

IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2018] SGCA 9

Criminal Appeal No 40 of 2016

Between

GOPU JAYA RAMAN

... Appellant

And

PUBLIC PROSECUTOR

... Respondent

JUDGMENT

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

[Criminal Procedure and Sentencing] — [Appeal] — [Acquittal]

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Gopu Jaya Raman

v

Public Prosecutor

[2018] SGCA 9

Court of Appeal — Criminal Appeal No 40 of 2016
Sundaresh Menon CJ, Judith Prakash JA, Tay Yong Kwang JA
14 August 2017

12 February 2018

Judgment reserved.

Sundaresh Menon CJ (delivering the judgment of the majority consisting of Judith Prakash JA and himself):

Introduction

1 The appellant, Gopu Jaya Raman (“the Appellant”), was sentenced to death in the High Court for the importation of diamorphine without authorisation under s 7 of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) (“the MDA”). The Appellant had ridden into Singapore through the Woodlands Checkpoint on a motorcycle on 24 March 2014. Three bundles were found hidden in a space on the inside of the motorcycle’s fenders. The space was covered by a lid that was held in place by four screws. The lid was in fact the base for a smaller storage area under the seat of the motorcycle. When the bundles were checked and tested, they were found to contain prohibited drugs. The Appellant’s defence was that he did not know that drugs had been hidden in the space enclosed by the fenders. According to him, although he had carried

out drug deliveries on two previous occasions, the drugs that were found in the motorcycle on this occasion had been planted there without his knowledge. Consistent with this, no trace of the Appellant’s DNA was found on any of the bundles. Nor was there any objective evidence to suggest that the Appellant had opened the lid of that space or placed the bundles there. Nonetheless, after a six-day trial, the Appellant was convicted of the importation charge. He also did not receive a certificate of substantive assistance. He was accordingly sentenced to death.

2 In *Harven a/l Segar v Public Prosecutor* [2017] 1 SLR 771 (“*Harven*”), this Court emphasised that when assessing whether an accused person has rebutted the relevant presumptions in the MDA, the court should bear in mind the inherent difficulties of proving a negative, in this context, that the offender was not in possession of the drugs or was not aware of their nature. In this regard, the court should also be mindful of the importance of not approaching its assessment of the evidence having, consciously or otherwise, already adopted a certain starting premise in its analysis. Certain pieces of evidence may be consistent with different possible conclusions, and it is of paramount importance that the court should analyse and assess the evidence before it in a critical and judicious manner. In our judgment, the question of the proper inferences to be drawn from the objective facts and evidence lies at the root of the difficulties that are raised in this case.

Background facts

3 The Appellant is a Malaysian national. At the material time, he was 28 years old, unemployed and residing in Johor Bahru, Malaysia.

4 On 24 March 2014, the Appellant rode a motorcycle bearing the Malaysian registration number WWR 1358 (“the Motorcycle”) into Singapore

through the Woodlands Checkpoint at about 7.35pm. He was arrested at the Motorcycle Arrival Lane when officers from the Immigration and Checkpoints Authority (“ICA”) discovered three black bundles believed to contain controlled drugs hidden in the Motorcycle in the course of a routine search at about 7.46pm. These bundles were found concealed in a space enclosed by the fenders. When confronted with this discovery, according to the officers at the scene, the Appellant looked *confused and lost*, denied ownership of the bundles, and said in Malay to ICA officer Corporal Abdul Hakim bin Abdul Razak (“Cpl Abdul Hakim”), “What’s that? That’s not my bike.”

5 The search was suspended and the Central Narcotics Bureau (“CNB”) was contacted. CNB officers arrived shortly after this at about 8.03pm. At about 8.05pm, the Appellant was brought to the ICA Arrival Car office where CNB officer Corporal Abdul Rahim bin Muhamad recorded a contemporaneous statement from the Appellant between 8.08pm and 8.27pm. In the statement, the Appellant maintained that he did not know about the bundles in the Motorcycle and that he did not know who they belonged to. He further indicated that he had come to Singapore to meet a friend.

6 A follow-up operation was then carried out by the CNB officers. This was aimed at apprehending any others who might be expected to collect the drugs from the Appellant. Corporal Vengedesh Raj Nainar s/o Nagarajan (“Cpl Vengedesh”) and Corporal Sollehen bin Sahadan (“Cpl Sollehen”) directed the Appellant to communicate with one Ganesh, who the Appellant believed had arranged for the drugs to be placed in the Motorcycle. These communications took place under the supervision and at the direction of the CNB officers. Between 9.52pm on 24 March 2014 and 2.06am on 25 March 2014, Cpl Vengedesh and Cpl Sollehen were beside the Appellant as he contacted a few people regarding the collection of the black bundles. This was done through

phone calls and text messages. The phone conversations were conducted over the speaker, so that the CNB officers could hear the conversations, which were in Tamil. Cpl Vengedesh spoke Tamil and could understand what was being said. However, Cpl Vengedesh, who gave evidence below, testified that he could not recall the contents of the conversations. As for Cpl Sollehen, he did not speak Tamil and could not understand the conversations. It subsequently emerged that regrettably, no audio recordings of the conversations were made in the course of the follow-up operation. The Prosecution, however, tendered a four-page extract of the CNB officers' investigation diary which contained some basic entries concerning the follow-up operation. We will make reference to and consider these entries in the course of this judgment.

