IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2024] SGCA 13

Criminal Appeal No 7 of 2020

Between

Mohamed Mubin bin Abdul Rahman

… *Appellant*

And

Public Prosecutor

… *Respondent*

JUDGMENT

[Criminal Law — Statutory offences — Misuse of Drugs Act]

Mohamed Mubin bin Abdul Rahman
v
Public Prosecutor

[2024] SGCA 13

Court of Appeal — Criminal Appeal No 7 of 2020
Sundaresh Menon CJ, Tay Yong Kwang JCA and Belinda Ang Saw Ean JCA
15 November 2023

8 May 2024 Judgment reserved.

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

Introduction

1 This is an appeal by Mr Mohamed Mubin bin Abdul Rahman ("the Appellant") who was convicted of two capital charges under s 5(1)(*a*) read with ss 5(2) and 12 of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) ("MDA") for trafficking in diamorphine. He has been sentenced to suffer death.

2 The Appellant originally claimed trial to a single capital charge under s 5(1)(*a*) read with ss 5(2) and 12 of the MDA for abetting by instigating his brother, Mr Lokman bin Abdul Rahman ("Lokman"), to traffic in two bundles of granular substances containing not less than 39.28g of diamorphine ("the Two Bundles"), by directing Lokman to pack and deliver the Two Bundles ("the Original Charge"). One of these bundles was to be delivered to someone named Edy while the other was to be delivered to the Appellant. Lokman, in turn, was

charged with and claimed trial to a single charge of having the Two Bundles in his possession for the purpose of trafficking.

3 The Appellant and Lokman were jointly tried before a High Court judge ("the Judge"), who found that the charge against Lokman of possession for the purpose of trafficking was made out in respect of the bundle intended for Edy, but not in respect of the other bundle intended to be delivered to the Appellant. The charge against Lokman was amended so that Lokman was charged with trafficking in just one of the Two Bundles. An additional charge of possession was preferred against Lokman in relation to the other bundle.

4 As for the Appellant, the Original Charge against the Appellant was amended to one of abetting by instigating Lokman to traffic in one of the Two Bundles, by directing Lokman to deliver the bundle to Edy ("the Amended Charge"). A fresh charge was preferred against the Appellant in respect of the other bundle, namely, a charge of trafficking under s 5(1)(*a*) of the MDA by directing Lokman to retrieve the other bundle from the Unit and thereby putting Lokman in possession of the bundle ("the Fresh Charge").

5 The Judge convicted both Lokman and the Appellant of the amended and fresh charges. Lokman was sentenced to life imprisonment while the Appellant was sentenced to suffer death (see *Public Prosecutor v Lokman bin Abdul Rahman and another* [2020] SGHC 48). The Appellant appealed against his conviction on and the corresponding sentence for both the Amended Charge and the Fresh Charge (collectively, "the Charges").

6 We reserved judgment after hearing the arguments and having considered the evidence and submissions of the parties, we now give our decision.

Background facts

7 We begin by briefly setting out the background facts.

8 The Appellant is presently 63 years old. On the night of 8 September 2015, at about 10.30pm, officers from the Central Narcotics Bureau ("CNB") apprehended Lokman on the ground level of Katong Park Towers ("KPT"), a condominium. Lokman had a black bag (later marked A1) with him which contained, among other things, the Two Bundles (later marked A1E1A and A1F1A, respectively). These bundles were central to the charges. Each of the Two Bundles was wrapped and placed in a separate bag, and the two bags were then placed inside the black bag, A1.

9 A1E1A was later found to contain not less than 19.88g of diamorphine while A1F1A was found to contain not less than 19.40g of diamorphine. The parties did not dispute the drug analysis and the chain of custody of the Two Bundles.

10 In addition to the Two Bundles, the black bag, A1, contained five other packets of diamorphine and 50 tablets of ethylone and methoxetamine. Another set of drugs, comprising five packets of diamorphine and three packets of methamphetamine, was found in a green and black bag that was in Lokman's possession. Following his arrest, the CNB officers escorted Lokman to unit #08-06 of KPT ("the Unit"). A subsequent search resulted in the discovery of various drugs and related items in different parts of the Unit, including some clear plastic wrapped in black tape, which was marked C1.

11 Following his arrest, Lokman was asked, under the direction of the CNB officers, to communicate with Edy and the Appellant using his mobile phone.

The contents of these conversations were recorded and later transcribed and translated.

12 According to lease records, the Unit was rented out to the Appellant and a lady who we refer to as "Siti". The Appellant's then-girlfriend, who we refer to as "Tihani", was in fact the person who concluded the lease but she had used Siti's identity card. The Appellant paid the monthly rent.

13 The Appellant was eventually arrested on 5 October 2015. At the time of his arrest, he was in possession of two packets of methamphetamine, three packets of diamorphine, some empty sachets, and a weighing scale.

The trial

The Prosecution's case

14 The Prosecution's case against Lokman initially was that he had actual knowledge of the contents of the Two Bundles, and he had them in his possession for the purpose of trafficking, by delivering one bundle to Edy and the other to the Appellant at a residence in Holland Close ("the Holland Close Flat"). In the alternative, the Prosecution invoked s 17 of the MDA, pursuant to which Lokman was presumed to be in possession of the Two Bundles for the purpose of trafficking. The Prosecution further contended that Lokman was acting at all times under the direction of the Appellant.

15 As for the Appellant, the Prosecution maintained that he had directed Lokman to collect the Two Bundles from the Unit and to deliver one bundle to Edy and the other to the Appellant. The Prosecution's case was that the Appellant managed a drug trafficking operation, in which Lokman assisted him. The Prosecution contended that in the week before Lokman's arrest, the

Appellant had received the Two Bundles from one Mohd Zaini bin Zainutdin ("Zaini") and one Mohd Noor bin Ismail ("Noor"), and stored them at the Unit. Lokman was acting on the Appellant's instructions on 8 September 2015 as outlined at [14] above, when he was apprehended. Zaini and Noor, who had been dealt with in a separate High Court trial that took place earlier, testified in the joint trial of Lokman and the Appellant. Zaini was called by the Prosecution while Noor was called by Lokman.

Lokman's account

16 Lokman admitted that he had the Two Bundles in his possession and was aware that they contained diamorphine. Throughout the investigations and the trial, Lokman consistently maintained that he worked for the Appellant and performed various duties in exchange for which, he was given a supply of drugs and some money. In essence, his only response to the charge was that he had acted as a courier.

17 Recounting the events of 8 September 2015, Lokman said that the Appellant called him in the afternoon, and directed him to collect all the drugs from the Unit and bring them to the Appellant at the Holland Close Flat. Specifically, the Appellant wanted Lokman to retrieve the Two Bundles and any other remaining drugs from the Unit. Later that evening, while Lokman was at the Unit, the Appellant called him and told him to deliver one of the Two Bundles to Edy. Lokman accordingly packed the Two Bundles, A1E1A and A1F1A, into two separate bags and placed them in the black bag, A1, together with the other drugs referred to at [10] above. These were the bundles he had with him when he was arrested.

The Appellant's account

18 The Appellant, on the other hand, denied that he had directed Lokman in any way. He claimed ignorance of the drugs that were found in Lokman's possession and in the Unit. He maintained that he only consumed methamphetamine, commonly known as "ice", in moderate amounts and that Zaini supplied him with only this drug. The Appellant said that he was not residing at the Unit when Lokman was apprehended and had not stored any drugs there. The Appellant claimed that he had lived at the Unit from around April to June 2015, after which he had moved to another apartment. By mid-July 2015, at the Appellant's suggestion, Lokman moved into the Unit, until around the end of July, when he shifted to the Holland Close Flat. In August, Tihani and her son moved into the Unit. The Appellant contended that Lokman had falsely implicated him because of some perceived rivalry between them for the affections of the Appellant's ex-wife, Hasina Begum binte Glum Hussin Mullah ("Hasina"), and also as a means to avoid a potential death sentence.

Decision below

Amendment of charges and new charges

19 After the Prosecution closed its case, the Court of Appeal issued its decision in *Ramesh a/l Perumal v Public Prosecutor and another appeal* [2019] 1 SLR 1003 ("*Ramesh*"). In *Ramesh*, the Court of Appeal held (at [110]) that on the facts of that case, where the accused person had received the drugs intending to return them to the person who had placed them with the accused person in the first place, this did not amount to trafficking. After closing submissions were received, the parties were directed by the Judge to make submissions on the possible impact of *Ramesh*.

20 Applying *Ramesh*, the Judge held as follows:

(a) In relation to Lokman, the charge of possession for the purpose of trafficking was made out in respect of the bundle intended for Edy, but not in respect of the other bundle that was intended for the Appellant. This was because there was no onward distribution of the latter bundle of drugs and Lokman simply held the latter bundle as a "bailee". Consequently, the Judge amended the original trafficking charge against Lokman (so that it covered only the trafficking of the bundle intended to be delivered to Edy) and preferred a new charge of possession against him (with respect to the bundle intended for the Appellant) and convicted Lokman on both these charges.

(b) In relation to the Appellant, the Original Charge against the Appellant was amended by the Judge such that it covered only the trafficking of one of the Two Bundles which was intended to be delivered to Edy. In relation to the other bundle, the Judge found that the act of putting Lokman in possession of the bundle by directing him to retrieve the bundle from the Unit constituted trafficking. Therefore, a Fresh Charge of trafficking was preferred against the Appellant in respect of the other bundle. The Judge convicted the Appellant of both Charges.

21 We now summarise the key parts of the Judge's decision below.

Factual elements of the charges

22 The Judge first examined the Appellant's and Lokman's involvement in arranging the supply of and subsequently receiving the Two Bundles. She found that drugs were supplied by Zaini and Noor on 1, 5 and 7 September 2015 to the

Appellant. As for the Two Bundles, the Judge found that these were delivered on 5 September 2015. The Judge also concluded that, in line with Lokman's testimony, it was the Appellant who dealt with Zaini and arranged for the supply and delivery of drugs including the Two Bundles. With reference to the Two Bundles, even though the evidence that Zaini, Noor and Lokman each gave featured some inconsistencies from one account to another, they all agreed that it was the Appellant, rather than Lokman, who ordered the drugs and the inconsistencies did not ultimately dissuade the Judge from finding that it was the Appellant who ordered the drugs in question.

23 The Judge also rejected the Appellant's claim that Lokman was running his own drug trafficking operation from the Unit. In any case, the Appellant himself did not assert that any of the bundles had been delivered to Lokman and did not contest that he (meaning the Appellant) had received deliveries of drugs from Zaini and Noor on 1, 5 and 7 September 2015.

24 Turning to the events of 8 September 2015, the Judge made some key findings as follows:

(a) Various telephone calls took place on that day between the Appellant, Lokman and Edy, in addition to the recorded calls between the Appellant and Lokman, that took place under the direction of the CNB, after Lokman's arrest. The Judge found that these significantly buttressed the Prosecution's case against the Appellant and established that he was in charge that night and had given instructions to Lokman to retrieve some bundles and deliver one to Edy and return the other to the Appellant that night.

(b) Second, the Judge found that Lokman's testimony as to the events of 8 September 2015, and specifically that he was acting on the

Appellant's instructions when he went to the Unit to pick up the drugs which included the Two Bundles, was generally reliable and corroborated by several independent witnesses and material pieces of evidence.

(c) Third, although some aspects of Lokman's evidence at trial were inconsistent with his contemporaneous statements and other evidence, the Judge found that these did not detract from the overall credibility of his evidence. The Judge also found that several of the inconsistencies were minor in nature, and/or could be satisfactorily explained. More importantly, Lokman was consistent throughout the various accounts regarding his dealings with the Appellant, his actions on 8 September 2015, and the Appellant's instructions to him.

