IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2023] SGHC 278

Criminal Motion No 52 of 2023
Magistrate's Appeal No 9214 of 2022

Between

Mohamed Faizel Ahmed

… *Appellant*

And

Public Prosecutor

… *Respondent*

GROUNDS OF DECISION

[Criminal Law — Appeal]
[Criminal Law — Statutory offences — Misuse of Drugs Act]
[Criminal Procedure and Sentencing — Appeal — Adducing fresh evidence]

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v
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Introduction

1 The appellant, Mr Mohamed Faizel Ahmed, filed an appeal against his conviction in respect of three charges (the "Appeal") and a Criminal Motion in relation to the Appeal (the "Motion"). I dismissed both the Motion and the Appeal on 31 July 2023. I now set out my reasons for doing so.

Procedural history

2 The appellant claimed trial to four charges and was convicted on 3 October 2022 of the first three charges and granted an acquittal on the last charge. The four charges were in respect of:

(a) an offence under s 8(*b*)(i) and punishable under s 33(3A) of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) (the "MDA") for

consuming 2-[1-(4-Fluorobutyl)-1Hindazole-3-carboxamido]-3,3-dimethylbutanoic acid or its hexanoic acid isomer or any of their respective fluoro positional isomers in the butyl group (the "1st Controlled Drug") (DAC-902247-2021) (the "1st Charge");

(b) an offence under s 8(*b*)(i) and punishable under s 33(3A) of the MDA for consuming 2-[1-(Pent-4-en-1-yl)-1Hindazole-3-carboxamido]-3,3-dimethylbutanoic acid or its hexanoic acid isomer or any of their respective pentenyl positional isomers in the pentyl group (the "2nd Controlled Drug") (DAC-902248-2021) (the "2nd Charge");

(c) an offence under s 8(*a*) and punishable under s 33(1) of the MDA for possessing a packet containing MDMB-4en-PINACA ("PINACA") (DAC-902249-2021) (the "3rd Charge"); and

(d) an offence under s 9 and punishable under s 33(1) of the MDA for possessing one packet of tobacco rolling paper, which was a utensil intended to be used in connection with controlled drugs (MAC-909899-2021) (the "4th Charge").

3 On 18 October 2022, the learned district judge (the "DJ") sentenced the appellant to a global sentence of one year and six months' imprisonment.[1]

4 The appellant was represented at trial by Mr Deya Shankar Dubey ("Mr Dubey"), who was his assigned counsel under the Criminal Legal Aid Scheme. Mr Dubey assisted the appellant to file his Notice of Appeal on 28 October 2022 and his Petition of Appeal ("POA") on 28 December 2022.

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[1] Notes of Evidence ("NEs") for Day 6 at p 5 lines 1 and 2.

The appellant subsequently discharged Mr Dubey and appointed his present counsel, Mr A Revi Shanker s/o K Annamalai ("Mr Shanker") to act in place of Mr Dubey. Mr Shanker then proceeded to file the Motion on 15 July 2023, asking the court to exercise its powers under s 392 of the Criminal Procedure Code 2010 (2020 Rev Ed) (the "CPC") to grant the appellant leave to adduce further evidence at the hearing of the Appeal.

Background facts

5 The appellant was arrested by police officers on 10 November 2020 in the vicinity of Woodlands MRT Station on suspicion of having consumed and being in possession of controlled drugs. He was found to have had in his possession one packet of vegetable matter (subsequently sealed in a tamper-proof bag and marked as "FA-A") and one packet of tobacco rolling paper (subsequently marked as "FA-B").[2]

6 On 11 November 2020, the appellant provided two urine samples, which were tested and found to contain Class A drugs under the First Schedule to the MDA as reflected in the 1st and 2nd Charges above.[3]

Prosecution's case below

7 In relation to the 1st and 2nd Charges for drug consumption, the Prosecution invoked the presumption in s 22 of the MDA by admitting into evidence certificates issued by the Health Sciences Authority which state that controlled drugs had been found in the appellant's urine. By virtue of the s 22 MDA presumption, the appellant was presumed to have the requisite *mens rea*

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2 Statement of Agreed Facts ("SOAF") at paras 2, 11 and 12.

3 SOAF at paras 4–10.

and *actus reus* to consume the 1st and 2nd Controlled Drugs.[4] The Prosecution relied on the presumption in s 18(2) of the MDA in respect of the 3rd Charge. The other elements of the charge were not disputed.[5] The Prosecution submitted that both the operative presumptions under the MDA had not been rebutted.

8 The Prosecution highlighted that evidence given by the Prosecution witnesses had been consistent and therefore credible,[6] and that they had no motive to falsely implicate the appellant.[7] In contrast, the appellant did not offer a consistent account of the events leading to his arrest. Specifically, he was inconsistent on:

(a) whether four unidentified individuals he had allegedly met at a void deck of a block of flat in Woodlands (the "Four Individuals") had given him a rolled cigarette to smoke on two occasions;

(b) whether they had given him FA-A;

(c) when and how he had purchased FA-A;

(d) whether he had told the police about the foregoing; and

(e) how he had felt after smoking the cigarettes.[8]

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4 Prosecution's Closing Submissions dated 21 June 2022 ("PCS") at paras 7, 8 and 74.