7 At about 9.56pm on 24 March 2014, Cpl Vengedesh informed the other CNB officers involved in the follow-up operation that the Appellant had been instructed by Ganesh to park the Motorcycle near a convenience store along Woodlands Centre Road. A team of CNB officers was deployed on this basis, but the operation was called off at about 3am on 25 March 2014 when no recipient turned up.

8 The three black bundles found on the Motorcycle were subsequently found to contain not less than 46g of diamorphine, following an analysis conducted by the Health Sciences Authority.

9 When arrested, Appellant was also found with RM55 and no Singapore currency. He was also carrying two mobile phones, both with Malaysian SIM cards in them, as well as an additional Singapore SIM card in his wallet. Under the seat of the Motorcycle, a scarf and a screwdriver were found on the seat compartment lid. Swabs were taken from the three bundles, the screwdriver and the four screws that held the seat compartment lid in place, but no useful DNA

profiles could be generated from them. As for the DNA profile obtained from the scarf and the seat compartment lid, a complicated mixed DNA profile was obtained and this proved to be incapable of interpretation.

10 One charge of illegal importation was brought against the Appellant under s 7 of the MDA and it read as follows:

That you, **GOPU JAYA RAMAN**, on 24 March 2014 at about 7.48 p.m., at the Motorcycle Arrival Lane, Woodlands Checkpoint, Singapore, in a motorcycle bearing license plate number WWR 1358, did import into Singapore three bundles containing not less than 1351.4 grams of granular powdery substance which was analyzed and found to contain not less than 46 grams of diamorphine, a “Class A” controlled drug listed in the First Schedule to the Misuse of Drugs Act, Chapter 185, Rev. Ed. 2008, without authorisation under the said Act or the Regulations made thereunder and you have thereby committed an offence under section 7 punishable under Section 33(1) of the said Act.

The proceedings and decision below

11 The Appellant was generally consistent in his statements. The Appellant admitted that he had made two previous drug deliveries from Johor Bahru, Malaysia to Singapore. He had met Ganesh and someone he knew as “Ah Boy” in January 2014. The Appellant had borrowed some money from Ganesh. When he was unable to settle his loan, Ganesh insisted that the Appellant would have to help deliver drugs to Singapore and threatened to harm his family if he did not do as he was told. He therefore delivered drugs to Singapore using the same Motorcycle on two previous occasions. On both occasions, the drugs had been packed in green bundles, and were covered with a scarf and placed over the seat compartment lid, which itself was then covered by the seat. On those occasions, the drugs had not been hidden in the space enclosed by the fenders where the three bundles were found on 24 March 2014.

12 However, on this occasion, the Appellant maintained that the drugs had been hidden in the Motorcycle without his knowledge, and that he had not agreed to deliver these drugs. He also maintained that he had seen the three bundles for the first time when the ICA officers discovered them in the course of searching the Motorcycle at the Woodlands Checkpoint. The Appellant claimed that he had borrowed the Motorcycle on 24 March 2014 to visit his girlfriend, Tamil Selvan Revalthi (“Revalthi”), and a friend, one “John”, in Singapore because he wanted to celebrate his birthday, which fell on the previous day (*ie*, 23 March 2014).

13 The Appellant also said in his statements that while riding on the Causeway towards Singapore, he received a call from Ganesh who asked him to call him when he arrived in Singapore. When he asked Ganesh why, he was told that the “recipients changed their contact numbers”; he subsequently attempted unsuccessfully to retract this statement during the trial. He also said that this conversation led him to suspect that Ganesh had placed some drugs in the Motorcycle, but he was already approaching Woodlands and there was no time or opportunity to do anything. He also took comfort in the fact that when he filled petrol before he reached the Causeway, he had checked the place in the Motorcycle where the drugs had been kept on the previous occasions and found nothing there.

14 Aside from this, a critical part of the evidence pertains to what transpired between Ganesh and the Appellant in the course of their conversations during the follow-up operation. The Appellant maintained that he had asked Ganesh, during the follow-up operation in the presence of the CNB officers, why Ganesh had put the drugs in the Motorcycle without informing him. In this regard, the Appellant submitted that Cpl Vengedesh’s own impression, which was formed during the follow-up operation and on the basis of the conversations between

the Appellant and Ganesh (which Cpl Vengedesh was monitoring), was that the Appellant did not in fact have knowledge of the drugs. In this regard, he relied in particular on the fact that Cpl Vengedesh had, while fully apprised of the conversations between Ganesh and the Appellant, directed the Appellant to draft a text message to Ganesh complaining that Ganesh had not previously told the Appellant about the drugs. He contended that it would not have made sense to direct the Appellant to draft such a message unless Cpl Vengedesh in fact believed that the Appellant had not known about the drugs. Otherwise, by directing the Appellant to send this message, Cpl Vengedesh would virtually have guaranteed the failure of the follow-up operation.

