IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2020] SGCA 11

Criminal Appeal No 31 of 2018

Between

Han Fang Guan

… *Appellant*

And

Public Prosecutor

… *Respondent*

In the matter of Criminal Case No 7 of 2018

Between

Public Prosecutor

And

(1) Khor Chong Seng
(2) Han Fang Guan

JUDGMENT

[Criminal law] — [Statutory offences] — [Misuse of Drugs Act]
[Criminal law] — [Attempt] — [Impossible attempt]

Han Fang Guan
v
Public Prosecutor

[2020] SGCA 11

Court of Appeal — Criminal Appeal No 31 of 2018
Sundaresh Menon CJ, Andrew Phang Boon Leong JA and Steven Chong JA
10 July, 15 August 2019

28 February 2020 Judgment reserved.

Sundaresh Menon CJ (delivering the judgment of the court):

Introduction

1 The appellant, Han Fang Guan ("Han"), claimed trial to a capital charge of attempting to possess one bundle containing not less than 18.62g of diamorphine for the purpose of trafficking, an offence under s 5(1)(*a*) read with s 5(2) and s 12 of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) ("MDA").

2 Han was tried jointly with one Khor Chong Seng ("Khor"), who had been apprehended by officers from the Central Narcotics Bureau ("CNB") shortly after entering Singapore through Woodlands Checkpoint, and who was found to be in possession of seven bundles of controlled drugs. Khor agreed to assist in a follow-up operation against the intended recipients of the drugs. He was instructed by the CNB officers to continue communicating with the drug supplier in Malaysia from whom he received instructions, as well as with the

intended recipients of the drugs in Singapore. The phone conversations between Khor, the drug supplier in Malaysia and the intended drug recipients were recorded by the CNB officers. It transpired that Khor was instructed by the drug supplier to deliver a single bundle of drugs to Han. The drug supplier put Han and Khor in touch with each other, and they in turn arranged to meet at a location in Toa Payoh. CNB officers were dispatched to the arranged location, where they arrested Han.

3 The Prosecution's case against Han was that the drug supplier had instructed Khor to deliver to Han any one of three bundles of similar size, colour and weight, containing similar amounts of diamorphine. Seeking to be fair to Han, the Prosecution proceeded against him in respect of the bundle that contained the smallest quantity of diamorphine.

4 Following a six-day trial, the High Court judge ("the Judge") found that the charge against Han was made out and convicted him. Han was not issued a certificate of substantive assistance by the Public Prosecutor, and the Judge found, in any event, that he was not a mere courier. The Judge therefore imposed the mandatory death sentence on him: see *Public Prosecutor v Khor Chong Seng and another* [2018] SGHC 219 ("the GD").

5 This is Han's appeal against his conviction and sentence. For reasons which we will explain in this judgment, we are satisfied that Han's appeal should be allowed. In essence, we think that a reasonable doubt has arisen in relation to the charge that was brought against Han. However, we also think that based on Han's own evidence, consideration should be given to an alternative charge being pressed against him for attempting to commit a different offence. As it turned out, it was not possible for the primary offence, which Han says he did intend to commit, to have been committed. This judgment presents us with

the opportunity to reconsider the law on what we will term "impossible attempts", that is to say, attempts to commit offences that could not possibly have been consummated in the circumstances. Before we do so, we recount the key facts.

Background facts

6 Sometime before 2 March 2016, Han contacted his drug supplier in Malaysia, known to him as "Ah Tiong", to place an order for drugs.

7 On the night of 1 March 2016, Khor collected two motorcycle helmets containing several bundles of drugs from someone in Malaysia, known to him as "Lao Ban". Before us, it was not seriously disputed that "Ah Tiong" and "Lao Ban" are one and the same person, and in this judgment, we refer to him as "Lao Ban".

8 Khor's task on the night of 1 March 2016, and extending into the early hours of the next morning, was to deliver the drugs to various intended recipients in Singapore. This was to be Khor's fourth drug delivery. The three prior deliveries had all been executed in a similar manner:

(a) Khor would collect the drugs from Lao Ban in Malaysia. The drugs would have been packed in motorcycle helmets by Lao Ban's associates.

(b) Khor would then cross from Malaysia into Singapore on his motorcycle. After clearing the Singapore customs, he would call Lao Ban for instructions. Lao Ban would send him text messages containing phone numbers, code names and the amount of money to collect from

each recipient, while also identifying the bundles that were to be handed to each recipient.

(c) Khor would then liaise with each recipient and make arrangements for each delivery. After Khor completed the deliveries, he would return to Malaysia and hand the money that he had collected to Lao Ban.

9 On 2 March 2016, at about 12.10am, Khor entered Singapore through Woodlands Checkpoint. He was stopped and searched by CNB officers. The search revealed that the two motorcycle helmets in his possession contained seven bundles of controlled drugs as follows:

(a) A large bundle wrapped in black tape, with a yellow sticker bearing the word "KEN". The bundle was marked "C1B". It weighed 458.9g, and was subsequently analysed and found to contain not less than 18.80g of diamorphine.

(b) A large bundle wrapped in black tape, with a yellow sticker bearing the word "KEN". The bundle was marked "C1C". It weighed 457.3g, and was subsequently analysed and found to contain not less than 19.63g of diamorphine.

(c) A small bundle wrapped in black tape, with a yellow sticker bearing the words "KEN 水 500". The bundle was marked "C1D". It weighed 49.85g, and was subsequently analysed and found to contain not less than 34.04g of methamphetamine.

(d) A bundle wrapped in transparent tape, with a yellow sticker bearing the word "KEN". The bundle was marked "C1E". It contained 400 nimetazepam tablets.

(e) A large bundle wrapped in black tape, with a yellow sticker bearing the word "KEN". The bundle was marked "D1B". It weighed 457.4g, and was subsequently analysed and found to contain not less than 18.62g of diamorphine. The drugs in D1B formed the subject matter of the charge against Han.

(f) A bundle wrapped in transparent tape, with a yellow sticker bearing the word "KEN". The bundle was marked "D1C". It contained 400 nimetazepam tablets.

(g) A bundle wrapped in transparent tape, with a yellow sticker bearing the word "KEN". The bundle was marked "D1D". It contained 200 nimetazepam tablets.

10 For reasons that will become clear later, it is useful to note the following:

(a) Four of the seven bundles were wrapped in black tape, while three were wrapped in transparent tape.

(b) Each of the seven bundles had a yellow sticker with the word "KEN", and in one case, there were some other markings on the sticker as well.

(c) Three of the bundles wrapped in black tape were large and contained diamorphine, while the fourth was small and contained methamphetamine.

(d) The three bundles wrapped with transparent tape each contained nimetazepam tablets.

11 Khor informed the CNB officers that he had been tasked to deliver the drugs to recipients in Singapore and was awaiting instructions from Lao Ban. As mentioned at [2] above, he agreed to assist in a follow-up operation against the intended recipients of the drugs. The follow-up operation was conducted in the following manner:

(a) The CNB officers instructed Khor to communicate with Lao Ban and the intended recipients of the drugs in order to make arrangements to meet the intended recipients.

(b) All the phone conversations between Khor and Lao Ban, as well as between Khor and the intended recipients of the drugs were recorded by the CNB officers.

(c) Based on the information obtained by and through Khor, CNB officers were despatched to various parts of Singapore to effect arrests.

12 At about 1.55am on 2 March 2016, Khor called Lao Ban to explain his delay and requested instructions on the drug deliveries. Lao Ban accepted Khor's explanation and told him that he would send him "the phone number".

13 At 2.02am and 2.04am, Khor received two text messages from Lao Ban. Each text message contained a code name, a phone number and an amount of money. For instance, the message sent at 2.04am read "T-98676050=$3600". Shortly after, Lao Ban called Khor and gave instructions for the delivery of the drugs to three individuals, whom Lao Ban referred to as "99", "T" and "Ken". Lao Ban told Khor to deliver "[t]wo big bundles, yellow one" to 99 and "one

yellow bundle" to T, while the rest of the bundles would be "[a]ll for Ah Ken". Lao Ban also told Khor to collect $3,600 from T. As we have already noted, all the bundles had yellow stickers on them, though none of the bundles were in fact yellow.

14 The call records show that Han received a phone call from Lao Ban at 2.43am, and again at 2.45am. In between, at 2.44am, Khor received a phone call from Lao Ban, who told Khor that he would ask T to call Khor. At 2.45am, Han received a text message from Lao Ban stating "T-86531409=$3600". At 2.47am, Han called Khor and introduced himself as T.

15 During this period, Khor also engaged in several recorded conversations with 99 and Ken. Using the information obtained in these conversations, CNB officers arrested 99 and Ken at 3.20am and 3.30am respectively.

16 Subsequently, over four phone calls that took place between 4.02am and 4.40am, Han and Khor made arrangements to meet at Block 5, Lorong 7, Toa Payoh ("Block 5"). While Han was making those arrangements, CNB officers were despatched to the arranged location to effect his arrest. A CNB officer assumed the place of Khor and travelled to Block 5 in a taxi. Upon reaching Block 5, that officer remained in the taxi and did not alight or attempt to approach Han because the CNB officers had learnt that Han knew what Khor looked like. Instead, after the officer confirmed Han's identity from within the taxi, CNB officers trailing the taxi in another vehicle alighted to effect the arrest. As the CNB officers approached Han, he started walking away quickly and was eventually arrested at Block 4, Lorong 7, Toa Payoh. He was searched, and $3,600 in cash was found in the front left pocket of his shorts. The cash was bundled with a rubber band and was kept separate from his wallet, which contained some other cash. The CNB officers brought Han to his apartment and

searched it. Various other amounts of drugs were recovered there, including a bundle, which was subsequently analysed and found to contain not less than 6.77g of diamorphine, and a small packet, which was likewise analysed and found to contain not less than 0.19g of diamorphine. There are, however, no pending charges in relation to the drugs found in Han's apartment.

17 The circumstances of Han's arrest were unusual in that there was no possibility of Han consummating the offence of possessing controlled drugs for the purpose of trafficking because, at the material time, the drugs were already in the CNB's custody and there was never any intention to deliver the drugs to Han; and also because, according to Han, he had ordered from Lao Ban a different selection of drugs which were not in the consignment that Khor had transported into Singapore. The significance of these circumstances will be explored in greater detail below.

18 In the course of the investigations, the CNB officers recorded six statements from Han, namely:

(a) two contemporaneous statements recorded pursuant to s 22 of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) ("CPC") at 5.15am and 10.55am on 2 March 2016, the day of his arrest;

(b) a cautioned statement recorded pursuant to s 23 of the CPC at 10.45pm on 2 March 2016;

(c) two long statements recorded pursuant to s 22 of the CPC on 8 and 9 March 2016; and

(d) one long statement recorded pursuant to s 22 of the CPC on 31 August 2016.

19 We will only briefly summarise the contents of these statements and leave detailed discussion, where needed, to the relevant sections below. In his first contemporaneous statement, Han claimed that the sum of $3,600 that was found on him at the time of his arrest was "meant for gambling". In his cautioned statement, in response to a charge that he had engaged in a conspiracy with Khor and other unknown persons to import diamorphine into Singapore, Han stated that he did not know Khor and "did not tell him to bring this over to Singapore". In his long statement recorded on 8 March 2016, Han stated that he had ordered 100g of ketamine and 25g of "Ice" (a street name for methamphetamine), and not diamorphine, from Lao Ban. He reiterated this defence in his long statements recorded on 9 March and 31 August 2016.