5 PCS at para 75.

6 PCS at paras 50–58.

7 PCS at paras 59–60.

8 PCS at paras 61–65.

Furthermore, the appellant did not give a logical explanation for the delay in revealing that the Four Individuals had allegedly given him rolled cigarettes to smoke and FA-A.[9]

Defence's case below

9 According to the appellant, prior to his arrest, he purchased five packets of "Butterfly" rolling tobacco from a nearby minimart in Woodlands on behalf of the Four Individuals. The Four Individuals then offered him the two hand-rolled cigarettes to smoke, which he did. He assumed that the cigarettes contained "Butterfly" rolling tobacco.[10] As a tip for running errands for them, the Four Individuals offered FA-A to the appellant, which he believed to be one of the five packets of "Butterfly" rolling tobacco which he had earlier bought for them.[11]

10 In relation to the 1st and 2nd Charges, the appellant claimed that he was not aware that he had consumed anything which contained controlled drugs,[12] and had believed that the cigarettes he smoked had been rolled using "Butterfly" rolling tobacco. He saw the Four Individuals prepare hand-rolled cigarettes from a packet identical to the five packets of "Butterfly" rolling tobacco he had purchased earlier.[13] He suggested that there had been opportunities for the Four Individuals to lace the cigarettes with controlled drugs before he smoked them.[14] He further suggested that his act of smoking in public and in view of the police

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9 PCS at paras 68–71.

10 Defence's Closing Submissions dated 21 June 2022 ("DCS") at paras 18, 20 and 23–24.

11 DCS at para 24.

12 DCS at para 57.

13 DCS at para 59.

14 DCS at para 60.

officers prior to his arrest and his co-operation with them when he had been approached suggested that he had not known that he had been consuming controlled drugs.[15]

11 In relation to the 3rd Charge, the appellant claimed that he was unaware that FA-A contained PINACA and/or was unaware of the precise nature of the PINACA which the vegetable matter in FA-A was found to contain. Therefore, he did not have PINACA in his possession.[16] The arguments in his defence were substantially similar to those that were raised in relation to the 1st and 2nd Charges.[17] He thus rebutted the presumptions in ss 18(1) and 18(2) of the MDA.[18]

12 It was further submitted that, even if the court were to find that the appellant had known about the PINACA in FA-A, there would still be sufficient evidence to rebut the presumption in s 18(2) of the MDA. This is because the following showed that the appellant could not reasonably have been expected to know that PINACA was a controlled drug:

(a) FA-A was identical to packets of "Butterfly" rolling tobacco purchased by the appellant; and

(b) the vegetable matter in FA-A was, in fact, tobacco, and the PINACA was simply laced on the tobacco.[19]

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15 DCS at para 61.

16 DCS at para 33.

17 DCS at paras 39–49.

18 DCS at paras 33, 52–53.

19 DCS at para 53.

The decision below

13 In respect of the 1st and 2nd Charges, the DJ found that the appellant had not rebutted the s 22 MDA presumption. The appellant's defence was merely a bare assertion.[20] He did not disclose the involvement of the Four Individuals in any of his statements recorded during the investigations,[21] which led to an adverse inference being drawn against him.[22] The DJ also decided that the appellant's conduct in co-operating with the police officers on 10 November 2020 was inconclusive as to his guilt.[23]

14 Regarding the 3rd Charge, the DJ acknowledged that it was not disputed that FA-A had been retrieved from a bag the appellant had been carrying at the time of his arrest, and that the appellant had known that FA-A was in his bag. The DJ noted that the Defence had mistakenly conflated the element of physical possession with the element of knowledge of the nature of the drug. All that was necessary to establish physical possession was that the appellant knew that FA-A *was in his possession*, and his knowledge (or lack thereof) of the *nature of the drug* was a separate matter.[24] The DJ concluded that the factual element of physical possession was made out. Accordingly, the presumption in s 18(2) of the MDA was unrebutted by the appellant, and therefore the 3rd Charge was made out.

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20 Grounds of Decision ("GD") at para 31.

21 GD at para 32.

22 GD at paras 33–42.

23 GD at para 43.

24 GD at paras 52–56.

The Motion

15 For the purposes of the Motion, the appellant filed two supporting affidavits dated 14 July 2023 ("Appellant's First Affidavit") and 24 July 2023 (two versions of this affidavit were filed, and I referred to the later version filed on 25 July 2023) ("Appellant's Second Affidavit").

16 The appellant submitted that the Motion was filed primarily in relation to what had transpired on 27 April 2022, the second day of trial. The focus of the Motion was on whether he had, contrary to the DJ's findings, previously (including on the second day of trial) raised his defence concerning the involvement of the Four Individuals and how he came to be in possession of the drugs and to have unknowingly consumed drugs. Having regard to the points made in the appellant's supporting affidavits and the Appellant's Written Submissions for the Motion ("AWS (Motion)"), it would appear that the appellant had sought to adduce the following evidence at the hearing of the Appeal:

> (a) The appellant told a senior Central Narcotics Bureau officer, Mr Khairul Bin Jalani, (the "Senior Officer") whom he had met by chance on 31 January 2021 that he had neither smoked any controlled drugs nor known that FA-A contained controlled drugs, because he had only smoked cigarettes offered by the Four Individuals rolled with "Butterfly" rolling tobacco which he had earlier purchased for them.[25] This happened after the Senior Officer purchased a drink which cost $1 from a shop where the appellant was working and tried to use a $10 note to pay, whereupon the appellant told him that since he had no

[25] AWS (Motion) at paras 13 and 15; Appellant's First Affidavit at paras 14, 15, 16(vi), 16(vii), 16(ix) and 16(x).

change, he could pay later. The Senior Officer later returned to pay for his drink.[26] The Senior Officer agreed to the appellant's request to inform the investigating officer, Mr Mohamed Fauzi Bin Abdul Karim, (the "IO") of the foregoing.[27]

(b) The appellant only realised on 27 April 2022, the second day of trial, that the Senior Officer was not called as a witness. He immediately instructed Mr Dubey, his counsel at the time, that the Senior Officer should be called as a witness.[28] Mr Dubey had a conversation with the trial prosecutor, after which Mr Dubey told the appellant that, if evidence were adduced through the Senior Officer, the appellant would be charged for bribing the Senior Officer with the $1 drink.[29] The appellant did not eventually call the Senior Officer as a witness in the trial.[30]

(collectively, the "Fresh Evidence").

