IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2020] SGCA 70

Criminal Appeal No 4 of 2019

Between

Public Prosecutor

… *Appellant*

And

Aishamudin bin Jamaludin

… *Respondent*

In the matter of Criminal Case No 11 of 2018

Between

Public Prosecutor

And

(1) Aishamudin bin Jamaludin
(2) Mohammad Azli bin Mohammad Salleh
(3) Roszaidi bin Osman

JUDGMENT

[Criminal Law] — [Statutory offences] — [Misuse of Drugs Act]
[Criminal Law] — [Complicity] — [Common intention]

Public Prosecutor
v
Aishamudin bin Jamaludin

[2020] SGCA 70

Court of Appeal — Criminal Appeal No 4 of 2019
Sundaresh Menon CJ, Andrew Phang Boon Leong JA, Judith Prakash JA, Tay Yong Kwang JA and Steven Chong JA
17 February 2020

17 July 2020 Judgment reserved.

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

Introduction

1 The respondent, Aishamudin bin Jamaludin ("Aishamudin"), was tried jointly with Mohammad Azli bin Mohammad Salleh ("Azli") and Roszaidi bin Osman ("Roszaidi") arising from their involvement in a drug transaction pertaining to, among other things, two packets containing not less than 32.54g of diamorphine ("the Drugs"). In this judgment, we address the Prosecution's appeal against the decision of the High Court judge ("the Judge") to convict Aishamudin on a lesser charge. We have issued a separate judgment in respect of Azli's and Roszaidi's appeals and their related applications: see *Mohammad Azli bin Mohammad Salleh v Public Prosecutor and another appeal and other matters* [2020] 1 SLR 1374 ("*Azli*"). In short, we allowed Azli's appeal against his conviction, and acquitted him of his charge of abetting Roszaidi to traffic in

the Drugs (at [111]). As for Roszaidi, we dismissed his appeal against his conviction for trafficking in the Drugs, but remitted the issue of whether he qualified for the alternative sentencing regime under s 33B(3) of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) ("MDA") to the Judge for additional evidence to be taken (at [3]). As the issues in Azli's and Roszaidi's appeals are distinct from those in the present appeal, it is not necessary for us to say anything more about our decision in *Azli*.

2 Aishamudin claimed trial to a capital charge of trafficking in the Drugs under s 5(1)(*a*) of the MDA by delivering them to Roszaidi, in furtherance of his common intention with another co-accused person, Suhaizam bin Khariri ("Suhaizam"), by virtue of s 34 of the Penal Code (Cap 224, 2008 Rev Ed). Significantly, the quantity of diamorphine that was reflected in Aishamudin's charge was *not less than 32.54g of diamorphine*. We refer to this charge as the "original charge". Suhaizam, on the other hand, pleaded guilty to a non-capital charge in the State Courts. Suhaizam's charge mirrored Aishamudin's original charge save in one material respect – the quantity of diamorphine was stated to be *not less than 14.99g of diamorphine*. It should be noted that under s 33(1) of the MDA read with the Second Schedule, the death sentence is generally mandated for the offence of trafficking in diamorphine if the quantity involved is more than 15g.

3 The Judge found it logically unsound for the Prosecution to have charged Aishamudin and Suhaizam with a *common intention* to traffic in *different amounts of diamorphine*. Accordingly, he amended the quantity of diamorphine in Aishamudin's original charge to not less than 14.99g ("the amended charge"), reflecting that stated in Suhaizam's charge, and convicted Aishamudin on the amended charge. The Judge sentenced Aishamudin to

25 years' imprisonment and 15 strokes of the cane: see *Public Prosecutor v Aishamudin bin Jamaludin and others* [2019] SGHC 08 ("GD") at [25]–[30].

4 The Prosecution appeals against the Judge's decision to amend Aishamudin's original charge. It contends that the original charge was made out both on the evidence and in law, and that in reducing the original charge, the Judge interfered with the proper exercise of prosecutorial discretion when there was no basis for him to do so. Aishamudin, on the other hand, defends the Judge's decision to amend the original charge. In this appeal, he no longer contests the fact that he delivered the Drugs to Roszaidi, and he therefore accepts that his conviction on the amended charge was sound. In fact, as Mr Hassan Esa Almenoar ("Mr Almenoar"), Aishamudin's counsel, candidly conceded before us, Aishamudin would have no basis at all to contest the original charge against him, if only the element of common intention with Suhaizam were removed.

5 In the circumstances, the main issue in this appeal is whether the Prosecution can charge two accused persons on the basis of a common intention between them, but prefer a more serious charge against one accused person and a less serious charge against the other. At first glance, there might appear to be an inconsistency between such common intention charges, particularly where the *mens rea* elements are concerned. For convenience, we refer to this situation as one of "differing common intention charges".

The facts

6 Given Aishamudin's position in the present appeal, the facts need only be set out briefly. Aishamudin accepted that of the ten statements that he gave in the course of the investigations, the account in his first seven statements was

largely inaccurate, in so far as he sought to distance himself from the drug transaction with Roszaidi. In his eighth statement, which was recorded on 11 July 2016 at 10.22am, he admitted that while he initially sought to pin the blame entirely on Suhaizam, he did not wish to "hide the truth" any longer. At the trial, Aishamudin accepted in cross-examination that his eighth, ninth and tenth statements were accurately recorded. We therefore take the account given by Aishamudin in these statements.

7 In essence, at the material time, Aishamudin and Suhaizam were colleagues employed as truck drivers to deliver goods from Malaysia to Singapore. In the course of these deliveries, Aishamudin would, for monetary reward, deliver drugs to recipients in Singapore on behalf of drug traffickers known to him as "Tambi" and "Suhadi". There were at least two prior occasions on which Aishamudin had delivered drugs on behalf of Tambi and Suhadi, and Suhaizam had collaborated with him in delivering the drugs on the second occasion.

8 On 6 October 2015, Aishamudin was informed by Suhadi that there was a "job" that day. Accordingly, Aishamudin went to Suhadi's house and collected a red plastic bag. Suhadi explicitly told Aishamudin that there were packets in the red plastic bag which contained "heroin and a bit of *sejuk*" (heroin being a common name for diamorphine, and *sejuk* being a street name for methamphetamine). On the same day, Aishamudin asked Suhaizam to help him transport these drugs to Singapore and deliver them, and Suhaizam agreed to do so. Aishamudin expected that they would receive RM4,000 for performing this delivery.

9 At the trial, Aishamudin testified that when he entered the truck driven by Suhaizam on 6 October 2015, he had the red plastic bag with him, and he

informed Suhaizam that there was diamorphine and methamphetamine in it. After clearing Tuas Checkpoint, Aishamudin and Suhaizam proceeded to Changi Cargo Complex to perform a cargo delivery. Sometime after 9.00pm, Suhaizam drove the truck to Bulim Avenue and parked it along the road. Unknown to them, they were being observed by officers from the Central Narcotics Bureau ("CNB"). Shortly thereafter, a car driven by Azli turned into Bulim Avenue. Roszaidi alighted from the car and collected the red plastic bag from Aishamudin before returning to the car. Both vehicles then exited Bulim Avenue. Throughout the incident, Aishamudin received instructions from Tambi and Suhadi. All the individuals involved in the transportation, delivery and collection of the red plastic bag and its contents were subsequently arrested by CNB officers at various locations.

The charges against Aishamudin and Suhaizam

10 We turn to the charges preferred against Aishamudin and Suhaizam, which we have alluded to earlier at [2] above. The original charge against Aishamudin was as follows:

> That you …
>
> on 6 October 2015 sometime before 10.00 p.m., in the vicinity of Bulim Avenue, Singapore, together with one Suhaizam Bin Khariri (Malaysian IC: 85[XXX]), and in furtherance of the common intention of you both, did traffic in a Class 'A' controlled drug listed in the First Schedule to the [MDA], *to wit, by delivering two (02) packets containing not less than 921.50 grams of granular/powdery substance, which was analysed and found to contain* ***not less than 32.54 grams of diamorphine***, to one Roszaidi Bin Osman (NRIC: S72[XXX]), without authorisation under the [MDA] or the Regulations made thereunder, and you have thereby committed an offence under section 5(1)(a) of the [MDA] read with section 34 of the Penal Code …, and punishable under section 33(1) or section 33B of the [MDA].
>
> [emphasis added in italics and bold italics]

11 The charge against Suhaizam mirrored Aishamudin's charge save for the reduced quantity of diamorphine, and read as follows:

> You,
>
> SUHAIZAM BIN KHARIRI
> …
>
> are charged that you, on 6 October 2015 sometime before 10.00 p.m., in the vicinity of Bulim Avenue, Singapore, together with one Aishamudin Bin Jamaludin (Malaysian IC: 85[XXX]), and in furtherance of the common intention of you both, did traffic in a Class 'A' controlled drug listed in the First Schedule to the [MDA], *to wit, by delivering two (02) packets containing not less than 921.50 grams of granular/powdery substance, which was analysed and found to contain* ***not less than 14.99 grams of diamorphine***, to one Roszaidi Bin Osman (NRIC: S72[XXX]), without authorisation under the [MDA] or the Regulations made thereunder, and you have thereby committed an offence under section 5(1)(a) of the [MDA] read with section 34 of the Penal Code …, and punishable under section 33(1) of the [MDA].
>
> [emphasis added in italics and bold italics]

12 On 15 January 2018, Suhaizam pleaded guilty to this charge and was sentenced by the District Judge to 25 years' imprisonment and 15 strokes of the cane (see *Public Prosecutor v Suhaizam bin Khariri* [2018] SGDC 16). His appeal against sentence was dismissed by the High Court.

13 In the proceedings against Suhaizam, the Prosecution tendered a statement of facts which Suhaizam unreservedly admitted to. This statement of facts is consistent with the narrative we have set out above. We note that when Suhaizam was called as a prosecution witness at Aishamudin's trial, he initially testified that he was "just the driver" and did not know that there was diamorphine in the red plastic bag. Suhaizam also claimed to be unaware that Aishamudin had passed the red plastic bag to Roszaidi. However, when the Prosecution applied to cross-examine Suhaizam and impeach his credit,

Suhaizam accepted that the statement of facts which he had admitted to was true and correct.

The decision below

14 At the trial, a key point of contention between the parties was whether the red plastic bag which Aishamudin handed to Roszaidi had contained the Drugs in the first place. However, in this appeal, Aishamudin does not take any issue with the Judge's finding that the Drugs originated from the red plastic bag in his possession (GD at [30]; see also [4] above). It is thus not necessary for us to say anything more about this issue.