(d) The Judge also rejected the Appellant's assertion that Lokman had two separate motives to falsely implicate the Appellant, namely, (i) to get back at the Appellant due to their supposed rivalry for Hasina's affections, with Lokman allegedly being jealous over the possibility that Hasina and the Appellant might be moving towards reconciling, and (ii) to obtain a Certificate of Substantive Assistance ("CSA") and avoid a potential death sentence (see [18] above). As regards (i), the Judge found that there was no factual basis for this. Hasina testified that there were no plans for any reconciliation between her and the Appellant and that Lokman was not vying for her affection. In relation to (ii), the Judge considered that, regardless of whether Lokman was incentivised to obtain a CSA, his testimony was consistent with and corroborated by objective evidence. The Judge therefore gave full weight to Lokman's testimony.

(e) In contrast, the Judge disbelieved the Appellant's account of the events of 8 September 2015. The Appellant had claimed that he had been with Hasina and Lokman at the Holland Close Flat when Lokman left at about 7.15pm, saying that he was going out to meet a friend. The Appellant claimed he called Lokman at around 9.15pm asking him to buy some food, which Lokman agreed to do. The Appellant denied giving any instructions as to the Two Bundles, claiming that he did not even know about those drugs. The Judge disbelieved this account for three principal reasons. First, Hasina contradicted this account and denied being with the Appellant on that day. Second, the Appellant's account at trial contradicted his own statement, recorded about a month after 8 September 2015, when the Appellant said he could not recall where he was on 8 September 2015. The Judge found it incredible that the Appellant was then able to provide a detailed account of what transpired on that day nearly four years later. Third, the Judge also considered the recorded calls between the Appellant and Lokman (see [24(a)] above) which went against the Appellant's account that he was waiting for Lokman to return home with the food, and instead showed that the Appellant had given Lokman instructions to make a delivery to Edy.

25 The Judge therefore accepted Lokman's account that he was just a courier in possession of the Two Bundles for the purpose of trafficking under the Appellant's direction. Consequently, the Judge also rejected the Appellant's version that he was just a consumer of "ice", which is the street name for methamphetamine. In summary, the Judge found that:

(a) The Appellant ordered the Two Bundles, was notified when Zaini and Noor came to Singapore, coordinated the deliveries of the Two

Bundles with Zaini and Noor, and eventually received them from Zaini and Noor on 5 September 2015;

(b) the Appellant then kept the Two Bundles in the Unit;

(c) the Appellant instructed Lokman to retrieve the Two Bundles and some other drugs from the Unit on 8 September 2015;

(d) the Appellant further instructed Lokman to deliver one bundle to Edy and to return the remaining bundle to the Appellant at the Holland Close Flat; and

(e) the Appellant knew that the Two Bundles contained diamorphine and he intended that Lokman would take possession of the Two Bundles for the purpose of delivering one to Edy and to bring the other to him.

26 As for Lokman, the Judge found, based on his admissions and the evidence, that Lokman did intend to deliver one of the Two Bundles to Edy and to return the other bundle to the Appellant when he was caught in possession of the bundles.

27 In addition, the Judge also agreed with the Prosecution's contention that the Appellant had lied on a number of points and that these lies were corroborative of his guilt.

The remittal hearing

28 In his Petition of Appeal, the Appellant raised, for the first time, the contention that he was suffering from an abnormality of mind which substantially impaired his mental responsibility in relation to the Charges. Accordingly, on 1 April 2021, we directed that the matter be remitted to the

Judge to hear the evidence on the Appellant's alleged abnormality of mind, and to determine whether the Appellant satisfied s 33B(3)(*b*) of the MDA, so as to qualify for the alternative sentencing regime that is prescribed there, in the event he failed in his substantive appeal.

29 The Judge found that the Appellant did not suffer from an abnormality of mind and that s 33B(3)(*b*) of the MDA was therefore not engaged. The Appellant initially sought to challenge this finding on appeal. However, counsel for the Appellant, Mr Eugene Thuraisingam ("Mr Thuraisingam"), conceded at the hearing before us that, if the primary findings made by the Judge were affirmed, the Appellant would not realistically be able to show that his involvement was limited to that of a "courier" within the meaning of s 33B(3)(*a*) of the MDA. Since this is one of the requirements that would have to be established for the Appellant to qualify for the alternative sentencing regime, Mr Thuraisingam accepted that there was little utility in pursuing the argument that the Judge erred in finding that the Appellant did not suffer from an abnormality of mind. In the premises, we do not address the parties' positions at the remittal hearing or the Judge's findings on this issue.

The parties' submissions on appeal

The Appellant's submissions

30 In his Petition of Appeal, the Appellant raised numerous issues which relate to the soundness of his conviction and sentence on both the Amended Charge and the Fresh Charge. Some of these were further explored in his written submissions. In his oral submissions, however, Mr Thuraisingam confined the appeal to a single issue, which pertained to the provenance of the Two Bundles. There are two facets to this argument.

31 First, Mr Thuraisingam contends that prejudice was caused to the Appellant because of the manner in which the Prosecution had run its case at trial. By way of background, it should be noted that based on the evidence led by the Prosecution, various consignments of drugs were delivered by Zaini and Noor to the Appellant in the week preceding Lokman's arrest on 8 September 2015. As we have noted above, these were said to have been delivered on 1, 5 and 7 September. Further, it appeared to be the case that different types and quantities of drugs were delivered on these dates. According to Mr Thuraisingam, before the Appellant was called to give his evidence, the Prosecution's case was that: (a) two bundles of diamorphine were delivered by Zaini and Noor on 5 September 2015 *but these had been unwrapped and disposed of by the time of Lokman's arrest on 8 September 2015*; and (b) the Two Bundles which were seized upon Lokman's arrest were said to have been delivered by Zaini and Noor on 7 September 2015. This was evident from the Prosecution's cross-examination of Lokman. However, *after* the Appellant testified at trial, in its closing submissions, the Prosecution took the position that the Two Bundles could have been delivered on a date earlier than 7 September 2015 and that it did not matter whether the Two Bundles were delivered on 1 September 2015, 5 September 2015 or 7 September 2015. According to Mr Thuraisingam, irreparable prejudice was caused to the Appellant because of the shift in the Prosecution's case *after* this had been closed, and more particularly, *after* the Appellant had given his evidence.

32 Second, Mr Thuraisingam submits that there is a flaw in the Prosecution's case which is fatal. The Prosecution accepts on appeal the finding made by the Judge in the court below that the Two Bundles were delivered by Zaini and Noor on 5 September 2015. However, according to Mr Thuraisingam, this finding cannot stand. In the court below, the Prosecution had run a case that the two bundles of diamorphine which were delivered on 5 September 2015 had

been unwrapped and disposed of by the time of Lokman's arrest on 8 September 2015, as was made clear in its cross-examination of Lokman. Further, this was consistent with the physical evidence which included the wrapper used for one of the bundles delivered on 5 September 2015. It was also submitted that it was not open to the Judge to make a finding that the Two Bundles were delivered by Zaini and Noor on 7 September 2015, because the *unchallenged* evidence of Zaini, who was the Prosecution's witness, was that methamphetamine, and not diamorphine, was delivered on 7 September 2015.

The Prosecution's submissions

33 Given the narrow focus of the Appellant's case on appeal, we similarly confine our summary of the Prosecution's submissions to this issue, though we will later examine some other aspects of the Prosecution's case.

34 First, the Prosecution accepts that it cross-examined Lokman on the footing that the Two Bundles were supplied on 7 September 2015 because that was Lokman's consistent evidence all along. However, the Prosecution acknowledges that Lokman might have been wrong on this. The Prosecution further notes that Lokman may have assumed that the two bundles delivered on 7 September 2015 contained diamorphine, given that he had not physically handled the bundles at the point of delivery.

35 Second, the Prosecution states that it cross-examined Lokman on the basis that any drugs that were delivered *before* 7 September 2015 had been unwrapped and disposed of because Lokman had testified to the same effect during cross-examination. Specifically, Lokman agreed that of the two bundles that were received on 5 September 2015, there was no sign of either bundle and instead one empty wrapper, C1, which was believed to be from one of those bundles, was recovered from the dustbin (see [10] above). Lokman also testified

that it was possible that he had assisted the Appellant to repack the drugs received on 5 September 2015 given that his DNA was found on C1. Therefore, based on Lokman's testimony, the Prosecution believed that the Two Bundles were delivered on 7 September 2015 as any drugs that were delivered before 7 September 2015 had been disposed of.

36 Third, as the evidence adduced from the witnesses was inconsistent on whether it was methamphetamine or diamorphine which had been supplied by Zaini and Noor on 7 September 2015, the Prosecution finally ran its case on the basis that the Two Bundles could have been delivered either on 5 or 7 September 2015. Further, the Prosecution placed particular emphasis on the monitored telephone calls that were recorded, the fact that the Appellant was clearly the individual dealing with Zaini and Noor, and the fact that diamorphine had been delivered by Zaini and Noor at some point. As against this, the Appellant had attempted to minimise his involvement by falsely disclaiming knowledge of any diamorphine being involved at all.

37 In essence, the Prosecution's response is that if the Judge erred, it was only as to the date on which the Two Bundles were delivered (meaning that the Judge had incorrectly found that the bundles were supplied on 5 September 2015). However, the Appellant's conviction should stand given that he was running the drug business and dealt with the suppliers, Zaini and Noor, who plainly did deliver diamorphine to him at some point that week.

Issues for determination

38 At the outset, we make some brief observations:

(a) This case was tried on the basis of certain limited possibilities as to who supplied the Two Bundles and when this happened.

(b) There was never any suggestion that the Two Bundles were delivered by anyone other than Zaini, in the company of Noor. Hence, it was not open to the court to find that the Two Bundles could have been obtained by the Appellant from any other sources.

(c) Because Zaini and Noor were Malaysian nationals, there was objective evidence of the dates on which they came into Singapore and there were three such dates in this case within reasonable proximity to the date of Lokman's arrest and the seizure of the Two Bundles – namely, 1, 5 and 7 September 2015.

(d) The Appellant was never found in possession of the Two Bundles. Hence, the presumptions of possession, knowledge and purpose, under ss 17 and 18 of the MDA could not be relied on. The Prosecution's case rested primarily on the evidence of Lokman, who *was* arrested in possession of the Two Bundles, to the effect that he was acting on the instructions of the Appellant; and that the Two Bundles had been imported into Singapore by Zaini and Noor.

(e) The cumulative effect of the foregoing points is that:

(i) The Appellant could successfully defend the charge if he showed that the Prosecution could not establish on the evidence led at the trial that the Two Bundles had been imported into Singapore on any of the dates when Zaini and Noor came here and /or if he raised a reasonable doubt in this respect; and

(ii) The date on which the Two Bundles were brought into Singapore therefore became a material issue. We say this because if the Prosecution could not establish beyond a reasonable doubt that the Two Bundles were delivered to the

Appellant on one of those three dates, then it undermined the case theory it advanced at the trial which was that the Appellant alone ordered the Two Bundles from Zaini and Noor, and they delivered them to him on one of those dates. This was certainly the case the Prosecution ran until after the Appellant testified.

39 In that light, two main issues arise for our determination:

(a) First, when were the Two Bundles delivered to the Appellant? There are two aspects to this:

(i) Based on the evidence that was adduced and the Prosecution's case at trial, whether the Judge erred in finding that the Two Bundles (A1E1A and A1F1A) were delivered by Zaini and Noor on 5 September 2015 to the Appellant.

(ii) If the Judge erred in this respect, whether it could be established beyond a reasonable doubt that the Two Bundles were delivered on either 1 September 2015 or 7 September 2015.

(b) We have alluded to the Prosecution's change of case. It is clear to us that after the Appellant had testified, the Prosecution changed its case so that it sought to rely on other evidence to make out its contention that the Appellant in fact directed the operations on the night in question and that those operations only concerned the Two Bundles. This gives rise to the second main issue in this case which again has two aspects:

(i) Whether this change of case is permissible; and

(ii) If so, whether in the event it is not possible to find beyond a reasonable doubt when exactly the Two Bundles were

delivered by Zaini and Noor, the Prosecution's case against the Appellant can nonetheless stand.