15 After a six-day trial, the High Court judge (“the Judge”) convicted the Appellant and found that he had failed to rebut the presumptions under ss 21 and 18(2) of the MDA. The Judge’s decision is reported as *Public Prosecutor v Gopu Jaya Raman* [2016] SGHC 272 (“the Judgment”).

16 The Judge found that:

- (a) the Appellant’s claim that the purpose of his trip to Singapore was to visit Revalthi and John was not supported by the objective evidence (Judgment at [24]–[38]);
- (b) there was evidence of a prior arrangement between Ganesh and the Appellant to deliver drugs on 24 March 2014, based on:
 - (i) what Ganesh had told the Appellant when the former called the latter as he was crossing into Singapore on the Causeway (see [13] above; Judgment at [39]–[40]);

(ii) certain text messages that Ganesh and Ah Boy sent to the Appellant that indicated that they were frantically trying to contact the Appellant (Judgment at [45]); and

(iii) the fact that the same Singapore SIM card belonging to Ah Boy (which had been used during the Appellant's two previous drug deliveries) was found in the Appellant's wallet (Judgment at [49]–[50]).

17 The Judge placed no weight on the text message drafted by the Appellant to Ganesh (as directed by Cpl Vengedesh during the follow-up operation) because he considered that the CNB officers did not have the time to carefully assess the veracity of everything said by the Appellant, and so even if they did accept at face value what the Appellant was saying, this had no probative weight. Rather, their main concern at that time was to gather information and apprehend any other persons who were involved (Judgment at [55]–[57]).

The appeal

18 In his appeal, the Appellant submits that the Judge erred in failing to give due weight to evidence that showed that the Appellant did not know of the presence of the drugs in the Motorcycle. In broad terms, the main planks of his case can be summarised thus:

(a) he had been candid and consistent throughout and even mentioned the previous deliveries while he maintained his ignorance of the drugs in this instance;

(b) his conduct upon arrest and during the follow-up operation was consistent with that of a person who was unaware of the drugs; and

(c) during the follow-up operation, the CNB officers heard the conversations between the Appellant and Ganesh and these strongly corroborated the fact that the Appellant had no knowledge of the drugs. This culminated in the text message that Cpl Vengedesh instructed the Appellant to draft and send to Ganesh.

19 The primary issue on appeal is whether the presumption of possession under s 21 of the MDA has been rebutted by the Appellant. If the answer to that is in the negative, then a further question arises as to whether the presumption of knowledge under s 18(2) has been rebutted. In this regard, the following matters will be considered:

- (a) the Appellant's evidence in his statements and on the witness stand;
- (b) the sequence of events before the Appellant entered Woodlands Checkpoint;
- (c) the Appellant's conduct upon his arrest and the events that transpired during the follow-up operation;
- (d) the matters relied on by the Judge to find a prior arrangement to deliver drugs, including: (i) the reference to "recipients" when Ganesh called the Appellant before the latter reached Woodlands Checkpoint; (ii) the efforts of Ah Boy and Ganesh to contact the Appellant; and (iii) the fact that Ah Boy lent the Appellant his Singapore SIM card;
- (e) the surrounding objective evidence; and
- (f) the Appellant's claimed reasons for coming to Singapore.

Our decision

20 We begin with the undisputed fact that the three black bundles containing the prohibited drugs were found in the Motorcycle and that the Appellant had charge of that vehicle at the material time. Section 21 of the MDA provides:

Presumption relating to vehicle

21. If any controlled drug is found in any vehicle, it shall be presumed, until the contrary is proved, to be in the possession of the owner of the vehicle and of the person in charge of the vehicle for the time being.

21 The Prosecution relies on the presumption set out in s 21 of the MDA, and the Appellant is accordingly presumed, until the contrary is proved, to have been in possession of the controlled drugs. According to the settled law, which we apply for present purposes without reviewing or reconsidering it, the burden is on the Appellant to establish, on a balance of probabilities, that he did not know that the drugs were hidden in the Motorcycle. In *Obeng Comfort v Public Prosecutor* [2017] 1 SLR 633 (“*Obeng Comfort*”), we discussed the presumption of possession in s 18(1) of the MDA, and (at [35] and [36]) distinguished the s 18(1) presumption from the presumption of knowledge in s 18(2) of the MDA:

35 To rebut the presumption in s 18(1), the accused has to prove, on a balance of probabilities, that he did not have the drug in his possession. In this context, the most obvious way in which the presumption can be rebutted is **by establishing that the accused did not know that the thing in issue contained that which is shown to be the drug in question**. Thus, for instance, the presumption could be rebutted successfully if the accused is able to persuade the court that the **drug ... was placed in his vehicle ... without his knowledge**. The inquiry under s 18(1) does not extend to the accused’s knowledge of the *nature* of the drug. That is dealt with under the presumption of knowledge in s 18(2) where a person who is proved or presumed to be in possession of a controlled drug is presumed to have known “the nature of that drug”. As clarified by this court in

Nagaenthran a/l K Dharmalingam v PP [2011] 4 SLR 1156 (“*Nagaenthran*”) at [23]–[24], the nature of the drug refers to the specific controlled drug found in his possession (for instance, methamphetamine or diamorphine).