15 The other key point of contention at the trial was whether there was a common or shared intention between Aishamudin and Suhaizam to traffic in the Drugs. Aishamudin submitted that if there were indeed such an intention, there would have been no reason for the Prosecution to prefer a reduced charge against Suhaizam. In contrast, the Prosecution contended that the requisite common intention between Aishamudin and Suhaizam was supported by the evidence, and that the original charge against Aishamudin was unaffected by its decision to proceed on a reduced charge against Suhaizam. In addition, the Prosecution submitted that there was nothing put forward by the Defence to show any element of unconstitutionality or failure of justice in relation to its decision to press differing common intention charges.

16 We turn to the Judge's reasons for amending the original charge against Aishamudin. The Judge noted that Aishamudin and Suhaizam were charged with having the *common intention* to traffic in the Drugs. In that light, the Judge considered it logically unsound that the charges against them reflected different quantities of diamorphine. The Judge explained that while the two men might

have had the common intention to traffic, "the common intention *must correlate to the same amount of diamorphine*" [emphasis added] (GD at [29]). The Judge elaborated that as a matter of logic, "one can say that the larger amount of Aishamudin includes the lower amount of Suhaizam, but the lower amount of Suhaizam cannot possibly include the larger amount of Aishamudin" (GD at [26]).

17 As Suhaizam's case had already been disposed of, the Judge observed that it was out of the question to have him retried for having the common intention with Aishamudin to traffic in not less than 32.54g of diamorphine. In the circumstances, the Judge amended the quantity of diamorphine reflected in the original charge against Aishamudin to mirror the quantity stated in the charge against Suhaizam by reducing the former quantity to not less than 14.99g. The Judge was satisfied that the elements of trafficking had been made out against Aishamudin in respect of the amended charge, and sentenced him to 25 years' imprisonment and 15 strokes of the cane (GD at [29]–[30]).

The parties' respective cases on appeal

The Prosecution's case

18 The Prosecution advances three principal submissions in its appeal against the Judge's decision to amend Aishamudin's original charge.

19 First, the Prosecution submits that the Judge erred in finding that the original charge was not made out. Specifically, with regard to the common intention element, which is the only element disputed by Aishamudin on appeal, the Prosecution contends that Aishamudin and Suhaizam shared the common intention to traffic in *the two packets of diamorphine which had a gross weight of not less than 921.50g*. On the Prosecution's case, the common intention

element does not pertain to *the net weight, post-analysis, of not less than 32.54g of diamorphine*.

20 Second, the Prosecution submits that the Judge erred in finding that the differing common intention charges were incongruous. On a plain reading, "not less than 14.99g" did not exclude and was not incompatible with a quantity of 32.54g. Further, the difference between the net weight of the diamorphine in the original charge against Aishamudin and that of the diamorphine in the charge against Suhaizam did not impact the underlying agreement between Aishamudin and Suhaizam to traffic in the two packets containing not less than 32.54g of diamorphine. There was no factual or legal inconsistency in the cases brought against Aishamudin and Suhaizam.

21 Third, the Prosecution submits that the Judge, in amending the original charge, interfered with a proper exercise of prosecutorial discretion when there was no basis for him to do so.

Aishamudin's case

22 In contrast, Aishamudin seeks to defend the Judge's decision to amend the original charge. He accepts, in this appeal, that *the Prosecution has proved that there was a common intention between him and Suhaizam to traffic in not less than 14.99g of diamorphine*. He submits, however, that since Suhaizam did not face the same charge as him, the Prosecution has failed to prove that they had the common intention to traffic in the *remaining quantity of diamorphine contained in the Drugs*. Thus, it cannot be said that he and Suhaizam had the common intention to traffic in not less than 32.54g of diamorphine. In particular, it is clear from the foregoing that Aishamudin's quarrel with the common intention element of the original charge against him is that the Prosecution has

failed to prove that *Suhaizam* had the intention to traffic in not less than 32.54g of diamorphine. Aishamudin does *not* argue that he himself had anything less than the intent to traffic in the entirety of the Drugs, which he accepts he did by handing the Drugs to Roszaidi. As we mentioned at [4] above, Aishamudin in fact accepts that he could lawfully have been convicted of the original charge had it not involved any element of common intention.

23 Aishamudin also makes clear in his submissions that he does not raise any issue of constitutionality, nor does he challenge the exercise of prosecutorial discretion against him. Rather, his contention is simply that the Prosecution has failed to prove its case against him in respect of the original charge, and the Judge was thus entitled to amend the original charge accordingly.

The issues to be determined

24 There are two main issues which arise in this appeal.

25 First, we consider whether it is permissible for the Prosecution to prefer differing common intention charges against accused persons. We will address this in the following manner:

(a) We begin by summarising the existing law, under which the Prosecution is entitled to charge co-offenders in the same criminal enterprise with *different offences*.

(b) We then consider whether there is anything in respect of *common intention charges* that mandates a different approach from the general position. We also discuss the possible objections that an accused person might be entitled to raise when charged with one of a set of differing common intention charges.

26 Second, we analyse whether any of the possible objections is applicable to the original charge against Aishamudin, and whether the original charge is made out on the evidence.

Preamble to Issue 1: The current state of the law

27 We begin with the existing law on whether the Prosecution is entitled to charge co-offenders in the same criminal enterprise with *different offence*s. We focus on a trio of cases decided by this court in early 2012: *Ramalingam Ravinthran v Attorney-General* [2012] 2 SLR 49 ("*Ramalingam*"), *Quek Hock Lye v Public Prosecutor* [2012] 2 SLR 1012 ("*Quek Hock Lye*") and *Chan Heng Kong and another v Public Prosecutor* [2012] SGCA 18 ("*Chan Heng Kong*"). At the outset, we stress that none of these three cases concerned differing *common intention* charges. Nonetheless, they provide a useful backdrop to our analysis of the issue at hand.

28 In *Ramalingam*, eight blocks of vegetable matter were found on the applicant, Ramalingam. After a trial, he was convicted of two charges, namely, possessing 5,560.1g of cannabis and 2,078.3g of cannabis mixture respectively for the purpose of trafficking. Both charges reflected the *actual amount* of cannabis and cannabis mixture found on Ramalingam and were capital charges. The mandatory death sentence was therefore imposed on him. In contrast, Sundar, the individual who had passed Ramalingam the drugs, was charged with trafficking in a *smaller amount* of cannabis and cannabis mixture than the actual amount involved. The quantities of controlled drugs stated in the charges against Sundar were just below the threshold that would carry the mandatory death sentence on conviction. Sundar pleaded guilty to these non-capital charges. In the circumstances, Ramalingam, by way of a criminal motion, sought to reopen his conviction before this court. He submitted that the Prosecution had violated

Art 12(1) of the Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint) ("the Constitution") in charging him with capital charges while charging Sundar with non-capital charges, even though *both* of them were involved in the same criminal enterprise (at [1]–[5]). Article 12(1) provides that "[a]ll persons are equal before the law and entitled to the equal protection of the law".

29 It was held that there was no breach of Art 12(1) of the Constitution because Ramalingam had not discharged his burden of establishing a *prima facie* case that the Prosecution had infringed Art 12(1) (at [73]). The following principles set out in *Ramalingam* are relevant for present purposes:

> (a) Article 12(1) requires the Prosecution, in the exercise of its discretion, to give unbiased consideration to every offender and disregard any irrelevant consideration. This applies both to cases involving a single offender, and cases where several offenders are involved in the same or similar offences committed in the same criminal enterprise (at [51]–[52]).
>
> (b) The Prosecution may take into account a myriad of factors in determining whether or not to *charge an offender* and, if charges are to be brought, *for what offence or offences*. These factors may include the question of whether there is sufficient evidence against the offender and his co-offenders (if any), their personal circumstances, the willingness of one offender to testify against other co-offenders, and other policy factors. Such distinctions may justify offenders in the same criminal enterprise being prosecuted differently (at [52]).

(c) It is not necessarily in the public interest that every offender *must* be prosecuted, or that an offender must be prosecuted for the *most serious offence* that arises on the facts (at [53]).

(d) The mere differentiation of charges between co-offenders, even between those of *equal culpability*, is not *per se* sufficient to constitute *prima facie* evidence of bias or the taking into account of irrelevant considerations by the Prosecution, thereby constituting a breach of Art 12(1). Such differentiation might be legitimate for a variety of reasons, and might be justified based on a consideration of the sort of factors set out at [29(b)] above. However, there could well be cases where it might be possible to prove a breach of Art 12(1): for example, where a less culpable offender is charged with a more serious offence as compared to his more culpable co-offender, and where there are no other facts to show a lawful differentiation between their respective positions. On the facts of *Ramalingam*, Sundar was not more culpable than Ramalingam; at its highest, it could only be said that they were of equal culpability and/or moral blameworthiness. There was no *prima facie* evidence that the Prosecution had been biased or had taken into account irrelevant considerations (at [70], [71] and [73]).

30 *Ramalingam* was subsequently applied in the context of accessorial liability in *Quek Hock Lye*. There, the appellant, Quek, was convicted in the High Court of possessing not less than 62.14g of diamorphine for the purpose of trafficking, in furtherance of a *criminal conspiracy* with Winai. The mandatory death sentence was imposed on him. Prior to Quek's trial, Winai had pleaded guilty to an identical charge, save that the quantity of diamorphine in his charge was reflected as "not less than 14.99 of diamorphine", which is just

below the threshold for the imposition of the mandatory death sentence (see [2] above).

31 On appeal, Quek's Art 12(1) objection was dismissed on the ground that he had not discharged his burden of establishing a *prima facie* case that the Prosecution had infringed Art 12(1) (at [25]).