Whether the Motion should be granted

17 In arriving at my decision, I bore in mind the established test first set out in *Ladd v Marshall* [1954] 1 WLR 1489 and as adopted in *Public Prosecutor v Mohd Ariffan bin Mohd Hassan* [2018] 1 SLR 544 (at [27]–[28]) and *Sanjay Krishnan v Public Prosecutor* [2022] 2 SLR 49 ("*Sanjay Krishnan*") (at [11]).[31]

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26 Appellant's First Affidavit at para 15.

27 Appellant's First Affidavit at para 17.

28 Appellant's First Affidavit at paras 18–19.

29 AWS (Motion) at para 8; Appellant's First Affidavit at para 21.

30 Appellant's First Affidavit at para 23.

31 Respondent's Written Submissions for the Motion ("RWS (Motion)") at para 4.

As held by the Court of Appeal in *Sanjay Krishnan* at [11], the requirements are that the Fresh Evidence:

> (a) could not have been obtained with reasonable diligence for use at trial (the "non-availability" requirement);
>
> (b) would probably have an important influence on the result of the case, although it need not be decisive – in other words, it must be "material" (the "materiality" requirement); and
>
> (c) be credible, although it need not be incontrovertible (the "reliability" requirement).

18 I was of the view that all three requirements were not satisfied in the present case.

Non-availability of the Fresh Evidence

19 From what I could discern, the Motion essentially sought to adduce new evidence pertaining to the events of 31 January 2021, linked to what had allegedly transpired on 27 April 2022, the second day of trial (see above at [16]).

20 The non-availability requirement was plainly not satisfied. The Fresh Evidence concerning the events of 31 January 2021 was within the appellant's personal knowledge and it was always open to him to raise the evidence at trial. He sought to argue that he had not surfaced this earlier because he had been afraid of the risk that he would face a serious corruption charge.[32] Yet he somehow experienced a recent change of heart, as evidenced by his willingness to take this risk by filing the Motion. To my mind, this did not satisfy the requirement of non-availability for the purposes of adducing the Fresh Evidence. There was no plausible reason given for his change of heart.

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[32] Appellant's First Affidavit at para 23; Appellant's Second Affidavit at paras 12 and 13.

21 In short, the Fresh Evidence could have been furnished at trial, and the appellant did not provide any convincing explanation for his failure to do so (*Sanjay Krishnan* at [15] and [19]).

Credibility of the Fresh Evidence

22 Turning next to the issue of credibility, I found that the Fresh Evidence was not credible.

23 The Fresh Evidence in relation to the events of 31 January 2021, in particular, relating to how much the appellant had told the Senior Officer of the events on 10 November 2020, was plainly contradicted by the evidence provided in the affidavit of the Senior Officer. The Senior Officer's evidence was that he had interacted with the appellant on 27 January 2021 and not 31 January 2021 when he was buying a canned drink from Red Dot coffeeshop in Chinatown.[33] The appellant, who was working at the drinks stall, told him that the drink cost $1.50 but he could just pay $1. The Senior Officer did not understand why the appellant would give him a $0.50 discount but he thought that the appellant might be closing up the shop, so he just paid him $1 and walked off.[34] As he walked away, the appellant approached him to tell him about his working life in Singapore and his family in India. The appellant went on to "[talk] briefly about buying a cigarette from a shop and that he did not know it was a drug". The Senior Officer then ascertained that the appellant was on bail for a pending charge and thus he returned to the drinks stall and paid the balance of $0.50 and requested for a receipt. He clarified that the appellant "did not

33 Affidavit of Khairul Bin Jalani at para 5.

34 Affidavit of Khairul Bin Jalani at para 6.

inform [him] about meeting an elderly uncle and a group of 4 individuals at Woodlands".[35]

24 In contrast, the appellant put forward in his account a series of bare and uncorroborated assertions, peppered with numerous inconsequential details such as first meeting the "elderly uncle" at Woodlands on 10 November 2020 for "job purposes", and then agreeing to purchase 4D tickets on behalf of both the "elderly uncle" and the Four Individuals.[36] No mention of the Four Individuals surfaced previously in his statements. The Prosecution submitted that there was no reason for the appellant to have volunteered detailed information to the Senior Officer about what happened on 10 November 2020 involving the Four Individuals, and that this showed that the appellant's narrative was false.[37] I was of the view however that the appellant could have genuinely believed that telling the Senior Officer about the Four Individuals might help his case. Nevertheless, I did not think that all these extensive details about his case were actually mentioned by the appellant to the Senior Officer who had fortuitously bought a drink from him and was not even involved in investigating his case.

25 For these same reasons, I rejected the appellant's argument, made at the hearing of the Motion, that the Senior Officer had confirmed that he had spoken to the appellant and that this was an important fact which should justify granting the Motion. By itself, this did not justify his application as the central issue remained whether the Fresh Evidence itself was apparently credible.

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35 Affidavit of Khairul Bin Jalani at paras 7–8; RWS (Motion) at para 6.