Issue 1: Whether a finding could be made beyond a reasonable doubt on when the Two Bundles were delivered

40 We first consider the issue of when exactly the Two Bundles were delivered. We have already explained why at least to a certain point in the case, this was a central issue in this case, but we make some further observations:

(a) The Appellant does not deny that he did, in fact, place orders for drugs and that he did receive drugs from Zaini and Noor. He contends that he only ordered and received methamphetamine from Zaini and Noor, and did not place orders for diamorphine. Further, according to the Appellant, the methamphetamine that he received from Zaini and Noor was primarily for his own consumption, though he would occasionally consume the methamphetamine with Tihani or a friend.

(b) It is undisputed that three deliveries occurred within a week of Lokman's arrest. However, the relevant witnesses – Zaini, Noor, Lokman and the Appellant – gave differing accounts of the nature of the drugs which were delivered on each occasion.

(c) It is also undisputed that various types of drugs were recovered from the Unit at the time of Lokman's arrest. Further, Zaini's evidence was that he delivered a variety of drugs to the Appellant.

(d) Given these facts, as well as the fact that the Two Bundles were found in Lokman's possession upon his arrest and never in the Appellant's possession, it is relevant to examine the evidentiary basis for linking the Appellant to the Two Bundles. As we have already noted,

unlike Lokman, who has been separately convicted, the Appellant was never found in possession of the Two Bundles.

41 In view of the fact that each of the four relevant witnesses – Zaini, Noor, Lokman and the Appellant – provided different accounts of the deliveries on 1 September 2015, 5 September 2015 and 7 September 2015, we first set out in some detail their evidence before examining what findings may be made on this basis.

Zaini's evidence

42 We begin with Zaini's evidence. Zaini was called by the Prosecution as part of its case, and he was the supplier who dealt with the Appellant.

43 Before setting out Zaini's evidence in relation to what transpired on the three relevant dates of 1, 5 and 7 September 2015, we summarise some general aspects of his evidence in relation to the deliveries to the Appellant as follows:

(a) First, Zaini testified that an individual named "Apoi" instructed him to deliver drugs to the Appellant on various occasions. In all, he delivered drugs to the Appellant "about four times". Upon arriving in Singapore, Zaini said that he would usually call one of the Appellant's telephone numbers and arrange to deliver the drugs. While Zaini had saved multiple phone numbers belonging to the Appellant on his mobile phones, Zaini did not have any of Lokman's numbers saved on his phones.

(b) Second, Zaini said that he delivered three types of drugs to the Appellant in the course of those four occasions: cannabis, diamorphine and methamphetamine.

1 September 2015

44 In relation to the delivery on 1 September 2015, Zaini testified that he was unable to recall his interactions with the Appellant or any details about the delivery of drugs on that day.

5 September 2015

45 In relation to the delivery on 5 September 2015, Zaini said that he delivered drugs on the instructions of the Appellant. Upon entering Singapore at 2.48pm, Zaini made four calls to the Appellant at 4.50pm, 4.51pm, 4.58pm and 5.00pm to ask about the location for the delivery of the drugs. He was told by the Appellant to proceed to Meyer Road and await Lokman who would lead him to KPT. Shortly after Zaini arrived at Meyer Road, Lokman pulled up on a motorcycle, and Zaini and Noor then followed Lokman who rode his motorcycle into the basement carpark of KPT. Zaini then handed two bundles of diamorphine which were wrapped in black tape to Lokman. Zaini believed that these two bundles contained diamorphine because that was what Apoi had told him. Thereafter, Zaini and Noor proceeded to the Unit where they met the Appellant. Zaini informed the Appellant that he had handed the two bundles to Lokman. According to Zaini, he and the Appellant then consumed methamphetamine at the Unit. Lokman, who had initially remained at the basement carpark, later entered the Unit and handed the two bundles to the Appellant.

46 When the Prosecution re-examined Zaini, it was pointed out to Zaini that he had said in his statement dated 23 September 2015 that when he was instructed to meet Lokman along Meyer Road, that had in fact transpired sometime after 10.00am. However, Zaini had only entered Singapore at 2.48pm on 5 September 2015. It was therefore suggested that Zaini may have been

referring to their meeting on 1 September 2015 when he stated that he had met Lokman along Meyer Road and followed Lokman into the basement carpark of KPT. Zaini said this was possible, but ultimately also said that he could not remember more details of what had happened on 5 September 2015, except that he had delivered drugs to the Appellant.

7 September 2015

47 Zaini also testified that he delivered drugs to the Appellant on 7 September 2015. Upon entering Singapore at 12.18am, Zaini placed several calls to the Appellant at 12.24am, 12.50am and 12.51am, to inform the Appellant that he was already at the Marina Bay Sands Hotel ("MBS") and to ask where the Appellant was. The Appellant then arrived at MBS and boarded Zaini's car. While in the car, he passed two bundles of drugs to the Appellant. These were wrapped in black tape.

48 According to Zaini, the two bundles of drugs that were handed to the Appellant on 7 September 2015 contained "ice". Zaini said that this was based on what Apoi had told him about the contents of the two bundles. We set out the relevant excerpt from the notes of evidence ("NE"):

> Q Alright, can you tell us when you had passed the drugs to Mubin?
>
> A When we were in the car.
>
> Q Which point of time did you pass the drugs to him?
>
> A It was on the way from MBS to Katong.
>
> Q Right, and you said you passed the drugs to him. Can you describe what the drugs look like?
>
> A It was wrapped in a---in a tape---black tape.
>
> Q Can you remember how many bundles of black tape there were on the 7th of September on this occasion?
>
> A Two bundle.

Q Do you know what---specifically what drugs were in the bundles?

A Ice.

Q How did you know it was Ice?

A Apoi was the one who told me that they were Ice.

Q For yourself, did you know for a fact what it was?

A No, I didn't know.

49 During cross-examination by counsel for Lokman, Mr Mohamed Muzammil bin Mohamed ("Mr Muzammil"), and the former counsel for the Appellant, Mr Ram Goswami ("Mr Goswami"), Zaini confirmed that he had not delivered any diamorphine to the Appellant on 7 September 2015, and he was not challenged on this by the Prosecution.

50 After the Appellant took possession of the two bundles, he suggested that they proceed to the Unit. Zaini agreed and drove to KPT. However, they first made a detour to deliver some petrol to Lokman, whose motorcycle had run out of fuel. Thereafter, Zaini, Noor and the Appellant proceeded to the Unit, and Lokman joined them subsequently. Zaini, the Appellant and Lokman then consumed some methamphetamine in the Unit. This was taken from Zaini's personal supply and not from the two bundles which the Appellant had just received from Zaini. Zaini, Noor and the Appellant left the Unit at 4.49am to get something to eat. The two bundles of methamphetamine delivered by Zaini and Noor were left in the Unit.

51 In terms of the weight of the two bundles of methamphetamine delivered on 7 September 2015, Zaini's evidence was as follows.

(a) During cross-examination by Mr Goswami, Zaini maintained that these bundles contained methamphetamine, the weight of which he did not know, but he thought each bundle weighed

about 25g. We set out below the relevant excerpt of the NE setting out Zaini's response on this issue when he was cross-examined by Mr Goswami:

Q … When was the fourth time that you met up with Mubin?

A At MBS, 7th September.

Q At MBS?

A Yes.

Q And why did you meet up with Mubin on that day?

A To deliver drugs as well.

…

Q Name the drug.

A Ice.

Q Ice. And how much Ice did you deliver to Mubin?

A Two bundles wrapped with a black tape.

Q What's the total weight of these two bundles?

A I don't know. But I think one bundle weighs about 25 grams.

Q One bundle, 25 grams. So you gave him two bundles?

A Yes.

[emphasis added]

(b) During further cross-examination by Mr Goswami, Zaini again said that he *estimated* that the two bundles of methamphetamine delivered on 7 September 2015 contained about 50g of methamphetamine.

(c) Subsequently, during re-examination, the Prosecution asked Zaini to confirm that his testimony was that he had brought in "ice bundles of 25 grams each", which he confirmed.

Noor's evidence

52 We next turn to Noor's evidence. Noor accompanied Zaini on two of the occasions that Zaini delivered drugs to the Appellant, and he was called as a witness by Lokman.

53 Noor said he had seen Zaini deliver drugs to the Appellant, and recalled two occasions when he had accompanied Zaini to KPT to deliver drugs. However, Noor was unable to recall the specific dates on which this had taken place. Nonetheless, from the evidence of the others and having regard to Noor's description of the events, it seems safe to assume these were on 5 and 7 September 2015 respectively.

54 In relation to the first occasion, Noor said that Zaini and he waited at Meyer Road for Lokman. Lokman then arrived on a motorcycle and told Zaini to follow him into the basement carpark of KPT. Noor testified that, upon arriving at the basement carpark of KPT, Zaini stepped out of the car, retrieved a shoe box from his car boot and handed it to Noor, telling him that it contained methamphetamine as well as some drug paraphernalia to consume methamphetamine, and asked him to bring this up to the Unit. On reaching the Unit, Zaini handed the shoe box to the Appellant.

55 During cross-examination by the Prosecution, Noor was presented with his investigative statement recorded on 5 November 2015, and he then agreed that the statement contained the accurate version of events. According to Noor's statement, Noor had seen Zaini put two bundles in a shoe bag at the basement carpark of KPT, and then handed the shoe bag (containing the two bundles) to Noor to bring it up to the Unit. However, Noor did not indicate in his statement what the two bundles contained. Upon reaching the Unit, Zaini took the shoe

bag and passed it to the Appellant. Noor also saw Zaini receiving cash amounting to around $5,000 from the Appellant.

56 In relation to the second occasion, Noor testified that the Appellant boarded Zaini's car at MBS, and then asked Zaini about the amount of drugs which he was to collect. The drugs were next to the Appellant on the back seat. Zaini's reply was two "batu" which is a Malay word that may be translated as a "block" or a "brick". Noor did not know what quantity was signified by the reference to "batu". He specifically disagreed with the Prosecution's suggestion that the this meant a pound or around 450gms and also that it necessarily referred to diamorphine. According to Noor, the term "batu" could refer to varying quantities of drugs and to different types of drugs including methamphetamine. Noor also said he did not see the drugs and could not therefore say what type of drug it was. Thereafter, Zaini, Noor and the Appellant proceeded to KPT. However, they first made a detour to deliver some petrol to Lokman whose motorcycle had run out of fuel. Thereafter, Noor, Zaini and the Appellant proceeded to the Unit, and Lokman arrived subsequently. Zaini received $5,000 from the Appellant at the Unit.

Lokman's evidence

57 We next consider Lokman's evidence.

1 September 2015

58 Lokman did not testify in relation to any delivery on 1 September 2015.

5 September 2015

59 In relation to the delivery on 5 September 2015, when giving his evidence-in-chief, Lokman testified that he had been instructed by the Appellant

to meet Zaini and Noor along Meyer Road on 5 September 2015. He went there on his motorcycle, met Zaini and Noor, and told them that the Appellant wanted to meet them at KPT. He asked them to follow him as he rode his motorcycle. Upon arriving at KPT, Lokman informed the security officer that Zaini and Noor were his relatives. He then guided Zaini and Noor to the basement carpark. He did not receive any items from Zaini or Noor, though he saw Noor carrying a bag. Lokman said that he did not know what the bag contained. Lokman told them to proceed to the Unit, though he did not accompany them because he did not have any business with them. He only went to the Unit later and saw the Appellant, Zaini and Noor consuming methamphetamine. The Appellant later left the Unit with Zaini and Noor, while Lokman subsequently left to meet his friend.

60 During cross-examination by the Prosecution, Lokman said that two bundles of drugs wrapped in black tape were delivered on 5 September 2015 by Zaini and Noor to the Appellant. Lokman agreed with the Prosecution's suggestion to him that one of the two bundles had been unwrapped, with the wrapper found in a dustbin in the Unit. When the Prosecution pointed Lokman to his statement and suggested to Lokman that the Appellant had cut open one of the two bundles containing diamorphine and packed it into smaller packets, Lokman agreed. When asked why his DNA was found on the wrapper in the dustbin, Lokman said that he would usually clean up the Unit and would have handled leftover items such as the wrapper. Lokman also agreed that there was no sign of the second bundle of drugs delivered on 5 September 2015, and explained that the Appellant's drug trafficking operation had a very high turnover and this would therefore already have been disposed of.