20 Han faced the following charge at the trial:

> That you, … **HAN FANG GUAN**,
>
> on 2 March 2016, at or about 4.45am, in the vicinity of Block 4, Lorong 7, Toa Payoh, Singapore, did attempt to traffic in a Class 'A' controlled drug listed in the First Schedule to the Misuse of Drugs Act (Cap 185, 2008 Rev Ed), *to wit*, by attempting to possess for the purpose of trafficking one packet containing not less than 457.4 grams of granular/powdery substance which was analysed and found to contain not less than **18.62 grams of diamorphine**, without authorisation under the said Act or the Regulations made thereunder, and you have thereby committed an offence under Section 5(1)(*a*) read with Section 5(2) and Section 12 of the Misuse of Drugs Act and punishable under section 33(1) of the said Act, and alternatively, upon your conviction, you may be liable to be punished under section 33B of the said Act.
>
> [emphasis in bold in original]

21 As we noted earlier (see [9(e)] above), the diamorphine listed in the charge corresponded with the drugs found in D1B, which was the bundle that contained the smallest amount of diamorphine among the three bundles of diamorphine.

22 At the trial, the crux of Han's defence was that he had ordered only ketamine and Ice, and not diamorphine, from Lao Ban. At certain points during the trial, Han also suggested that he had not made any prior arrangements to meet Khor, and had intended to use the sum of money found on him at the time of his arrest primarily to gamble; however, he also said that if someone had arrived with the drugs that he had ordered, he would have used the money intended for gambling to pay for the drugs. Han admitted at the trial that he sold Ice, erimin and ketamine to fund his daily expenses.

The decision below

23 The Judge held that in order to make out the charge against Han, the Prosecution had to prove beyond a reasonable doubt that Han: (a) intended to possess the drugs in D1B, which contained not less than 18.62g of diamorphine; (b) intended to traffic in those drugs; and (c) had undertaken steps towards the commission of the offence, such that it might be said that he had "embarked on the crime proper" (see the GD at [67]–[68]). The Judge found that all three elements were established beyond a reasonable doubt.

24 On the intention to possess the diamorphine contained in D1B, the Judge found that the weight of the evidence cohered with the Prosecution's case that Han had ordered diamorphine from Lao Ban for the price of $3,600, and had specifically arranged to meet Khor on the morning of 2 March 2016 to collect the drugs ordered:

> (a) It was not disputed that in the phone conversations between Khor and Lao Ban, T was a reference to Han. Although Lao Ban had instructed Khor to deliver one *yellow* bundle to T, the Judge found that given the context of the recorded phone conversations between Khor and Lao Ban, it was clear that Lao Ban had in fact been referring to one of

the three *black* bundles of similar shape and size (namely, C1B, C1C and D1B). This was because Lao Ban had referred to the three yellow bundles interchangeably. Lao Ban had also referred to the yellow bundles as "big" bundles. The only three bundles that: (i) were of similar shape and size; (ii) contained the same controlled drug; and (iii) were bigger than the other four bundles were C1B, C1C and D1B. The Judge also noted that Khor had subjectively understood Lao Ban's instructions to mean that he was supposed to deliver one of these three bundles to T (see the GD at [74]–[77]). The fact that all seven of the bundles were labelled "Ken" was immaterial as there was evidence from Khor that in previous deliveries, the labels on the bundles had not been determinative as to who the intended recipients would be (see the GD at [78]). The Judge rejected Han's defence that there had been a mix-up in his drug order. This was thought to be extremely unlikely given the high stakes involved in transporting such large quantities of drugs (see the GD at [79]). Further, after Khor arrived in Singapore, Lao Ban had contacted Han several times to confirm that the delivery of the drugs which Han had ordered would take place. None of the seven bundles of drugs found in Khor's possession contained ketamine, which Han claimed he had ordered, and the only bundle containing Ice contained 34.04g of the drug, and not 25g as purportedly ordered by Han. In short, none of the drugs in the seven bundles matched Han's purported order of 100g of ketamine and 25g of Ice (see the GD at [80]).

(b) The Judge found that the sum of $3,600 found on Han when he was arrested was meant to be the exact payment for the diamorphine contained in D1B. One of the CNB officers had testified that the market price of one pound of heroin was approximately $3,600. Han's explanations of the purpose of the $3,600 were inconsistent, in that the

explanations that he gave: (i) in his contemporaneous statement recorded shortly after his arrest on 2 March 2016; (ii) in his long statement recorded on 8 March 2016; (iii) in his long statement recorded on 9 March 2016; and (iv) at the trial all differed from each other (see the GD at [82]–[84]).

(c) The Judge noted that Han had failed to mention his order of ketamine and Ice in his cautioned statement recorded on 2 March 2016, when he was invited to state his defence in respect of a charge that he had engaged in a conspiracy with Khor and other unknown persons to import diamorphine into Singapore. This undermined Han's defence that he had ordered only ketamine and Ice, and not diamorphine, from Lao Ban (see the GD at [85]–[86]).

(d) The Judge highlighted that contrary to the impression that Han sought to give in his statements and at the trial (namely, that he had not made any prior arrangements with Khor to meet him, and that Khor had in fact interrupted his plan, which had been to meet some others to gamble), the objective call records and transcripts made clear that Han had not only been expecting a courier to deliver his order of drugs on 2 March 2016, but had also taken active steps to arrange to meet the courier (see the GD at [87]–[91]).

25 On the intention to traffic in the diamorphine contained in D1B, the Judge noted that even if the presumption of trafficking in s 17(*c*) of the MDA were not relied upon, the quantity of drugs in an accused person's possession was still relevant in assessing whether the Prosecution had discharged its burden of proving that the drugs were for the purpose of trafficking. The Judge noted that counsel for Han had confirmed that Han was not contending that he had

ordered the diamorphine for his own consumption, and indicated that even if that had been Han's contention, she would have dismissed it. Han had already admitted to having in his possession 6.96g of diamorphine (that being the total quantity of diamorphine found in his apartment after his arrest: see [16] above). This was a substantial quantity, more than three times the 2g of diamorphine that would trigger the presumption of trafficking in s 17(*c*), and it would certainly have been sufficient to cover Han's personal consumption for a considerable period of time in the light of the evidence that his rate of consumption was low (see the GD at [94]–[95]).

26 On whether Han had "embarked on the crime proper", the Judge found that Han: (a) had been in communication with Lao Ban; (b) had contacted Khor and arranged to meet him at the foot of Block 5; (c) had waited for Khor's arrival at Block 5; and (d) had brought along $3,600 to pay for the drugs. Those steps were sufficient to show that Han had "embarked on the crime proper" (see the GD at [97]–[98]).

27 As for Han's sentence, the Judge found that Han had not proved that he was a mere courier because he had not adduced any evidence to that effect. The Public Prosecutor had also not issued Han a certificate of substantive assistance. Hence, the alternative sentencing regime was not available to Han, and the Judge imposed the mandatory death sentence on him (see the GD at [102]).

The parties' respective cases on appeal

28 Han's appeal rests on three broad grounds:

(a) The first ground is that the Judge did not accord sufficient weight to the defence that there could have been a mix-up in the drug orders. According to Han, he did not order diamorphine from Lao Ban, but

instead ordered ketamine and Ice. Han highlights that Lao Ban's instructions to Khor were that he (Han) was to be given "one yellow bundle", but the bundle in respect of which he was charged was a black bundle.

(b) The second ground involves an attack on the Judge's finding that the *actus reus* of the offence charged was made out. Han argues that the Judge should have applied a stricter test in determining whether the Prosecution had proved the *actus reus* of an attempt to commit an offence under the MDA. Han also argues that, in any event, even under the more lenient test applied by the Judge, the acts undertaken by him were insufficient to satisfy the threshold to establish the *actus reus* of the offence charged.

(c) The third ground is that the Judge erred in finding that Han intended to traffic in the diamorphine contained in D1B because there was insufficient evidence to prove this beyond a reasonable doubt.

29 The Prosecution's case is that:

(a) The Judge was right in finding that Han intended to possess the diamorphine contained in D1B. The evidence indisputably showed that D1B, which was earmarked for delivery to Han, contained diamorphine, and Han was to hand $3,600 to Khor. On the evidence, there were only two possibilities: either Han had ordered diamorphine and would have received his order but for the intervention of the CNB; or Han had ordered ketamine and Ice, and there had been a mix-up in his drug order independent of the CNB's intervention. Han's contention that he had ordered ketamine and Ice but not diamorphine was rightly rejected by the Judge because it was not credible and was riddled with

inconsistencies. The possibility of a mix-up was also unlikely. Hence, the only rational inference to be drawn from the facts was that Han had ordered the diamorphine contained in D1B. The evidence also established that Han had contacted Khor to arrange for a meeting, had brought cash along with him when he went to meet Khor and had waited for Khor at the agreed meeting location.

(b) The Judge, in considering whether Han had carried out the *actus reus* of the offence of attempting to possess diamorphine, did not apply the wrong test. In any event, the *actus reus* of the offence would be satisfied whichever test was applied.

(c) The Judge was right in finding that Han intended to traffic in the 18.62g of diamorphine contained in D1B. That quantity of diamorphine was more than nine times the amount that triggered the presumption of trafficking under s 17(*c*) of the MDA. Han's counsel had expressly confirmed at the trial that Han would not be relying on the personal consumption defence. The absence of drug paraphernalia in Han's possession was not probative of a lack of intention to traffic, especially since it was clear that Han did not require any drug trafficking paraphernalia to sell drugs.

The issues to be determined

30 The parties raised three issues before us, corresponding to the three broad grounds raised by Han:

(a) first, whether the Judge erred in finding that Han had ordered diamorphine from Lao Ban and that there had been no mix-up in his drug order;

(b) second, whether the Judge erred in finding that the *actus reus* of the offence charged was made out; and

(c) third, whether the Judge erred in finding that Han intended to traffic in the diamorphine contained in D1B.

31 As the parties' arguments developed over the course of the appeal, it became apparent that the unusual circumstances at the time of Han's arrest (see [17] above) necessitated consideration of a further question, which we posed to the parties in the following terms:

> … [W]hether the present facts could, as a matter of law, come within s 12 of the [MDA], having regard to the fact that at the time [Han] was arrested, the police/CNB knew that it would not have been possible for him to consummate the commission of the offence, given that neither the drugs nor the courier were present at the scene of the putative crime. In responding to this issue the parties are to have regard to the observations of the Court of Appeal in *Public Prosecutor v Mas Swan bin Adnan and another appeal* [2012] 3 SLR 527 at [38] to [41].

32 Having considered the parties' written and oral submissions on the issues raised, including their written submissions on the further question that we posed, we frame the issues that we must consider in order to determine this appeal as follows:

(a) Was there a reasonable doubt that Han had ordered a bundle of diamorphine from Lao Ban?

(b) If so, then under what circumstances can criminal liability attach to impossible attempts?

We did not think it was necessary for us to consider whether the acts done by Han were sufficient to warrant his being charged with attempting to possess the diamorphine contained in D1B for the purpose of trafficking because regardless

of the test that is applied, we considered that Han's acts were more than sufficient for the reasons identified by the Judge and summarised at [26] above.

Was there a reasonable doubt that Han had ordered a bundle of diamorphine from Lao Ban?

33 The parties agree that one necessary element of the offence of attempt under s 12 of the MDA is that the accused person must intend to commit the primary offence (see *Public Prosecutor v Mas Swan bin Adnan and another appeal* [2012] 3 SLR 527 ("*Mas Swan*") at [33] and [37]). In the context of the present case, in order to sustain Han's conviction on the charge, the Prosecution would have to prove *beyond a reasonable doubt* that:

(a) Han intended to possess the drugs in D1B, which contained not less than 18.62g of diamorphine, and knew that D1B contained diamorphine; and

(b) Han intended to traffic in those drugs.

34 The Judge accepted the Prosecution's case that Han had ordered diamorphine from Lao Ban, for which he was to pay $3,600, and that Han had specifically arranged to meet Khor on the morning of 2 March 2016 to receive the ordered drugs from Khor. On this basis, the Judge ruled that Han intended to possess the diamorphine contained in D1B. Han attacks this finding on appeal, and reiterates his defence at the trial that he had not ordered diamorphine and that there had been a mix-up in his drug order.

35 For the reasons that follow, we accept that there is a reasonable doubt as to whether Han had ordered diamorphine from Lao Ban, and we therefore allow this appeal and acquit Han of the charge against him as it currently stands on the basis that the Prosecution has failed to prove beyond a reasonable doubt that

he intended to possess the diamorphine contained in D1B.