36 Appellant's First Affidavit at para 16.

37 RWS (Motion) at para 8.

26 The Fresh Evidence concerning the events of 27 April 2022 involving Mr Dubey was partly corroborated by emails from Mr Dubey to the appellant dated 31 March 2023 at 5.14pm and 15 July 2023 at 7.21pm.[38] At the case management conference on 19 July 2023, the appellant waived legal privilege in respect of his communications with Mr Dubey. These emails were appended to the Appellant's Second Affidavit. They show that the appellant told Mr Dubey that the Senior Officer should be called as a witness and that Mr Dubey then spoke to the trial prosecutor. The appellant was also made aware of the potential corruption charge.[39] However, the email from Mr Dubey to the appellant dated 15 July 2023 at 7.21pm was highly telling as it revealed that Mr Dubey did "not recall [the appellant] instructing [Mr Dubey] that [he] had provided the CNB officers with the [same] level of detail" as that set out in the appellant's earlier correspondence with Mr Dubey (corresponding to the Fresh Evidence). In addition, Mr Dubey pointedly asked the appellant why he had only raised the Fresh Evidence then, and the appellant's response was that he had "suddenly remembered this in court". [40] Accordingly, the Fresh Evidence concerning the events of 27 April 2022 involving Mr Dubey did not appear to be corroborated anywhere, which cast serious doubt on its credibility.

27 The Fresh Evidence concerning the events of 27 April 2022 in relation to the IO was also an unsubstantiated claim by the appellant. In my view, however, the Prosecution's submission that the Fresh Evidence was not credible *because* the IO, *had not spoken with the appellant or Mr Dubey on 27 April 2022*,[41] was not helpful. The appellant's evidence was that the IO spoke to the

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38 Appellant's Second Affidavit at pp 20–21.

39 Appellant's Second Affidavit at p 9.

40 Appellant's Second Affidavit at p 20.

41 RWS (Motion) at para 7.

trial prosecutor, and not that he spoke to either the appellant or Mr Dubey. Nonetheless, in the first place, the Fresh Evidence relating to the IO's conduct on 27 April 2022 did not assist the appellant. Even if the IO did know of the appellant's conversation with the Senior Officer, any evidence given by the IO would constitute hearsay under section 62 of the Evidence Act 1893 (2020 Rev Ed) and would hence have been inadmissible.

Materiality of the Fresh Evidence

28 Lastly, I found that the Fresh Evidence was unlikely to have an important influence on the result of the case.

29 Given my finding that the Fresh Evidence was not credible, it would logically follow that it could not have any material influence on the outcome of the case even if the evidence had been taken into account. A related question was whether the appellant had furnished relevant details pertaining to the Four Individuals' involvement prior to the trial. The fact remained that he did not mention the Four Individuals in his four investigation statements, one of which was recorded as late as 17 June 2021, well after he had allegedly spoken with the Senior Officer on 31 January 2021. In addition, as clarified by the respondent, the appellant did not disclose any details pertaining to the Four Individuals in his Case for the Defence ("CFD"), including any information which might lead to their identification. I set out my analysis in respect of the CFD further at [41]–[43] below.

30 Furthermore, the substance of the appellant's Fresh Evidence in so far as the involvement of the Four Individuals was concerned was inconsistent with what he had told the police during the investigations.[42] According to the IO, the

[42] NEs for Day 2 at p 72 lines 3–13.

appellant maintained then that he had purchased FA-A from a minimart.[43] He did not mention the Four Individuals. As was the case in *Sanjay Krishnan*, the inconsistency in an accused's position would point towards limited materiality of fresh evidence sought to be adduced (*Sanjay Krishnan* at [22]). Accordingly, even if the Fresh Evidence had been led, there was no basis to suggest that it would probably have resulted in a different view as to the appellant's guilt (*Sanjay Krishnan* at [23]).

31 I also noted that, while the appellant emphasised how the Fresh Evidence supported his innocence, he glossed over the prior question of the *threshold* the said evidence has to meet in order to rebut the s 22 MDA presumption. It was insufficient to merely raise a reasonable doubt by making a bare denial or a declaration of innocence: *Cheng Siah Johnson v Public Prosecutor* [2002] 1 SLR(R) 839 at [15]; *Public Prosecutor v Kenneth Choo Chee Fye* [2017] SGDC 207 ("*Kenneth Choo*") at [44]. In the circumstances, even if the Fresh Evidence was adduced, the appellant had merely put forth dubious assertions concerning the Four Individuals, whose existence was not verifiable and whose identities were not known. Accordingly, although the Fresh Evidence did not have to be incontrovertible or dispositive, it would not have had an important influence on the result of the case.

32 By virtue of the foregoing, I concluded that leave should not be granted for the appellant to adduce additional evidence at this stage.

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[43] NEs for Day 2 at p 22 lines 4–16.

Whether the trial prosecutor had threatened the appellant or wrongfully suppressed evidence

33 For completeness, I shall also address an additional argument that was raised by the appellant in the Motion. It was repeatedly suggested that the trial prosecutor had informed Mr Dubey on 27 April 2022 that a corruption charge would be brought against the appellant, and therefore there was a "conscious decision to disallow evidence by the eminence of a corruption charge". According to the appellant, there was a "bargain, of a tit for tat occurrence that [the appellant] will be prosecuted for a corruption charge will not transpire if [he] refrains from airing in court his version of events".[44]

34 This argument was disingenuous and groundless. Mr Dubey's email dated 15 July 2023 at 7.21 pm showed that the appellant was apprised and duly advised of what the trial prosecutor had informed him. I reproduce the relevant paragraphs of that email below:[45]

> 5. Nevertheless, in light of your request, I set out my recollection of what transpired on 27 April 2022. To the best of my recollection, we were either at or almost at the close of the Prosecution's case when you instructed me that you had suddenly recalled that in January 2021, you had informed two (2) CNB officers that you had obtained the tobacco which tested positive for the illicit substances ("**FA-A**") from third parties. I asked you for further details, and you informed me that the CNB officers were at the food stall that you were working at, and you had recognised one of the CNB officers and when they were leaving, you approached them and informed them that you received FA-A from third parties, and that it was not yours. You then asked them to help you and the CNB officers nodded. I then asked you why you were only now mentioning it, and you informed me that you had suddenly remembered this in court. I do not recall you instructing me that you had provided the CNB officers with the level of detail which you have set out at paragraph 9 of your 8 July letter.