7 September 2015

61 In relation to the delivery on 7 September 2015, Lokman said that he dropped the Appellant at the lobby of MBS. He later saw Zaini's car exiting the carpark of MBS. The Appellant boarded Zaini's car and Zaini then re-entered the carpark. Lokman waited near the roadside until he received a call from the Appellant. The Appellant informed him that he would leave MBS in Zaini's car. Lokman later called the Appellant, and was told that they were heading to KPT. Lokman then followed Zaini's car towards KPT. However, as his motorcycle ran out of fuel near Kallang Stadium, Lokman called the Appellant and asked for help. The Appellant, Zaini and Noor then brought him some petrol, before proceeding to the Unit. Lokman joined them there about 30 to 45 minutes later after he had refuelled his motorcycle.

62 When Lokman arrived at the Unit, he saw the Appellant, Zaini and Noor conversing. They later left the Unit, and Lokman left about 30 minutes later when he was instructed by the Appellant to proceed to Geylang Serai. There, he met the Appellant, Zaini and Noor at a 24-hour food outlet.

63 Under cross-examination by the Prosecution, Lokman agreed that the Two Bundles which were seized from him at the time of his arrest were those delivered on 7 September 2015. Lokman testified that he saw the Appellant in possession of two bundles of drugs which were wrapped in black tape, but did not see where the Appellant placed them.

The Appellant's evidence

64 Finally, we turn to the Appellant's evidence.

1 September 2015

65 In relation to the delivery on 1 September 2015, the Appellant testified that he could not recall any details of his meeting with Zaini and Noor. However, he said that Zaini did not deliver the Two Bundles, or two bundles of diamorphine in general, on 1 September 2015.

66 Under cross-examination by the Prosecution, the Appellant accepted that that he must have received one bundle of methamphetamine weighing 25g on 1 September 2015, because, according to the Appellant, this was what Zaini usually delivered to him.

5 September 2015

67 The Appellant agreed that he met Zaini and Noor at the Unit on 5 September 2015. However, according to the Appellant, he had only ever ordered methamphetamine from Zaini. According to the Appellant, Zaini handed him a single black bundle containing 25g of methamphetamine, which Zaini had retrieved from a bag that Noor was carrying. He paid Zaini $700 for this bundle of methamphetamine, having informed him beforehand that this was all he could pay that day and that he would pay the balance of $700 subsequently. The Appellant claimed that he and Zaini then consumed some methamphetamine in the Unit.

68 When cross-examined by Mr Muzammil, the Appellant said that when he left the Unit on 5 September 2015, he took the bundle of methamphetamine, that Zaini had delivered, with him to the Holland Close Flat.

7 September 2015

69 The Appellant further testified that Zaini called him before 7 September 2015 and asked him about the balance of $700 that the Appellant still owed him for the earlier delivery of methamphetamine on 5 September 2015. Zaini said that he needed money and asked the Appellant to purchase two bundles of methamphetamine, each weighing 25g, from him. The Appellant agreed, and arranged to meet Zaini at MBS. When Zaini drove his car out of the carpark of MBS, the Appellant boarded Zaini's car and sat at the back seat. Noor was in the front passenger seat. Zaini told the Appellant that the "items", which the Appellant understood to mean the bundles of methamphetamine, were in the back seat. Thereafter, the Appellant, Zaini and Noor proceeded towards KPT. However, Lokman called the Appellant and told him that his motorcycle had run out of fuel. The Appellant, Zaini and Noor proceeded to the Unit to retrieve a container before purchasing some petrol. They then met Lokman and handed him the container of petrol.

70 The Appellant, Zaini and Noor then returned to the Unit at KPT. The Appellant brought the two bundles of methamphetamine into the bedroom while Zaini and Noor remained in the living room. After checking the contents of the two bundles, the Appellant left these in the bedroom and rejoined Zaini and Noor in the living room. The Appellant handed $3,500 to Zaini, comprising $700 that he owed Zaini for the delivery on 5 September 2015 and $2,800 for the two bundles of methamphetamine which were delivered by Zaini on 7 September 2015. The Appellant denied receiving any diamorphine from Zaini on 7 September 2015.

71 When cross-examined by Mr Muzammil, the Appellant added that, when he left the Unit on 7 September 2015, he took the two bundles of methamphetamine, that Zaini had delivered with him, to the Holland Close Flat.

Summary

72 We summarise the position as follows:

(a) In relation to the events of 1 September 2015, neither Zaini nor the Appellant could recall any material details, while Noor and Lokman did not testify on this at all.

(b) In relation to the events of 5 September 2015:

(i) Zaini said he delivered two bundles of diamorphine. Lokman agreed with the Prosecution's suggestion that the two bundles contained diamorphine and that Lokman had witnessed the Appellant handling and packing one of the bundles into smaller packets. As to this, we observe that if this evidence is accepted, then it would rule out these bundles being the Two Bundles. We also note that it was Lokman's DNA rather than the Appellant's that was found on the wrapper. As for Noor and the Appellant, they said that methamphetamine was delivered that day.

(ii) Lokman also agreed with the Prosecution's suggestion that the diamorphine delivered that day had been unpacked and he believed it had been disposed of by the time of his arrest.

(c) In relation to the events of 7 September 2015, Zaini and the Appellant said methamphetamine was delivered. Noor did not know

what was delivered. Lokman also did not know but apparently assumed it was diamorphine and that it was the Two Bundles.

Whether the Judge erred in finding that the Two Bundles were delivered on 5 September 2015

73 Having set out the evidence of the key witness, we consider whether the Judge's findings could be supported. We begin with the Judge's finding that the Two Bundles were delivered on 5 September 2015. In our judgment, the Judge erred in this respect, given Lokman's evidence, which was not challenged by the Prosecution, as well as the Prosecution's own case when it cross-examined Lokman.

74 Lokman's evidence was that, while two bundles of diamorphine had been delivered on 5 September 2015 by Zaini and Noor to the Appellant, one of these had been unwrapped and repacked by the time of Lokman's arrest on 8 September 2015, while the other could not be found and had likely already been sold to others. The relevant excerpt from the NE is reproduced below:

> Q Yes. I'm talking about the last delivery now. Would you agree that after the last delivery, the drugs were kept---the---after the delivery on 5th September, the drugs were kept at Katong Park Towers.
>
> A I agree.
>
> Q Right. And there was the black wrapper that was on the dustbin that you have been pointed to, right?
>
> A Yes.
>
> Q Agree that this was one of the---this was the wrapper from one of the two batus.
>
> [Mr Muzammil] Sorry, the wrappers from?
>
> [DPP] One of the two---of the two bundles that were delivered on that day.
>
> [Mr Muzammil] On what day?

[DPP] 5th September. I moved to 5th September.

A I agree.

…

Q Okay. And you said there were two bundles that were delivered, right, on the 5th of September?

A Yes.

Q And there's no sign of the second bundle in the unit anywhere, right?

A Yes.

Q Do you know whether this bundle had been delivered in its intact form to someone?

A I don't know.

…

Q Right. And for the bundle that was received on the 5th---for the two bundles that were received on the 5th, there's no sign of one bundle and you have one empty wrapper in the dustbin.

A Yes.

75 In fact, when he was cross-examined by the Prosecution, Lokman said that he thought the Two Bundles were delivered on 7 September 2015. The relevant excerpt of the NE is reproduced below:

Q Okay. But would you agree that just prior to your arrest, you---*when you were going out to deliver the batus on 8th September, you were very well aware that the*

> *bundles they were going out to deliver were the exact two bundles that were received on 7th September.*
>
> *A* *Yes, because these two bundles came on the day before I was arrested, so it makes sense that it has to move out the next day.*
>
> [emphasis added]

76 The Prosecution did not challenge Lokman's evidence that the two bundles of diamorphine delivered on 5 September 2015 had already been unwrapped and repacked or otherwise disposed of by the time of his arrest. In fact, in support of this, the Prosecution pointed to the forensic evidence which consisted of Lokman's DNA that was found on the empty wrapper in the dustbin. The relevant excerpt of the NE is reproduced below:

> Q Now, Mr Lokman, before we left off, I was asking you about the black wrapper C1 in the dustbin.
>
> A Yes.
>
> Q Alright. Now, there are two versions as to what happened to the heroin from this bundle. One version is in your statements, paragraph 18 and 29, as Mr Goswami has pointed out that it was Mubin who cut it open and packed it into smaller packets.
>
> A Yes.
>
> Q And the second version is in your contemporaneous statement 2D5 that at answer 13 that you were the one who packed it.
>
> A Yes.
>
> Q Okay. My question is: Who packed it?
>
> A Mubin, which is why I said earlier that the answer to 13 was from.
>
> Q Could it be that you helped Mubin to pack it?
>
> A If he asks me to.
>
> Q If he asks you to, you would help to pack the packets?
>
> A Yes.
>
> Q So for this bundle, did he ask you to help him to pack?

A No.

Q Okay. Then can you---as Mr Goswami has pointed out, *your DNA and not Mubin's DNA was found on the wrapper and some of the small packets that were found on you. So is it possible that you could have helped to repack the drugs?*

A *Maybe if my DNA was found on the wrapper and the small packet, it could be I have helped him. But maybe my DNA was found on the wrapper and the small packet because in that house, I am the one who usually clean up the room.*

[emphasis added]

77 Based on the Prosecution's cross-examination of Lokman, the Prosecution's case was that: (a) while two bundles of diamorphine were delivered by Zaini and Noor on 5 September 2015, these had been unwrapped and repacked or disposed of by the time of Lokman's arrest on 8 September 2015; and (b) the Two Bundles which were seized upon Lokman's arrest were delivered by Zaini and Noor on 7 September 2015.

78 Given that the Judge's finding was contradicted by Lokman's unchallenged evidence, the objective evidence consisting of the discarded wrapper, and the Prosecution's case that it put to Lokman, it was not open to the Judge to find that the Two Bundles were delivered on 5 September 2015. In any case, for these same reasons, there was a reasonable doubt as to whether the Two Bundles were delivered on 5 September 2015. In addition, in this connection, there is also Noor's evidence that Zaini had told him it was methamphetamine that was delivered on 5 September 2015 (see [54] above).

Whether a finding can be made that the Two Bundles were delivered on either 1 September 2015 or 7 September 2015

79 The next question is whether the evidence could support a finding that the Two Bundles had been delivered either on 1 or 7 September 2015.

80 As regards 1 September 2015, the available evidence shed virtually no light on the events of that day. Both Zaini and Noor were unable to recall specific details relating to the deliveries at KPT on 1 September 2015. The only evidence which emerged in relation to the events of 1 September 2015 may be summarised as follows:

(a) the Immigration and Checkpoints Authority records showed that Zaini and Noor entered Singapore on 1 September 2015 at 7.40am;

(b) Zaini made two calls to the Appellant at 8.52am and 8.54am; and

(c) KPT's records showed Zaini's car entering KPT at 9.12am and exiting KPT at 11.10am.

81 In the absence of evidence as to what was delivered by Zaini and Noor on 1 September 2015, it is unsurprising that the Judge made no factual findings on the events of 1 September 2015.

82 We finally turn to 7 September 2015. Having carefully considered the evidence, we are of the view that it does not support a finding beyond reasonable doubt that the Two Bundles were delivered on 7 September 2015 for the reasons that follow.

Zaini's evidence that two bundles of methamphetamine were delivered on 7 September 2015 was not challenged by the Prosecution

83 First, Zaini's unchallenged evidence was that two bundles of *methamphetamine*, and not diamorphine, were delivered on 7 September 2015. While the Prosecution did question whether Zaini had personal knowledge of the contents of the two bundles delivered on 7 September 2015 or was relying on what Apoi had told him (see [48] above), the Prosecution did not challenge

Zaini's evidence that methamphetamine was, in fact, delivered on 7 September 2015. This was also the evidence of the Appellant. Noor did not know what was delivered. As for Lokman, even the Prosecution accepts that he did not know and likely *assumed* it was diamorphine (see [34] above). We also note, in passing, that Zaini's claim that he delivered diamorphine on 5 September 2015, which the Prosecution did rely on, was similarly based on what Apoi had told Zaini (see [45] above).