36 In *Public Prosecutor v GCK and another matter* [2020] SGCA 2 at [149(b)]–[149(h)], we very recently explained the concept of a reasonable doubt as follows:

> (b) The principle of proof beyond a reasonable doubt entails that upon considering all the evidence presented by the parties, the evidence suffices to establish beyond a reasonable doubt each and every element of the charge against the accused person.
>
> (c) The Prosecution's legal burden to prove the charge against the accused person beyond a reasonable doubt does not shift throughout the proceedings. The term "beyond a reasonable doubt" requires a *qualitative* appreciation of whether a reasonable doubt has arisen, in the sense of a doubt that is supported by reasons that are logically connected to the evidence. A reasonable doubt is, in other words, a *reasoned* doubt, and is a necessary condition for an acquittal.
>
> (d) Depending on the fact in issue and the nature of the defence, the evidential burden may lie on the Prosecution or on the Defence. Regardless of the incidence of the evidential burden, where a particular fact or defence raised by the accused person has properly come into issue, the Prosecution must rebut that fact or defence so as [to] meet its overall legal burden of proving the charge against the accused person beyond a reasonable doubt.
>
> (e) The principle of proof beyond a reasonable doubt can be conceptualised in two ways. First, a reasonable doubt may arise from *within the case mounted by the Prosecution*. As part of its own case, the Prosecution must adduce sufficient evidence to establish the accused person's guilt beyond a reasonable doubt on at least a *prima facie* basis. Failure to do so may lead to a finding that the Prosecution has failed to mount a case to answer, or to an acquittal. In those situations, the court must nevertheless particularise the specific weakness in the Prosecution's own evidence that irrevocably lowers it below the threshold of proof beyond a reasonable doubt.
>
> (f) Once the court has identified the flaw internal to the Prosecution's case, weaknesses in the Defence's case cannot ordinarily shore up what is lacking in the Prosecution's case to begin with, because the Prosecution has simply not been able to discharge its overall legal burden.

> (g) The second way in which a reasonable doubt may arise is on an assessment of the *totality of the evidence*. The inquiry here is intimately connected with the "unusually convincing" standard, which arises in the context of mutually exclusive and competing testimonies. The "unusually convincing" standard sets the threshold for a witness's testimony to be preferred over the evidence put forth by the accused person where it is a case of one person's word against another's.
>
> (h) The assessment of the Prosecution's evidence under the "unusually convincing" standard must be made with regard to the *totality of the evidence*, which logically includes the case mounted by the Defence. The evaluative task is not just *internal* to the Prosecution's case, but also *comparative* in nature. Where the evidential burden lies on the Defence and this has not been discharged, the court may find that the Prosecution has discharged its burden of proving its case against the accused person beyond a reasonable doubt. At this stage, regard may be had to weaknesses in the Defence's case.
>
> [emphasis in original]

37 In the present case, we find that there is a significant inconsistency within the Prosecution's case, as is evident from the record of the critical phone conversation shortly after 2.00am on 2 March 2016 in which Lao Ban instructed Khor as to which bundle he was to deliver to Han (see [13] above). The relevant portion of the translated record reads as follows:

> [Lao Ban]: You received two numbers already, right?
>
> …
>
> [Khor]: Ah, received, received.
>
> [Lao Ban]: Okay, first one, that belongs to number 99, 99 one ah, you collect 6800, give two bundles.
>
> [Khor]: Ah, Ah.
>
> [Lao Ban]: Understand?
>
> [Khor]: Ah. Then?
>
> [Lao Ban]: [Y]ou collect 6800, give him two bundles.
>
> [Khor]: Ah.
>
> [Lao Ban]: Okay?

[Khor]: 6800.

…

[Lao Ban]: 6800 give him two bundles lah.

[Khor]: Correct, correct, I know.

[Lao Ban]: ***Two bundles, Two big bundles, yellow one.***

…

[Lao Ban]: Understand? Okay, then second number is T mah, right?

…

[Khor]: T ah, ah.

[Lao Ban]: ***Ah, T that one orh, You give him one yellow bundle.***

[Khor]: Ah, Ah.

[Lao Ban]: Understand?

[Khor]: Okay, okay.

[Lao Ban]: ***A total of three bundles mah, yellow one.***

…

[Khor]: Correct.

[Lao Ban]: ***Ah, correct orh? Okay. Two is for the first one, for 99.***

[Khor]: Ah.

[Lao Ban]: Collect 6800.

[Khor]: 6800, ah.

[Lao Ban]: ***The second one is for T, You collect 3600 from T.***

[Khor]: 3600

[Lao Ban]: T, T, T.

[Khor]: 3600 ah?

[Lao Ban]: Ah. Ah.

[Khor]: Okay, okay, then?

[Lao Ban]: Then I hand you the third one after you finished these two.

[Khor]: Okay, okay.

[Lao Ban]: The third is for Ah Ken, All for Ah Ken, same one (inaudible)

[emphasis added in bold italics]

38 It is evident that in the aforesaid phone conversation, Lao Ban repeatedly referred to the bundle that he intended Han to receive as a "*yellow* bundle" [emphasis added]. Yet, D1B, the bundle eventually attributed to Han in the charge, was a *black* bundle.

39 There are three possible explanations for this inconsistency:

(a) Lao Ban and/or his associates mistakenly failed to hand one or more yellow bundles to Khor. Thus, in asking Khor to deliver "one yellow bundle" to Han, Lao Ban was actually referring to a bundle that had never been in Khor's possession ("Scenario One").

(b) Lao Ban and/or his associates placed the correct bundles with Khor, but Lao Ban made a mistake in describing the bundle earmarked for Han as a yellow bundle, when he meant to refer to one of the three big black bundles instead ("Scenario Two").

(c) Lao Ban and/or his associates placed the correct bundles with Khor, but Lao Ban made a mistake in describing the bundle earmarked for Han as a yellow bundle, when he meant to refer to another bundle in Khor's possession other than the three big black bundles ("Scenario Three").

40 Scenario Two, in substance, reflects the Prosecution's case that Han had ordered diamorphine from Lao Ban, whereas the first and third scenarios correspond with Han's defence that he had not ordered diamorphine. Scenario

Three, however, can, in our judgment, be readily dismissed because it is undisputed that none of the bundles that were in Khor's possession contained drugs that corresponded to Han's alleged order of 100g of ketamine and 25g of Ice. Therefore, the real issue is whether it is Scenario One or Scenario Two that represented the true state of affairs, and this turns on whether the Prosecution has succeeded in dispelling any reasonable doubt as to Scenario One being a possibility in the circumstances. In our judgment, the Prosecution has not discharged its burden of proof in this regard for essentially two reasons.

41 The first reason arises out of the difficulties that are inherent in the Prosecution's evidence concerning the critical phone conversation between Khor and Lao Ban shortly after 2.00am on 2 March 2016.

42 This phone conversation took place in the course of the CNB's follow-up operation against the intended recipients of the drugs found in Khor's possession. The follow-up operation was conducted in the following manner:

(a) The CNB team in charge of the operation was led by ASP Lim Peng Chye ("ASP Lim"). The other officers included SSI Pang Hee Lim ("SSI Pang"), Sgt Muhammad Firdaus Bin Salleh ("Sgt Firdaus") and Sgt Zakaria Bin Zainal ("Sgt Zakaria").

(b) At the time of the aforesaid phone conversation, Khor was in a car belonging to the CNB, together with SSI Pang and Sgt Firdaus. SSI Pang was seated in the driver's seat, Sgt Firdaus was seated behind SSI Pang, and Khor was seated next to Sgt Firdaus, behind the front passenger seat. ASP Lim and Sgt Zakaria were outside the car.

(c) SSI Pang, who is fluent in Mandarin and Hokkien, directed Khor in Mandarin, listened in on the aforesaid phone conversation as well as

> the other phone conversations outlined at [14]–[16] above, and stepped out of the car in between the various phone conversations to update ASP Lim on these conversations. SSI Pang also translated these conversations for Sgt Firdaus.

43 At the trial, there was some initial confusion over whether the drug exhibits were within sight of SSI Pang and Khor at the time of the various phone conversations. Initially, SSI Pang testified that the drug exhibits were in the car with Khor while the phone conversations were going on, and that he had sight of the drug exhibits. Sgt Firdaus's subsequent testimony, however, contradicted SSI Pang's testimony, in that Sgt Firdaus maintained that the drug exhibits were not in the car during the follow-up operation. Upon re-examination, Sgt Firdaus changed his earlier account and said that he could not remember whether or not the drug exhibits were in the car. Eventually, Sgt Zakaria and another CNB officer, Senior Staff Sgt Samir Bin Haroon ("SSgt Samir"), testified that SSgt Samir had handed the drug exhibits to Sgt Zakaria, who had in turn handed them to SSI Pang during the follow-up operation. SSI Pang was then recalled to the stand, and he confirmed that the chain of custody of the drug exhibits was as narrated by Sgt Zakaria and SSgt Samir.

44 If the testimony of SSI Pang, Sgt Zakaria and SSgt Samir were accepted, then the drug exhibits would have been in the car at the time the various phone conversations took place, and it would have been obvious to SSI Pang that none of the bundles of drugs corresponded to Lao Ban's reference to yellow bundles. Yet, no instruction was given to Khor to clarify with Lao Ban what he meant when he referred to yellow bundles. Instead, without clarifying this, SSI Pang informed ASP Lim that Khor was required to deliver two of the three big *black* bundles to 99 and the remaining big *black* bundle to T.

45 At the trial, SSI Pang confirmed that he did not at any point instruct Khor to clarify with either Lao Ban or Han which bundle Han was supposed to receive:

> Q: Did you at any point ask Khor Chong Seng to clarify what yellow bundle or what is it that he was supposed to give to whom?
>
> A: No, Ma'am.
>
> Q: So when the calls were made to Han or when Han called, did you at any point in time ask Khor Chong Seng to say: "Han, you're supposed to receive one big bundle of heroin or what is it you are supposed to receive because I've got seven bundles here?"
>
> A: No. Ma'am, I think, *because of the operation-wise we cannot ask too much, we can ask him but ask too much, the fellow will suspect.*
>
> [emphasis added]

46 While SSI Pang's explanation was directed more at the question of whether he had instructed Khor to clarify the matter with Han, his explanation reveals an insight into his general approach towards the discrepancy between the colour of the bundles mentioned by Lao Ban in his instructions to Khor and the colour of the bundles that were actually with Khor. In short, SSI Pang seemed unwilling to try to resolve any doubts arising from this discrepancy lest it alert those with whom Khor was communicating that something was amiss. From an operational perspective, we can well understand SSI Pang's approach, but it is quite a different matter when it comes to the evidential question of whether, in all the circumstances, it can be said that the Prosecution has discharged its burden of dispelling any reasonable doubt that Scenario One might have represented the true state of affairs.

47 In fact, the conclusion that Lao Ban was referring to the big *black* bundles, even though he had expressly mentioned *yellow* bundles in his

instructions to Khor, was premised entirely on SSI Pang's assumption at the material time as to what Lao Ban must have meant. SSI Pang confirmed as much on the stand when he admitted that it was his "presumption" that Lao Ban was referring to the big black bundles when he mentioned the yellow bundles. It was this presumption that he conveyed to ASP Lim. When pressed on how he came to this "presumption", SSI Pang said that he drew from his experience that "six thousand eight is 2 pound" (referring to the two yellow bundles that Lao Ban had instructed Khor to deliver to 99) and "two [*sic*] thousand six is 1 pound". We note that although SSI Pang spoke of a sum of $2,600 in the latter statement, this was undoubtedly a mistaken reference to the sum of $3,600 that was meant to be collected from Han and that was in fact found in his possession at the time of his arrest.