32 In addition, the court also considered whether Quek and Winai could be said to be parties to the same *criminal conspiracy* to traffic in diamorphine despite having been separately charged in respect of different quantities of diamorphine. It found that notwithstanding the seeming incongruity in the charges against Quek and Winai, this had no impact on their *underlying agreement to traffic in the full amount of 62.14g of diamorphine*. The fact that Winai's charge specified a lower amount of diamorphine only reflected the Prosecution's discretion to prefer a less serious charge. Accordingly, it was held that there was no irregularity in the charges (at [40]):

> … *[T]he point is that where sufficient evidence can be adduced to prove the underlying agreement between the co-conspirators beyond a reasonable doubt*, the outcome *per se* of the proceedings of a co-conspirator, or the death or disappearance of the co-conspirator is not *ipso facto* a reason to set aside the conviction or amend the charge preferred against the other co-conspirator. In the present case, the Public Prosecutor's decision to prefer charges against Quek and Winai involving different quantities of the seized drugs does not undermine the fact that *there was a conspiracy between them to traffic in the total seized quantity*. The situation that results is in fact not dissimilar from the situation where a co-conspirator has either been acquitted or has disappeared. *It bears emphasising that the evidence adduced establishing the underlying agreement between the respective co-conspirators remains undisturbed.* Indeed, in contrast to a situation involving the acquittal of a co-conspirator, both Quek and Winai were in fact convicted in the present case; *the difference in punishments arising solely from the exercise of prosecutorial discretion, a discretion accorded to the Public Prosecutor under the Constitution.* Furthermore, we also think that Winai's separate charge for possession of not

> less than 14.99g of diamorphine in furtherance of a criminal conspiracy with Somchit [another co-conspirator] and Quek to traffic in the stated quantity of the seized drugs, is not, on a plain reading, incongruous with the amended charge on which Quek was convicted as "not less than 14.99 g" could include 62.14g. We would reiterate that in Winai's [statement of facts] upon which he was convicted on the reduced quantity, the full weight of the seized drugs discovered was clearly stated. [emphasis in original omitted; emphasis added in italics]

33 Finally, we turn to *Chan Heng Kong* ([27] *supra*). There, the appellant, Sng, was charged with *abetting* his younger brother, Choong Peng, to traffic in drugs by instigating the latter to be in possession of 30 packets of substance containing *not less than 17.70g of diamorphine* for the purpose of trafficking. In contrast, Choong Peng faced a non-capital charge of possessing 30 packets of substance containing *not less than 14.99g of diamorphine* for the purpose of trafficking. On appeal, Sng's objection under Art 12(1) of the Constitution was dismissed on the ground that he had failed to substantiate his case that the Prosecution had exercised its discretion based on irrelevant considerations (at [40]).

34 In addition, Sng also contended that the quantity of the diamorphine reflected in his charge had to be the same as that in Choong Peng's charge. He submitted that this was necessary given the language of s 12 of the MDA, which provides that "[a]ny person who abets 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*" [emphasis added]. Sng's submission was rejected as follows (at [43]):

> *… In our view, the words "that offence" in s 12 of the MDA refer to the offence which the Prosecution is able to prove against an accused on the admissible evidence. In the present case, the offence that could have been proved against Choong Peng is that of trafficking in 30 packets of substance containing not less than 17.70g of diamorphine, and, accordingly, he too could have been charged with a capital offence. However, the commission of an*

> *offence by an offender does not necessarily result in his being charged for that particular offence.* As fully explained by this court in [*Ramalingam*], the Attorney-General, as the Public Prosecutor, may exercise his prosecutorial discretion to charge two or more offenders engaged in the same criminal enterprise with different offences punishable with different punishments according to (*inter alia*) their culpability in the carrying out of that criminal enterprise. He is not required by law to charge all offenders involved in a criminal enterprise with the same offence, be it a capital offence or a non-capital offence, provided that his decision is neither biased nor made as a result of taking into consideration irrelevant matters … [emphasis added]

35 The following key principles may be distilled from our brief summary of the current legal position in relation to accessorial liability as well as where two or more offenders are separately charged in connection with a single criminal transaction:

(a) First, it is permissible for the Prosecution to charge co-offenders in the same criminal enterprise with different offences, so long as the exercise of its discretion is free of bias and untainted by irrelevant considerations. Where this is not the case, an objection based on Art 12(1) of the Constitution may be open to the Defence.

(b) Second, the relevant inquiry is not the seeming inconsistency between the charges against different co-offenders, but whether the Prosecution is able to prove all the elements of the more serious charge. In this regard, the fact that the Prosecution may have proceeded on a less serious charge against one co-offender does not result in the lowering of its burden of proving the more serious charge against another co-offender. Thus, in *Quek Hock Lye* ([27] *supra*), for example, in order for the Prosecution to prove the *criminal conspiracy* charge against Quek, it had to prove that in furtherance of the alleged conspiracy, *both Quek and Winai* possessed not less than 62.14g of diamorphine for the purpose

> of trafficking. Similarly, in *Chan Heng Kong*, in order to make out the *abetment* charge against Sng, the Prosecution had to prove that Choong Peng possessed not less than 17.70g of diamorphine for the purpose of trafficking. The fact that Winai (in *Quek Hock Lye*) and Choong Peng (in *Chan Heng Kong*) were charged with and convicted of non-capital charges involving *lesser* quantities of controlled drugs did not reduce the Prosecution's burden of proof in respect of the charges against Quek and Sng respectively (see *Quek Hock Lye* at [40], quoted at [32] above, and *Chan Heng Kong* at [43], quoted at [34] above).

36 With these principles in mind, we turn to consider whether there is anything in respect of *common intention* charges which requires us to take a different approach from the general position set out above.

Issue 1: Whether it is permissible for the Prosecution to prefer differing common intention charges

37 We begin with two preliminary points. First, this appears to be the first time that the permissibility of preferring differing *common intention* charges has been raised squarely before us. There have been other cases where the Prosecution preferred differing common intention charges in relation to drug offences (see, for example, *Public Prosecutor v Muhammad Nur Sallehin bin Kamaruzaman* [2017] SGHC 302 and *Raman Selvam s/o Renganathan v Public Prosecutor* [2004] 1 SLR(R) 550). However, no objection was taken by the accused persons in those cases. We also observe that differing common intention charges are not unique to drug offences. For instance, the Prosecution may charge A with voluntarily causing grievous hurt ("VCGH") under s 325 of the Penal Code in furtherance of a common intention with B, and yet charge B only with voluntarily causing hurt ("VCH") under s 323 of the Penal Code in furtherance of the same common intention with A (see, for example, *Arumugam*

Selvaraj v Public Prosecutor [2019] 5 SLR 881 ("*Arumugam*"), which we discuss at [52] below).

38 Second, we should also point out that while the Prosecution's preferring of differing common intention charges can result in co-offenders being charged with *different* offences, strictly speaking, both Aishamudin and Suhaizam were charged under the *same* offence-creating provision, namely, trafficking in a controlled drug contrary to s 5(1)(*a*) of the MDA. However, because their respective charges specified different quantities of diamorphine, there is a divergence in the prescribed punishment under the Second Schedule of the MDA. In our judgment, this does not change the analysis in respect of the permissibility of pressing differing common intention charges.

The plain reading of s 34 of the Penal Code

39 We begin with the language of s 34 of the Penal Code, which concerns liability for acts done pursuant to a common intention. It states:

> **Each of several persons liable for an *act* done by all, in like manner as if done by him alone**
>
> **34.** When a ***criminal act*** is done by several persons, in furtherance of the *common intention* of all, each of such persons is liable for that ***act*** in the same manner as if the ***act*** were done by him alone.
>
> [emphasis added in italics and bold italics]

40 In our judgment, the *text* of s 34 is of critical importance and anchors our analysis. We note that s 34 is a *distinct* provision which does not find an equivalent in a number of common law jurisdictions, such as England, Australia and Hong Kong. Section 34 of the Penal Code can be traced to s 34 of India's Penal Code (Act 45 of 1860) ("the Indian Penal Code"). In 1870, the original version of s 34 of the Indian Penal Code was amended by the addition of the

phrase "in furtherance of the common intention of all". It was this amended version which was introduced into our legislation when the Penal Code (Ordinance 4 of 1871) was enacted in 1872 while Singapore was part of the Straits Settlements (see *Daniel Vijay s/o Kathesaran and others v Public Prosecutor* [2010] 4 SLR 1119 ("*Daniel Vijay*") at [80]). The text of s 34 has remained unchanged in all subsequent editions of the Penal Code.

41 A few observations can be made based on a plain reading of s 34.

42 To begin, s 34 is invoked where the entirety of a criminal act is performed by a number of different persons, pursuant to a common intention shared by all of them. It can be described as a *deeming provision* because where it is invoked, an accused person is, by its virtue, treated in the eyes of the law *as if* he had himself performed the entire "criminal act", even though he might in fact only have performed some aspects of the act in question. On this basis, he may be made fully liable for the entirety of that "criminal act". To put it in another way, the effect of s 34 is to make a co-offender liable even for those aspects of a criminal act that were carried out by others so long as those other aspects were carried out in furtherance of their shared common intention, and so long as they each *participated* in the criminal act. To illustrate, if three individuals had the common intention to commit robbery while armed with a gun, it is immaterial that only A carried the gun and took the money, while B kept a lookout and C waited in the car as a getaway driver. Regardless of the precise roles performed by each of A, B and C, *all three of them* are potentially liable for the "criminal act" in question, namely, the entire venture of committing robbery while armed with a gun, by virtue of their participation in it.

43 We pause to note that s 34 has been described as laying down "a *rule of evidence* to infer joint responsibility" [emphasis added] (see, for example, *Teh Thiam Huat v Public Prosecutor* [1996] 3 SLR(R) 234 at [26]). With respect, and in the light of the explanation above, we consider this terminology to be inaccurate and potentially confusing. This is because whether an accused person may be made liable for the acts of others raises a *question of law*, rather than one merely *of evidence*. What s 34 lays down is, as described by this court in *Daniel Vijay*, "a principle of liability" (at [75]).

44 We return to our analysis of the text of s 34. In our judgment, the comparator employed in s 34 is critical: it states that a party to a criminal act done by several persons in furtherance of their common intention is "liable for *that act* in the same manner as if *the act* were done by him alone" [emphasis added]. Significantly, s 34 does not refer to the *charge(s) or offence(s)* which may arise out of that act; it also does not purport to make each party to that act *liable in the same manner* (and no more or no less) as every other party. Instead, its effect is to make an offender liable even for acts carried out by others pursuant to a shared common intention, as if those acts had been carried out by himself. We digress here to observe that it is well established that a "criminal act" is *not* synonymous with the offence(s) which may arise from that act. In *Lee Chez Kee v Public Prosecutor* [2008] 3 SLR(R) 447 ("*Lee Chez Kee*"), we explained the distinction between the two expressions in the following terms (at [136]):

> There is usually no problem with the requirement of a "criminal act", save that some decisions have perhaps been a bit inaccurate in stating that the common intention must be to commit a particular "offence". In this regard, it is important to bear in mind that the "criminal act" that is "done by several persons" in s 34 does not refer to the actual crime done only. *It is essential to realise that the expression "criminal act" is not synonymous with "offence" as defined in s 40 of the Penal Code, which provides as follows*:

> **"Offence".**
>
> **40**.—(1) Except in the Chapters and sections mentioned in subsections (2) and (3), "offence" denotes a thing made punishable by this Code.