Zaini was not challenged by the Prosecution on the difference in weight between two 25g methamphetamine bundles and two 450g diamorphine bundles

84 Second, as set out at [51(a)] above, Zaini had given evidence at trial on the weight of the two bundles of methamphetamine that he delivered on 7 September 2015. In particular, Zaini estimated that each of the two bundles of methamphetamine that he delivered weighed about 25g, making the total weight of the two bundles about 50g.

85 What is significant is that Zaini was not challenged by the Prosecution on the difference in weight between two 25g bundles of methamphetamine and two 450g bundles of diamorphine. The Prosecution only asked Zaini in re-examination what the two "ice bundles" delivered on 7 September 2015 looked like. His response was that it looked like the Two Bundles (meaning the two bundles of diamorphine seized from Lokman) as they were wrapped with black tape, but that the two "ice bundles" were *slightly smaller and slightly lighter*. The Prosecution did not question Zaini further thereafter. We set out below Zaini's evidence on this issue during re-examination by the Prosecution:

> Q You know, just now you testified that you had brought in Ice bundles of 25 grams each.
>
> A Yes.

Q What did they look like?

A It look like this [*ie*, the Two Bundles of diamorphine], wrapped with a black tape.

Q Similar in size?

A *I feel that it's slightly smaller than this and slightly lighter than heroin.*

Q *Smaller and lighter? Alright. Are you able to give even an estimate of how heavy the heroin bundles were?*

A *I can't give a accurate estimate but I think it's heavier than the bundle of Ice which weigh 25 gram.*

[emphasis added]

86 Notably, the Prosecution did not question Zaini at any point on the fact that the weight of two 450g diamorphine bundles would have been quite different from two 25g methamphetamine bundles. In contrast, the Prosecution did so when challenging the Appellant's evidence in cross-examination. We set out an extract from the Prosecution's cross-examination of the Appellant (which was not similarly explored when the Prosecution examined and re-examined Zaini):

Q And would you say that it's difficult to confuse a 25-bundle of Ice with a batu of heroin?

A If you were to---again I would have to say you have to compare with heroin bundle, I am not familiar with heroin bundle. Whatever I receive, the shape as described to you would be the bundle of Ice.

Q *Okay. I just---okay. Would you agree that 25-gram packets of Ice would actually be very light?*

A *I agree.*

Q *And they would be very light compared with the weight of one batu of heroin which is 456.8 grams?*

A *Yes.*

Q And would you agree that if you had bought Ice, the two packets in the plastic bag would have been very light?

A The two packet of Ice in one bundle or two separate bundle?

> Q In two separate bundles.
>
> A Yes.
>
> [emphasis added]

87 The absence of such a line of questioning directed to Zaini when he touched on this issue suggests that the Prosecution did not challenge Zaini's evidence that two smaller and lighter bundles were delivered on 7 September 2015, as compared to the Two Bundles recovered from Lokman.

88 In our judgment, Zaini's evidence as to the contents of the two bundles delivered on 7 September 2015, namely that it was methamphetamine and that these were slightly smaller and lighter than the Two Bundles, raises a reasonable doubt that the Two Bundles were delivered on 7 September 2015.

Noor's evidence that the term "batu" was used to refer to the two bundles of drugs delivered on 7 September 2015

89 Third, Noor testified that the term "batu" was used when Zaini spoke about the two bundles handed to the Appellant on 7 September 2015 (see [56] above). However, this evidence is not sufficient to support a finding that the Two Bundles (of diamorphine) were delivered on 7 September 2015. This is because Noor's evidence at trial was also that: (i) he had heard the term "batu" being used to refer to smaller bundles of drugs other than bundles containing one pound, or around 440g to 450g of diamorphine; and (ii) he had heard the term "batu" being used to refer to smaller bundles of methamphetamine.

90 When cross-examining Noor, the Prosecution tried to establish that "batu" was a term that specifically referred to a pound of diamorphine. In this regard, the Prosecution had adduced evidence from Assistant Superintendent Yang Rongluan ("ASP Yang"), who stated that in her six years and nine months at the CNB, she had encountered the term "batu" and this term was associated

with diamorphine. In particular, ASP Yang gave evidence that "batu" was used as a unit of measurement of diamorphine, with one "batu" of heroin referring to one pound, or around 440g to 450g, of diamorphine. ASP Yang also stated that she had not encountered the term "batu" being associated with other types of drugs.

91 However, Noor did not accept this and maintained that the "black bundles" referred to as "batu" were not always the same size as the Two Bundles. According to Noor, he had also seen "batu" or "black bundles" which were smaller. He even went further when he disagreed with the Prosecution's suggestion that the black bundles would only contain diamorphine and not other drugs like cannabis or methamphetamine. According to Noor, methamphetamine too was packed in a similar way. We set out below the exchange between the Prosecution and Noor on this issue in full:

> Q Okay. Now, would you agree with me that when you refer to the delivery of black bundles, you are referring to bundles that look like this? As in P50.
>
> (Conferring)
>
> [DPP]: Black bundles.
>
> *A* *Not all will look like this. Some of them are smaller.*
>
> *Q* *Okay. So yesterday in Court when you said that Mubin asked Zaini about the drugs, right, and Zaini replied "2 batu", now I refer to the term "batu". Do you understand "batu" to refer to a black bundle like that?*
>
> *A* *I didn't see the 2 batu. It was in a bag.*
>
> *Q* *Okay, but when you refer to "batu", in your mind, would it be consistent with bundles of this nature?*
>
> *A* *It's not consistent, 1 because I have seen a smaller packaging, and that is called 2 batu as well.*
>
> Q I see. When you say "smaller packaging", how much smaller are you referring to?
>
> A Slightly smaller than this packaging.

Q Okay. Now, Mr Noor, the 13 bundles that were brought in by yourself, each of them were about 460 grams. Would you agree with that?

A Yes.

Q And the two bundles here, the evidence after it's weighed is that they are each also about 460 grams. Okay? To be precise, each of the bundles in this particular case weighed 456.8 grams. So when we refer to a term "batu", is it generally---would you agree with me that it's generally the case that the bundles are around 460 grams, maybe slightly bigger, maybe slightly smaller, but around the same form and weight?

A Yes, I agree.

Q Alright. Now yesterday when you testified, you said that you didn't know that the drugs contained in each batu was heroin and you only knew after your arrest. You remember that?

A Yes.

Q Okay. Now---but would you agree that even if you didn't know the name of the drug, you knew that the black bundles contained drugs?

A I agree.

Q Right? And to your knowledge, the drugs in the black bundles resembled small brown rocks?

A Yes.

Q Right. If you look at P57. Something like that?

A Yes.

Q And you are now aware that these drugs which resemble small brown rocks are heroin which contain diamorphine?

A Yes.

Q *And would you agree that as far as you know, these black bundles do not contain any other drugs like cannabis or Ice or something else?*

A *I disagree because at times, Ice will be packed in this way as well.*

Q *You have seen that?*

A *Yes.*

Q In the same weight?

A Not the same weight.

Q What do the Ice bundles look like?

A Black bundle, weigh about 500 grams.

Q Also? So this is 460 grams. So you are saying Ice is packed in bundles of about 500 grams as well?

A Well, depend on the order. At the times, it can be 250 grams.

Q Okay. Now, when [Lokman] testified, when he gave evidence, he says that as far as he knows, the drugs that Mubin buys from Zaini is heroin. Would you agree with that?

A That is his statement, I can't comment on that.

Q Do you know Mubin's orders?

A It's between him and Zaini. I do not know.

[emphasis added]

92 Noor's evidence that Zaini had referred to the two bundles of drugs handed to the Appellant on 7 September 2015 as "two batu" has to be considered alongside his *unchallenged* evidence that the use of the word "batu" did not refer only to a bundle containing a pound of diamorphine, but could also refer to smaller packets of other drugs, including those containing methamphetamine. Therefore, this evidence cannot support a finding beyond reasonable doubt that the Two Bundles were delivered on 7 September 2015.

The evidence on the amount paid by the Appellant on 7 September 2015

93 Finally, we consider the evidence that the Appellant had handed some money to Zaini on 7 September 2015 after the delivery of drugs.

94 We first summarise the evidence of Zaini, Noor, Lokman and the Appellant on the amount which was purportedly paid by the Appellant to Zaini on 7 September 2015:

(a) Zaini's evidence at trial was that he did not receive any money from the Appellant for any transaction including the delivery on 7 September 2015. Further, Zaini said that Apoi had never asked him to collect money from the Appellant.

(b) In Noor's statement recorded on 5 November 2015 at 10am, he said that when the Appellant entered the car at MBS (meaning the delivery on 7 September 2015), the Appellant "passed Zaini a stack of cash in Singapore dollars" at the Unit, though he did not know how much was handed over. At trial, however, Noor said that he saw Zaini receiving $5,000 from the Appellant on 7 September 2015 after they arrived at the Unit.

(c) Lokman did not testify on whether any money was handed over by the Appellant to Zaini on 7 September 2015. In any case, he only arrived at the Unit sometime later after he had refuelled his motorcycle. Hence, he would likely not have witnessed Zaini receiving any money from the Appellant. Further, in line with this, in his statement recorded on 16 September 2015 at 1505hrs, Lokman said that he had never seen the Appellant pass any money to Zaini or Noor.

(d) The Appellant's evidence at trial on the events of 7 September 2015 was that he had arrived at the Unit and proceeded to check the contents of the two bundles of methamphetamine in the bedroom. Thereafter, he left the two bundles in the bedroom and went to the living room, where he handed $3,500 to Zaini, comprising the $700 he owed Zaini for the delivery on 5 September 2015 and $2,800 for the two bundles of methamphetamine which were delivered by Zaini on 7 September 2015.

95 Zaini, Noor and the Appellant were challenged on their evidence as to the amount that was handed over by the Appellant to Zaini on 7 September 2015, but each of them maintained their respective positions.

96 Noor was challenged on his evidence that he saw Zaini receiving $5,000 from the Appellant on 7 September 2015, but consistently maintained that he did see this. When asked by Mr Goswami how he knew that Zaini received the sum of $5,000 from the Appellant, Noor's response was that he had asked the Appellant who told him it was $5,000.

97 When cross-examined by the Prosecution, Noor repeated that he saw Zaini receiving $5,000 from the Appellant on 7 September 2015, and further agreed with the Prosecution's suggestion that $5,000 was the usual amount that Zaini collected when he delivered two bundles to the Appellant.

98 As against this, the Appellant testified that he only handed $3,500 to Zaini on 7 September 2015, and he maintained throughout that he did not hand $5,000 to Zaini.

99 The Appellant was asked if he was contending that Noor was lying when he testified that the Appellant had handed $5,000 to Zaini on 7 September 2015. The Appellant maintained that Noor was indeed lying. When asked why he would do so, the Appellant said he did not know why though he speculated that Noor might have done so in the effort to obtain a Certificate of Substantive Assistance and qualify for the alternative sentencing regime under s 33 of the MDA.

100 The effect of all this is that there was simply no basis to come to a finding as to whether the Appellant did pay Zaini some amount on 7 September 2015,

and if so, how much. Beyond an observation that the witnesses' accounts differed, we note that the Judge did not make any finding on this issue.

Conclusion

101 Taking all of these strands in the round, in our judgment, the evidence does not support a finding that the Appellant received the Two Bundles from Zaini on 7 September 2015. In summary:

(a) Zaini's unchallenged evidence was that two bundles of *methamphetamine*, and not diamorphine, were delivered on 7 September 2015. This was also the evidence of the Appellant, while Noor and Lokman in fact did not know what drugs were delivered that day.

(b) Zaini was not challenged by the Prosecution on what would have been a discernible difference in weight between two 25g bundles of methamphetamine and two bundles of 450g diamorphine.

(c) Noor's evidence that Zaini had referred to the two bundles of drugs handed to the Appellant on 7 September 2015 as "two batu" has to be considered alongside his unchallenged evidence that the use of the word "batu" could also refer to smaller packets of drugs containing methamphetamine.