48 From the foregoing discussion, it is evident that the Prosecution's evidence in support of its case that Scenario Two represented the true state of affairs (to the exclusion of Scenario One) was far from satisfactory. It essentially rested on: (a) SSI Pang's *interpretation* of Lao Ban's instructions, despite it being apparent that there was a discrepancy between those instructions and the physical reality presented by the bundles in question; and (b) SSI Pang's decision *not* to instruct Khor to resolve the discrepancy with Lao Ban, but to proceed instead on the basis of *presuming* what Lao Ban must have meant. Even the evidence that $3,600 was the market price of one pound of diamorphine, which was consistent with the sum of $3,600 found on Han when he was arrested, was evidence that emerged only at the trial, when SSI Pang was pressed to justify his interpretation of Lao Ban's instructions. Indeed, there are also difficulties with the evidence relating to the sum of $3,600 since the amount to be collected from 99 for the two bundles earmarked for him was $6,800, which was equivalent to $3,400 for each bundle. No attempt was made to

explain the difference between the price per bundle that 99 and Han respectively were supposedly being charged. There was also no evidence led on the market price of the drugs that Han allegedly did order so as to show whether or not this was consistent with the sum of $3,600 that Han had in his possession at the time of his arrest.

49 There is a further point of importance. The Prosecution's case is that *all* the three bundles that Lao Ban referred to as "yellow bundles" were identical and were referred to interchangeably. It is true that these bundles all contained diamorphine. Two of these bundles were meant for 99. Unfortunately, there was a complete lack of any evidence that the two bundles meant for 99 were *intended* to contain diamorphine. 99 could have been called to testify that he had ordered diamorphine, and it was well within the Prosecution's control to lead such evidence since 99 was also apprehended during the CNB operation. But this was never done. Had evidence been led establishing that 99 had in fact ordered diamorphine, we might well have come to a different view as to whether there was a reasonable doubt that Han had ordered diamorphine from Lao Ban, since it would entail the conclusion that Lao Ban was referring to the bundles in a way that suggested that they were identical when, in fact, they were not. But not only did the Prosecution fail to adduce such evidence, it also emerged in the course of the hearing of the appeal that the charges against 99 had been dropped altogether, even though, based on the Prosecution's case against Han, 99 must have ordered *twice the amount of diamorphine* that Han had allegedly ordered.

50 The second reason for our finding that the Prosecution has not dispelled any reasonable doubt as to Scenario One being a possibility is that Han appears to have consistently stated that he had not ordered diamorphine, but had instead ordered other drugs (namely, ketamine and Ice). Significantly, he made this

claim even before he was aware of objective evidence which supported the possibility of this defence.

51 As we alluded to earlier (at [19] above), in his cautioned statement recorded on 2 March 2016, in response to a charge of conspiring with Khor and other unknown persons to import diamorphine into Singapore, Han stated:

> ***I did not tell him to bring this over to Singapore***. I did not personally tell him to do so. Someone from JB called me asking if I want this thing. ***The person asked me what I needed and I told him***. I do not know who will be coming, and I do not know who this person is. So how could you say that I told him to bring this into Singapore. [emphasis added in bold italics]

52 It is unclear whether, in the portions in bold italics in the extract above, Han meant that: (a) he had ordered diamorphine because diamorphine was what he needed, but he had not spoken to Khor specifically; or (b) he had ordered some other drugs. There was no contemporaneous follow-up question to clarify what the portions in bold italics meant at the time Han gave his cautioned statement. At the trial, however, Han testified that what he meant was that "[a]s far as I am concerned, I ordered Ketamine and Ice". Given that the context in which Han made his cautioned statement was in *denying* the aforesaid conspiracy charge, and that interpretation (a) would essentially have been an *admission* by Han that he had ordered the drugs which were the subject matter of the charge, save that he had not ordered those drugs from Khor, we are satisfied that there is at least a reasonable possibility that interpretation (b) is the correct one.

53 This is supported by the fact that at the very next opportunity that Han had to clarify his case, which was during the recording of the long statement dated 8 March 2016, Han unequivocally stated that what he had ordered from Lao Ban was not diamorphine, but 100g of ketamine and 25g of Ice.

54 It bears emphasis that at the time Han gave these statements, he had not, so far as we are aware, been given access to the record of the phone conversations between Khor and Lao Ban (in particular, the critical phone conversation shortly after 2.00am on 2 March 2016), which would have indicated the possibility of a mix-up in the drug orders. Despite this, Han independently offered up a defence that was consistent with the objective evidence presented by these phone conversations.

55 In our judgment, in the light of these two points, at least taken together, it is impossible to conclude beyond a reasonable doubt that Scenario One indeed did not represent the true state of affairs. We therefore find that the Prosecution has failed to discharge its burden of proving beyond a reasonable doubt that Han intended to possess the diamorphine contained in D1B, and we acquit Han of the charge against him as it currently stands.

Under what circumstances can criminal liability attach to impossible attempts?

56 It remains necessary for us to consider whether we should amend the current charge against Han to one that he attempted to possess some other drugs for the purpose of trafficking, given that the essence of his defence is that he had ordered ketamine and Ice instead of diamorphine. To address this, it is necessary for us to consider the circumstances under which criminal liability can attach to impossible attempts.

57 This issue arises because there was no possibility of Han consummating the primary offence of possessing those other drugs for the purpose of trafficking, given that Khor never had any bundles containing the amount of ketamine and Ice allegedly ordered by Han. In short, given that it was impossible at the relevant time for Han to have committed the offence of

possessing ketamine and Ice for the purpose of trafficking, can he be charged with *attempting* to commit that offence? In the present case, this has to be considered in the particular context, first, of s 12 of the MDA, which states:

> **Abetments and attempts punishable as offences**
>
> **12.** Any person who abets the commission of or who attempts to commit or does any act preparatory to, or in furtherance of, the commission of any offence under this Act shall be guilty of that offence and shall be liable on conviction to the punishment provided for that offence.

58 To address this, it is necessary for us to survey and take account of some of the key tensions that have arisen in this area of the law. We therefore begin our analysis by examining the approaches that have been taken in various jurisdictions to the issue of impossible attempts.

The existing law on impossible attempts

Singapore

59 At the time of Han's acts and his arrest, s 511 of the Penal Code (Cap 224, 2008 Rev Ed) ("Penal Code"), which is the general provision dealing with attempts to commit offences, read as follows:

> **Punishment for attempting to commit offences**
>
> **511.**—(1) Subject to subsection (2), whoever attempts to commit an offence punishable by this Code or by any other written law with imprisonment or fine or with a combination of such punishments, or attempts to cause such an offence to be committed, and in such attempt does any act towards the commission of the offence, shall, where no express provision is made by this Code or by such other written law, as the case may be, for the punishment of such attempt, be punished with such punishment as is provided for the offence.
>
> (2) The longest term of imprisonment that may be imposed under subsection (1) shall not exceed —

> (*a*) 15 years where such attempt is in relation to an offence punishable with imprisonment for life; or
>
> (*b*) one-half of the longest term provided for the offence in any other case.
>
> *Illustrations*
>
> (*a*) *A* makes an attempt to steal some jewels by breaking open a box, and finds after so opening the box that there is no jewel in it. He has done an act towards the commission of theft, and therefore is guilty under this section.
>
> (*b*) *A* makes an attempt to pick the pocket of *Z* by thrusting his hand into *Z*'s pocket. *A* fails in the attempt in consequence of *Z*'s having nothing in his pocket. *A* is guilty under this section.

Section 511 has since been amended by the Criminal Law Reform Act 2019 (Act 15 of 2019), but the amended version of s 511 is not applicable for the purposes of this appeal.

60 Two Singapore cases are relevant to the issue of impossible attempts.

61 The first is the decision of the High Court in *Chua Kian Kok v Public Prosecutor* [1999] 1 SLR(R) 826 ("*Chua Kian Kok*"). There, at [43]–[45], the court set out four categories of impossibility: (a) physical impossibility; (b) impossibility because of the non-criminality of the intended offence; (c) impossibility by law; and (d) impossibility through the ineptitude of the would-be criminal.

62 The court gave the examples of attempting to steal jewels from an empty safe and stabbing a corpse believing it to be alive as examples of physical impossibility. The court held that physical impossibility was the type of impossibility covered by the illustrations to s 511 of the Penal Code. Thus, it was clear that physical impossibility was not a defence to a charge of attempt under s 511 (see *Chua Kian Kok* at [43]).

63 In relation to impossibility because of the non-criminality of the intended offence ("no-offence impossibility"), the court cited the example of a situation where a citizen from another country travelled to Singapore and had carnal relations with a girl aged 19, believing it to be illegal to have such relations with a girl below the age of 21. The court held that "[c]ommon sense dictates this type of impossible attempts is not caught by s 511" (see *Chua Kian Kok* at [43]).

64 As for impossibility by law ("legal impossibility"), the court described as the "classic example" the situation where a man took away his own umbrella from an umbrella stand intending to steal it, genuinely believing that it belonged to another. The court noted that there were two reasons underlying the initial hesitancy to find that attempts involving legal impossibility would be caught by s 511. First, it was thought that these were situations which most people, as a matter of common sense, would not regard as involving criminality. The court did not consider this a very strong point, noting that there were other hypothetical situations of legal impossibility which would, as a matter of common sense, militate in favour of imposing liability. The court gave the example of a scenario where a man entered a darkened room and raped a resisting woman as he intended, but it turned out that the woman was his wife (*Chua Kian Kok* having been decided at a time when there was still immunity for marital rape). Second, it seemed illogical to impose liability for attempts involving legal impossibility because it would entail saying, for instance, that the would-be umbrella thief was in fact setting out to steal his own umbrella. This appeared wholly illogical because it would never be illegal for a person to take his own umbrella, and in the circumstances, it was difficult to understand how it could be an offence for him to *attempt* to do so. The court considered that this too was not a valid objection to imposing criminal liability for attempts

involving legal impossibility because, in truth, "the attempt was in respect of the intended offence". In other words, the character of the attempt was to be assessed by reference to what the actor in fact intended to do, and that was to take someone else's umbrella. In the case of the empty box (see Illustration (*a*) to s 511 of the Penal Code), the thief was liable not for attempting to steal from an empty box, but for attempting to steal from a box that he expected would contain jewels; likewise, the would-be umbrella thief would be liable not for attempting to steal his own umbrella, but for attempting to steal an umbrella belonging to another. The court concluded that since the two common reasons for hesitancy to attach criminal liability to attempts involving legal impossibility did not withstand scrutiny, legal impossibility was also not a valid answer to a charge under s 511 (see *Chua Kian Kok* at [44]).

65 On the last category, impossibility through the ineptitude of the would-be criminal ("inept-offender impossibility"), the court considered the situation of a man who tried to break into a safe using a jemmy that was too small for the task, and concluded that in those circumstances, the offender would be found liable for the attempt. The court noted the objection that there could be extreme cases giving rise to absurdity. An example of this would be where a person purported to use telepathic powers to open a safe and "teleport" the contents of the safe out to himself. It seemed wrong to hold such a person guilty of attempted safe-breaking. However, the court considered that such cases were unlikely to come before a court as they would be filtered out by the exercise of prosecutorial discretion, and highlighted that the UK Law Commission, in its report entitled "Criminal Law: Attempt, and Impossibility in Relation to Attempt, Conspiracy and Incitement" (Law Commission No 102, 1980) ("the 1980 Law Commission Report"), had come to the same conclusion (see *Chua Kian Kok* at [45]–[46]). Having rejected all but one category of impossibility

(namely, no-offence impossibility) as being capable of affording a viable defence to a charge under s 511, the court concluded that there was "very little room" for the defence of impossibility to operate in this area of the law (see *Chua Kian Kok* at [47]).

66 The second case is our decision in *Mas Swan*. That involved an accused person who had imported 21.48g of diamorphine from Malaysia into Singapore. His defence, which was accepted by the trial judge, was that he believed he was carrying ecstasy pills instead of diamorphine. One issue on appeal was whether the accused person could be convicted of the offence of attempting to import ecstasy, given that it was impossible for him to have committed the primary offence of importing ecstasy because the drug that he had actually brought into Singapore was diamorphine (see *Mas Swan* at [22] and [39]).