36 Where the presumption in s 18(1) of the MDA is invoked by the Prosecution and is then rebutted successfully by the accused, the Prosecution would have failed to prove that the accused was in possession of the drug. **There would be no need to consider the next issue** of whether the accused had knowledge of the nature of the drug. However, if an accused is either (a) proved to have had the controlled drug in his possession; or (b) presumed under s 18(1) of the MDA to have had the controlled drug in his possession and the contrary is not proved, the presumption under s 18(2) that he has knowledge of the nature of the drug would be invoked. This follows because an accused person, who, it has been established, was in possession of the controlled drug should be taken to know the nature of that drug unless he can demonstrate otherwise. To rebut the presumption in s 18(2), the accused must prove, on a balance of probabilities, that he did not have knowledge of the nature of the controlled drug (in effect, that he did not have the *mens rea* of the offence). In *Dinesh Pillai a/l K Raja Retnam v PP* [2012] 2 SLR 903 (“*Dinesh Pillai*”), this court observed (at [18]) that the accused can do so by showing that “he did not know or could not reasonably be expected to have known the nature of the controlled drug”.

[emphasis in original in italics; emphasis added in bold]

22 The Appellant’s defence that the drugs in the three bundles were planted in the Motorcycle without his knowledge aims to rebut the presumption of possession under s 21 of the MDA. If he succeeds in doing so, the Prosecution would have failed to prove that the Appellant was in *possession* of the controlled drugs. There would then be no need or occasion to consider the next issue of whether the Appellant knew the *nature* of the drug.

23 In our judgment, the Appellant should be acquitted of the charge because we are satisfied that he has succeeded in rebutting the presumption of possession under s 21 of the MDA. We arrive at this conclusion based primarily on:

- (a) the totality of the evidence including in particular, the evidence of the Appellant's conversations with Ganesh during the follow-up operation; and
- (b) the absence of any objective evidence linking the Appellant to the drugs.

24 In this context, we recall this Court's previous observation that it is inherently difficult to prove a negative (*Harven* at [2], citing *Public Prosecutor v Sibeko Lindiwe Mary-Jane* [2016] SGHC 199 at [61]) and once again emphasise that the court should be mindful of this when it evaluates the evidence to determine whether the Appellant is telling the truth. In short, the burden on the Appellant should not be so onerous that it becomes virtually impossible to discharge.

25 Much of the factual matrix in this case is not disputed. As we have noted, the drugs were found in the Motorcycle; Ganesh and Ah Boy knew the drugs were in the Motorcycle; a follow-up operation was conducted under the supervision of the CNB officers in the course of which certain conversations took place between Ganesh and the Appellant. In this setting, *there is only one fact that is controversial: the Appellant's knowledge that the drugs were hidden in the Motorcycle*. If he knew of the drugs, then the Judge's decision will stand; if he did not, it cannot. To determine this fact, a delicate and fact-sensitive inquiry is required, in the context of which we must unpack and examine each relevant fact or piece of evidence to assess whether it supports one or both possibilities. A fact that is consistent with both possibilities is likely to be probatively neutral unlike a fact that is consistent with only one of the two possibilities. However, although the Prosecution has a statutory presumption operating in its favour, when it comes to assessing the evidence in order to

determine whether the presumption has been rebutted, the starting point should be neutral with no predilection for either conclusion. The real significance of the statutory presumption is that it reverses the burden of proof. But once the evidence has been led, it must be evaluated neutrally to determine whether the presumption has been rebutted. In that light, we turn to consider the evidence.

The Appellant’s evidence in his statements and on the witness stand

26 We begin with the Appellant’s evidence in his statements to the CNB officers and his oral testimony during the trial.

27 These were broadly consistent in denying knowledge of the drugs and in asserting that the drugs had been hidden in the Motorcycle without his knowledge. Four statements from the Appellant were recorded after his arrest:

- (a) a contemporaneous statement recorded on 24 March 2014 at about 8.08pm after the Appellant was arrested;
- (b) a cautioned statement recorded on 25 March 2014 at 12.03pm under s 23 of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) (“the CPC”);
- (c) an investigative statement recorded on 27 March 2014 at 11.48am under s 22 of the CPC; and
- (d) an investigative statement recorded on 28 March 2014 at 12.25pm under s 22 of the CPC.

