtue of s 3(2) of the Customs Act are under the control of a customs officer. With respect, this discloses a clear error of principle.

80 As a general matter, when a compound phrase such as "customs control" is used in a statute, it must be construed as a whole and it would be incorrect to assume that the meaning of the phrase is merely the sum of the meanings of the individual words which constitute the phrase (see *Mersey Docks and Harbour Board v Henderson Bros* (1888) 13 App Cas 595 at 599). As the prosecution pointed out, even in the context of the Customs Act, it is clear that Parliament had consistently used the expression "customs control" as a term of art (see, *eg*, ss 15(2), 27, and 59) in contradistinction to the expression "control" which appears at, *inter alia*, ss 56 and 57.[65]

81 In the Customs Act, the expression "customs control" is always used in relation to the *placement* of goods in *designated places* (*eg*, a free trade zone, warehouses, vehicles, *etc*: see s 3(2) of the Customs Act) from which they may not be removed without permission. Such permission is usually only granted upon the payment of the necessary duties (see, *eg*, s 27(1)(*a*) of the Customs Act). What is contemplated by this is control in a jurisdictional sense: the Customs Act sets up a system of zonal legal control over the movement of goods within particular geographical limits to facilitate the collection of customs and excise duties (see *Transmax* at [55] and [61]).

82 In contrast, where the expression "control" is used in the Customs Act, it is always used in relation to the custody of goods by *particular persons*. For example, s 56 of the Customs Act, which relates to the exemption of the Government from tortious liability in certain defined circumstances, reads:

> The Government shall not be liable to make good any loss sustained in respect of any goods by fire, theft, damage or other cause, while the goods are in any Government warehouse or customs office or customs station *or in* ***any other place*** *approved by the Director- General in writing or in the* ***lawful custody or control*** *of any officer of customs,* unless the loss has been caused by the wilful neglect or default of an officer of customs or of a person employed by the Government in connection with the customs. [emphasis added in italics and bold italics]

83 There is a clear juxtaposition between goods which are merely placed in certain places (Government warehouses, customs offices, *etc*) and goods which are in the "lawful custody or control" of a particular officer of customs. When the expression "control" is used, therefore, it goes beyond mere jurisdictional control (such as that contemplated in the notion of "customs control") to a form of active control, such that it is possible for the loss of the

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[65] Appellant's submissions at paras 73–75.

goods to have been caused by the "wilful neglect or default" of an officer of customs in whose control the goods have been reposed. The upshot of all this is that if the expressions "customs control" and "control" are not even intended to bear the same meaning in the same Act of Parliament then, *a fortiori*, the notion of "control" within the context of the ESA cannot be equated with the concept of "customs control" under the Customs Act.

84 Together, these two points alone would have been sufficient to undermine the District Judge's finding that the offloaded Rosewood was within the control of an authorised officer at all material times. I now turn to consider what the expression "control" means within the scheme of the ESA.

The purposive argument

85 The word "control" is a protean expression whose meaning must be derived from the context in which it is used. When used in relation to goods, it can mean anything ranging from physical possessory control to abstract legal control in the sense of a legal authority or entitlement to direct the manner in which the goods are to be dealt with. In deciding what meaning should be ascribed to the expression "control" in s 2(2)(*c*) of the ESA, I was mindful that s 9A of the Interpretation Act (Cap 1, 2002 Rev Ed) mandates that an interpretation favouring the underlying legislative purpose of the enactment be favoured over one which does not (see *Public Prosecutor v Low Kok Heng* [2007] 4 SLR(R) 183 at [41]). The case of *Transmax* is instructive in this regard.

86 There, the respondent discharged a large quantity of cigarettes into Singapore and applied for permission for them to be stored in their warehouse pending transhipment. Singapore Customs granted the requisite permission, subject to strict conditions set out in the cargo clearance permit, one of which

was that the container in which the cigarettes were stored was to be sealed with a customs seal and locked with a customs padlock both of which could only be removed under the supervision of an officer of customs. The seal and lock were affixed at the customs checkpoint and the container was driven away. Subsequently, the seal was removed and the lock was cut and the cigarettes were stolen. The question the Court of Appeal had to answer was whether the cigarettes, despite having been stolen, could still be considered to be under "customs control" within the meaning of s 16(1) of the Customs Act (Cap 70, 1995 Rev Ed) ("s 16(1)") such that the owner of the goods may be granted an abatement of the customs duties payable on account of them having been lost through theft.