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44 AWS (Motion) at paras 5, 6, 11, 12, 17 and 18.

45 Appellant's Second Affidavit at pp 20–21.

6. I then advised you that if what you told me is true, then we should ask for those CNB officers to come to court to give evidence and be cross-examined. You agreed, and I approached the DPP, Mr R Arvindren (the "**DPP**") to inform him of what you had informed me and to request that the CNB officers be called as witnesses. The DPP then informed me (I do not recall if the IO was involved in this conversation) that the CNB officers recall this interaction going differently. Specifically, the CNB officers stated that they had been at your stall and you had asked them to help with your case but they did not recall being informed by you that you received FA-A from third parties. When the CNB officers were leaving or had left, they realised that you had paid for their drinks, and so they had returned to the stall to make payment for the drinks. The DPP then informed me that this issue had not been escalated internally at the material time, but *if you gave evidence in open court on your version of events, then the CNB officers would have no choice but to state their version of events, and this matter would have to be escalated within the AGC and investigated which may lead to a charge being brought against you for corruption. I informed the DPP that I did not believe that a charge of corruption was warranted, as I did not think you were trying to bribe the CNB officers but that I would take your instructions. I proceeded to inform you about what the DPP had stated, including the version from the CNB officers, and the DPP's point that an investigation and a potential charge for corruption may be brought against you.* I then asked you whether it was true that you had paid for the CNB officers' drinks, and you told me that you did pay for their drinks which was around S$1 because you were trying to be friendly.

7. I then approached the DPP again, and informed him that there should not be a corruption charge because you stated that you were simply being friendly and had no corrupt intent. The DPP noted my views but maintained his point. I then informed you of what the DPP stated again, and asked you to decide if you wished to call the CNB officers. You asked me to decide on your behalf, but I informed you that this was not a decision I could make for you since I could not tell you what evidence to give. However, I did advise you that on the facts as told to me, I did not think a corruption charge would be made out, though I could not guarantee that a charge would not be brought or that you would be acquitted of such a charge. Nevertheless, *if you were telling the truth, then you had nothing to worry about. I gave you some time to think about this issue, and you decided against calling the CNB officers, which I then told the DPP. The trial then progressed and this topic did not arise again.*

[emphasis added in italics]

35 As the above paragraphs clearly demonstrate, Mr Dubey's account made no mention of a threat or any attempt to suppress evidence. From his recollection, the trial prosecutor had merely pointed out, quite fairly, that there might be a need to further investigate the matter and this could possibly lead to a corruption charge. The trial prosecutor did not go so far as to threaten the appellant with a corruption charge. Neither was there any "tit for tat occurrence", as alleged, to suppress evidence by preventing the appellant from calling the "CNB officers" to testify. It did not appear to be Mr Dubey's opinion that the appellant was being prevented from doing so; rather, Mr Dubey had left it up to the appellant to decide if he wished to call the relevant "CNB officers". The Senior Officer confirmed that he was ready and willing to testify.[46]

36 The appellant may have somehow perceived that there was a threat or that the evidence from the "CNB officers" was being "withheld or knocked out from the Trial Court's attention".[47] However, any such perception appeared to have been entirely self-induced. As Mr Dubey put it in his email, he told the appellant that he did not think that a charge of corruption was warranted, and, if the appellant was telling the truth, he had "nothing to worry about".[48]

37 The appellant further took issue with the fact that the trial prosecutor did not file an affidavit to contradict or clarify what was said at trial concerning the potential corruption charge.[49] Mr Dubey had no reason to lie or misstate his recollection in his email dated 15 July 2023 at 7.21 pm. Given the contents of this email, I did not see why such an affidavit was necessary. The trial

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46 Affidavit of Khairul Bin Jalani at para 10; RWS (Motion) at para 10.

47 AWS (Motion) at para 19.

48 Appellant's Second Affidavit at p 21.

49 AWS (Motion) at para 6.

prosecutor had also appeared on behalf of the respondent at the hearing before me, but, for the same reason, I saw no basis for any objection to this.

The Appeal

The grounds of appeal

38 As set out in the POA, the appellant sought to challenge his conviction for the 1st and 2nd Charges on the basis that the DJ had failed to give weight to the following aspects of his evidence, which I summarise as follows:

(a) he did not know of the existence of controlled drugs in FA-A and was not aware that he had consumed anything which contained illegal or controlled drugs;

(b) he smoked hand-rolled cigarettes prepared and given to him by the Four Individuals; and

(c) his conduct around the time of his arrest corroborated his defence that he had not known that FA-A contained a controlled drug.[50]

39 The appellant appealed against his conviction for the 3rd Charge on the basis that the DJ had erred in finding that the statutory presumption in s 18(2) of the MDA was triggered and not rebutted. The appellant contended that:

(a) the DJ erred in law in deciding that the appellant's knowledge or otherwise of the existence of PINACA in FA-A went towards his knowledge of the nature of the controlled drug instead of the fact of possession;

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50 POA at para 8.

(b) the DJ failed to give proper weight to the appellant's evidence that he had been unaware of the existence of PINACA in FA-A and that FA-A had been given to him by the Four Individuals;

(c) the DJ failed to give proper weight to the appellant's conduct around the time of his arrest which corroborated his defence that he had not known that FA-A contained a controlled drug;

(d) the DJ erred in drawing an adverse inference against the appellant in respect of his failure to disclose the Four Individuals' involvement after he was arrested; and

(e) the DJ erred in deciding that the appellant had physical possession of the PINACA because he had physical possession of FA-A.[51]

The 1st and 2nd Charges

The alleged involvement of the Four Individuals

40 The thrust of the appellant's arguments in the Appeal was that the DJ had erred in finding that his evidence relating to the Four Individuals was a complete fabrication and an afterthought.