67 The court briefly reviewed the history of s 12 of the MDA, and concluded that there was nothing in the drafting history of the provision which shed light on how it should be interpreted (see *Mas Swan* at [26]–[28]). The court held that the elements of the general offence of attempt under s 511 of the Penal Code should be adopted in the context of s 12 of the MDA for two reasons. First, there was nothing in the words of s 12 of the MDA which suggested that a different approach should be taken. Second, there was also nothing in the origins of s 12 of the MDA which suggested that the provision should be interpreted in a different manner from s 511 of the Penal Code (see *Mas Swan* at [37]).

68 The court highlighted the four categories of impossibility set out in *Chua Kian Kok*, and observed that *Mas Swan* concerned physical impossibility, which would not afford a defence. It was not a case of legal impossibility because the accused person was not mistaken as to the legal status of the object that he

possessed: both the object that he intended to possess and the object that he actually possessed were controlled drugs. The accused person was instead mistaken only as to the physical quality of the object (see *Mas Swan* at [38]–[39]). The court agreed with the ruling in *Chua Kian Kok* that attempting the physically impossible was an offence under s 511 of the Penal Code as this was made clear by Illustration (*b*) to s 511 (see *Mas Swan* at [40]).

69 The court held that the same position should apply under s 12 of the MDA. The court noted that prior to the decision of the House of Lords in *Haughton v Smith* [1975] AC 476 ("*Haughton*"), physically impossible attempts were crimes under English law. *Haughton* changed that position, but that decision had been criticised (by academics and in the 1980 Law Commission Report), and it was later legislatively reversed by the Criminal Attempts Act 1981 (c 47) (UK) ("the CAA (UK)"). The court noted that the current position in England was that physically impossible attempts were offences. The court held that when our Parliament enacted s 12 of the MDA in 1973 (in the form of s 10 of the Misuse of Drugs Act 1973 (Act 5 of 1973) ("Act 5 of 1973")), it must be presumed, in the absence of contrary intention, to have intended to follow the existing English common law position on physically impossible attempts (meaning the pre-*Haughton* position that physically impossible attempts were offences). The court went on to state at [41]:

> … From the perspective of the rationale for punishing attempts (*viz*, deterrence and retribution), a person who sets out to commit an offence and does everything possible to commit the offence, but who is (perhaps fortuitously) prevented from committing the offence due to some external circumstance is as culpable as a person who is interrupted from completing the offence …

70 Before moving from the Singapore cases, it should be noted that while this court in *Mas Swan* was of the view that the pre-*Haughton* English common

law position on impossible attempts was that physically impossible attempts were criminalised, the court in *Chua Kian Kok* seemed to take a different view at [38]:

> …. Before 1981, the common law position in England was that generally speaking, a person could not be liable for attempting to commit a crime, if the commission of the offence was impossible. …

71 In our judgment, the view expressed in *Mas Swan* is a more accurate description of the development of English common law in this respect. This will be apparent in the following discussion of the English position on impossible attempts.

England

72 The judgment of Lord Mansfield in *Rex v Scofield* (1784) Cald 397 ("*Scofield*") is generally accepted to be the first decision to firmly establish the modern doctrine that an attempt to commit a crime is itself a crime (see J W Cecil Turner, "Attempts to Commit Crimes" (1934) 5(2) CLJ 230 at p 230, and Kayla Barkase & David MacAlister, "Impossibility in the Law of Criminal Attempt: A Comparison of Canada, Australia and New Zealand" (2014) 14(2) Oxford University Commonwealth Law Journal 153 ("Barkase") at p 156). In *Scofield*, Lord Mansfield stated (at 403):

> … So long as an act rests in bare intention, it is not punishable by our laws: but immediately when an act is done, the law judges, not only of the act done but of the intent with which it is done; and, if it is coupled with an unlawful and malicious intent, though the act itself would otherwise have been innocent, the intent being criminal, the act becomes criminal and punishable. …

73 This was qualified somewhat in *Reg v Collins and Others* (1864) 9 Cox CC 497 ("*Collins*"), where the English Court of Criminal Appeal held that

attempting to steal out of an empty pocket could not constitute a crime. There could only be a criminal attempt to commit an offence where, if no interruption had taken place, the attempt could have been carried out successfully. The court observed (at 499):

> … [W]e think that an attempt to commit a felony can only be made out when, if no interruption had taken place, the attempt could have been carried out successfully, and the felony completed of the attempt to commit [in respect of] which the party is charged. …

74 That in turn was doubted in *Reg v Brown* (1889) 24 QBD 357 ("*Brown*") and *Reg v Ring and others* (1892) 17 Cox CC 491 ("*Ring*"). In *Brown* at 358–359, Lord Coleridge CJ stated:

> … In *Reg.* v. *Collins* … the Court held that, where a man put his hand into another's pocket and there was nothing in the pocket which he could steal, he could not be convicted of an attempt to steal. That is a decision with which we are not satisfied. *Reg.* v. *Dodd* [(unreported)] … proceeded upon the same view that a person could not be convicted of an attempt to commit an offence which he could not actually commit. … *Reg.* v. *Dodd* … is no longer law. It was decided on the authority of *Reg.* v. *Collins* …, and that case, in our opinion, is no longer law.

75 Following the decisions in *Brown* and *Ring*, physically impossible attempts to commit offences were considered crimes under English law until the decision in *Haughton* (see *Haughton* at 495, and the 1980 Law Commission Report at para 2.58). We digress to note that the pre-*Haughton* English common law position is precisely the position reflected in Illustrations (*a*) and (*b*) to s 511 of the Penal Code.

76 The House of Lords in *Haughton* doubted the decisions in *Brown* and *Ring*. *Haughton* involved a van that was loaded with stolen corned beef. The van was intercepted by police officers partway through its intended journey. The police officers decided to let the van continue on its journey to the place

where the van driver was supposed to meet with the respondent, but with police officers on board the van. At the designated meeting place, the respondent got onto the van and directed that it be driven to London. Upon reaching London, the respondent played a prominent part in assisting in the unloading of the corned beef and the disposal of the van, and thus handled the corned beef within the meaning of s 22 of the Theft Act 1968 (c 60) (UK), which codified the offence of handling stolen goods. The respondent was then arrested. However, it was not disputed that by the time the respondent handled the corned beef, it was no longer considered stolen because it had been restored to lawful custody when the police intercepted the van. The question was whether the respondent could nevertheless be convicted of the offence of attempting to handle stolen goods (see *Haughton* at 489). The House of Lords in *Haughton* unanimously held that the respondent was not guilty of that offence (see *Haughton* at 497, 500, 502 and 506). Viscount Dilhorne observed as follows at 506:

> In my opinion … *Reg.* v. *Collins*, [(1864)] 9 Cox C.C. 497 and *Reg.* v. *M'Pherson*, [(1857)] Dears. & B. 197 were rightly decided for it is conduct that is normally made punishable as a criminal offence, not just the belief of the accused. It may be morally he may have sinned as much as a result of his belief but it is conduct that is made punishable under our law. A man cannot attempt to handle goods which are not stolen. A man taking his own umbrella from a club thinking it the property of someone else does not steal. His belief does not convert his conduct into an offence if his conduct cannot constitute a crime. In my view, it matters not that the crime cannot be committed as a result of physical impossibility … or of legal impossibility. In either case he cannot be convicted of an attempt when he could not be convicted of the full offence if he had succeeded in doing all that he attempted to do. Conduct which is not criminal is not converted into criminal conduct by the accused believing that a state of affairs exists which does not exist.

77 As highlighted earlier (see [69] above), *Haughton* was subject to much criticism, and following the 1980 Law Commission Report, s 1 of the CAA (UK) was enacted in response to this criticism. Section 1 reads:

> **1 Attempting to commit an offence**
>
> (1) If, with intent to commit an offence to which this section applies, a person does an act which is more than merely preparatory to the commission of the offence, he is guilty of attempting to commit the offence.
>
> (2) A person may be guilty of attempting to commit an offence to which this section applies even though the facts are such that the commission of the offence is impossible.
>
> (3) In any case where —
>
> (a) apart from this subsection a person's intention would not be regarded as having amounted to an intent to commit an offence; but
>
> (b) if the facts of the case had been as he believed them to be, his intention would be so regarded,
>
> then, for the purposes of subsection (1) above, he shall be regarded as having had an intent to commit that offence.
>
> …

78 In the initial years following the enactment of s 1 of the CAA (UK), there was significant uncertainty over whether the CAA (UK) had the effect of legislatively reversing *Haughton*. This uncertainty is reflected in the decision of the House of Lords in *Anderton v Ryan* [1985] 2 WLR 968 ("*Anderton*"). There, the accused person purchased a video recorder for an extremely low price. She believed that the video recorder was stolen, although that belief was incidental to her decision to purchase the video recorder. There was no other proof that the video recorder was in fact stolen, and for the purposes of the appeal, it was assumed that the video recorder was not stolen. The accused person was charged with attempting to dishonestly handle stolen goods, contrary to s 1(1) of the CAA (UK). The question before the court was whether this charge could be sustained. Lord Bridge of Harwich, with whom the majority of the court agreed, couched the issue in the following terms (see *Anderton* at 982):

> … Does section 1 of the [CAA (UK)] create a new offence of attempt where a person embarks on and completes a course of conduct which is objectively innocent, solely on the ground that

> the person mistakenly believes facts which, if true, would make that course of conduct a complete crime? …

79 Lord Bridge concluded that the question must be answered in the negative because to hold otherwise would entail convictions in a number of surprising cases, including (see *Anderton* at 982):

> … [T]he classic case of the man who takes away his own umbrella from a stand, believing it not to be his own and with intent to steal it; the case of the man who has consensual intercourse with a girl over 16 believing her to be under that age; the case of the art dealer who sells a picture which he represents to be and which is in fact a genuine Picasso, but which the dealer mistakenly believes to be a fake.

80 Lord Bridge highlighted that in all these cases, "the mind alone is guilty, the act is objectively innocent" (see *Anderton* at 982). He held that "if the action is throughout innocent and the actor has done everything he intended to do", there would be no offence under s 1 of the CAA (UK) (see *Anderton* at 983). If the English Parliament had intended to make "purely subjective guilt" criminally punishable, it should have done so with clearer language, especially in a section aimed specifically at inchoate offences (see *Anderton* at 982).

81 Lord Roskill agreed with Lord Bridge as follows (see *Anderton* at 980):

> … I respectfully agree with his view that if the action is innocent and the defendant does everything he intends to do, subsection (3) [of the CAA (UK)] does not compel the conclusion that erroneous belief in the existence of facts which, if true, would have made his completed act a crime, makes him guilty of an attempt to commit that crime. …

82 Thus, the House of Lords held, by a majority of 4:1 (Lord Edmund-Davies dissenting), that in the situation where the accused person had done all that he intended to do and the relevant acts were "objectively innocent", such acts would not amount to a criminal attempt even if the accused person mistakenly thought the factual position was otherwise. On this basis, the charge

against the accused person in *Anderton* was set aside (see *Anderton* at 981). Lord Bridge noted that the majority's decision would mean that the decision in *Haughton* had not been legislatively reversed by the CAA (UK) (see *Anderton* at 983).

83 *Anderton* was itself overruled a year later by the House of Lords in *Regina v Shivpuri* [1987] AC 1 ("*Shivpuri*"). The appellant there was charged with attempting to knowingly deal with and harbour diamorphine with the intent to evade the prohibition on its importation. Although the appellant believed that he was involved in the importation of diamorphine, the substances in question were harmless. He was convicted at first instance, and his conviction was upheld by the Criminal Division of the English Court of Appeal. The issue before the House of Lords was as follows (see *Shivpuri* at 4):

> Does a person commit an offence under section 1 of the [CAA (UK)] where, if the facts were as that person believed them to be, the full offence would have been committed by him, but where on the true facts the offence which that person set out to commit was in law impossible, e.g., because the substance imported and believed to be heroin was not heroin but a harmless substance?