> *Thus, a single criminal act may involve and give rise to several "offences".* In other words, as the learned authors of [W W Chitaley & V B Bakhale, *The Indian Penal Code (XLV of 1860)* (The All India Reporter Ltd, 3rd Ed, 1980)] point out at vol 1 p 160, *the expression "criminal act" in s 34 means the whole of the criminal transaction in which the co-offenders engage themselves by virtue of their common design and not any particular offence or offences that may be committed in the course of such a transaction.*
>
> [emphasis added]

45 There is therefore nothing in the language of s 34 that *mandates* that the Prosecution must bring identical charges against all those who are charged pursuant to a common intention to do a criminal act. Indeed, s 34 is not concerned with *limiting* the power of the Prosecution at all; on the contrary, it is a tool by which the Prosecution's ability to proceed against an accused person is *extended* so that the accused person may be held liable even for the acts of others as long as the provision can properly be invoked. Further, in our judgment, there are good reasons why there is no general rule that the Prosecution must bring identical charges against all the parties to a criminal act.

46 First, the Prosecution is not obliged to charge every participant in a criminal enterprise (see [29(c)] above). In the present case, the Prosecution could well have decided not to charge Suhaizam at all, if there had been valid reasons for it to take that position in the exercise of its prosecutorial discretion. If the Prosecution had preferred the original charge against Aishamudin but had brought *no charge* against Suhaizam, it is clear that the original charge against Aishamudin would have been made out as long as the Prosecution could prove each and every element of that charge. That being the case, it seems unsatisfactory to proscribe the Prosecution from preferring a reduced charge

against Suhaizam. The Prosecution would then be left with a binary decision in respect of Suhaizam – either to not charge him at all, or to charge him with a capital offence – when the Prosecution might have determined in its discretion that the more appropriate course was to charge Suhaizam with a less serious non-capital offence.

47 Second, allowing the Prosecution to proceed with differing common intention charges also enables it to tailor the respective charges in line with each accused person's culpability and circumstances (see [29(b)] and [35(a)] above). For example, if a mastermind manipulates and instigates a young person to carry out the more egregious aspects of a criminal act in furtherance of their common intention, the mastermind's culpability would likely be higher, and it might be in the interests of justice to charge him with a more serious offence.

48 Third, and most significantly, an accused person who faces a more serious charge relative to his fellow participants in a criminal enterprise cannot be said to be prejudiced because the Prosecution's *legal burden* to prove the charge and its *evidential burden* to adduce sufficient evidence are not in any way compromised or attenuated where it chooses to press differing common intention charges. Even when the Prosecution brings differing common intention charges against A and B, with A facing a more serious charge than B, it must nevertheless prove each element of that more serious charge against *both* A and B at A's trial (whether or not B is also being jointly tried at this trial). Its burden of proof at A's trial is no more and no less than if both A and B faced the more serious charge. There is therefore no overreach of constructive liability under s 34 by a notional lowering of the Prosecution's burden of proof. This is no different from differing charges in the context of accessorial liability: see [35(b)] above. We will now explain why this is the case by virtue of the principles governing s 34 liability.

The requirements for liability under s 34 of the Penal Code

49 As this court explained in *Muhammad Ridzuan bin Md Ali v Public Prosecutor and other matters* [2014] 3 SLR 721 ("*Ridzuan*") at [34], citing *Daniel Vijay* ([40] *supra*), three elements must be present before s 34 may be invoked: (a) a criminal act; (b) a common intention between the persons in question; and (c) participation in the criminal act.

(a) A *criminal act* in this context has been defined as "that unity of criminal behaviour, which results in something, for which an individual would be punishable, if it were all done by himself alone" [emphasis in original omitted] (*Daniel Vijay* at [92], citing *Barendra Kumar Ghosh v Emperor* AIR 1925 PC 1 at 9). It refers not to the offence that the individuals concerned plan or carry out, but rather, to an act or a continuum of acts – in short, a criminal design (*Lee Chez Kee* ([44] *supra*) at [137]; see also [44] above).

(b) A *common intention* refers to a "common design" or plan, which might either have been pre-arranged or formed spontaneously at the scene of the criminal act (*Lee Chez Kee* at [158] and [161]). This must be the intention to do "the very criminal act done by the actual doer" [emphasis in original omitted]; foresight of the possibility of the criminal act is not enough (*Daniel Vijay* at [107]; see also *Daniel Vijay* at [87] and [166]). This is the critical aspect on which this court in *Daniel Vijay* departed from the earlier analysis in *Lee Chez Kee*. As this formulation shows, the common intention, strictly speaking, refers not to the intention to commit the offence which is the subject of the charge, but to the intention to do the criminal act, although in many cases, the two will overlap (*Daniel Vijay* at [99]).

(c) The parties to a common intention charge must *participate* in "any of the diverse acts which together form the unity of criminal behaviour resulting in the offence charged" (*Daniel Vijay* at [163]). This reflects the principle that "a person cannot be made liable for an offence with the help of s 34 unless he has actually participated in the commission of the crime" (*Lee Chez Kee* at [138]). It was also recognised in *Lee Chez Kee* that participation may take many forms and degrees, and it was held that whether an accused person's participation in a criminal act is of a sufficient degree to satisfy the participation element and attract liability under s 34 is a question of fact. In this regard, it was noted too that there is no requirement for an accused person to be physically present at the scene of the criminal act in order for him to be liable under s 34 (at [146]).

50 It is evident from the foregoing that a common intention charge against A for committing an offence pursuant to a common intention with B involves proof of the elements of common intention against *both* A and B, even if the trial is concerned only with A. In so far as the *actus reus* of such a charge is concerned, the criminal act involved in the offence must be proved to have occurred, with the participation in the criminal act of both A and B. As for the *mens rea*, common intention, when broken down to its constituent parts, requires the Prosecution to prove that A had the intention to do the criminal act, that B also had such an intention, and that this was part of a common design between them. Thus, it is not possible for the common intention charge against *A* to stand if *B* either did not participate in the criminal act, or did not share the requisite common intention with A. If either or both of these matters are not proved in respect of B (whether or not B is also being tried at the same trial),

then there can be no common intention charge involving A and B. A, after all, cannot be said to have a *common* intention just by himself.

51 As a simple illustration, suppose that A and B are both involved in an altercation with a victim. A is charged with committing VCGH pursuant to a common intention with B, while the Prosecution reduces the charge against B to one of committing VCH pursuant to a common intention with A, to which B pleads guilty. At *A*'s trial, the Prosecution would have to prove that *both* A and B shared a common intention to commit a criminal act which amounted to VCGH, and that they both participated in the criminal act. The fact that B has pleaded guilty to the lesser offence of committing VCH pursuant to a common intention with A does not change the analysis in so far as the charge against A is concerned. It would, of course, remain open to the Defence at A's trial to run the case that B in fact only had the intention to commit VCH, and so attempt to raise a reasonable doubt as to the basis of the VCGH common intention charge against A.

52 Indeed, a similar situation involving differing common intention charges was the subject of an appeal before the High Court in *Arumugam* ([37] *supra*). There, the appellant had claimed trial to a charge of VCGH in furtherance of a common intention with a co-offender. The co-offender pleaded guilty to and was convicted of a charge of VCH in furtherance of that common intention. The appeal was confined to a dispute over whether the parties had to share a specific common intention to inflict the precise injury that was caused in that case (a fractured finger), or whether it sufficed to establish a common intention to commit VCGH in general. The High Court found that it sufficed for the Prosecution to show that there was a common intention to cause an injury falling within the class of injuries covered by the penal provision (namely, grievous hurt) (at [10]). Although no objection was raised to the differing common

intention charges, the reasoning of the court may be taken as *implicitly* supporting the notion that what mattered was whether there was sufficient evidence to establish that there was in fact "a common intention to cause *grievous hurt*" [emphasis added] (at [12]) notwithstanding the co-offender's plea of guilt to the lesser charge of VCH. For the reasons explained below at [73], we observe that in the example given in the previous paragraph, the fact that the case against B would have proceeded on the basis of A and B having a common intention to commit VCH is not an obstacle to the case against A proceeding on the basis of their sharing a common intention to commit VCGH.

The objection against inconsistent cases

53 We have now considered two well-established bases on which an accused person may be able to challenge differing common intention charges: he could raise a challenge under Art 12(1) of the Constitution, or he could seek to raise a reasonable doubt in respect of the elements of the charge against him. With regard to the latter basis, we explained at [50] above that despite pressing differing common intention charges, the Prosecution's legal and evidential burden remains that of proving every element of each charge against *all* the co-offenders said to share in the common intention that is reflected in the charge in question, notwithstanding the fact that they might not individually face the same charges.

54 While this addresses the concern that the pressing of differing common intention charges must not result in unduly lowering the burden of proof incumbent upon the Prosecution when it seeks to secure convictions against participants in a joint criminal enterprise, it does not fully address the concern expressed by the Judge in the present case. Part of that concern, as we understand it, is that even though the Prosecution may be able to prove its case

on one of a set of differing common intention charges, it may be doing so on a basis which is *inconsistent* with its case in respect of the remaining charge(s) involving the same common intention. It is clear that this concern would be most acute when the differing common intention charges are tried at separate proceedings – and even more so when one of those proceedings involves a plea of guilt, where the facts are not fully tested at trial, as with Suhaizam's conviction in the present case.

55 In our judgment, this concern can be seen as part of a wider objection against inconsistent cases, which contains at least two strands:

(a) The first strand pertains to the need to ensure *procedural fairness* in criminal proceedings. It is generally incumbent on the Prosecution to advance a consistent case, whether in single or separate proceedings, so that the accused person knows the case that he has to meet.

(b) The second strand concerns the need to avoid *prejudicial outcomes*. This can manifest itself when the Prosecution secures convictions or sentences against different accused persons on factual premises which contradict one another.

(c) Ultimately, the common thread underlying both strands is that of *prejudice*: the court should ensure that an accused person is not prejudiced by reason of any inconsistency in the Prosecution's case.