87 The Court of Appeal answered the question in the affirmative. The possibility of abatement was provided for under s 16(1), it held, because while goods are under "customs control", Singapore Customs has the right to direct how the owners are to deal with the property. Thus, if goods were lost despite full compliance with the directions given, then it was only fair that the owners should be permitted an abatement of the customs duties payable (at [63]). On the facts, the court held that while the cigarettes were removed from the physical control of Singapore Customs after it was driven away from the customs checkpoint, it nevertheless still remained within the legal control of Singapore Customs because it still exercised jurisdiction over all dealings with the goods. This was sufficient to constitute "customs control" such that an abatement of duties may be granted (at [66]).

88 The expression "control" is not defined in the ESA. However, when s 2(2) of the ESA is examined, what stands out is that the requirement of "control" is only found within ss 2(2)(*b*) and 2(2)(*c*), both of which concern situations in which the scheduled species is removed from the conveyance on

which it was brought, but not s 2(2)(*a*), which concerns the situation when the scheduled species never leaves the conveyance. It is evident that the requirement of control is directed towards a particular mischief which occurs when the scheduled species enters the territory of the transit state. But what exactly is the mischief that is being targeted?

89 A tension which lies at the heart of CITES, to which the ESA was enacted to give effect (as stated in the long title to the ESA), is the need to balance the need for the sustainable and legitimate use of natural resources against the imperative of conservation. This much is clear from the preamble to CITES, which recognises both the "ever-growing value of wild fauna and flora" and the need to protect them "against over-exploitation through international trade." Thus, a cornerstone of CITES is the proviso that it "shall not apply to the transit or transhipment of specimens through or in the territory of a Party while the specimens remain in Customs control" (see Art VII(1) of CITES). As explained in David S Favre, *International Trade in Endangered Species: A Guide to CITES* (Martinus Nijhoff Publishers, 1989) ("*A Guide to CITES*") at p 168, the drafters of CITES were of the view that the administrative burden of issuing import and export certificates would be excessive if the requirements were to apply even to specimens which were only passing through the territory of a third state. This is the source of the import/transit distinction which exists in our law today.

90 However, the drafters of CITES were also conscious that this could be the subject of abuse which may undermine the core goal of CITES, which is the conservation of endangered species. This was underscored by Dr Lee Boon Yang, the then-Senior Minister of State for National Development at the Second Reading of the Endangered Species (Import and Export) Bill (Bill 4 of 1989) who emphasised that "the aim of CITES is the long-term protection of

wild fauna and flora" (see *Singapore Parliamentary Debates, Official Report* (26 January 1989) vol 52 at col 561) ("ESA Debates"). The potential for abuse was recognised from the outset, and it was repeatedly emphasised by the member states to CITES, which have passed various resolutions to draw attention to the potential for abuse (see [67]–[71] above). I highlight two.

91 First, some traders might seek to keep scheduled species in the territory of a transit country while searching for a buyer in another country. This was a problem which was identified by the Conference of the Parties in Conf 9.7 (see [68] above). Second, it was thought that it could give rise to the danger that would-be smugglers might seek to circumvent CITES protections by disposing of their scheduled species *en route*. The following example was given in *A Guide to CITES* at p 170:

> A second example of illegal actions by our nefarious trader would be the exchange of specimens while in transit. Presume the trader with his skins arrives in Vancouver, Canada. He declares that he is proceeding by train or bus across Canada to Quebec where he is going to fly to Italy. Once in route, he meets with another and exchanges illegal skins for the ones on the permit. This exchange could even happen at an airport waiting lounge once the trader is out of sight at [*sic*] the custom officials. Since the specimens are in transit, and no re-export certificate is required, the specimens might not be compared with the issued permits. Additionally, once out of sight of the customs official, the specimens might be sold and disappear entirely.

92 Therefore, it was specifically stated that the carve-out for specimens in transit would only apply so long as they remain "under customs control": Art VII(1) of CITES. (I hasten to add that the notion of "customs control" under CITES is distinct from the same expression used in our Customs Act.) The addition of this proviso reflects a basic premise of CITES, which is that international co-operation is essential to the conservation effort and to that end all countries would assert control, through their national customs authorities,

over all items entering and exiting their jurisdiction and therefore prevent smugglers from circumventing the system of permit controls set out in CITES by fraudulently claiming that their goods are only meant to be in transit when in fact they were meant to be imported (see *A Guide to CITES* at p 171).

93 Against this background, I agreed with the prosecution that the expression "control" must be interpreted in a way that is capable of addressing the problems identified above.[66] This would give full effect to the purpose and object of the ESA, which is that Singapore, "an important port of call and a major trading centre", would be able to play its "role in helping to control international trade in endangered species" (see *ESA Debates* at col 561).