Contemporaneous statement dated 24 March 2014

28 In his contemporaneous statement made on 24 March 2014 at about 8.08pm, *before* the follow-up operation, the Appellant disclaimed knowledge of

the three black bundles and said that he had borrowed the Motorcycle from someone known as “Boy”. The Appellant said that he had done so at about 6.30pm that day to come to Singapore to meet his friend “John” at Woodlands Loop Sector 1 to celebrate his own birthday. According to the Appellant, John is a male Indian Malaysian, staying at one of the hostels at Woodlands Loop and working at Bengawan Solo.

Cautioned statement dated 25 March 2014

29 In his cautioned statement on 25 March 2014, which was recorded several hours *after* the follow-up operation, the Appellant admitted that he had on two previous occasions, on 10 and 12 March 2014, delivered drugs to Singapore. However, he maintained his ignorance of the drugs that were found in the Motorcycle on 24 March 2014. He stated that “Ah Boy” was a friend of his boss, “Ganesh” and he had borrowed the Motorcycle from him in order to come to Singapore to visit John. He also said that he had a girlfriend here, and that he meant to “meet them to celebrate [his] birthday”. He repeated that he was innocent, and significantly, he stated that after his arrest, during the follow-up operation, he had asked Ganesh over the phone in the hearing of the CNB officers, “*Why did [Ganesh] put the drugs in the bike without informing me*” (see [6] above). The Appellant noted that the conversation was “recorded by the officer” and pleaded to the authorities to help him.

30 We digress to observe that the last point was a matter of considerable significance because:

- (a) It related to a conversation between Ganesh and the Appellant which, if true, could have a bearing on the question of the Appellant’s state of knowledge. There was no doubt as to Ganesh’s involvement in this crime and if he appeared to accept in the course of a conversation

between them that the Appellant was ignorant, then this would be a matter of potential probative significance;

(b) The Appellant made a pointed statement that the conversation was recorded by the CNB officers. This was not merely a self-serving assertion but one that was said to have been heard and recorded by the CNB. One would expect the CNB to have pursued this to establish just how and by whom it had been recorded since it was exculpatory of the Appellant. And, if it was found not to be the case, then the CNB would have been expected to clarify this with the Appellant. However, it does not appear that any of this was followed up on and the Appellant's assertion to this effect remains essentially unrebutted;

(c) The statement was made within hours of the follow-up operation. We find it unlikely that the Appellant would have said this if it were not true because this would have been completely fresh in the minds of those involved and could, should and would be expected to have been rebutted if it were not true; and

(d) This was the very first occasion on which he could have raised this since it was the first statement taken after the follow-up operation during which the conversation allegedly took place.

Long statements dated 27 and 28 March 2014

31 In his statements on 27 and 28 March 2014, the Appellant gave further details about his interactions with Ganesh and Ah Boy. He said that he had agreed on previous occasions to help them to bring drugs to Singapore in order to help service a loan of RM4,000 that he took from Ganesh in February 2014.

Ganesh had allegedly threatened harm to the Appellant's family if the Appellant did not assist in this way.

32 As to the events relevant to the charge, the Appellant said that on 22 March 2014 before his arrest, he had gone to a club in Johor Bahru to celebrate his birthday with some friends. On 23 March 2014, the Appellant said that he had met with a traffic accident and sustained some injuries to his chest and leg. On the next day, he asked Ganesh for a loan of RM150 to see a doctor. Ganesh initially refused because the Appellant was "not doing any work for him". When the Appellant replied that he would return the money after getting a job, Ganesh asked him to see Ah Boy. When the Appellant met Ah Boy at about 2.40pm, Ah Boy asked him whether he could deliver "10 stones" the next morning on 25 March 2014. Realising that these were drugs, the Appellant refused and told Ah Boy that he did not want to deliver drugs to Singapore anymore. Ah Boy discussed this with Ganesh before passing the Appellant the sum of RM150 and telling him that Ganesh would call him later.

33 The Appellant then visited a doctor and reached home shortly after 4pm. When he reached home, the Appellant saw his friend's brother, one "Sri", there. He knew Sri had gone to Singapore for a job interview and asked how it had gone. Sri replied that he had gotten the job and would start work the next morning. The Appellant then called Ganesh again and asked to borrow his motorcycle having decided that he wanted to visit Singapore on the spur of the moment.

34 In the event, Ganesh agreed and asked him to get it from Ah Boy. When the Appellant met Ah Boy, he was lent and he took the Motorcycle. This was shortly after 6pm.

35 The Appellant then proceeded to a petrol kiosk to top up the fuel tank before heading for Singapore. While refuelling, the Appellant said he “checked the usual place where the drugs were placed but nothing was found”. He did this, in part, because of Ah Boy’s earlier request for him to deliver “10 stones” which he had refused. In the previous deliveries, the drugs had been placed under the seat of the Motorcycle, on the seat compartment lid and covered with a scarf. It did not occur to him to check *underneath* the seat compartment lid, which was secured with four screws.