The objection based on procedural fairness

56 We turn to the first facet of the objection against inconsistent cases – procedural fairness. Within the context of a *single set of proceedings* against a single accused person, there is no doubt that there is a proscription against the

Prosecution running a case which is internally inconsistent. We alluded to this in *Mui Jia Jun v Public Prosecutor* [2018] 2 SLR 1087 at [89]:

> … [I]t is a fundamental principle of our criminal law that *an accused person should know with certainty, and thus be prepared to meet, the Prosecution's case against him* … [I]t would violate that principle if a court were to consider a basis for convicting an accused that he was not aware of and thus was not ready to meet at his trial, in circumstances where knowledge of that basis for conviction might have affected the evidence presented at the trial. [emphasis added]

57 We reiterated this basic principle recently in *Public Prosecutor v Wee Teong Boo and another appeal and another matter* [2020] SGCA 56 at [113]. There, we stated that the Prosecution is not permitted to seek a conviction on a factual premise that it has never advanced, and which it has in fact denied in its case against the accused person. We suggested that this might be seen as part of a wider duty upon the Prosecution not to run inconsistent cases that amount to an abuse of process.

58 The objection against inconsistent cases based on procedural fairness extends equally to multiple accused persons in a joint trial. For instance, in *Ramesh a/l Perumal v Public Prosecutor and another appeal* [2019] 1 SLR 1003 ("*Ramesh a/l Perumal*"), the accused persons, Ramesh and Chander, were jointly tried on *separate charges* of drug trafficking. We observed that "there were significant problems with the manner in which the Prosecution's case against Ramesh had developed" (at [82]), as the Prosecution had put different and mutually incompatible accounts of a significant aspect of its case to Ramesh and Chander in cross-examination. We commented (likewise at [82]):

> … [A]s a matter of procedural fairness, and given that this was a joint trial, it was incumbent upon the Prosecution to develop a *unified case theory regarding the material facts* which both Chander and Ramesh, and their respective counsels, could challenge as *a single, objective account; rather than two separate*

> *case theories which contradicted each other*. … [emphasis added]

On the basis of this and other shortcomings in the Prosecution's case, we found that the Prosecution had failed to make out its primary case against Ramesh (at [87]).

59 In each of the foregoing cases, we stressed that the Prosecution could not run inconsistent cases because of the need to ensure procedural fairness to the accused person. In each of those cases, we considered that the inconsistencies in the Prosecution's case prevented the accused person from understanding, and therefore from being fully prepared to meet, the case which the Prosecution ultimately sought to advance against him. In such circumstances, the Prosecution's inconsistent cases may simply result in an acquittal of the charge against the accused person. Given that this facet of the objection against inconsistent cases is relatively well-established in the case law, it is not necessary for us to say anything more about it here.

The objection based on prejudicial outcomes

60 In our judgment, there is another facet to the objection against inconsistent cases that is based on *prejudicial outcomes* rather than procedural unfairness. Indeed, the concern we have described at [54] above, as well as our comment in *Ramesh a/l Perumal* that it is incumbent upon the Prosecution to develop a unified case theory against co-accused persons, alludes also to prejudice arising from outcomes rather than process. This occurs where the Prosecution secures outcomes (whether they be convictions or particular sentences) against multiple accused persons on inconsistent bases.

61 A distinction ought to be drawn between these two forms of prejudice because it may be possible for the accused persons in question to be prejudiced

by the Prosecution's inconsistent cases even if the Prosecution's case against each individual accused person is crystal clear. The simplest instance of such a situation is where the Prosecution secures a conviction against A on the basis of one set of facts, and then subsequently secures a conviction against B on the basis of a different set of facts which necessarily contradicts the basis of A's conviction – for example, by presenting a contradictory account of the same key events. The convictions of A and B cannot both be sound – proving the charge against B implicitly disproves the charge against A. It might be that at B's trial, taking place later in time, new evidence comes to light which proves B's guilt beyond reasonable doubt. Therefore, at the time of B's trial, there is no doubt that he should be convicted. But what then of the earlier case against A that stood on an inconsistent factual basis? It would appear that by convicting B in these circumstances, the court would be endorsing the Prosecution's securing of favourable outcomes against multiple accused persons by running inconsistent cases.

62 It seems to us that such an outcome is objectionable, even if there has been no procedural unfairness at either A's trial or B's trial. Indeed, there is a well-established proscription against an analogous situation in civil proceedings. The seeking of judgment by a party on multiple civil claims on the basis of inconsistent positions may amount to an abuse of process. We reiterated this proposition recently in *BWG v BWF* [2020] 1 SLR 1296 ("*BWG*") at [56]:

> [An] example of abuse of process might be where a debtor adopts an inconsistent position as regards a defence which it raises to dispute the debt to restrain a winding-up application. The debtor may have taken an inconsistent position in the same proceedings or in related proceedings. This is analogous to the situation where a debtor had previously admitted that it owes the debt, but subsequently disputes it. *The assertion of inconsistent positions may be treated as an abuse of process in order to protect the integrity of the judicial process and to safeguard the administration of justice.* … [I]f the debtor takes an inconsistent position in the same or related proceedings, the

> court may, in the absence of a clear and convincing reason for the debtor's inconsistency, deny the debtor relief as its conduct might amount to an abuse of process. [emphasis added]

63 The doctrine of approbation and reprobation is also apt to describe such a situation. A party impermissibly approbates and reprobates when it seeks to take the benefit of a position despite having also taken the benefit of another contradictory position (*BWG* at [102]). In *BWG* at [118], we held that the doctrine of approbation and reprobation extends to cases where the same party asserts inconsistent positions against different parties in different proceedings, so long as the said party has received an actual benefit as a result of an earlier inconsistent position. In that context, "benefit" refers to the party obtaining judgment in its favour (at [119]).

64 In our view, there is no reason why the proscription against parties seeking to take the benefit of inconsistent positions should not also apply in respect of the Prosecution. It is worth remembering that if anything, the Prosecution owes an even greater allegiance to consistent conduct than private parties do. The Prosecution's responsibility extends beyond simply succeeding in proving each individual case it pursues; instead, it owes a duty to assist in the determination of the truth: see *Muhammad bin Kadar and another v Public Prosecutor* [2011] 3 SLR 1205 at [200], which we recently reiterated in *Muhammad Nabill bin Mohd Fuad v Public Prosecutor* [2020] 1 SLR 984 at [37]. It would thus follow that the Prosecution cannot be satisfied solely with proving each individual charge in isolation, but must also be concerned with ensuring that it secures outcomes that are not impermissibly inconsistent over multiple proceedings and across time.

65 We are therefore satisfied that it would be objectionable in principle for the Prosecution to seek to secure prejudicial outcomes (whether convictions or

particular sentences) against different accused persons on the basis of cases advanced against each accused person in such a way that they are not consistent or compatible with one another.

66 Thus far, we have examined the two facets of the objection against inconsistent cases: the first based on procedural fairness, and the second based on prejudicial outcomes. These two aspects of the objection explain *why* there is a need to proscribe the Prosecution from running inconsistent cases. On the other hand, as we have seen at [46]–[47] above, there may be good reasons for the Prosecution not to charge all the participants in a criminal enterprise with the same offence. It is therefore important that the contours of the objection against the Prosecution running inconsistent cases be properly delineated by identifying *what amounts to an inconsistent case, particularly in the context of differing common intention charges*. Following this, we will also make some brief observations on what it means to secure *prejudicial* outcomes, and what *recourse* may be available where the objection is well-founded.

What amounts to the running of inconsistent cases?

67 Before examining what amounts to the running of inconsistent cases in the context of differing common intention charges, we first consider what it means for the Prosecution to run inconsistent cases in general.

68 In our view, the following approach may determine whether the Prosecution is running inconsistent cases in respect of any series of charges: when all the facts and arguments which are material to establishing the Prosecution's case against each of the accused persons are spelled out, would it be possible for all of these facts and arguments to be cumulatively true? Where the answer to this is in the negative, it would seem to point to the existence of a

material inconsistency. The key concern is to ensure that the Prosecution does not secure inconsistent *outcomes* by running inconsistent *cases*. Hence, for the purposes of this analysis, the material facts and arguments are those which are material to any outcome that has been secured (in respect of a charge where judgment has been obtained), and those which are material to the outcome that is presently being sought (in respect of the charge that is currently before the court). In short, the analysis is concerned with whether the Prosecution's cases are capable of constituting part of a single coherent world of facts.

69 In the present case, we are concerned primarily with a particular subset of the analysis on inconsistent cases: whether the Prosecution has pressed a set of *charges* against two or more accused persons that necessarily entail the running of inconsistent cases. We will refer to this situation as one of "inconsistent charges". Inconsistent charges arise if, when all the elements of each charge, as particularised in the charge, are spelled out, there is some inconsistency in holding that all the elements of all the charges are cumulatively established. Inconsistent charges are therefore inconsistent *on their face*, meaning their inconsistency is evident even before the proceedings start. On the other hand, a set of charges may not be inconsistent *on their face*, but the case run by the Prosecution on each of the charges may yet give rise to an inconsistency *in the course of the proceedings* – such as by virtue of inconsistencies in the evidence adduced, or in the case theories advanced.

70 We now turn to differing common intention charges. In our judgment, common intention charges do not attract an analysis that is different in kind from any other type of charges when it comes to determining whether they are inconsistent charges. However, we recognise that the problem of inconsistency is perhaps more likely to arise in the context of differing common intention charges than in many other kinds of charges. Where there are differing common

intention charges, the Prosecution would have pressed a charge ("Charge X") against A pursuant to a common intention with B, and a different charge ("Charge Y") against B pursuant to a common intention with A, both arising out of the same criminal act. As we explained at [50] above, to prove Charge X against A, each of its elements must be proved in respect of *both* A *and* B. By the same token, to prove Charge Y against B, the Prosecution would have to prove each of the elements of that charge in respect of both A and B.