84 Lord Bridge delivered the leading opinion in *Shivpuri*. He first noted that, applying the language of the CAA (UK) to the facts of the case, the appellant in *Shivpuri* would be liable for attempting to knowingly deal with and harbour diamorphine with the intent to evade the prohibition on its importation (see *Shivpuri* at 18–20). However, in the light of the decision of the majority in *Anderton*, the court had to consider whether there was a principled distinction between the situation in *Shivpuri* and that in *Anderton* (see *Shivpuri* at 20). Lord Bridge stated that the concern of the majority in *Anderton* had been to "avoid convictions in situations which most people, as a matter of common sense, would not regard as involving criminality" (see *Shivpuri* at 21). In doing

so, the majority in *Anderton* had drawn a distinction between "objectively innocent" acts and "guilty" acts (see *Shivpuri* at 20–21). Lord Bridge said that on further consideration (see *Shivpuri* at 21–22):

> … [T]he concept of "objective innocence" is incapable of sensible application in relation to the law of criminal attempts. The reason for this is that any attempt to commit an offence which involves "an act which is more than merely preparatory to the commission of the offence" but for any reason fails, so that in the event no offence is committed, must ex hypothesi, from the point of view of the criminal law, be "objectively innocent." What turns what would otherwise, from the point of view of the criminal law, be an innocent act into a crime is the intent of the actor to commit an offence. … A puts his hand into B's pocket. Whether or not there is anything in the pocket capable of being stolen, if A intends to steal, his act is a criminal attempt; if he does not so intend, his act is innocent. A plunges a knife into a bolster in a bed. To avoid the complication of an offence of criminal damage, assume it to be A's bolster. If A believes the bolster to be his enemy B and intends to kill him, his act is an attempt to murder B; if he knows the bolster is only a bolster, his act is innocent. These considerations lead me to the conclusion that the distinction sought to be drawn in *Anderton v. Ryan* between innocent and guilty acts considered "objectively" and independently of the state of mind of the actor cannot be sensibly maintained.

85 Lord Bridge noted (at 21) that the majority in *Anderton* had not given due regard to the fact that the concern of injustice in exceptional cases had been specifically addressed in the 1980 Law Commission Report, which preceded the enactment of the CAA (UK). In particular, he highlighted para 2.97 of the 1980 Law Commission Report, which reads:

> If it is right in principle that an attempt should be chargeable even though the crime which it is sought to commit could not possibly be committed, we do not think that we should be deterred by the consideration that such a change in our law would also cover some extreme and exceptional cases in which a prosecution would be theoretically possible. An example would be where a person is offered goods at such a low price that he believes that they are stolen, when in fact they are not; if he actually purchases them, upon the principles which we have discussed he would be liable for an attempt to handle stolen goods. Another case which has been much debated is

> that raised in argument by Bramwell B. in *R.* v. *Collins*. If A takes his own umbrella, mistaking it for one belonging to B and intending to steal B's umbrella, is he guilty of attempted theft? Again on the principles which we have discussed he would in theory be guilty, but in neither case would it be realistic to suppose that a complaint would be made or that a prosecution would ensue. …

86 In the circumstances, in *Shivpuri*, the House of Lords was persuaded to overrule *Anderton* and find that the decision in *Haughton* had in fact been legislatively reversed by the CAA (UK). The House of Lords thus upheld the appellant's conviction (see *Shivpuri* at 23).

Australia

87 The decision of the Supreme Court of Victoria in *Britten v Alpogut* [1987] VR 929 ("*Britten*") is the leading decision on the common law position in Australia in relation to impossible attempts, and it has been followed in a number of Australian states (see *R v Irwin* (2006) 94 SASR 480 at [13] and the cases cited therein: *R v Lee* (1990) 1 WAR 411, *R v English* (1993) 10 WAR 355, *R v Mai* (1992) 26 NSWLR 371, *R v Barbouttis* (1995) 37 NSWLR 256, *R v Prior* (1992) 65 A Crim R 1, *R v Barnes* (1993) 19 MVR 33, and *Guillot v Hender* (1997) 102 A Crim R 397). The court in *Britten* reviewed the decision in *Haughton* and the English cases preceding it, and declined to follow *Haughton*. After considering various English authorities pre-dating *Haughton*, Murphy J stated (see *Britten* at 932–933):

> It will be seen that *in the law of attempt the emphasis lies on the criminal intent of the actor, rather than on the patent criminality of the act which he performed. The act itself may be innocuous.*
>
> …
>
> In my opinion, it can be said that before *Haughton v. Smith* the law of attempt punished a manifest criminal intention to commit a crime which was not accomplished.

> For some inexplicable reason the law of attempt became involved with the question whether or not the crime attempted could have been in fact accomplished by the accused.
>
> It was thought by some that the accused could not be convicted of an attempt to commit a particular crime, when on the facts of the case it would not have been possible for the accused to commit the crime in question.
>
> Immediately, there was a confusion demonstrated between a relevant step in the commission of a possible crime and a relevant step in the commission of an intended crime, but one not capable of being accomplished.
>
> Courts began to ignore the importance of the intention of the accused and tended to concentrate on the question whether what was done was a step towards a crime, which if uninterrupted, would have been committed …
>
> It was at this stage that the embryo of the heresy in *Haughton v. Smith* was conceived.
>
> …
>
> It tended to be forgotten that the crime of attempt derives its criminality from *the conduct intended or sought to be done* …
>
> [emphasis added]

88 Murphy J further noted (see *Britten* at 935):

> *Attempts are crimes because of the criminal intent of the actor.* A man who intends to kill V, and who picks up a gun believing it to be loaded, and who points it at V and pulls the trigger is guilty of an attempt to murder V, even if it transpires that the gun was not loaded. Why is this an attempt? Because if the facts had been as the actor believed them to be, he would have committed the intended crime; he intended to murder V, but failed because of a mistake of fact. He is punishable for an attempt, not because of any harm that he has actually done by his conduct, but because of his evil mind accompanied by acts manifesting that intent. The criminality comes from *the conduct intended to be done. That conduct intended must amount to an actual and not an imagined crime,* but if it does, then it matters not that the gun is in fact unloaded, or the police intervene, or the victim is too far away, or the girl is in fact over 16, or the pocket is empty, or the safe is too strong, or the goods are not cannabis. [emphasis added]

89 We should highlight that the preceding extract captures one permissible avenue in which the defence of impossibility may play a part in the law on criminal attempts: where the intended conduct is not a crime at all, there would be no criminal liability for the attempt to commit that supposed crime. This was reiterated by Murphy J in a later part of his judgment (see *Britten* at 938):

> … [A]t common law a criminal attempt is committed if it is proven that the accused had at all material times the guilty intent to commit a recognized crime and it is proven that at the same time he did an act or acts (which in appropriate circumstances would include omissions) which are seen to be sufficiently proximate to the commission of the said crime and are not seen to be merely preparatory to it. The "objective innocence" or otherwise of those acts is irrelevant.
>
> Impossibility is also irrelevant, *unless it be that the so-called crime intended is not a crime known to the law, in which case a criminal attempt to commit it cannot be made.*
>
> [emphasis added]

90 Thus, the Supreme Court of Victoria declined to follow *Haughton*, and held that impossibility was not a valid defence to a charge of criminal attempt save in the situation of no-offence impossibility.

India

91 Section 511 of the Indian Penal Code 1860 (Act No 45 of 1860) ("IPC") is the provision that sets out the law on attempts in India, and it is in terms identical to s 511 of our Penal Code. Despite this, the Indian authorities adopt a different approach to the question of impossibility.

92 In *Queen Empress v Mangesh Jiva'ji* (1887) ILR 11 Bom 376 ("*Mangesh*"), the defendant was charged with attempting to commit the offence of criminal intimidation. The defendant had sent a letter to a Divisional Commissioner, threatening to kill a particular officer of the Forest Department

unless certain demands were met. It was found that the Divisional Commissioner was not interested in that particular officer, as a result of which the threat was unlikely to have an effect on the Divisional Commissioner's feelings or conduct. Thus, it would have been impossible for the threat to have fallen within the ambit of the offence of criminal intimidation under s 503 of the IPC since that provision required the relevant threat to be towards (among other possibilities) "the person or reputation of any one [*sic*] in whom [the person threatened] is interested". The court distinguished the case before it from Illustration (*b*) to s 511 of the IPC in the following manner (see *Mangesh* at 379):

> It may be a fine distinction that separates an attempt, such as the one in the present case, from an attempt according to … illustration (*b*) to section 511 of the [IPC]; but still, we think, the distinction exists. In the illustration, the act completed so far as the accused could complete it, and constituting, if completed, the principal offence, is supposed to be frustrated by the accidental circumstance of there being nothing at the moment in a pocket, where ordinarily something would be found. If it were the normal condition of a pocket to be empty, the Legislature could hardly be supposed to have intended to guard against an endeavour which could not be conceived as injurious. In the present case, the attempt as found by the Sessions Court, as distinguished from the complete offence, rests on the impossibility of frightening the Commissioner, Southern Division, by the threat against Mr McGregor [the officer of the Forest Department]. Now, this relation of no special interest was a permanent and essential relation. It was not variable from day to day, much less was it a relation of an interest generally existing, but accidentally absent on the present occasion. *The attempt could not succeed for a reason which would operate against any attempt, however often repeated. There might, indeed, be an intent to cause alarm; but the person addressed being always and essentially insusceptible of the particular alarm purposed, there was nothing for the penal law to guard either in the species or the instance.* … [emphasis added]

93 *Mangesh* thus approached the issue by distinguishing between two categories of attempts. In the first category, the attempt would never have

succeeded under any circumstances, and the accused person would fail to consummate the offence even if he were to make a fresh attempt. In the second category, the attempt failed only because it was rendered impossible by one-off circumstances, and a subsequent attempt might well succeed. Criminal liability would only be imposed in the latter situation.

94 *Mangesh* was criticised by the Singapore High Court in *Public Prosecutor v Ketmuang Banphanuk and Another* [1995] SGHC 46. The court considered that the illustrations to s 511 of the Penal Code did not in fact draw the distinction that was relied upon in *Mangesh*, and thus, it was inappropriate to rely on such a distinction:

> … If one cannot attempt to intimidate a person not affected by the threat, one cannot steal something that is not there. This is the old [*Collins*] argument. When the attempts are declared to be offences in the illustrations, it is because the law treats the actor's intent as the determining factor. When Mangesh Jiva'ji [the defendant in *Mangesh*] issued the threat to the Commissioner, he attempted to commit intimidation. That the threat had no effect on [the Commissioner] is no more significant than the fact that the box and [the] pocket [in the illustrations to s 511] were empty. With the s. 511 illustrations in place, [*Collins*] should be put to rest.

95 A different approach was taken by the High Court of Calcutta in *Asgarali Pradhania v Emperor* (1934) ILR 61 Cal 54 ("*Asgarali*"). There, the appellant was convicted of attempting to cause a miscarriage, but there was no evidence to show that the substances that the appellant had given the victim were capable of causing a miscarriage (see *Asgarali* at [2]). The court drew a distinction between cases where the accused person's failure to consummate the crime was due, broadly speaking, to his own volition and cases where the failure to consummate the crime was due to an independent factor. Criminal liability for an attempt would only attach in the latter situation (see *Asgarali* at [9]–[11]):

> 9. Thus, if a man thrusts his hand into the pocket of another with intent to steal, he does an act towards the commission of the offence of stealing, though unknown to him the pocket is empty. He tries to steal, but is frustrated by a fact, namely the emptiness of the pocket, which is not in any way due to any act or omission on his part. … [H]e may be convicted of an attempt to steal. …
>
> 10. But if one who believes in witchcraft puts a spall [*sic*] on another, or burns him in effigy, or curses him with the intention of causing him hurt, and believing that his actions will have that result, he cannot in my opinion be convicted of an attempt to cause hurt. Because what he does is not an act towards the commission of that offence, but an act towards the commission of something which cannot, according to ordinary human experience result in hurt to another, within the meaning of the [IPC] that is to say, his act was intrinsically useless, or defective, or inappropriate for the purpose he had in mind, owing to the undeveloped state of his intelligence, or to ignorance of modern science. His failure was due, broadly speaking, to his own volition. …
>
> …
>
> 11. … But if A, with intent to hurt B by administering poison, prepares a glass for him and fills it with poison, but while A's back is turned, C who has observed A's act, pours away the poison and fills the glass with water, which A in ignorance of what C has done, administers to B, in my opinion A is guilty and can be convicted of an attempt to cause hurt by administering poison. His failure was not due to any act or omission of his own, but to the intervention of a factor independent of his own volition. …

96 The court noted that since the substances administered by the appellant to the victim could not have caused a miscarriage, the appellant's failure was not due to a factor independent of himself and set aside the appellant's conviction (see *Asgarali* at [17]).