41 The appellant pointed out that the DJ had been influenced by the Prosecution's (undisputed) statement that the descriptions of the Four Individuals had not been provided in his CFD, even though the appellant

[51] POA at para 7.

maintained that he had told his counsel about the Four Individuals.[52] Accordingly, he submitted that the DJ had erred in finding him guilty.

42 First, it should be borne in mind that the CFD was not admitted in evidence, notwithstanding that it had been admissible under s 258A of the CPC. It was hence not clear if the appellant had, in fact, disclosed in the CFD that he had smoked hand-rolled cigarettes which were prepared and given to him by the Four Individuals. More importantly, I considered that if the CFD had supported the appellant's case, one would have expected the appellant himself to have sought to adduce it in evidence during his trial. At the hearing of the Motion, the appellant also did not elaborate on what was contained in the CFD although there was ample opportunity for him to do so. Moreover, the appellant did not seek to admit the CFD as part of the Motion. As all this was not done, the obvious inference was that the CFD did not, in fact, aid his defence.

43 It was also for this reason that the appellant's submission that the Prosecution had misinformed the court about the CFD was questionable.[53] On the appellant's own case, the CFD would have constituted evidence of such misinformation, but the appellant had not sought to adduce it. Similarly, it was not open to the appellant to take issue with the fact that the CFD should have been introduced at trial to dispel the allegation that the Prosecution had not known about the Four Individuals prior to the trial.[54] The appellant had after all chosen not to disclose the CFD at any point.

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52 Appellant's Written Submissions for the Appeal ("AWS (Appeal)") at paras 2, 24, 29, 36–37.

53 AWS (Appeal) at para 40.

54 AWS (Appeal) at paras 24–27. See also AWS (Appeal) at para 38.

44 The appellant further submitted that the Prosecution had not conducted its case fairly, since it had adequate knowledge and time to appreciate his defence involving the Four Individuals and conduct further investigations.[55] This submission was also not convincing. The appellant's grievance appeared to be that the police did not conduct further investigations into the Four Individuals and how they had purportedly caused him to consume and possess controlled drugs. But the appellant had apparently not provided any descriptions to help identify the Four Individuals to begin with. As noted above at [31], their existence was not verifiable and their identities were not known. The police were not required to conduct investigations specifically to support the appellant's case. In the first place, the appellant did not establish that the police had failed to conduct their investigations diligently.

45 The appellant also pointed out that two Prosecution witnesses, namely Insp Leong Li An and the IO, had not been questioned about the Four Individuals.[56] But it was unclear how this would assist him or what evidence they could have given in relation to the Four Individuals even if they had been questioned. If the appellant's complaint was that they had not been cross-examined on any aspects pertaining to the Four Individuals, it had been for the appellant to put any relevant questions to them at trial. There was nothing to preclude him from doing so.

46 In addition, the appellant referred to *Kenneth Choo* and suggested that the trial judge in that case had "made reference to the Case for the Defense filed by the Appellant there when considering the reliability of the Appellant's Defense". It was thus proposed that the DJ's purported failure to scrutinise the

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55 AWS (Appeal) at para 3.

56 AWS (Appeal) at paras 1(iv), 32–33.

CFD was "so fundamentally erroneous that [it] goes to the core of the conviction [and therefore it should be] set aside".[57] But that was not a proposition made by the trial judge in *Kenneth Choo*, and the pinpoint reference in the Appellant's Written Submissions to the grounds of decision in *Kenneth Choo* at [58], contrary to what the appellant maintained, says nothing of the Case for the Defence in that case.

47 I noted that the appellant's responses at trial showed that the evidence relating to the involvement of the Four Individuals could have been put forward during the investigation stage since his case was that the controlled drugs had been given to him by the Four Individuals[58] (*Sanjay Krishnan* at [15]). However, not only did the appellant fail to raise this evidence during the course of investigations, he instead *lied* to the police that the controlled drugs had been obtained from the minimart.[59]

48 The appellant offered two reasons as to why he had not disclosed the involvement of the Four Individuals during the course of investigations. The first was that he was never asked about how and from whom he had obtained FA-A. The DJ justifiably rejected this as a "preposterous" explanation.[60] If the appellant had believed that this evidence was so material as to be able to exculpate him at trial (and now on appeal), he would have raised it as soon as he could on his own accord. The second reason was that he was afraid that the Four Individuals would "do something" to him. However, no reason was proffered as to why he was so afraid of them that he could not have disclosed

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57 AWS (Appeal) at para 5.

58 RWS (Motion) at para 9.

59 NEs for Day 2 at p 72 line 5–16; NEs for Day 3 at p 8 lines 14–16.

60 GD at para 36.

this information during the course of investigations, but was seemingly no longer fearful at the trial or on appeal.

49 Finally, although the appellant seemed to take issue with the DJ's adverse inference against him only in relation to the 3rd Charge (which I deal with below at [59]–[60]), I noted that the DJ had not erred in drawing an adverse inference arising from the appellant's material non-disclosure in his statements, in so far as the 1st and 2nd Charges were concerned.

50 For these reasons, I agreed with the DJ's finding that the appellant's narrative concerning the Four Individuals was untrue and was an afterthought.