71 In our judgment, inconsistencies that arise between inconsistent charges can be legal or factual in nature, or they can potentially be of mixed law and fact. It is in cases of *legal* inconsistency where the detailed analysis we have just considered is most helpful in distinguishing between permissible and impermissible differing common intention charges. The simplest example of a legal inconsistency arises where the elements of the charges are incompatible because of an express statutory provision. Suppose A is charged under s 300(*d*) of the Penal Code with murder by committing a dangerous act that would in all probability cause death, pursuant to a common intention with B. However, in respect of the same criminal act, B is charged with causing death by a rash act under s 304A(*a*) of the Penal Code pursuant to a common intention with A. These seem to us, without having heard arguments specifically on this point, to be inconsistent charges because s 304A specifically provides that it applies in respect of a rash (or negligent) act "not amounting to culpable homicide". The qualifying words "not amounting to culpable homicide" seem to us to limit the legal character of the act in question. As against this, a charge under s 300(*d*) requires that the act in question be "culpable homicide", which in turn is defined in s 299 as causing death by doing an act with a specific intention or specific knowledge. The charge against B in this example requires that A and B share an intention to act in a manner which seems to us, by definition, to fall short of

the common intention required by the charge against A. We emphasise that what makes this objectionable is the fact that the two charges allege two inconsistent *common intentions*. These cannot both be true. To be clear, if the Prosecution were able to establish the elements of each charge against the respective accused persons without recourse to common intention under s 34, such an objection would not lie.

72 On the other hand, a *factual* inconsistency on the face of the charges will arise where the particulars of the charges are mutually incompatible as a matter of logic, even without the need to consider any evidence or case theory. For example, it would be factually inconsistent to charge A with killing V pursuant to a common intention with B on one date, and to charge B with killing V, the same person, pursuant to a corresponding common intention with A but on a different date – since these particulars cannot both be true.

73 With these illustrations in mind, one can understand why the example discussed at [51]–[52] above does not involve inconsistent charges. There is no difficulty in holding, in respect of the same criminal act, that A committed VCGH pursuant to a common intention with B, while also holding that B committed VCH pursuant to a common intention with A. The only difference between the elements of these charges, and therefore the only possible source of any inconsistency between them on their face, is the fact that on the charge against A, A and B inflicted grievous hurt with an intention to do so, whereas on the charge against B, A and B inflicted simple hurt with an intention to do so. But this is in fact not an inconsistency because s 320 of the Penal Code makes it clear that grievous hurt is a *kind* of hurt: grievous hurt can be understood as comprising two elements – hurt, accompanied by an aggravating fact (namely, the fact that the hurt is one of the kinds enumerated in s 320). An intention to inflict grievous hurt is thus an intention to inflict hurt accompanied

by an aggravating intention. The differing elements of the charges against A and B are therefore entirely consistent with each other since there is no inconsistency in their being cumulatively true.

74 For the same reasons, Suhaizam's charge and the original charge against Aishamudin are not inconsistent charges. The differing elements of these two charges, which relate to the *actus reus* of the quantity of diamorphine trafficked and the *mens rea* of the quantity intended to be trafficked, are entirely consistent with each other. With respect, the Judge erred in holding that "the lower amount of Suhaizam [*ie*, 14.99g] cannot possibly include the larger amount of Aishamudin [*ie*, 32.54g]" (GD at [26]). Although this statement is true taken by itself, it is not the correct *question* to ask in the analysis of inconsistent charges. Instead, the question is whether the two amounts (and the corresponding *mentes reae*) are *consistent with* each other. In the light of the analysis above, it is clear to us that they are. Both Suhaizam's charge and the original charge against Aishamudin are capable of constituting part of a single coherent world of facts, namely, one in which Suhaizam and Aishamudin both shared the common intention to traffic in 32.54g (or more) of diamorphine. In this regard, it bears remembering that consistency on the face of these charges merely means that they *can* both be proved, not that they *will* be.

75 We emphasise that the foregoing discussion pertains to charges which are inconsistent on their face – in other words, inconsistent in terms of their elements and particulars. As we have explained at [69] above, even if the charges themselves are not inconsistent charges, there may yet be inconsistencies that emerge in the course of the proceedings (by way of the evidence adduced or the case theories advanced). For instance, in the present case, if the evidence showed that Suhaizam intended to traffic in *only* 14.99g of diamorphine and no more, then it would be inconsistent for the Prosecution to

advance a case on the original charge against Aishamudin which would necessarily have to assert that Suhaizam intended to traffic in 32.54g of diamorphine. However, on these facts, the Prosecution would simply have failed to make out the common intention required for the original charge against Aishamudin. Aishamudin's acquittal on the original charge would take the sting out of any inconsistency in the Prosecution's cases against Suhaizam and Aishamudin. We address in full the issue of whether there is any broader inconsistency in the Prosecution's cases against Suhaizam and Aishamudin at [92]–[101] below. This further raises the question of whether the Prosecution should even have proceeded with common intention charges against Suhaizam and Aishamudin at all if, on the facts of the case, it could perfectly well have proceeded on separate individual charges against each of them.

Recourse against prejudicial outcomes

76 In the discussion at [55(c)] and [59]–[65] above, we explained that the objection against inconsistent cases is based on prejudice to the accused person. In particular, we are concerned here with prejudice in the form of outcomes secured by the Prosecution. This raises the question of what is meant by the notion of *prejudicial* outcomes. The further question that follows is what recourse is available to accused persons who find themselves faced with such outcomes. Since we are satisfied that in the present case, there is no impermissible inconsistency between Suhaizam's charge and the original charge against Aishamudin on their face, and, for the reasons which we explain at [92]–[101] below, are also satisfied that there is no other inconsistency involved in convicting Aishamudin on the original charge, it is not necessary for us to conclusively answer these further questions. However, we think it is beneficial for us to provide a tentative framework for the objection against

inconsistent cases based on prejudicial outcomes so that these issues may be considered more fully on a subsequent occasion should they arise.

77 In our view, the law's primary concern is that accused persons are not *prejudiced* by inconsistent outcomes against them, and not the mere fact of the inconsistency in itself. It follows that if the inconsistent outcome consists of an unduly lenient outcome against an accused person, this is not necessarily objectionable in the way that an unjustifiably harsh outcome would be. This is illustrated by the decision of the Privy Council on appeal from Hong Kong in *Hui Chi-ming v The Queen* [1992] 1 AC 34 ("*Hui Chi-ming*"). There, a victim was killed in the course of an alleged joint enterprise. The offender who actually killed the victim was tried and acquitted of murder but convicted of manslaughter. The appellant was then tried for murder at a subsequent trial and convicted. It was not suggested that there was any consistent explanation for these disparate outcomes. In fact, the Privy Council acknowledged that a "serious anomaly" had occurred (at 57E). Nevertheless, it rejected the appellant's contention that his prosecution for murder amounted to an abuse of process, and upheld his conviction on the basis that it was supported by ample evidence. The Privy Council suggested that the main perpetrator's acquittal by the jury was "perverse", and that the lenient outcome in his case was "due to his good fortune" (at 56H–57A).

78 The Privy Council's decision in *Hui Chi-ming* may be justified on the basis that on the evidence before the court at the subsequent trial of the appellant, the appellant had been correctly convicted of murder, and it was in fact the main perpetrator's acquittal at the earlier trial that was flawed. The inconsistent outcomes in *Hui Chi-ming* therefore consisted of a legally justified outcome against the appellant and what appeared to be an unduly lenient outcome against the main perpetrator. Neither accused person could

legitimately be said to have been *prejudiced* by this set of inconsistent outcomes.

79 Similarly, in the context of inconsistent positions adopted by a party in civil proceedings, what is prohibited is *that party* obtaining relief on, or taking the benefit of, inconsistent positions (see [62]–[63] above). This underlines the fact that the law's primary concern in such situations is not with inconsistent outcomes as such, but with the securing of an undue benefit on the part of the party advancing inconsistent positions.

80 It is worth noting, however, that in *Hui Chi-ming*, a further plank of the Privy Council's reasoning was that the verdict reached in an earlier proceeding was entirely irrelevant in a later one (at 42H–43A). This holding was applied by the Supreme Court of India in *Rajan Rai v State of Bihar* (2006) 1 SCC 191 ("*Rajan Rai*"), which involved a case of murder read with common intention under s 34 of the Indian Penal Code. The court held that the acquittal of the co-offenders by the High Court on appeal against the verdict in an earlier trial was irrelevant to and inadmissible in the proceedings involving the appellant, who had been tried and convicted at a subsequent trial (at [8]–[9]). Instead, each individual trial had to be decided on the basis of the evidence adduced therein (at [10]).

81 If the position adopted in *Hui Chi-ming* and *Rajan Rai* were applicable in Singapore, an accused person would have difficulty showing that the Prosecution's case against him is inconsistent with the outcome that it secured against a co-offender in an *earlier* proceeding. However, in our judgment, the position here is not the same. In Singapore, s 45A of the Evidence Act (Cap 97, 1997 Rev Ed), which was introduced in 1996, provides:

> **Relevance of convictions and acquittals**
>
> **45A.**—(1) … [T]he fact that a person has been convicted or acquitted of an offence by or before any court in Singapore shall be admissible in evidence for the purpose of proving, where relevant to any issue in the proceedings, that he committed (or, as the case may be, did not commit) that offence, whether or not he is a party to the proceedings; and where he was convicted, whether he was so convicted upon a plea of guilty or otherwise.
>
> …

82 In *Chua Boon Chye v Public Prosecutor* [2015] 4 SLR 922 ("*Chua Boon Chye*"), this court confirmed that s 45A applies in subsequent *criminal* proceedings (see [71]–[72]). This therefore directly addresses the specific point decided in *Hui Chi-ming* and *Rajan Rai*, which was the admissibility in later proceedings of the fact of the acquittal of the co-offenders in earlier proceedings.

83 Beyond the outcome itself, the precise findings of fact in the earlier proceedings may also be relevant, since it will be important to discern precisely how the alleged inconsistency arises. In Singapore, it is for the judge to make findings of fact. These findings will invariably be distilled into brief oral grounds at least, if not a written judgment, which will provide a firm basis for assessing the consistency between the findings in one proceeding and the Prosecution's case in another proceeding. The problem of uncertainty over the reasons for a verdict would not typically arise in Singapore. Such findings would appear to be admissible under s 45A of the Evidence Act: see s 45A(5); *Chua Boon Chye* at [44] and [70(a)]; and *Halsbury's Laws of Singapore* vol 10 (LexisNexis, 2016 Reissue) at para 120.177. In any event, even before the enactment of s 45A, such findings would arguably have been admissible in appropriate cases under the general relevancy provisions of the Evidence Act, such as s 11:

> **When facts not otherwise relevant become relevant**
>
> **11.** Facts not otherwise relevant are relevant —
>
> (*a*) if they are inconsistent with any fact in issue or relevant fact;
>
> (*b*) if by themselves or in connection with other facts they make the existence or non-existence of any fact in issue or relevant fact highly probable or improbable.