36 After filling petrol, the Appellant reached Malaysian customs at about 7pm and upon clearing it, proceeded to the Woodlands Checkpoint. While riding towards Woodlands along the Causeway, he received a call from Ganesh who asked him to call him once he reached Woodlands. The Appellant asked why, and Ganesh answered that “all the recipients changed their contact numbers”. The Appellant said that when Ganesh told him this, he “roughly [knew] that there were drugs hidden inside the bike [but he] just [could not] confirm”. When the Appellant asked if Ganesh had hidden any “Jaman” (the street term in Tamil for drugs) in the Motorcycle, Ganesh laughed it off. By the time the call ended, the Appellant had already reached the motorcycle booth at the Woodlands Checkpoint.

Evidence in court

37 In court, the Appellant’s testimony regarding the events leading up to his arrest was largely consistent with what he had said in his statements. He claimed throughout that the drugs had been planted in the Motorcycle without his knowledge. On the witness stand, the Appellant consistently maintained that: (a) he owed Ganesh money that he was unable to repay; (b) in his two previous drug deliveries, the drugs had been kept under the seat of the

Motorcycle on the seat compartment lid and wrapped in green colour tape; (c) he was asked but refused to deliver drugs at the time he asked to borrow money to see a doctor in order to attend to his injuries; (d) before riding into Singapore, he had checked where the drugs were previously hidden when he was at the petrol kiosk; (e) he suspected that there were drugs in the Motorcycle after the call from Ganesh, which he answered just before he arrived at the Singapore customs, but there was no way for him to turn back; and (f) the first time he saw the three black bundles was when the CNB officers retrieved them from the Motorcycle.

38 The Appellant appeared to depart somewhat from his previous statements in only two ways. This was noted by the Judge at [11(p)] of the Judgment. First, the Appellant denied that Ganesh had said anything to the effect that the recipients' contact numbers had changed. This contradicted what he had previously said in his statements. Instead, he claimed that Ganesh had simply told the Appellant to "call once [he] enter[ed]" or "call [him] once [he] reach[ed]" Singapore. Second, instead of saying that he "*knew*" by the end of his phone conversation with Ganesh along the Causeway that there were drugs inside the Motorcycle, the Appellant maintained that he merely *suspected* or *guessed* that there were drugs.

39 As to the first point, the Judge rejected the Appellant's evidence on this point and found no reason to think that this part of the statement had been incorrectly recorded (Judgment at [43]–[44]). We see no reason to disagree with this part of the Judge's decision.

40 On that footing, this leads us to the second point, which is the more important point as it concerns what the Appellant deduced from what he had been told. Having examined the evidence, we do not agree that the second point

is in fact an instance of his contradicting what he had said in his statements. When the statements are read in their proper context, they plainly suggest that the Appellant had not in fact *known* that there were drugs in the Motorcycle even after the phone call from Ganesh along the Causeway. Rather, the sense that is conveyed by these statements, taken as a whole, is that following the conversation, the Appellant *suspected* that there might be drugs hidden somewhere in the Motorcycle.

41 In his statement given on 27 March 2014, after the Appellant described the phone call from Ganesh, he is recorded as having said that this “*confirmed* that there are drugs inside the bike” [emphasis added]. However, the Appellant referred to this in the very next paragraph and clarified what he had meant:

... Awhile later CNB officers arrived. They escorted me to the bike again. They open up the cover and take out the 3 black bundles ... I did not know that this 3 bundles of drugs were inside the bike when I borrowed the bikes from Ganesh. *Like what I mentioned earlier, I roughly know* that there were drugs hidden inside the bike *I just cannot confirm* ... [emphasis added]

42 Similarly, in his statement on 28 March 2014, the Appellant is recorded to have said that when Ganesh laughed off his question about whether there were drugs in the Motorcycle, “at that point of time I *know* there must be drugs” [emphasis added]. However, in the same paragraph, the Appellant again qualified this as meaning that he *suspected* or surmised this to be the case:

... I know that this 3 black bundles are Heroin after my arrest. These 3 bundles of Heroin do not belong to me. I do not know the Heroin were hid inside location A and B in the bike. I have never touched it before. *Like what I mentioned earlier* that I *suspect* that there are drugs inside the bike when Ganesh call me after I clear the Malaysia custom ... [emphasis added]

43 Locations A and B refer to the respective side fenders of the Motorcycle. In the same statement, just a few paragraphs before this quoted extract, the

Appellant had expressly stated that he had only harboured a suspicion after Ganesh's call:

... Prior to my arrest I do not know that the drugs were inside. My previous 2 drug deliveries, the drugs were placed on the seat compartment lid under the seat. *Like what I mentioned earlier in my statement* that upon receiving Ganesh call I *suspected* that there were drugs, I thought that the drugs were at the seat compartment lid like before. I did not expect the drugs to be hidden in Location A and B. [emphasis added]