97 It can be seen that the Indian cases offer two alternative approaches to cases involving impossible attempts. One is to distinguish situations where the accused person's conduct would normally result in the commission of the primary offence from situations where such conduct would never lead to the

commission of that offence; the other is premised on whether the attempt failed because of a factor independent of the accused person or because of a factor intrinsic to the accused person.

Summary

98 Having examined the position in the various jurisdictions surveyed above, we make a few broad observations:

(a) We question the correctness of the classifications of impossibility adopted by the High Court in *Chua Kian Kok*. It seems to us that at least one of the four categories identified there, namely, inept-offender impossibility (see [65] above), is not a case of impossibility at all. The very nature of an attempted offence is that the primary offence has not been consummated. The ineptitude of the offender does nothing more than provide the explanation for why the primary offence was not consummated, but it does not make the attempt to commit the primary offence an *impossible* attempt for that reason, any more than it can be said that any uncompleted offence was, because it was not completed, impossible. Second, it seems to us that the categorisation adopted in *Chua Kian Kok* fails to pay due attention to the one key element in any criminal attempt, which is the *intent* to commit the specific act constituting the primary offence. It is that intent which is made the subject of a charge of attempt under s 511 of the Penal Code as long as it is accompanied by sufficient steps taken towards its fulfilment: see [33] above.

(b) It is evident from the analysis of the English cases that the law on impossible attempts has undergone a difficult and circuitous path of development. With great respect, it seems to us that at least part of the

reason for this is the inability, or perhaps more correctly, the unwillingness of the courts to apply a workable principle to resolve cases involving impossible attempts, ostensibly because the principle in question is not workable. That principle is to ask whether the accused person did in fact intend to commit the specific act constituting the primary offence. We will elaborate on this shortly. The English courts have eschewed this approach on the ground that it is too uncertain, but have then resorted to dealing with individual cases by working backwards from desired or acceptable outcomes: see above at [78]–[79] and [84] in particular. This is seldom, if ever, a reliable guide to a court, and still less can it be an acceptable approach in our context, where much of the criminal law is codified and subject to periodic legislative review.

(c) The one area where there is a measure of common ground is in respect of what has been described as no-offence impossibility: see [63] and [89] above. We agree that no criminal liability should attach in such cases because the mistaken belief of the actor that what he has done is criminal cannot possibly make his conduct an offence if it is not in fact so.

(d) Much of the difficulty in this area of the law has stemmed from a tendency to analyse the accused person's actions from the standpoint of what has in fact been done, rather than beginning from the standpoint of what, on the evidence, it can be said the accused person in fact *intended* to do, and then considering whether there is sufficient evidence of action to manifest that intention. After all, the very essence of a criminal attempt is an *intended* act which, for some reason, is not brought to fruition. In this regard, the Australian jurisprudence provides a useful reminder that the focus should instead be on the criminal intent

of the actor, rather than on the criminality or otherwise of the act that has in fact been carried out: see [87]–[88] above).

(e) While the Indian case law that we have considered does not commend itself to us as providing a principled way forward, it does suggest that in considering liability in this area, it may be relevant to examine, among other things:

(i) Whether the actions taken by the accused person were so far-fetched that it could not reasonably be said in the circumstances that his actions in fact extended beyond a mere guilty intention. This would cover cases where, for instance, the accused person intended to cause injury to the targeted victim by uttering a meaningless curse.

(ii) Whether there is any relevant fact that accounts for the failure to consummate an initially guilty intent. We will touch on this below.

(f) Finally, in this area of the law, there are likely to be a number of challenging fact situations that may strain any attempt to develop and apply a principled approach. While the court should attempt to address these situations as best as it can, it should also recognise that some will best be left to be dealt with as and when they arise.

The appropriate approach to cases involving impossible attempts

99 In this light, we turn to consider the appropriate approach to cases involving impossible attempts. The choice between widening or narrowing the scope of impossibility as a defence to the offence of criminal attempt reflects the tension between a more objectivist and a more subjectivist approach towards

criminal liability (see Stanley Yeo, Neil Morgan & Chan Wing Cheong, *Criminal Law in Malaysia and Singapore* (LexisNexis, 3rd Ed, 2018) at para 36.10). In Glanville Williams, "The Lords and Impossible Attempts, or *Quis Custodiet Ipsos Custodes*?" (1986) 45(1) CLJ 33 ("*The Lords and Impossible Attempts*"), Professor Williams described this tension in the following manner (at p 36):

> We are now in a position to make a broad choice between two competing theories of attempt that have found support in the past. The question is whether the law of criminal attempt is or should be based on the supposed facts (plus the defendant's effort to commit a crime, acting on the facts as he believed them to be), or whether it requires or should require all or some of the forbidden elements to be actually or (in the case of future facts) potentially present. …

100 We also draw attention to Professor Stanley Yeo's observation in "Clarifying Impossible Attempts and Criminal Conspiracies" (2007) 19 SAcLJ 1 at para 6 that:

> … Whether the accused should be guilty of attempted theft is very much dictated by public policy. On one view, the accused should not be guilty because it would amount to punishing him for merely having a guilty intention. The opposing view is that the accused should be punished to promote deterrence. …

101 There are existing statutes that govern this area, and hence, in making this policy choice, the court is obliged as far as possible to give effect to any intention that is expressed or implied in the relevant statute. Thus, the first port of call in the present case is to examine the text and the context of s 12 of the MDA, which we again reproduce below:

> **Abetments and attempts punishable as offences**
>
> **12.** Any person who abets the commission of or who attempts to commit or does any act preparatory to, or in furtherance of, the commission of any offence under this Act shall be guilty of that offence and shall be liable on conviction to the punishment provided for that offence.

102 Section 12 of the MDA is silent on the issue of impossible attempts. As we alluded to earlier (see [69] above), in *Mas Swan* at [41], we held that there was nothing in the text or the origins of this provision which suggested that at the time it was enacted in 1973 (in the form of s 10 of Act 5 of 1973), Parliament intended to depart from the existing English common law position on physically impossible attempts. We therefore held that the pre-*Haughton* English common law position (which is set out at [72]–[75] above) ought to apply. It should be noted, however, that the common law position at the time of the enactment of s 12 *was not uniform among all the common law jurisdictions*. Significantly, the Indian position had departed from the English position by that time (see [91]–[97] above).

103 Further, as was noted at [37] of *Mas Swan* (see [67] above), there is nothing in the text or the origins of s 12 of the MDA which suggests that the provision should be interpreted in a manner different from s 511 of the Penal Code. This suggests that the approach taken by the Indian authorities (which is premised on interpreting a provision virtually identical to s 511 of our Penal Code) ought, at least in theory, to be potentially more persuasive than the English approach.

104 Having said that, given the tenor of our comments at [98] above, we consider it appropriate to reconsider the position from first principles. Before doing so, we set out again in full s 511 as it stood at the time of Han's acts and his arrest:

> **Punishment for attempting to commit offences**
>
> **511.**—(1) Subject to subsection (2), whoever attempts to commit an offence punishable by this Code or by any other written law with imprisonment or fine or with a combination of such punishments, or attempts to cause such an offence to be committed, and in such attempt does any act towards the

> commission of the offence, shall, where no express provision is made by this Code or by such other written law, as the case may be, for the punishment of such attempt, be punished with such punishment as is provided for the offence.
>
> (2) The longest term of imprisonment that may be imposed under subsection (1) shall not exceed —
>
> > (*a*) 15 years where such attempt is in relation to an offence punishable with imprisonment for life; or
> >
> > (*b*) one-half of the longest term provided for the offence in any other case.
>
> *Illustrations*
>
> (*a*) *A* makes an attempt to steal some jewels by breaking open a box, and finds after so opening the box that there is no jewel in it. He has done an act towards the commission of theft, and therefore is guilty under this section.
>
> (*b*) *A* makes an attempt to pick the pocket of *Z* by thrusting his hand into *Z*'s pocket. *A* fails in the attempt in consequence of *Z*'s having nothing in his pocket. *A* is guilty under this section.

105 There is nothing in the main text of s 511 that sheds light on the issue of impossible attempts. However, the two illustrations to s 511 are relevant. These illustrations suggest that criminal liability will be imposed for certain types or classes of impossible attempts, but not necessarily for all. As was suggested by the court in *Mangesh* (see [92] above), reading these illustrations widely to cover all forms of impossible attempts would seem illogical since, if that had been the legislative intent, it could easily have been much more clearly expressed.

106 We think it is helpful to begin by examining the typical context in which an accused person may be charged with an attempt. In general, this may arise in two broad situations. The first is where the accused person has not completed his intended course of action. In these cases, leaving aside the possible relevance of whether the accused person has resiled from his intended act, it will generally be irrelevant to the analysis whether the reason for the non-consummation of

the primary offence is the ineptitude of the accused person, the inadequacy of his tools, the intervention of a third party or some other reason. In our judgment, all of these situations can and should be analysed in the same way. We leave open the situation of an accused person who resiles from his original intention and does not carry it out because of a change of heart. This is because if, as we think is the case, the essence of a criminal attempt is the *intention* to embark on a criminal endeavour, then potentially difficult questions arise where the accused person resiles from that intention.

107 The second situation is where the accused person has done all that he intended to do, but the primary offence has nonetheless not been consummated for some reason. Examples of this can be seen in *Mas Swan*, *Haughton* and *Shivpuri*. In each of these instances, the accused person was operating under a mistaken belief as to some fact. This mistaken belief lies at the heart of the problem of impossible attempts because it leads to dissonance between the accused person's *mens rea* and his *actus reus*; or, in other words, between the primary act (and, consequently, the primary offence) that the accused person *intended* to carry out, and the act which *he in fact carried out*. In our respectful view, the error in the analysis undertaken in many of the cases has been to assume that the question of whether the accused person may be charged with attempting to commit an offence is to be assessed by reference to the act that he actually did, rather than by reference to the act that he intended to do. This is wrong. An attempt is criminalised because the intended (or attempted) act is illegal; and the imposition of a requirement that there be sufficient acts to corroborate the existence of that guilty intention serves not only as an evidentiary threshold, but also, and more importantly, as a safeguard to ensure that an accused person is not penalised purely for having a guilty intent. Seen in this light, cases involving impossible attempts must be resolved by focusing on

the criminality of the *intended* act. If that is sufficiently established, it will not generally matter even if what the accused person in fact did would not objectively amount to an offence, such as if a would-be murderer stabbed a bolster mistakenly thinking it was his intended victim. The accused person's acts are to be analysed against the guilty intent with which he set out, in order to corroborate that intent and establish a movement towards its fulfilment that the law regards as sufficient so as to filter out cases that reside, in truth, only in the guilty mind.

108 In that light, we turn to what we regard to be the correct approach, which, in our judgment, is, in broad terms, to align with the Australian jurisprudence and our own decision in *Mas Swan*. We approach impossible attempts through a two-stage framework that examines the intention of the accused person and whether there were sufficient acts that manifested that intention and the embarkation towards its consummation ("the Framework"). We elaborate on each of these as follows:

(a) Intention – Was there was a specific intention to commit a criminal act?