Whether the appellant's conduct around the time of his arrest corroborated his defence

51 The appellant highlighted his conduct around the time of his arrest, including that he had openly smoked at the bicycle bay of Woodlands MRT Station and in view of police officers, and had co-operated with the said police officers.[61] He claimed that his conduct indicated that he had not known that FA-A had contained a controlled drug, and he had thereby rebutted the presumption in s 18(2) of the MDA.[62] However, the appellant also stated that at the time he was "smok[ing] a pre-rolled cigarette from his own box of cigarettes",[63] so it need not have been the case that he had openly smoked only the cigarettes which contained controlled drugs. His act of openly smoking cigarettes did not necessarily suggest that he had not known that FA-A had contained a controlled drug. In any case, I agreed with the Prosecution that the DJ's finding, that the

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61 DCS at paras 45–49.

62 DCS at paras 32–33, 61.

63 DCS at para 25; NEs for Day 2 at p 65 lines 1–5.

appellant's conduct around the time of his arrest had been "at best, inconclusive", was correct.[64] The appellant gave no reasons for me to doubt the correctness of this aspect of the DJ's decision.

Whether the appellant had rebutted the presumption under s 22 of the MDA

52 Section 22 of the MDA provides for the following presumption in respect of drug consumption:

> **22.** If any controlled drug is found in the urine of a person as a result of both urine tests conducted under section 31(4)(*b*), he shall be presumed, until the contrary is proved, to have consumed that controlled drug in contravention of section 8(*b*).

53 The appellant's evidence that he had not known of the existence of controlled drugs in FA-A was not directly relevant to the 1st and 2nd Charges which related to drug consumption, save perhaps for its possible value in corroborating his claim that FA-A had been a similar packet of "Butterfly" rolling tobacco which the Four Individuals had hand-rolled into cigarettes which the appellant had smoked. However, that was not an argument that the appellant actually made. In the circumstances, the appellant's purported lack of knowledge of existence of PINACA in FA-A was irrelevant to the 1st and 2nd Charges.

54 The appellant did however argue that the DJ's finding that the s 22 MDA presumption was unrebutted was erroneous because the Prosecution had borne the legal burden even if the evidential burden shifted to the appellant by virtue of the presumption, and the Prosecution had failed to rebut the appellant's defence.[65] With respect, this reflected a basic misunderstanding of the difference

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64 Respondent's Written Submissions for the Appeal ("RWS (Appeal)") at para 31.

65 AWS (Appeal) at para 4.

between the legal and evidential burdens. The Prosecution always retains the legal burden. In this case, the Prosecution satisfied its evidential burden by, *inter alia*, relying on the presumption in s 22 of the MDA. The Prosecution was justified in doing so, and therefore the evidential burden to rebut that presumption shifted to the appellant. If the appellant was unable to rebut the presumption, then the Prosecution's case was made out. This was, in fact, what transpired in this case. While the Prosecution bore the legal burden, it remained incumbent on the appellant to rebut the operative presumption under s 22 of the MDA in order to succeed in his appeal.

55 In order to rebut the presumption under s 22 of the MDA, a bare assertion was insufficient (see [31] above).[66] The appellant merely made the repeated assertion that he had not consumed anything which had contained controlled drugs. Even if I were to take into account his evidence concerning the Four Individuals, these were mere uncorroborated assertions that the Four Individuals had laced his tobacco with controlled drugs without his knowledge. Apart from the appellant's own say-so, no other evidence was adduced as to the existence or identity of the Four Individuals. There was nothing to substantiate his claims that they had with them controlled drugs, that they had laced tobacco with controlled drugs, or that they had given him cigarettes which contained controlled drugs to smoke.

56 The appellant's evidence was thus not credible or cogent. I therefore concurred with the DJ's finding that the appellant had failed to rebut the presumption under s 22 of the MDA in respect of the 1st and 2nd Charges.[67]

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66 RWS (Appeal) at paras 27–30.

67 GD at para 45.

The 3rd Charge

Whether the appellant had physical possession, custody or control of the drug

57 I agreed with the DJ's analysis regarding the appellant's mistaken conflation of physical possession with knowledge of the nature of the drug.[68] In any event, the appellant did not offer any substantive arguments on this point which was raised in the POA. Furthermore, the appellant himself conceded that he had "physical control and custody of the vegetable matter in FA-A".[69] Thus, there was sufficient evidence to prove the element of physical possession.

58 In the POA, it was also stated that the DJ erred in law in holding that the appellant's knowledge of the existence of PINACA in FA-A went towards his knowledge of the nature of the controlled drug instead of the fact of possession. The appellant again did not put forward any arguments before me on this point, which was raised in his POA. I shall examine these points further at [63]–[65] below in dealing with whether the appellant had rebutted the presumption under s 18(2) of the MDA.

Whether the DJ erred in drawing an adverse inference against the appellant

59 The appellant appeared to argue that the DJ erred in drawing an adverse inference against him "because the Prosecution which bears the legal burden… has failed to rebut the defense case … and the Court fail[ed] to take into account the defense filed by [the appellant] such that **under s169(1)(c) and or 169(2) Criminal Procedure Code 1893 (CPC)**, there was no basis to invoke an adverse inference against [him]" [emphasis in original].[70] However, the DJ had

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68 GD at para 52.

69 DCS at paras 32 and 34.

70 AWS (Appeal) at para 4.

drawn an adverse inference arising from the appellant's non-disclosure of facts pertaining to the Four Individuals in his investigation statements,[71] and not pursuant to s 169 of the CPC, which deals with the consequences of non-compliance with criminal case disclosure procedures. The appellant's criticism was hence misconceived, as the DJ was entitled to draw a discretionary adverse inference.