(d) The evidence was inconclusive as to what, if any amount, was paid by the Appellant to Zaini on 7 September 2015 and this therefore shed no light at all on what was delivered on 7 September 2015.

102 It follows that there is a reasonable doubt as to whether the Two Bundles were delivered on any of the three dates by Zaini and Noor to the Appellant. In

relation to the first main issue, therefore, we agree with Mr Thuraisingam that the provenance of the Two Bundles has not been established beyond a reasonable doubt. This is potentially a fatal flaw in the Prosecution's case because it was never suggested that the Appellant could have obtained the Two Bundles from any other source or on any other date. In that light, we turn to the second main issue.

Issue 2: Whether the Prosecution changed its case, and if so, whether it is permitted to do so such that the conviction may be sustained on a different basis?

The Prosecution's case at trial on the provenance of the Two Bundles

103 We first set out the Prosecution's case at trial on the provenance of the Two Bundles. The only factual witness called by the Prosecution as part of its case who could testify about *when* the Two Bundles were delivered was Zaini.

104 As will be made apparent, the Prosecution's case shifted significantly during the course of the trial, which we find unsatisfactory.

105 The Prosecution's opening statement at the commencement of the trial did not address the issue of when the Two Bundles were delivered or set out the Prosecution's case on this issue. Rather, the Prosecution only stated that it would adduce evidence to show that Lokman was working for the Appellant as a runner and that the Appellant had given instructions to Lokman in relation to the delivery of the Two Bundles.

106 As has been noted above, Zaini was called as a witness by the Prosecution and his evidence was that he had delivered two bundles of diamorphine on 5 September 2015, and two bundles of methamphetamine, each weighing 25g, on 7 September 2015. In the course of his evidence-in-chief, the

Prosecution did not challenge Zaini's evidence that methamphetamine, and not diamorphine, was delivered on 7 September 2015.

107 The Prosecution did explore whether Zaini's evidence on the contents of the two bundles delivered to the Appellant when the Appellant boarded Zaini's car at MBS was based on his own knowledge or what Apoi had told him. Having elicited the response that this was based on what Apoi had told him, the Prosecution did not go further to challenge or refute Zaini's evidence that as far as he was concerned, he had delivered two bundles of methamphetamine to the Appellant on 7 September 2015. Nor was it explored as to why Apoi would have lied about the contents of the two bundles.

108 Hence, the Prosecution's case, at least when it closed its case, was that the Two Bundles were delivered on 5 September 2015. Zaini's unchallenged evidence as to the events of 1 September 2015 and 7 September 2015 made it untenable for the Prosecution to pursue a case that the Two Bundles were delivered on those dates.

109 However, when cross-examining Lokman, the Prosecution led evidence from Lokman that two bundles of diamorphine were delivered both on 5 September 2015 and 7 September 2015, and further that the two bundles of diamorphine which were delivered on 5 September 2015 had been unwrapped and repacked or otherwise disposed of by the time Lokman was arrested on 8 September 2015 (see [60] and [74]–[76] above). The Prosecution also pointed to the fact that Lokman's DNA was found on the empty wrapper that was found in the dustbin and then pursued a line of questioning which led to Lokman agreeing that the two bundles of diamorphine on 5 September 2015 had been unwrapped and repacked or disposed of by the time of his arrest because of the high turnover of the Appellant's drug trafficking business and that the Two

Bundles which were seized from him upon his arrest were those delivered on 7 September 2015. It should be noted that Lokman never handled the bundles that were delivered on 7 September 2015, at least at the point of delivery. The evidence of Zaini, who delivered the drugs, and the Appellant who ordered, received and supposedly checked it, was that it was methamphetamine that had been ordered and delivered on 7 September 2015.

110 In short, when the Prosecution cross-examined Lokman, its case shifted to one where two bundles of diamorphine were delivered by Zaini and Noor to the Appellant on both 5 September 2015 and 7 September 2015, and the Two Bundles were from the delivery on 7 September 2015 since those delivered on 5 September 2015 had been already unwrapped and repacked or disposed of.

111 When cross-examining the Appellant, the Prosecution's position shifted once again to a broader case. Instead of putting its case to the Appellant that the Two Bundles were delivered on either 5 September 2015 (which appeared to be the Prosecution's case based on the unchallenged evidence of its witness, Zaini) or 7 September 2015 (which appeared to be the Prosecution's case based on its cross-examination of Lokman), the Prosecution put its case more broadly as seen in the following excerpt of the NE:

> Q Okay. And I put it to you that you received the two bundles of heroin from Zaini *sometime in the first week of September*.
>
> A I disagree. I did not receive those item.
>
> Q I put it to you that you safe-kept these two bundles of heroin at Katong Park Towers.
>
> A I disagree.
>
> [emphasis added]

112 This was a significant shift in the Prosecution's case which had not featured in its line of questioning or examination of the other witnesses. Neither

before the close of its case, nor even in the cross-examination of Lokman, had this broader position been advanced. Significantly, however, even then the case mounted by the Prosecution was that the Two Bundles were delivered to the Appellant *by Zaini, in the first week of September*. This, however, brings us back to the difficulties we have analysed in the first part of this judgment.

113 In the Prosecution's closing submissions at trial, its position shifted further between: (a) on the one hand, accepting Zaini's version of events that the Two Bundles were delivered on 5 September 2015; and (b) on the other, contending that *it was irrelevant which date specifically the Two Bundles were delivered on*. We reproduce below the relevant paragraphs of the Prosecution's written closing submissions in the court below:

> 43 *Zaini testified that he had delivered heroin to Mubin on 5 September 2015. He also said that Apoi informed him that the two bundles contained heroin.* In this regard, it is not disputed that Zaini and Noor entered Singapore through Tuas Checkpoint on 5 September 2015 at about 2.48 p.m. Between 4.50 to 5 p.m., Zaini made four phone calls to Mubin. Zaini testified that the calls were about where he should deliver the drugs, and that Mubin had instructed him to drive to Meyer Road to wait for Lokman. Thereafter, Lokman brought them to Katong Park Towers and Zaini handed the two bundles of heroin to Lokman before he and Noor went up to the Unit. By then, Mubin was already inside the Unit, and Zaini informed him that he had passed the drugs to Lokman. When Lokman arrived in the Unit, Zaini saw Lokman handing the two bundles to Mubin, who then put them aside on the sofa.
>
> 44 *The two bundles referred to above are the Drugs* [*ie*, the Two Bundles]. During his cross-examination, Zaini confirmed that A1E1 and A1F1 in photos P48 and P50 looked like the bundles of heroin that he had handed to Mubin based on the "black tape wrappings and the double-side tape marks". Zaini explained that he would paste a double-sided tape on the bundle so that he could stick the bundle on the wall of the compartment in the car boot without it falling off. Hence, he was able to specifically identify these bundles because the photos showed that these bundles had a sticky mark.
>
> 45 On the other hand, Noor testified in Court that Zaini had passed "two batu" to Mubin when they met Mubin at Marina

> Bay Sands casino. Noor further testified that at that point in time, he did not know what type of drugs Zaini had handed to Mubin and he could not be sure "because only Zaini would know what exactly it is". Noor also testified that he did not know what drugs Zaini brought in or where he had kept the drugs because he did not see the drugs. It is not disputed that the meet-up at Marina Bay Sands casino happened on 7 September 2015. In this regard, in relation to this meet-up on 7 September 2015, Zaini testified that Apoi instructed him to hand two bundles of methamphetamine to Mubin. These two bundles were wrapped with black tape.
>
> 46 The point to be made by the evidence of Zaini and Noor is that they pinpoint Mubin as the recipient who ordered and took delivery of the drugs they brought. This included the Drugs. *While there were inconsistencies between the accounts given by Zaini and Noor as to how, where and the exact day in September as to when Zaini handed the two bundles of heroin to Mubin, we submit that they are not material. …*
>
> [emphasis added]

114 And, in its oral closing submissions, the Prosecution made clear its position that the specific date of delivery of the Two Bundles was completely irrelevant. The relevant excerpt of the NE is reproduced below:

> Court: How about Zaini and Noor's inconsistency? What is the prosecution case on that?
>
> [DPP]: Your Honour, *the prosecution case is that we are not concerned about when the drugs were delivered, where the drugs---all we are concerned about is that Zaini and Noor had delivered these drugs at some point to Katong Park Towers*, and we have tied that evidence, and we can say this quite specifically because the---of the analysts of the drugs which suggest that Zaini and Noor had brought them. The HSA analysts. So even though there is inconsistency, the fact that remains is that the drugs were bought by them. They were there and they must have been delivered to Mubin. *The prosecution is not---says that it does not matter whether it came on the 1st, the 5th or the 7th. The fact it was delivered and the instructions were in relation to the drugs for the specific purpose of the charge here.*
>
> [emphasis added]

115 This represented a dramatic shift in the Prosecution's case. Throughout the case, the Prosecution's position had shifted from saying that the Two Bundles were delivered, first on 5 September, then on 7 September, then at sometime in the first week of September, and then on 5 September, but without ruling out 7 September. But for the first time, in its oral closing submissions, it said that it was irrelevant when the Two Bundles were delivered. This was a very different case from the one that the Defence had until then been confronted with. Although the Prosecution still tied the Two Bundles to Zaini and Noor as the supplier, their final position sought to break the very shackles it had put on its case at the outset as noted at [38] above.

116 As long as the Prosecution's case was tied to the Two Bundles having been delivered by Zaini and Noor on one of those dates in September, it was necessary to examine the evidence to ascertain whether a conclusion could be reached in respect of any of these dates beyond a reasonable doubt.

117 And, as we have explained, it is evident that on the evidence, there was at least a reasonable doubt that: (a) different types of drugs may have been delivered on different days; (b) to the extent diamorphine was delivered to the Appellant on one of these days (namely 5 September 2015), that diamorphine was no longer in existence by the time Lokman was arrested with the Two Bundles; and (c) as far as the drugs delivered on the other of these dates (namely 7 September 2015), the preponderance of the evidence was that it was **not** diamorphine. If the Prosecution maintained its position that the Two Bundles were delivered in the first week of September 2015, then the question of *when* the Two Bundles were delivered had a direct bearing on whether they were delivered at all to and for the Appellant and this led to the difficulties we have already noted. Perhaps realising the difficulty it had made for itself because of

the way it ran its case, the Prosecution then sought to introduce this very late and very significant change after all the evidence was in.

118 The question this raises is – can the Prosecution do that?

Legal principles governing a change of the Prosecution's case

119 To address this, we need to examine the extent to which the Prosecution may be constrained in the way it runs its case in a criminal trial. Aside from mandatory requirements of the law, such constraints may arise in at least two ways: first, by reason of the special role played by prosecutors as what has been referred to as "ministers of justice"; second, on account of the court's overriding concern that the pursuit of justice is undertaken through a fair process. We elaborate briefly on each of these.

120 In relation to the first, in a sense, a prosecutor's paramount duty, in common with that owed by any other advocate, is to the court, and to assist the court in its task of administering justice. But because the Prosecution discharges the constitutional function of the Attorney-General as the Public Prosecutor, there is a particular duty on the Prosecution to ensure that as far as is reasonably possible, the court has access to all the relevant material to enable it to come to an accurate determination of the truth. This explains such things as the development of special duties of disclosure that applies to the Prosecution as seen in *Muhammad bin Kadar and another v Public Prosecutor* [2011] 3 SLR 1205 (where we considered the Prosecution's duty to disclose relevant unused material to the defence) and *Muhammad Nabill bin Mohd Fuad v Public Prosecutor* [2020] 1 SLR 984 ("*Nabill*") (where we considered the Prosecution's duty to disclose the statements of material witnesses to the defence).