(i) The key questions in this regard are, in our judgment:

(A) What was the ***act*** that the accused person specifically ***intended to do***?

(B) Was that intended act criminal, either on its face or by reason of some mistaken belief harboured by the accused person? Thus, the intended act of taking an umbrella may be criminal either because the accused person knows that the umbrella belongs to another or because he mistakenly believes it to be so.

(ii) The inquiry only proceeds to the second stage if the answer to (B) above is "yes". This would sieve out situations where what the accused person intended to do was not an offence at all, meaning cases of no-offence impossibility, which, as we have noted, is commonly accepted not to give rise to criminal liability for attempt.

(b) *Actus reus* – Were there sufficient acts by the accused person in furtherance of the specific intention to commit the criminal act found under (a)? The inquiry here is directed at whether there were sufficient acts to reasonably corroborate the presence of that intention and demonstrate substantial movement towards its fulfilment. A conviction may only be arrived at if the answer to this is "yes". This inquiry also serves to avoid penalising mere guilty intentions.

109 The Framework is consistent with our statements in *Mas Swan* on the rationale behind punishing impossible attempts. There, we said at [41] (see also [69] above):

> … From the perspective of the rationale for punishing attempts (*viz*, deterrence and retribution), a person who sets out to commit an offence and does everything possible to commit the offence, but who is (perhaps fortuitously) prevented from committing the offence due to some external circumstance is as culpable as a person who is interrupted from completing the offence …

110 Such an approach is also consistent with the principle (expressed at [98(c)] and [108(a)(ii)] above) that an accused person should be held liable for an attempt only if he intended to commit an act that in fact amounts to a crime. The focus on the specific intention of the accused person avoids criminalising the mere possession of a mistaken belief (see George P Fletcher, *Rethinking Criminal Law* (Oxford University Press, 2000) at pp 174–184). It also provides

a retributive rationale by punishing only those attempts where the accused person specifically intended to commit an act that would, if carried to fruition, have been a recognised crime. As noted by Professor Yaffe (see Gideon Yaffe, "Criminal Attempts" (2014) 124(1) Yale Law Journal 92 at pp 110–111):

> The role of intentions in constituting commitments explains, also, why intention is of such paramount importance to culpability and criminal responsibility. What a person intends tells us a great deal about what kinds of considerations he recognizes as giving him reason, and about how he weighs those considerations in his deliberations about what to do. In fact, it is in part constitutive of those facts. Someone who intends to steal from his employer takes the fact that the contents of the cash drawer *are not his* as either providing him with no reason not to take those contents, or as providing a reason of insufficient significance to outweigh considerations in favour of stealing. These facts about the person's modes of recognition and response to reasons are of crucial importance to assessing his responsibility. It is partly because of those facts that he deserves censure for the act of taking what is not his; they sit at the root of his culpability. He deserves censure not merely because his employer suffers at his hand – although that is, of course, significant – but also because he has misused, misdirected, his capacities for the recognition and response to reasons, capacities that are distinctive of moral agents.
>
> … The actor's intentions and commitments are of particular importance because they are inextricably connected with modes of recognition and response to reasons, but also because there is a meaningful sense in which modes of recognition and response to reasons that have their source in intention and commitment are self-inflicted; they have their source in the agent's will.
>
> [emphasis in original]

111 In addition, the Framework has the advantage of resolving several difficult edgy situations in a manner that avoids intuitively unpalatable results:

(a) On the facts of *Anderton* (which the House of Lords in *Shivpuri* described (at 21) as a situation "which most people, as a matter of common sense, would not regard as involving criminality"), the accused person would not have been found liable for attempting to dishonestly

handle stolen goods because, in truth, pursuant to the first stage of the Framework, what she intended to do was to buy a cheap video recorder. She was indifferent to whether or not the video recorder was stolen, even if she believed or mistakenly thought it might be, and so did not possess the requisite *intent to commit the specific criminal act of dishonestly handling stolen goods*. This aligns with the outcome arrived at by the majority of the House of Lords in *Anderton*, but without recourse to the unworkable distinction between "objectively innocent" and "guilty" acts (see [84] above), which fails to have regard to the need to be mindful of the intent behind the putative act, regardless of the act which the accused person in fact carried out.

(b) The House of Lords acquitted the accused person in *Haughton* of attempting to handle stolen goods (see [76] above), but under the Framework, he would have been convicted because the act that he *intended* to do was a crime in every sense of the word, and in the circumstances, it was not a crime only because the police had already taken custody of the stolen corned beef without his knowledge. The result in *Haughton* is intuitively unsatisfactory, and indeed, as we mentioned earlier (at [69] and [77] above), the controversy attributed to the decision has been credited with spurring the enactment of the CAA (UK): see *Anderton* at 981. This dissatisfaction stems from the fact, as we have just observed, that the accused person in *Haughton* (unlike the accused person in *Anderton*) *specifically intended to deal with stolen goods*. Yet, he was acquitted on the basis that "[c]onduct which is not criminal is not converted into criminal conduct by the accused believing that a state of affairs exists which does not exist" (see the extract from *Haughton* reproduced at [76] above). As we have explained at [98(d)] and [107] above, *the premise that the criminality of*

an attempt to commit an offence arises out of the patent criminality of the act performed is erroneous, and this underlies what we respectfully consider to have been the error in *Haughton*. The Framework would realign the result of the decision in *Haughton* with the rationale behind punishing an accused person for a criminal attempt: in specifically intending to deal with stolen goods and coupling that specific intent with sufficient acts, the accused person in *Haughton* would be found, under the Framework, to be both morally and legally culpable, and therefore would be punished so as to deter him from further crime.

(c) In a situation where an accused person has sex with a girl over the age of 16 in the mistaken belief that she is under that age (see [79] above), whether he would be liable would turn on the question of his specific intent. If, by way of analogy with the facts in *Anderton*, he was indifferent to the actual age of the girl even if he mistakenly believed she might be underage, he would not be liable for attempting to commit statutory rape. Conversely, if the evidence demonstrates that he specifically targeted the girl because he thought she was under the age of 16 and would not have had sex with her otherwise, then he would be liable. This distinction would be justified on the basis of deterrence because the accused person in the latter situation would demonstrably be a danger to underage girls, which is precisely the danger that the applicable provisions are meant to protect against. He would also be more morally culpable and deserving of punishment in specifically intending to target a protected group of individuals.

(d) In the umbrella "theft" scenario (see [79] above), whether or not liability would attach would depend on the accused person's specific intention. Did he intend to take an umbrella that was not his own? If so,

> he would be liable for a criminal attempt, even if, by mistake, he ended up taking his own umbrella.

112 These examples illustrate the point that the inconsistencies and difficulties that have plagued this area of the law stem from a reliance on categories such as "physical impossibility" and "inept-offender impossibility" in an attempt to distinguish between criminal and non-criminal attempts. This has resulted in difficulty when the application of these categories has led to undesirable or unpalatable outcomes. The Framework would resolve some, if not many, of these inconsistencies and difficulties by returning to the crux of the criminality behind attempts: the specific *intent* to commit a recognised crime, coupled with sufficient acts in furtherance of that intention.

113 We note that a similar approach was considered and rejected in *Shivpuri*. There, Lord Bridge stated at 22:

> Another conceivable ground of distinction … is a distinction which would make guilt or innocence of the crime of attempt in a case of mistaken belief dependent on what, for want of a better phrase, I will call the defendant's dominant intention. According to the theory necessary to sustain this distinction, the appellant's dominant intention in *Anderton v. Ryan* was to buy a cheap video recorder; her belief that it was stolen was merely incidental. Likewise in the hypothetical case of attempted unlawful sexual intercourse, the young man's dominant intention was to have intercourse with the particular girl; his mistaken belief that she was under 16 was merely incidental. By contrast, in the instant case the appellant's dominant intention was to receive and distribute illegally imported heroin or cannabis.
>
> Whilst I see the superficial attraction of this suggested ground of distinction, I also see formidable practical difficulties in its application. By what test is a jury to be told that a defendant's dominant intention is to be recognised and distinguished from his incidental but mistaken belief? …

114 Professor Williams elaborated on the practical difficulties in a similar vein as follows (see *The Lords and Impossible Attempts* at pp 78–79):

> … Human motivation is complex and difficult to handle, which is one reason why the law does not normally go into it on questions of liability. It considers the immediate intention, never mind ulterior intention. Bringing motive into issues of liability can give rise to knotty problems, advantageous to no one but practising lawyers and flinty-hearted examiners. Perhaps the attempted bigamist really wanted to be a bigamist, and not to be so tightly knotted that he had the encumbrance of a wife. In that case he has at least partly failed in his "purpose," and the motivation theory would presumably allow him to be convicted of attempted bigamy; but if he is happy to find himself properly married the motivation theory would give him a defence. It is an odd result.
>
> In *Shivpuri* the defendant thought he was smuggling in heroin, but it turned out to be a harmless powder. If he had bought it as heroin he would (had he not been arrested) be disappointed. But if he was paid in advance merely for bringing the stuff in, its nature would be of no interest to him. He would not be concerned by the fact that his employer had been swindled, and the motivation theory would not prevent him from being liable for attempt, if he would otherwise be liable. Is it reasonable that liability for attempt should rest on such considerations? Would it not impose an undue burden on the prosecutor to have to prove beyond reasonable doubt that the defendant felt dished?

115 In our judgment, the difficulties highlighted may be more imagined than real. First, unlike the position that Lord Bridge was faced with in *Shivpuri*, we are not concerned with the dangers of leaving fine legal questions and distinctions in the hands of a jury. Our judges are experienced in routinely dealing with difficult questions rooted in the specific intentions of an accused person. An example of this is the wide range of mental states that may attend upon a homicide and the wide range of distinct offences that may be found to have been committed depending on the specific state of mind that the accused person had at the relevant time.

116 Aside from this, the inquiry where the accused person acted on the basis of a mistaken belief will often entail the application of a modified "but for" test: but for the accused person's mistaken belief, would he have acted in the way that he did? The "but for" test has long been applied in the context of causation without undue difficulty.

117 Finally, rejecting the Framework would not avoid the challenge of having to resolve the difficult cases that we have identified at [111] above. The English courts deal with at least some of these by resorting to prosecutorial discretion, trusting that this will sieve out exceptional or extreme cases. This seems to us unsatisfactory because: (a) the liberty of individuals should not be dependent on discretionary powers when they may be dealt with in a principled way; and (b) the premise of that solution, namely, that extreme cases will be sieved out by the exercise of prosecutorial discretion, has been shown to be false in some instances. Indeed, the facts of *Anderton* constituted one of the examples of "extreme and exceptional cases" which the 1980 Law Commission Report incorrectly postulated would never come before the courts because it would not be realistic "to suppose that a complaint would be made or that a prosecution would ensue" (see the extract from para 2.97 of the 1980 Law Commission Report reproduced at [85] above).

Conclusion

118 We return, finally, to this case. We allow the appeal on the charge against Han as it currently stands and acquit Han of this charge. We adjourn the matter pending submissions from the Prosecution on whether, in the light of the foregoing observations, we should amend the charge to one of attempting to possess 100g of ketamine and 25g of Ice for the purpose of trafficking. If the Prosecution so contends, we will need to hear Han on the proposed amended

charge as well as on whether he intends to contest it; and if he does not intend to contest it, we will need to hear the parties on how we should deal with the question of sentence. The Prosecution is to file its submissions on these matters within 21 days of the date of this judgment, and counsel for Han is to respond to the Prosecution's submissions within 14 days. We will then hear the parties. Until then, Han is to remain in custody.

Sundaresh Menon Chief Justice	Andrew Phang Boon Leong Judge of Appeal	Steven Chong Judge of Appeal

Low Cheong Yeow (Matthew Chiong Partnership), Favian Kang Kok Boon (Peter Low & Choo LLC) and Josephine Iezu Costan (David Nayar & Vardan) for the appellant;
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