If the earlier proceedings involved a plea of guilt, s 45A(5) of the Evidence Act also provides for the admissibility of the statement of facts which the offender admitted to.

84 Since a Singapore court hearing a trial can be provided with the relevant grounds of decision or statement of facts from earlier proceedings, it will be in a position to ascertain whether the findings in those earlier proceedings would give rise to any putative inconsistencies with the facts that the court is prepared to find proved beyond reasonable doubt based on the evidence adduced in the proceeding at hand. It seems to us that in such a case, there is no principled reason for the court not to examine the position further.

85 Although the objection against inconsistent cases can potentially arise in any permutation of proceedings, it is important to distinguish between cases which can be resolved on the basis of the Prosecution's burden of proof and those which cannot. The former category includes instances where the Prosecution runs inconsistent cases against co-offenders at a joint trial. This is a relatively straightforward situation since only one of the mutually incompatible cases can be true, and there would therefore be a reasonable doubt in the Prosecution's case against *at least* one of the co-offenders. The former category also includes instances where the Prosecution runs inconsistent cases against co-offenders tried in separate proceedings, but where the conclusion of the court at the subsequent trial is that the Prosecution has not proved its case

there beyond reasonable doubt. In such an event, the court would not have departed from any of the findings made in the earlier proceedings, and the Prosecution's initially inconsistent cases would not have resulted in outcomes resting on inconsistent bases.

86 On the other hand, there may be instances where the Prosecution runs inconsistent cases against co-offenders tried in separate proceedings, and the court concludes at the subsequent trial that the Prosecution has proved its new case beyond reasonable doubt. This scenario would fall into the latter category referred to at [85] above. In such a scenario, if the court at the subsequent trial were concerned solely with the evidence adduced at *that* trial, it should find fully in favour of the Prosecution's case. However, as we have explained at [61] above, it seems to us objectionable for the court simply to convict the accused person at the subsequent trial because the court would thereby be endorsing the Prosecution's securing of favourable outcomes against multiple accused persons by running inconsistent cases.

87 It seems to us provisionally that the situation we have just described may be addressed through a form of the doctrine of abuse of process. As we explained in *BWG* ([62] *supra*) at [56], set out at [62] above, such recourse is available to parties in civil proceedings in analogous circumstances. Although *BWG* concerned a dispute over a debt in the context of a winding-up application which was subject to an arbitration agreement, our observations on abuse of process are of wider applicability. As we said in *JTrust Asia Pte Ltd v Group Lease Holdings Pte Ltd and others* [2018] 2 SLR 159 at [99], "the general concept of abuse of process … pervades the whole law of civil (and criminal) procedure". The availability of a broad residual discretion to prevent abuse of process in criminal proceedings is also well-recognised across common law jurisdictions, such as England (see *Connelly v Director of Public Prosecutions*

[1964] AC 1254 at 1296 *per* Lord Reid, and *Director of Public Prosecutions v Humphrys* [1977] AC 1 at 46D *per* Lord Salmon), Hong Kong (see *Hui Chi-ming* ([77] *supra*) at 54G) and Australia (see *Likiardopoulos v R* (2012) 247 CLR 265 at [37]).

88 For present purposes, it is sufficient to leave the precise analysis and consequential orders that would be appropriate in such a situation to an occasion on which this issue squarely arises. We merely observe that there appear to be at least two avenues open to the Prosecution if, in such a situation, it wishes to advance an inconsistent case theory in a subsequent proceeding because it has changed its assessment of the true course of events. It could seek a revision or review of the earlier proceeding under the relevant provisions of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) if it considers that the threshold for doing so has been met. Alternatively, it can seek to satisfy the court in the subsequent proceeding that the outcome of the earlier proceeding remains safe on some other basis.

89 In the final analysis, the objection against inconsistent cases is part of the panoply of protections that aim to secure fairness to accused persons and ensure the integrity of the criminal justice system. It is impermissible for the Prosecution to advance inconsistent cases where this results in either procedural unfairness or prejudicial outcomes, whether within a single set of proceedings or across multiple proceedings. Where such prejudice cannot be adequately addressed by the making of appropriate findings by the court in the case before it, the doctrine of abuse of process may apply to enjoin the Prosecution from proceeding without addressing the inconsistency.

90 Conversely, there is no separate notion of abuse of process or a failure by the Prosecution to make out its case arising merely from common intention

charges that *appear* inconsistent because they involve differing offences, if they are in fact not inconsistent pursuant to the analysis set out at [69] above. If there is any objection based on the appearance of disparate treatment arising therefrom, it can only be made under Art 12(1) of the Constitution.

Conclusion on Issue 1: Possible objections to differing common intention charges

91 In sum, a valid objection can be made to a set of charges *by virtue of their being differing common intention charges* on the following grounds:

(a) First, an objection based on Art 12(1) of the Constitution (see [29] and [35(a)] above).

(b) Second, a genuine inconsistency arising on the face of the charges (see [69] above), which may result in one of two outcomes:

(i) the inconsistency may simply result in the court acquitting the accused person before it because the Prosecution has failed to prove its case (see [85] above); or

(ii) where the inconsistency arises between the Prosecution's case in the present proceeding and its case in an earlier proceeding, and this suggests that there is a flaw in the outcome of the earlier proceeding, a potential objection based on abuse of process may be available (see [86]–[88] above).

Issue 2(a): Whether there is any inconsistency in the Prosecution's cases against Suhaizam and Aishamudin

92 We now return to the facts in the present appeal. Since there is no objection based on Art 12(1) of the Constitution in the present case (see [23] above), we turn to the objection against inconsistent cases. As we have

explained at [74] above, no impermissible inconsistency arises from the juxtaposition of Aishamudin's original charge against Suhaizam's charge. In other words, the charges are not inconsistent. The only remaining question is whether the Prosecution has run inconsistent cases against Suhaizam and Aishamudin in the course of the proceedings. The only way in which such an inconsistency might conceivably arise in the present case is if Suhaizam's plea of guilt had been made on the basis that he intended to traffic in *only* 14.99g of diamorphine and *no more* (see [75] above). If so, the Prosecution may be running an inconsistent case in respect of Aishamudin by now seeking to show that both he and Suhaizam had an intention to traffic in *not less than* 32.54g of diamorphine, as it must do to prove the original charge against Aishamudin.

93 It is clear to us, however, that the Prosecution is not running inconsistent cases in this regard. The statement of facts which Suhaizam admitted to read as follows:

> 3. … On 6 October 2015, before leaving for Singapore, [the accused person, Suhaizam] received a call from Aishamudin, who asked for a ride. The accused then picked up Aishamudin … and they then headed to Singapore together. *Along the way, Aishamudin informed the accused that he was delivering heroin to someone in Singapore, and promised the accused a reward for helping him.* After clearing Tuas Checkpoint, the accused and Aishamudin then proceeded to Changi Cargo Complex … to complete the cargo delivery, before proceeding to Bulim Avenue to make the delivery of heroin.
>
> …
>
> 6. At Bulim Avenue, the accused observed Aishamudin handing over a plastic bag containing 2 packets of heroin … to Roszaidi.
>
> …
>
> 14. The total net weight of diamorphine, found in the 2 packets of heroin …, was not less than 32.54 grams. …
>
> 15. *The accused admitted that together with Aishamudin, they had the common intention to traffic in not less than*

> *14.99 grams of diamorphine by delivering the said diamorphine to Roszaidi.* … The accused has thereby committed an offence under section 5(1)(a) of the MDA read with section 34 of the Penal Code …
>
> [emphasis added]

94 It is evident from Suhaizam's statement of facts, which constituted the four corners of the Prosecution's case in the proceedings against him, that the Prosecution's case against him was based on precisely the same factual matrix as its case against Aishamudin. The only question is whether Suhaizam, by virtue of his admission to an intention to traffic in not less than 14.99g of diamorphine, should be taken to have limited his admission to an intention to traffic in less than the full quantity of 32.54g of diamorphine contained in the Drugs.

95 In our judgment, there is no basis to conclude that Suhaizam's intention was limited to an intention to traffic in anything less than the entire quantity of diamorphine (and methamphetamine) contained in the red plastic bag in Aishamudin's possession. There is nothing in the statement of facts to suggest that Suhaizam had any specific belief as to the gross or net weight of the diamorphine contained in the red plastic bag, such that he lacked the *mens rea* to traffic in its entire contents. This is unlike cases such as *Public Prosecutor v Muhammad Farid bin Mohd Yusop* [2015] 3 SLR 16, where the court found that the accused person's *mens rea* was limited specifically to trafficking in a certain quantity of drugs (at [27]).

96 Likewise, there is nothing to suggest that Suhaizam's intention was limited to trafficking in a lesser amount of diamorphine, measured by reference to some other physical attribute (such as the number of bundles), than the amount of diamorphine which the red plastic bag turned out to contain. This was the analysis adopted by this court in *Ridzuan* ([49] *supra*). There, the issue

was whether the amount of diamorphine collected by the co-offender, Abdul Haleem, exceeded the common intention shared by the appellant, Ridzuan. Specifically, the question was whether Ridzuan's intention extended only to trafficking in "one or two" additional bundles of diamorphine, which Abdul Haleem exceeded by collecting seven additional bundles (at [43]–[44]). In *Ridzuan*, this court analysed Ridzuan's intention in respect of the quantity and the nature of the drugs he had envisaged. It concluded that Ridzuan's intention involved the collection of *any* quantity of *diamorphine* given to him and Abdul Haleem in the transaction which he (Ridzuan) had arranged, and encompassed the intention to collect the quantity of diamorphine which Abdul Haleem in fact collected (at [57]).

97 We pause to note that the reasoning in *Ridzuan* should not be understood literally to mean that Ridzuan and Abdul Haleem had a common intention to collect diamorphine in any quantity without any limit whatsoever. It would be extremely unusual for such an expansive common intention to exist, and it should therefore not be easily inferred. Instead, properly understood, the conclusion in *Ridzuan* must have been that the seven additional bundles of diamorphine collected by Abdul Haleem were well within the contemplation of the common intention that he and Ridzuan shared (both in terms of the *quantity* and the *nature* of the drugs), especially since Ridzuan did not articulate any specific upper limit as to the bundles of diamorphine to be collected (at [54]).