121 In *Nabill*, we explained (at [45]) that the duty to disclose the statements of material witnesses to the defence is necessary in order for the defence to have access to all relevant information in order to make an informed choice in deciding whether or not to call a material witness. This is because the defence is at a distinct disadvantage in whether or not to call a material witness when it is not aware of what the witness has previously said in the course of the investigations into the offence alleged against the accused person. Further, we recognised in *Nabill* (at [45]) that there are practical difficulties which the defence faces in eliciting self-incriminating evidence from a material witness. We therefore found that disclosure by the Prosecution of the statements of material witnesses was necessary to arrive at a satisfactory balance between ensuring fairness to the accused person on the one hand, and preserving the adversarial nature of the trial process on the other. In *Nabill*, we also stated (at [67]) that while the Prosecution had no duty to call a material witness, its failure to do so might, in appropriate circumstances, result in a finding that the Prosecution has failed to discharge its evidential burden to rebut the defence advanced by an accused person.

122 This is distinct from, although it may operate in tandem with the second type of constraint which is primarily driven by the court's concern to ensure that the process by which an accused person's guilt or innocence is determined is a fair one. This is a particular concern in criminal justice because of the grave consequences of a conviction. This also explains the higher standard of proof that applies in this context, with the Prosecution bearing the legal burden to make out its case beyond a reasonable doubt.

123 The concern with fairness explains why, in *Public Prosecutor v Mohd Ariffan bin Mohd Hassan* [2018] 1 SLR 544 ("*Ariffan*"), the Court of Appeal held that the conditions set out in *Ladd v Marshall* [1954] 1 WLR 1489 applied

in an *unattenuated* manner to applications by the Prosecution to admit further evidence in a criminal appeal (in contrast to the less stringent application of the conditions to an accused person). This was driven by, among other things, the disparity of resources available to the Prosecution and to accused persons which gave rise to the "reasonable expectation that the Prosecution is in possession of all the evidence it deems necessary to make its case by the time of trial" (*Ariffan* at [58]). Further, the Prosecution has significant "lead time before it presses charges … the length of which is largely within its control" (*Ariffan* at [59]).

124 The same concern of fairness has also animated the dim view taken by the court when the Prosecution runs inconsistent cases.

125 In *Public Prosecutor v Aishamudin bin Jamaludin* [2020] 2 SLR 769 ("*Aishamudin*") at [55], we observed that there are two strands to the objection against running inconsistent cases:

> 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.
>
> [emphasis original]

126 We observe that at issue in the present case is the first strand, which is the need for the Prosecution to advance a consistent case so that an accused person knows the case that he has to meet. We will return to this later, but we continue with some other cases where we have been concerned with the importance of procedural fairness.

127 In *Mui Jia Jun v Public Prosecutor* [2018] 2 SLR 1087 ("*Mui Jia Jun*"), the appellant and one Tan Kah Ho ("Tan") were jointly tried for two counts of trafficking in controlled drugs with a common intention. Tan, who was arrested by CNB officers after delivering three drug bundles to a third party, was found in possession of seven additional bundles. All the bundles were wrapped in cling wrap and layers of black tape, and Tan's DNA was discovered on the tape covering five bundles and in some cases on the inner sticky side of the tape. The Prosecution's case at trial presented a single narrative with two interconnected aspects. First, it alleged that on the morning of Tan's arrest, the appellant had given him a "Jorano" bag containing the pre-packed ten bundles. According to this narrative, Tan had not previously prepared any of the bundles before receiving them from the appellant and had only separated them for their intended recipients. In short, he had at most handled the bundles on the outside. Second, the Prosecution claimed that the appellant had sent Tan text messages providing instructions for the drug delivery ("the Delivery Messages"). The Prosecution did not treat these two aspects as independent grounds for conviction. Following points that were raised at the initial hearing of the appeal, the Prosecution acknowledged that a reasonable doubt arose as to whether Tan had handed the Jorano bag containing drugs that were already packed. This was because Tan's DNA was found on the inside of some of the tapes and this seemed inconsistent with his claim that he had only touched the outside of the bundles and had not packed the bundles. However, the Prosecution argued that even if this part of the case against the appellant was ignored, he nonetheless

could and should be convicted based solely on the Delivery Messages ("the Alternative Case").

128 The Court of Appeal ordered a retrial, limiting the Prosecution to presenting its case solely on the ground that the appellant had sent the Delivery Messages. The court's decision was grounded in the view that it would be unfair to consider the Alternative Case for the first time at the appeal for two reasons: first, the Prosecution had not presented the Alternative Case as a standalone basis for convicting the appellant during the initial trial, and so, the appellant had never been confronted with that case. Second, had the Prosecution done so, the evidence might have unfolded differently. The Court held that it was inappropriate for an appellate court to rely on evidence from the trial where the Alternative Case had not been clearly articulated to determine the soundness of the appellant's conviction. The Court accepted the appellant's argument that had he known the Prosecution would be advancing the Alternative Case, the Defence's cross-examination of Tan in relation to the Delivery Messages might have unfolded differently.

129 The Court of Appeal made two other observations that are salient in this context. First, it noted (at [72]) that:

> … [I]n the context of a criminal trial, a trial court should generally not make a finding that resolves against the accused what would otherwise amount to a vital weakness in the Prosecution's case when the Prosecution itself has not sought to address that weakness by leading evidence and making submissions to support such a finding. [emphasis removed]

130 This is plainly correct because, first, the Prosecution is required to prove its case beyond a reasonable doubt, and it is not for the court or the defence to fill any gaps in the Prosecution's case, and second, as noted in *Mui Jia Jun* (at [77]):

> … Fairness to the accused demands that he should have the opportunity to address *every vital aspect of the factual basis on which he is convicted.* This follows from the more general principle … that the accused should know with certainty, and thus be in a position to meet, the Prosecution's case against him. Where there is what seems to be an important weakness in the Prosecution's case which the Prosecution does not address, *it would generally be unfair to the accused for a court to make a finding that is adverse to the accused in respect of that weakness if the case in favour of such a finding has not been presented at the trial. In such a situation, the accused would not have had the opportunity to challenge the basis of the adverse finding in cross-examination.* Adopting a case theory that the accused did not have the chance to rebut would be fundamentally unfair to him. This unfairness is compounded if there are reasons why the Prosecution has chosen not to advance a particular case theory that might seem attractive to a trial judge. The court might not appreciate those reasons since it does not have access to all the information gleaned in the course of the investigations. There is therefore a real danger that a court might unknowingly be adopting a case theory that may not in fact be factually sound and perhaps was not pursued by the Prosecution for that reason.
>
> [emphasis added]

131 We turn next to Ram*esh a/l Perumal v Public Prosecutor and another appeal* [2019] 1 SLR 1003 ("*Ramesh*"), where the appellant, Ramesh, received a bag ("the Bag"), containing four bundles of diamorphine ("the D bundles") from his co-accused, Chander. Shortly after, Ramesh was apprehended by CNB officers who found the bag in the lorry he was driving. Ramesh was charged with possessing the diamorphine bundles for the purposes of trafficking. At trial, one of Ramesh's defences was that Chander had assured him he would retrieve the Bag the same day it was handed over to Ramesh and would return it to Malaysia. Despite this defence, Ramesh was convicted of trafficking diamorphine by the trial judge.

132 On appeal, the Court of Appeal first considered the Prosecution's primary case, which was that Ramesh was supposed to deliver the D bundles to a third-party recipient. Having rejected this, the court dealt with the

Prosecution's alternative case, which was that, on Ramesh's own assertion, he was supposed to return the Bag containing the D bundles to Chander. As for the alternative case, the court concluded that on the facts of that case, Ramesh who was holding the drugs temporarily could not be said to have trafficked in the drugs because he had intended to return them to the original supplier (at [103]–[110]). Ramesh's conviction was overturned, and he was instead convicted of possession of the diamorphine bundles (at [117]–[118]).

133 For the purposes of the present appeal, what is relevant is why the Prosecution's primary case in *Ramesh* was rejected. The Court of Appeal found that there were significant flaws in how the case against Ramesh had unfolded. The Prosecution's position regarding a crucial aspect of its case, namely, the timing of Chander's key conversation with Ramesh, where Ramesh allegedly agreed to participate in delivering the D bundles, underwent a notable shift (at [82]). Initially, in line with Chander's account, the Prosecution asserted that the conversation took place on the night of 25 June 2013, a day before they drove into Singapore to deliver the drugs (at [77]–[78]). After Ramesh's counsel vigorously contested the credibility of Chander's testimony, the Prosecution shifted its position and suggested to Chander that he did not speak to Ramesh about the deliveries on the night of 25 June 2013, but instead on the morning of 26 June 2013 (at [81]).

134 The court observed that this shift in the Prosecution's case made this aspect of the case against Ramesh a "moving target". Although counsel for Ramesh did not in fact ask Chander any additional questions or test his evidence further following the change in the Prosecution's case, the court found it was conceivable that counsel for Ramesh might have adopted a very different approach in cross-examining Chander, and possibly in leading evidence from Ramesh, had the Prosecution adopted the position from the outset that Chander

only told Ramesh about the plan to deliver the bundles on the way in from Johor Bahru on the morning of 26 June 2013. The court held that as a matter of procedural fairness, particularly given that it was a joint trial, it was essential for the Prosecution to construct a coherent narrative regarding the essential facts. Both Chander, Ramesh and their respective counsels should have been presented with a unified case theory by the Prosecution that they could challenge as a single, consistent account, rather than having to deal with shifting case theories (at [82]).

135 In *Public Prosecutor v Wee Teong Boo and other appeal and another matter* [2020] 2 SLR 533 ("*Wee Teong Boo*"), the appellant ("Dr Wee"), a medical practitioner, faced a charge of outrage of modesty ("the OM Charge") and a charge of rape ("the Rape Charge") in respect of his conduct towards a patient ("V") on two different days. Following the trial, the judge convicted him on the OM Charge but acquitted Dr Wee of the Rape Charge because he found that there was a reasonable doubt as to whether it would have been physically possible for Dr Wee to have carried out penile-penetration of V's vagina in the manner described by her. However, the judge invoked s 139 of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) ("CPC") and convicted Dr Wee of the offence of sexual assault by digital penetration under s 376(2)(*a*) of the Penal Code ("the Digital Penetration Offence"), in lieu of the Rape Charge, without framing a charge.

136 In overturning Dr Wee's conviction on the Digital Penetration Offence, the Court of Appeal found that the judge was not entitled to have invoked s 139 of the CPC. The Prosecution's factual narrative was consistently centred around the assertion that Dr Wee had engaged in vaginal penetration with V using his penis. The charge of the Digital Penetration Offence was based on a version of events that was fundamentally incompatible with the Prosecution's

unambiguous case and contradicted V's testimony. Further, on the case that the Prosecution ran in respect of the Rape Charge, the Digital Penetration Offence was not within the realm of possible offences of which Dr Wee could have been convicted (at [117]–[119]).

137 The court noted that according to both V's account and the Prosecution's narrative, digital penetration had not occurred. The conviction based on Dr Wee's version of events (that he had inserted his fingers deep into V's vagina to conduct a vaginal examination) disregarded the critical point that his statement had been made in response to an accusation of penile-vaginal penetration, which the judge had determined did not occur. Additionally, if Dr Wee had been specifically charged with the Digital Penetration Offence, it was evident that he would have approached his defence differently. For instance, he might have adduced expert evidence regarding the appropriateness of the digital examination, which was what he attempted to do at the appeal (at [122]–[125]).

138 The court reiterated that s 139 of the CPC is an exception to the general rule that there must be a separate charge and trial for every distinct offence of which a person is accused. That general rule rests on a consideration of fairness: it must be clear to the accused person exactly what is alleged against him and what the case is that he must meet. This is also an essential safeguard to ensure that the Prosecution does not run shifting or inconsistent cases against the accused person (at [105]). Accordingly, where the Prosecution mounts a positive case against the accused person in respect of a factual element in the framed charge, he cannot be convicted on an unframed charge, where one or more key elements is or are fundamentally incompatible with the key factual elements of the framed charge (at [111]).