44 In construing the statements, we are mindful of the fact that these do not appear to be verbatim records. The statements are generally not presented in the form of questions and answers. Rather, the Appellant's answers appear to have been summarised by the recording officer. While this is not to suggest that there was any intention to misrepresent the Appellant's evidence as reflected in the statements, it does highlight why it is especially important to construe the entirety of the statements so as to fairly discern the essence of what the Appellant was saying. Once this is done, it becomes evident that the Judge was mistaken when he said (at [11(p)(ii)] of the Judgment) that the Appellant had "admitted ***unequivocally*** that, from his telephone conversation with Ganesh, he *knew* that there were drugs inside the [M]otorcycle as he went into Woodlands Checkpoint" [emphasis in original; emphasis added in bold italics]. Reading the statements as a whole, it becomes evident that there was no such unequivocal admission; on the contrary, the Appellant had maintained and clarified throughout his statements that he only *suspected* after Ganesh's call that there might be drugs hidden in the Motorcycle.

45 The other salient aspect of the Appellant's evidence pertained to the follow-up operation. The Appellant testified in court that he had said to Cpl Vengedesh that he was "not related to the drugs", to which Cpl Vengedesh responded that if that were the case, the Appellant would have to cooperate with

him. Various conversations and communications ensued and in the later stages of the operation, Cpl Vengedesh instructed the Appellant to send a message to Ganesh. The translation of that message was as follows:

Still how long more to wait. i'm not a dog... do like that only. don't play around bro *just now never even tell there brg. Now ask to bring back. crazy is it. i can't bring. quick send somebody to take the brg if not leave the mtr and brg here.* [emphasis added]

46 The Appellant explained that the reference to “brg” in the drafted message meant “barang”, which was a street reference to the drugs. During re-examination, the Appellant testified that after one of the conversations with Ganesh, he had said to Cpl Vengedesh who had been listening in on the Appellant’s phone call with Ganesh, “You just heard, right, I’m not involved in this”. The details of the call were presented as follows: after they exchanged greetings, Ganesh asked him where he was and he told Ganesh that he was at Woodlands Checkpoint. Ganesh then mentioned that there was “jaman” inside and asked him to bring it back to Malaysia. At this juncture, the Appellant asked why he had not told him so when he collected the Motorcycle. Ganesh then said “Forgive me. Bring the motor back to Malaysia”. After this phone call, Cpl Vengedesh reportedly said that “If you do not know about this, you cooperate and help the CNB and tell us who this is supposed to reach”. We will return to this and examine its significance more closely a little later when we consider the circumstances surrounding the follow-up operation.

The chronology of events before the trip to Singapore

47 In the light of the evidence contained in the Appellant’s statements and given at trial, we first deal with certain aspects of the events that transpired *before* the Appellant entered Singapore on the day of his arrest.

The loans of RM150, the Motorcycle and the SIM card

48 The Appellant’s account of his traffic accident and the injuries that he had suffered, which prompted him to borrow RM150 from Ganesh, were corroborated by a medical examination at Alexandra Hospital on 25 March 2014. It is stated in the medical report that he had claimed during the time of medical examination that he was involved in a road traffic accident in Malaysia. In his statement taken on 27 March 2014, the Appellant also said that he had told Ganesh that he had been hit by the handlebar of a motorcycle on the chest and had also injured his leg. In court, the Appellant testified that his hands, legs and chest were injured from the incident and that he needed to undergo an X-ray examination. Based on the medical examination, tenderness over his chest walls and right leg and abrasions over his right leg were noted, and the Appellant was diagnosed as having contusions of the right chest wall, right tibia and right foot. Hence, the objective evidence supports the claim that the Appellant needed to obtain a loan in order to get medical attention for the injuries he had suffered from the accident.

49 What happened subsequently, according to the Appellant, has been summarised at [32] above. The Prosecution submitted that it was implausible that Ganesh would be willing to lend the Appellant money to visit a doctor following his refusal to deliver more drugs for Ganesh. Indeed, the Prosecution submitted that it was even more implausible, in these circumstances, that Ganesh would then agree to also lend the Appellant the Motorcycle and that Ah Boy would also lend him the Singapore SIM card which was found in the Appellant’s wallet when he was arrested.

50 In our judgment however, this narrative of the events is not implausible. Mr Chua Eng Hui (“Mr Chua”), counsel for the Appellant, submitted that this