98 The situation is materially different in the present case. Suhaizam was in physical proximity to the Drugs – as stated in para 6 of his statement of facts, he observed Aishamudin handing over the red plastic bag containing the Drugs to Roszaidi (see [93] above). We note that this is only reinforced by Aishamudin's evidence that he brought the red plastic bag containing the diamorphine and methamphetamine onto the truck in full view of Suhaizam

before informing him of the nature of its contents (see [9] above). Suhaizam was therefore not in the position of a remote co-offender who would have no way of knowing what precisely had happened in the carrying out of his common intention at the scene of the criminal act. Instead, having seen the red plastic bag containing the Drugs and having received no other knowledge or assurance as to the quantity of the Drugs, the scope of Suhaizam's common intention plainly did encompass the entirety of the Drugs.

99 In short, in our judgment, there is no basis to read the conclusion in Suhaizam's statement of facts, which stated that Suhaizam and Aishamudin had a common intention to traffic in *not less than* 14.99g of diamorphine (see [93] above), as limiting Suhaizam's intention to that of trafficking in *no more than* 14.99g of diamorphine. There is nothing in this statement of facts or elsewhere in the evidence that suggests that Suhaizam's intention to traffic was in respect of anything other than the entire quantity of diamorphine contained in the red plastic bag.

100 For completeness, we note that the reference in Suhaizam's statement of facts to, specifically, "not less than" 14.99g of diamorphine is consistent with this analysis (a point made by this court in *Quek Hock Lye* ([27] *supra*) at [40], set out at [32] above), although we do not think those words are *essential*. Formulations like "not less than" may have the effect of clarifying the charge in certain cases, but they cannot ultimately change its substance.

101 We are therefore satisfied that an objection based on inconsistent cases would not have been sustainable in the present case.

Issue 2(b): Whether the Prosecution has proved the original charge against Aishamudin

102 We now come to the final question of whether the Prosecution has proved the original charge against Aishamudin in accordance with the requirements for liability under s 34 of the Penal Code. As we have explained at [49] above, liability under s 34 for an offence requires the commission of a criminal act amounting to that offence, the participation of the persons in question in the criminal act, and their common intention to do that criminal act. In short, to prove the original charge against Aishamudin, the Prosecution has to prove:

(a) that a criminal act amounting to the offence of trafficking has been committed;

(b) that Aishamudin and Suhaizam each participated in the criminal act; and

(c) that Aishamudin and Suhaizam each had a common intention to do the criminal act.

103 As we have observed at [22] above, Aishamudin's only contention on appeal pertains to the common intention element in so far as *Suhaizam's* intention is concerned.

104 In any event, for completeness, we are satisfied that the evidence proves beyond reasonable doubt that Aishamudin did hand the Drugs to Roszaidi at Bulim Avenue, and that he did have the necessary intention to traffic in the Drugs, which he knew were diamorphine. This is supported by Aishamudin's own investigative statements, as well as the statement of facts to which Suhaizam pleaded guilty and which he accepted to be true (see [13] above).

Roszaidi's evidence also shows that he collected the Drugs from the truck that Aishamudin and Suhaizam drove to Bulim Avenue. Moreover, Aishamudin knew the nature of the Drugs (see [8]–[9] above). This is sufficient to establish that the criminal act – namely, the process of bringing the Drugs to Bulim Avenue and handing them to Roszaidi – was committed, that Aishamudin participated in the criminal act (as the actual doer), and that he had the intention to commit the criminal act. We now turn to Suhaizam's involvement.

105 In the course of the investigations, Suhaizam attempted to downplay his involvement in the offence. In his investigative statement which the Prosecution adduced at Aishamudin's trial, all Suhaizam admitted to was that he *suspected* that Aishamudin was doing something illegal on the day of the offence. Suhaizam further claimed that Aishamudin was the one who had driven to Bulim Avenue, with Suhaizam sitting in the passenger seat. If this version of events were accepted, Suhaizam would essentially have been a passive observer of the criminal act, and not a participant. This would likely have led to his acquittal, and would almost certainly not have sufficed to establish common intention liability under s 34 of the Penal Code. However, this account must be rejected. In particular, there is clear evidence that Suhaizam in fact drove the truck to Bulim Avenue where the drug transaction occurred, and that he knew that he was thereby assisting Aishamudin in the drug transaction which was to take place there. The evidence of both Roszaidi and Aishamudin was that Roszaidi collected the consignment of drugs directly from the person seated in the passenger seat of the truck; according to Aishamudin, Suhaizam was the one driving while he was the one in the passenger seat. Further, as explained at [13] above, Suhaizam eventually accepted that the statement of facts he had admitted to was true and correct. The statement of facts, part of which we reproduced earlier (see [93] above), stated:

> 3. … On 6 October 2015, before leaving for Singapore, [the accused person, Suhaizam] received a call from Aishamudin, who asked for a ride. The accused then picked up Aishamudin … and they then headed to Singapore together. *Along the way, Aishamudin informed the accused that he was delivering heroin to someone in Singapore, and promised the accused a reward for helping him.* After clearing Tuas Checkpoint, the accused and Aishamudin then proceeded to Changi Cargo Complex … to complete the cargo delivery, before proceeding to Bulim Avenue to make the delivery of heroin.
>
> …
>
> 6. At Bulim Avenue, the accused observed Aishamudin handing over a plastic bag containing 2 packets of heroin … to Roszaidi.
>
> [emphasis added]

106 Taken together, the evidence shows that Suhaizam agreed to drive Aishamudin to a stipulated location so that the drug delivery could take place. Although Suhaizam's statement of facts could have been clearer as to his agreement to Aishamudin's proposal, this was the only reasonable inference to draw – Suhaizam's act of driving the truck to Bulim Avenue where the drug delivery was to take place could not be anything other than an agreement, whether express or tacit, to assist Aishamudin in the drug delivery. This amounted to participation by Suhaizam in the criminal act.

107 We now come to the nub of the controversy as to whether the original charge against Aishamudin is made out: whether the Prosecution has proved that Suhaizam shared the common intention to traffic in not less than *32.54g* of diamorphine. This analysis is greatly simplified by the fact that the evidence of Suhaizam's intention adduced by the Prosecution at Aishamudin's trial is encompassed in Suhaizam's statement of facts, which we have already discussed at [93]–[100] above. Suhaizam's evidence is corroborated by Aishamudin's confirmation in the course of cross-examination that he had asked Suhaizam to deliver drugs in Singapore together with him on 6 October 2015,

and that he had told Suhaizam upon boarding his truck with the red plastic bag that there was diamorphine and methamphetamine inside. On these facts, there is no doubt that Suhaizam did in fact share a common intention with Aishamudin to traffic in diamorphine, and that, for the reasons discussed above, this common intention pertained to the entirety of the 32.54g of diamorphine that was actually in the red plastic bag.

108 We therefore find that the Prosecution has established each of the elements of the original charge against Aishamudin. None of the objections to differing common intention charges or against inconsistent cases apply in the present case. As such, the Judge should have convicted Aishamudin on the original charge.

109 In any event, even if the original charge against Aishamudin were flawed on the basis that Suhaizam only shared an intention to traffic in 14.99g of the diamorphine contained in the Drugs, there would still be the question of what amendment the Judge ought to have made to the original charge. In our judgment, the Judge should have amended the original charge by deleting the reference to common intention, leaving it as a simple drug trafficking charge against Aishamudin for the full quantity of not less than 32.54g of diamorphine. There is no doubt that such a charge would be made out, as Mr Almenoar correctly conceded (see [4] above). That is because Aishamudin's own acts, taken alone, constituted the complete offence of trafficking the Drugs to Roszaidi. There is also nothing objectionable with allowing the charge against Suhaizam to stand as a common intention charge, while convicting Aishamudin of a charge read without common intention, given that all the elements of both charges are made out without any inconsistency between them. The Judge's amendment of the original charge against Aishamudin to the amended charge

for a reduced quantity of diamorphine therefore amounted, with respect, to an undue reduction of the charge framed by the Prosecution.

110 In closing, we note that in cases such as the present in which there is a clear distinction between principal offenders who committed the *actus reus* of the offence and secondary offenders whose involvement was more peripheral, it may be conceptually and practically more desirable to frame charges against the secondary offenders based either on abetment or on joint possession under s 18(4) of the MDA, instead of invoking s 34 of the Penal Code against all the offenders unnecessarily. This is especially the case in relation to drug trafficking charges, given that under s 2 of the MDA, the definition of "traffic" covers a broad range of activities. This, coupled with the seemingly wide basis for accessorial liability under the MDA, which in some instances is equivalent to primary liability (see s 12 of the MDA), suggests that it might often be unnecessary to invoke s 34 of the Penal Code in this context. That said, in the absence of any legal shortcoming in the original charge against Aishamudin, there is no basis for the court to interfere with that charge, notwithstanding the fact that the framing of that charge with reference to s 34 of the Penal Code is, strictly speaking, redundant for the reasons we have just explained.

Conclusion

111 Although we accept the fundamental intuition at the core of the Judge's reservations about the original charge against Aishamudin, a careful analysis of the law shows that the objection against differing common intention charges based on an inconsistency between the charges is a more limited one than what the Judge suggested. In this judgment, we have briefly outlined the ways in which this objection may be made. With respect, we do not see how such an objection can be sustained in the present case. We therefore allow the

Prosecution's appeal and convict Aishamudin of the original charge against him.

112 At the hearing of the appeal, the Prosecution confirmed that it would be issuing Aishamudin with a certificate of substantive assistance under s 33B(2)(*b*) of the MDA. We also see no reason, on the evidence before us, not to conclude that Aishamudin's involvement in the offence was restricted to the delivery of the Drugs for the purposes of s 33B(2)(*a*) of the MDA. In the circumstances, we set aside the sentence that was imposed by the Judge and exercise our discretion under s 33B(1)(*a*) of the MDA to sentence Aishamudin to life imprisonment and 15 strokes of the cane.

Sundaresh Menon Chief Justice	Andrew Phang Boon Leong Judge of Appeal	Judith Prakash Judge of Appeal

Tay Yong Kwang Judge of Appeal	Steven Chong Judge of Appeal

Hay Hung Chun, Sarah Ong, Soh Weiqi and Yan Jiakang (Attorney-General's Chambers) for the appellant;
Hassan Esa Almenoar and Yong Pui Yu Liane (R Ramason & Almenoar), Diana Foo (Tan Swee Swan & Co) and Balakrishnan Chitra (Regency Legal LLP) for the respondent.