139 Finally, we turn to *Gobi a/l Avedian v Public Prosecutor* [2021] 1 SLR 180 ("*Gobi*") which concerned an application to the Court of Appeal to review its earlier decision. The applicant, Gobi a/l Avedian ("the Applicant"), had originally claimed trial to a charge of importing not less than 40.22g of diamorphine ("the capital charge"). The Applicant needed funds for his daughter's operations and was introduced by his friend to one "Vinod", who told the Applicant that he could earn some money by delivering drugs into Singapore. Vinod told the Applicant that the drugs involved were "ordinary" and "not serious" and if he was to be arrested, the Applicant would receive "just a fine or a small punishment". The Applicant initially rejected Vinod's offer but subsequently approached another friend, "Jega", who told him that the drugs involved were "not … very dangerous" and "should not be a problem". On the basis of the separate assurances he had received from Vinod and Jega, the Applicant decided to accept Vinod's offer and delivered drugs for Vinod on multiple occasions.

140 The trial judge held that the Applicant had rebutted the presumption of knowledge of the nature of the drugs under s 18(2) of the MDA and acquitted him of the capital charge and convicted the Applicant of a reduced non-capital charge of attempting to import a Class C controlled drug ("the amended charge"). However, the Court of Appeal allowed the Prosecution's appeal (by way of CA/CCA 20/2017 ("CCA 20")) and convicted the Applicant of the capital charge, holding that the Judge erred in finding that the s 18(2) presumption had been rebutted. Following CCA 20, the Court of Appeal rendered its decision in *Adili Chibuike Ejike v Public Prosecutor* [2019] 2 SLR 254 ("*Adili*") which held that the knowledge presumed under s 18(1) of the MDA referred to actual knowledge and not knowledge which the accused person had been wilfully blind to.

141 In reliance of our decision in *Adili*, the Applicant argued that the holding in *Adili* should likewise apply to the presumption of knowledge under s 18(2) of the MDA such that it should not encompass wilful blindness. Since the Prosecution's case at the trial was not one of actual knowledge, but one of wilful blindness, the Prosecution could not have invoked the s 18(2) presumption against the Applicant.

142 Following our examination of the evidence and the Prosecution's submissions at the trial, we rejected the Prosecution's submission that its case at the trial was in fact one of actual knowledge and concluded that it was one of wilful blindness. This had not been raised or picked up at the original hearing of the appeal, presumably as that preceded the decision in *Adili.* As the Prosecution's case on appeal was one of actual knowledge, it was plain that there had been a change in its case on appeal. We found that this caused the Applicant prejudice because recourse to the s 18(2) presumption was therefore foreclosed to the Prosecution (at [117] and [120]–[121]). Further, the Applicant was never squarely confronted with the case that he *did not in fact* believe what he had been told by Vinod and Jega, and so could not have responded to such a case. As there was insufficient evidence to *prove* that the Applicant was wilfully blind to the nature of the drugs, we set aside the Applicant's conviction of the capital charge and reinstated his conviction on the amended charge (at [125] and [130]).

Summary of principles

143 We summarise the principles that emerge from this survey of the cases that explain the objection against inconsistent cases under the first strand that we have referred to at [125] above and that is at issue here. This pertains to the

need to ensure procedural *fairness* in criminal proceedings, and the relevant principles may be stated as follows:

(a) It is generally incumbent on the Prosecution to advance a consistent case, so that the accused person knows the case that he has to meet (*Aishamudin* at [55(a)]; *Mui Jia Jun* at [77]; *Wee Teong Boo* at [105]).

(b) This flows from the principle that fairness requires an accused person to have the chance to confront the case theory adopted by the Prosecution (*Mui Jia Jun* at [77]) and the need to ensure that an accused person is not prejudiced by reason of any inconsistency in the Prosecution's case (*Aishamudin* at [55(c)]).

(c) Accordingly, where there is an important weakness in the Prosecution's case which the prosecution does not address, the court should not make a finding that is adverse to the accused person in respect of that weakness (*Mui Jia Jun* at [72] and [77]).

(d) Where there are multiple co-accused persons, the Prosecution should present a unified case theory that the Defence could challenge as a single, coherent account (*Ramesh* at [82]).

Application in this case

144 In that light, we return to the facts before us. We have explained how the Prosecution shifted its case at various points of the trial culminating in its final position in the course of its oral closing submissions, when the Prosecution appeared to be attempting to break out of the original contours of its case that the Two Bundles were delivered in the first week of September 2015.

145 For the avoidance of doubt, if the Prosecution contends that it continues to stand by its case that the Two Bundles were delivered by Zaini and Noor at some point in that first week of September, then as we have explained, their case will remain exposed to the evidential weaknesses that we have summarised at [102] above. It seems to us that it may have been this difficulty which led to the Prosecution taking the position it eventually did in contending that it was ultimately irrelevant when the Two Bundles were delivered; meaning that the delivery could have happened even before September 2015.

146 In our judgment, this would be such a fundamental change of its case so as to be impermissible. There is no doubt at all, from the evidence we have reviewed, that the Prosecution expended considerable effort in:

(a) adducing evidence from its only witness on the delivery of the drugs, namely Zaini, as to what he delivered on each of those three dates in the first week of September 2015; and

(b) exploring these same issues with Lokman and then with Noor when cross-examining each of them.

147 When it cross-examined the Appellant, the Prosecution shifted its case to one where the Two Bundles were delivered *sometime in the first week* of September 2015 rather than a specific date. This was markedly different from the manner in which it had put its case forward when cross-examining Lokman, where it had positively advanced a case that the Two Bundles were delivered on 7 September 2015.

148 In our judgment, as was stated in *Ramesh* (at [82]), as a matter of procedural fairness, it was incumbent upon the Prosecution to develop a *unified*

case theory regarding the material facts, which both Lokman and the Appellant could confront as a single, objective account.

149 While we acknowledge that the case theories advanced by the Prosecution when cross-examining Lokman (namely, that the Two Bundles were delivered on 7 September 2015) and when cross-examining the Appellant (namely, that the Two Bundles were delivered sometime in the first week of September 2015) did not necessarily contradict each other, the principle in *Ramesh* remains relevant. The Prosecution had *shifted* its position in relation to an important aspect of its case, which is *when* the Two Bundles were delivered. It is the Appellant's perspective that is especially significant in this context. Based on the way the Prosecution had cross-examined Lokman, the Appellant would have seen the Prosecution's case as one that was rooted in the hypothesis that the Two Bundles had been delivered by Zaini on 7 September 2015. However, the Prosecution then appeared to resile from this position when cross-examining the Appellant and pursued a broader case instead that the Two Bundles were delivered sometime in the first week of September 2015.

150 The result of this shift was that this aspect of the case against the Appellant became a *moving target*. If the Prosecution had maintained its position that the Two Bundles were delivered on 7 September 2015, the Appellant could have simply pointed to Zaini's evidence that the two bundles delivered on 7 September 2015 contained methamphetamine. This was, in fact, what the Appellant had done before the Prosecution shifted its position to a broader case that Two Bundles were delivered sometime in the first week of September 2015:

> Q Right. And you remember that Zaini testified that he had passed two black bundles to you on 7th September in the car from MBS to Katong Park Towers on the way?

A Those were Ice.

Q Yes. And do you remember Zaini saying that while he thought they were Ice, he was also not sure?

A That's what he say. Yes, I ordered Ice from him, he delivered Ice to me.

A Okay. But you remember Zaini testifying that he had instructions to deliver two bundles of heroin to you on 5th September?

A That's what he said again.

…

Q Okay. And I put it to you that you received the two bundles of heroin from Zaini sometime in the first week of September.

A I disagree. I did not receive those item.

151 As we have noted already at [112], even such a case would have run into insurmountable evidential difficulties. But the final and even greater shift that became evident in the Prosecution's *oral* closing submissions at trial and in its submissions before us seemed to have been designed to overcome these difficulties. Specifically, the Prosecution sought to mount a different case against the Appellant which left unresolved, on the ground that it was ultimately immaterial, the question of when the Two Bundles were delivered by Zaini and Noor on the Appellant's instructions. Instead, the Prosecution focused on the inferences to be drawn from five other strands of evidence as follows:

(a) First, the Prosecution relied on the forensic evidence from the Health Sciences Authority. Based on the forensic evidence, the four plastic bags used as packaging for the Two Bundles and those used for the drugs found in Zaini and Noor's possession at the time of their arrest were likely to have been manufactured by the same machine. Further, the forensic evidence also suggested that the bags used as packaging for the Two Bundles and those used for the drugs found in Zaini and Noor's

possession at the time of their arrest had been sealed by the same heat sealer.

(b) Second, the Prosecution relied on the fact that the Two Bundles which were in the Unit before Lokman retrieved them on 8 September 2015 could only have been ordered by Lokman or the Appellant. During the Prosecution's cross-examination, the Appellant accepted that the Two Bundles had to be ordered by either the Appellant or Lokman if they were in the Unit before Lokman retrieved it on 8 September 2015.

(c) Third, the Prosecution pointed to the evidence of Zaini who said that he only delivered drugs to the Appellant, and the fact that Zaini only had the Appellant's phone numbers saved on his mobile phones and not Lokman's. During the Prosecution's cross-examination, the Appellant accepted that the evidence showed that the Appellant was the only person who liaised with Zaini and that Lokman could not have contacted Zaini on his own on any of the three occasions.

(d) Fourth, the Prosecution pointed to the transcripts of the recorded telephone conversations between the Appellant and Lokman where the Appellant seemed agitated that Lokman had failed to make the delivery to Edy and was also concerned about Lokman's whereabouts and safety. In one of the recorded telephone conversations, the Appellant had also used the term "batu", which the Prosecution contends is a term used as a unit of measurement for diamorphine and not other drugs (see [90] above).

152 As to the first point, this links the Two Bundles to Zaini and Noor. The second and third points suggest that the primary line of contact for the placement

of orders and making arrangements for deliveries was between the Appellant and Zaini. The fourth point would suggest that the Appellant did direct Lokman, who was in possession of the Two Bundles at the material time. And finally, to add to this was the fact that the Judge found various aspects of the Appellant's evidence to be lies which corroborated his guilt. However, this is a fundamentally different approach to the case when compared to the way in which the Prosecution in fact ran its case.

153 A case of the sort being considered now would be largely based on the inferences to be drawn from certain objective facts and would wholly bypass the problematic evidential issue of when the Two Bundles were delivered by Zaini. That is quite different from the case that was run at trial, which was based very largely on the evidence of four witnesses, and which evidence has been found by us to give rise to a reasonable doubt in relation to the provenance of the Two Bundles. We are satisfied that this is a case that cannot *now* be mounted to resist the appeal because to put it simply, it was not the case that the Appellant was confronted with at trial.

Conclusion

154 For these reasons, we are satisfied that the evidence adduced in the court below does not support a finding being made beyond a reasonable doubt on when exactly the Two Bundles were delivered. Given the manner in which the Prosecution conducted its case in the court below, the provenance of the Two Bundles was a material issue and, on this issue, we are satisfied that a reasonable doubt exists.

155 We, therefore, set aside the Appellant's conviction on both Charges. The remaining questions, on which the parties are to file written submissions within four weeks from today, are the following:

(a) First, whether an acquittal ought to follow, or whether a retrial should be ordered, bearing in mind the principles set out in *AOF v Public Prosecutor* [2012] 3 SLR 34 and also having regard to the length of time that will have elapsed between the offence and the new trial if one is to be ordered.

(b) Second, in the event a discharge amounting to an acquittal is granted for the Charges, whether any altered charges ought to be preferred against the Appellant in light of his admission that he had obtained methamphetamine from Zaini on multiple occasions including 7 September 2015, and the Appellant's response in that regard.

156 The parties are at liberty to apply for more time should this be required for the purposes of reviewing the matter in the light of this judgment, and to confer with one another.

157 Finally, Lokman was arrested with the Two Bundles in his possession and he admitted to being in possession of the Two Bundles for the purpose of trafficking. We therefore do not see that our decision in this appeal will have any impact on Lokman's conviction. Nonetheless, the Prosecution is to confer with Lokman and his counsel and inform us within four weeks of the date of this judgment if any further consideration is to be given to the disposal of that matter.

Sundaresh Menon
Chief Justice

Tay Yong Kwang
Justice of the Court of Appeal

Belinda Ang Saw Ean
Justice of the Court of Appeal

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