94 I accepted the prosecution's submission that the "control" envisaged by s 2(2)(*c*) of the ESA must be a form of *active* control in the sense that the person in question both knows of the existence of the goods and is in a position to determine how these goods should be used or moved.[67] This control must be operative. It cannot merely be the sort of passive superintendence or jurisdictional control contemplated in the notion of "customs control" (see [81] above). For instance, it would not suffice if the goods were merely placed in a location where it is subject to the enforcement authority or power of the Director-General or the authorised officer if no actual steps were taken for some form of conscious oversight to be exercised over the scheduled species. This would also comport with the way that s 2(2) of the ESA is drafted, which seems to contemplate that scheduled species which leave the conveyance they arrived in should nevertheless remain at least as secured as they would be if they had remained on board (see [88] above).

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66 Appellant's submissions at para 84.

67 Appellant's submissions at para 61.

95 That said, I agreed with Mr Koh where he submitted that the notion of "control" need not necessarily imply a form of possessory control.[68] The requisite control may be present where, as in *Transmax*, the goods are sealed and placed under lock and key with specific directions given as to where the scheduled species are to be stored and the specific circumstances under which they are to be moved. If the scheduled species were not in the physical custody of the authorised officers, then it must usually be shown that they had taken precautions to secure the integrity of the shipment in order for the requisite control to be found. Ultimately, whether the requisite control exists is a question of fact the answer to which would depend on the circumstances of each case.

96 As a corollary of this, a scheduled species would cease to be within the control of an authorised officer if, as in *Transmax*, they were stolen by a third party and therefore taken out of the control of an authorised officer. In such a situation, the scheduled species would now be considered to have been "imported", possibly exposing the person who brought it in to liability under s 4(1) of the ESA. However, such a contingency would be adequately covered by s 6(1) of the ESA, which provides that a person charged with an offence under ss 4 or 5 of the ESA has a defence if he can show (a) that the commission of the offence was "due to the act or default of another person or to some other cause beyond his control" *and* (b) he "took all reasonable precautions and exercised all due diligence".

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68 *Amicus curiae*'s submissions at paras 56–58.

The evidence of control

97 I now turn to the facts. Given the definition of control I set out above, it was clear that there was evidence to support the prosecution's claim that the requisite form of control required under s 2(2)(*c*) of the ESA was not present. There was no evidence from Mr Tan that anyone – be it an officer of customs or an authorised officer appointed by the Director-General or otherwise – was aware of the fact that the Rosewood was being unloaded, let alone that they exercised any control over the process. Mr Leong Yew Chung of the AVA, who was one of the officers involved in the seizure of the Rosewood, deposed that they only discovered that a portion of the shipment had been offloaded after they boarded the vessel.[69]

98 While the respondents pointed to DSP Roy's testimony that goods within an FTZ are "under [the] control of the Customs Department"[70], it was clear to me that DSP Roy's evidence was merely that this meant that Singapore Customs had the power to take "enforcement action over the goods that are stored in the [FTZ]".[71] The mere fact that the scheduled species were placed in a locality over which the Director-General or an authorised officer exercised passive dominion or jurisdiction cannot, without more, constitute the necessary control. Likewise, the District Judge's point that the "fact of Customs control at the material time is quite clear as even the AVA has to seek the cooperation of [Singapore] Customs to detain the Cargo" (see the GD at [60]) was neither here nor there. At best, it showed that Singapore Customs had the power and the ability to exercise enforcement action in the FTZ area

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69 Mr Leong Yew Chung's conditioned statement at paras 3–5 (ROP, pp 315 and 316).

70 Respondents' submissions at para 79; ROP, p 40, line 17 to p 41, line 2.

71 ROP, p 38, lines 21–24.

of Jurong Port at the *time of seizure* (which was not disputed), but it did not go towards determining that control was exercised over the Rosewood. In fact, the evidence was that from the time they were offloaded until they were seized, the 6,164 logs of rosewood lay in an open yard at berth J16 of Jurong Port without any visible measures being taken to prevent them from being removed (as can be seen in the photographs marked P24–28).[72]

99 In summary, I was satisfied that there was evidence to show that both the sole purpose and control conditions had not been satisfied and therefore that the Rosewood had been imported into Singapore instead of having merely been "in transit". I therefore concluded that there was a case to answer on the terms of the s 4(1) charge that had been framed.

100 Having held that there was a case to answer on the s 4(1) charge, I did not find it necessary to address the prosecution's alternative submission, which was that the District Judge had erred in not exercising her power to amend the charge to one under s 5(1) of the ESA.

Conclusion

101 The central question on appeal was whether there was some evidence, not inherently incredible, to show that the Rosewood had been imported as opposed to being merely "in transit" in Singapore. In my judgment, there was. I therefore allowed the appeal, set aside the order of acquittal, and remitted the case to the District Judge for the defence to be called.

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[72] Mr Wee's conditioned statement at para 7 (ROP, p 326); ROP, pp 413–416.

See Kee Oon
Judicial Commissioner

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