60 The appellant's main argument was that he had previously disclosed the Four Individuals' involvement by having informed the Senior Officer about this on 31 January 2021 and therefore an adverse inference should not have been drawn. I have explained above why the Motion to admit Fresh Evidence in relation to this point was not granted. Crucially, he did not disclose the evidence concerning the Four Individuals in his statements, and on that basis, the DJ did not err in drawing the adverse inference.

61 The appellant argued that an adverse inference should have been drawn against the Prosecution instead for its failure to conduct further investigations into the Four Individuals.[72] However, as I had also explained above at [44], the evidence indicated that the appellant had not disclosed details pertaining to the Four Individuals to the police and the Prosecution over the course of investigations. The appellant also did not particularise or elaborate on the basis on which he alleged that the police and the Prosecution had failed to conduct the necessary investigations.

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71 GD at paras 33–35.

72 AWS (Appeal) at para 32.

Whether the appellant had rebutted the presumption under s 18(2) of the MDA

62 The relevant provisions in ss 18(1)(*a*) and 18(2) of the MDA provide as follows:

> **18.**—(1) Any person who is proved to have had in his possession or custody or under his control —
>
> (*a*) anything containing a controlled drug;
>
> …
>
> shall, until the contrary is proved, be presumed to have had that drug in his possession.
>
> (2) Any person who is proved or presumed to have had a controlled drug in his possession shall, until the contrary is proved, be presumed to have known the nature of that drug.

63 In the present case, the factual premise for invoking the presumption in s 18(2) of the MDA was uncontroversial: the appellant was found with FA-A, a packet of vegetable matter, in his physical possession. He did not dispute knowing that FA-A was in his possession. As such, the element of physical possession was proved and the Prosecution did not need to invoke the presumption of physical possession in s 18(1)(*a*) of the MDA. The sole contentious issue was in relation to whether the appellant knew that the contents of FA-A contained PINACA, a controlled drug.

64 As the DJ correctly observed, the appellant had erroneously conflated the element of physical possession with the element of knowledge of the nature of the drug. The Prosecution was only required to prove that the appellant knew that FA-A was in his possession to establish the element of physical possession in respect of FA-A.[73] The High Court's decision in *Public Prosecutor v Muhammad Shafiq bin Shariff* [2021] 5 SLR 1317 ("*Muhammad Shafiq*") did

[73] GD at para 52.

not support the appellant's contentions.[74] In *Muhammad Shafiq*, the High Court made an express finding on the facts of that case that the accused did not know of the existence of the four packets of crystalline substance (containing methamphetamine). These four packets were found in a baby milk powder box contained within the boot of a taxi which the accused had entered Singapore in. In the present case, the burden fell squarely on the appellant to rebut the presumption in s 18(2) of the MDA that he had known the nature of the drug in FA-A, which was indubitably in his physical possession, custody and control.

65 The appellant argued that the DJ erred in finding that the s 18(2) MDA presumption had not been rebutted because the Prosecution bore the legal burden even if the evidential burden had shifted to the appellant by virtue of the presumption.[75] However, for the same reasons I have stated above at [54] in relation to s 22 of the MDA, I found that this argument was misconceived and untenable.

66 As I have explained above in relation to my findings for the 1st and 2nd Charges, the DJ did not err in finding that the appellant's evidence concerning the Four Individuals was a fabrication and an afterthought. Hence, the DJ rightly accorded no weight to the appellant's evidence that the Four Individuals had given him FA-A. While tobacco was found among the vegetable matter in FA-A, it was purely speculative for the appellant to assert that it would not have been difficult for the Four Individuals to have laced the vegetable matter in FA-A with PINACA without him noticing them doing so.[76] This suggestion was predicated on the appellant's narrative concerning the Four Individuals, which

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74 GD at para 54.

75 AWS (Appeal) at para 4.

76 DCS at paras 41–42.

has been rejected. Additionally, there was no reason for the Four Individuals to have deliberately given controlled drugs to the appellant while concealing this fact from him.

67 It was also submitted once again that the DJ failed to give proper weight to the appellant's conduct around the time of his arrest which corroborated his defence that he had not known that FA-A contained a controlled drug. For the reasons explained at [51] above, I rejected the appellant's argument that his act of openly smoking in public and in sight of the police officers on 10 November 2020 corroborated his defence.

68 I agreed with the DJ's conclusion that the appellant had failed to rebut the s 18(2) MDA presumption, for largely the same reasons why he was found to have failed to rebut the s 22 MDA presumption. His bare assertions concerning the Four Individuals were not only untrue but, more importantly, insufficient to rebut the presumption.

Summary of my decision on the Appeal

69 The Appeal turned on whether the DJ had erred in his findings of fact and whether he had correctly applied the law to the facts. I saw no basis to differ from the DJ's reasoning and conclusion that the relevant presumptions, namely under ss 22 and 18(2) of the MDA, had not been rebutted. I dismissed the Appeal primarily for the following reasons:

(a) The DJ rightly decided that the appellant's account of the Four Individuals was a fabrication and should not be accepted. His failure to disclose their involvement in his statements justifiably led to an adverse inference being drawn against him.

(b) The appellant's evidence that he had not known of the existence of controlled drugs in FA-A or that he had consumed anything which contained controlled drugs, and had merely smoked hand-rolled cigarettes which were prepared and given to him by the Four Individuals was rightly rejected. He thus failed to rebut the relevant presumptions in ss 22 and 18(2) of the MDA.

Conclusion

70 For the reasons set out above, I dismissed both the Motion and the Appeal. I found that none of the requirements for the admission of fresh evidence were satisfied, and the DJ's findings and decision were not plainly wrong or against the weight of the evidence.

See Kee Oon
Judge of the High Court

A Revi Shanker s/o K Annamalai (ARShanker Law Chambers) for the appellant;
R Arvindren (Attorney-General's Chambers) for the respondent.