should be seen in the context of a number of factors coming together. Among them, Mr Chua submitted that the Appellant was simple-minded, and was being taken advantage of by mercenary and opportunistic drug dealers. According to Mr Chua, the flaw in the Prosecution's view of the case was that it rested on the premise that Ganesh and/or Ah Boy were being extraordinarily and implausibly kind in lending the Appellant the money, the Motorcycle and the SIM card for his personal use. Mr Chua submitted that the alternative, and in his view much better, assessment of the facts was that Ganesh and Ah Boy saw benefits in ensuring that the Appellant felt indebted to them and when he asked to borrow the Motorcycle, they were presented with the perfect opportunity to use the Appellant without his knowledge. The actions of Ganesh and Ah Boy were not to be seen as illogically generous but as fiendishly cynical. If it were the case that the drugs had been planted without the Appellant's knowledge, the Motorcycle was lent to the Appellant not out of their goodwill but as a means of facilitating a drug delivery in Singapore without even letting the Appellant know. We reiterate a point we have made earlier at [25] above that in choosing between these two competing hypotheses, the *only* point of departure between them is whether the Appellant was clued in on the plan. Given the events pertaining to the follow-up operation, it is not really disputed that the key drivers of the plan were Ganesh and Ah Boy. The Appellant's role at its highest was to transport the drugs, assuming he was part of the plan. Mr Chua submitted that it was more probable than not that Ganesh and Ah Boy were perfectly happy to take advantage of the Appellant. In real terms, the loans of RM150, the Motorcycle and the SIM card cost them a mere pittance and in exchange, they stood to gain the services of an unwitting mule to transport the drugs into Singapore. Put another way, Ganesh and Ah Boy were so much better off with an *unwitting* mule than an *unwilling* one.

51 In our judgment, Mr Chua’s hypothesis has much to commend it. But even if we were not to accept it in preference to the Prosecution’s and the Judge’s view, in the final analysis, neither hypothesis can be said to be obviously more persuasive. This then becomes probatively neutral.

The phone call after clearing Malaysian customs

52 We turn to Ganesh’s phone call to the Appellant while he was on the Causeway.

53 Because the Judge rejected the Appellant’s story that the drugs had been hidden in the Motorcycle without the Appellant’s knowledge, he did not squarely address the question of whether the Appellant had *admitted* in his statements that he had travelled to Singapore knowing that he was carrying drugs in the Motorcycle (Judgment at [69]). However, this runs counter to the Judge’s finding that the Appellant’s statements demonstrated that he had “unequivocally” admitted that he knew about the drugs as he went into Woodlands Checkpoint (see [44] above; Judgment at [11(p)(ii)]). In any event, for the reasons set out above at [40]–[44], we are satisfied that the Appellant’s various references in his statements suggesting that he *knew* there were drugs in the Motorcycle after Ganesh’s call should not be taken out of context and should not be interpreted as constituting admissions of knowledge. At best, these were meant to convey his suspicion of this fact given that Ganesh’s call would have made little sense on the basis of his version of the facts.

54 Further, we do not think that it would be proper or fair to impute the requisite level of knowledge to the Appellant on the basis of a phone call from Ganesh that made the Appellant suspicious, when nothing was said to confirm the presence of drugs in the Motorcycle. Ganesh had only asked the Appellant to call him after he crossed into Singapore, and mentioned that the “recipients

changed their contact numbers”. The Appellant maintained that he was approaching Woodlands Checkpoint by this time and there was no time for the Appellant to react in these circumstances. Further, the Appellant also said that he took some comfort in the fact that while refuelling the Motorcycle just before making his way to Singapore, he had checked and seen that there were no drugs in the usual place beneath the seat (see [35] above). The Judge also accepted that *if* the Appellant had been checking for drugs when refuelling, it would have been “extremely difficult for him to notice” the three bundles hidden in the fenders unless he *knew where to look* and was *using a torchlight* to aid his search (Judgment at [67(b)]). This was plainly correct given that the size and the dark colour of the bundles would mean that they would not have been noticeable when placed in a dark space such as the fender region of the Motorcycle.

55 In the final analysis, we are unable to see how the Appellant can be said to have “known” that the drugs were hidden within the Motorcycle. Taken as a whole, even accepting that the Appellant’s suspicions were aroused, given the matters noted at [54] above, we do not think the Appellant can be found to have known that the drugs were hidden in the Motorcycle and therefore found to be in possession of the drugs in these specific circumstances.

The arrest and the follow-up operation

56 We turn next to the circumstances surrounding the Appellant’s arrest as well as the CNB’s subsequent follow-up operation. It is especially important to consider what was said between Ganesh and the Appellant. This part of the evidence is extremely pertinent not just because of its contemporaneity, but also because of its consistency with the Appellant’s account. To this extent, it is probatively material and weighs in favour of the Appellant.

57 First, ICA officer Cpl Abdul Hakim, who first checked the Motorcycle and saw the three black bundles in the side fenders, testified as to the Appellant's immediate reaction and in particular that he looked "confused" and "lost". The Appellant then denied ownership of the Motorcycle and of the bundles. Cpl Abdul Hakim's observation of the Appellant's reaction comports with the Appellant's claim that he was not, in fact, aware of the drugs.

58 Second, and more pertinent, is what transpired in the course of the exchanges between Ganesh and the Appellant. This took place in the context of an operation that was being orchestrated by the CNB officers in an attempt to apprehend others involved in the ring. The Appellant was directed to communicate with Ganesh and/or Ah Boy without letting them know that he had been arrested or that the CNB officers were monitoring their conversations. After listening to a number of exchanges between Ganesh and the Appellant, Cpl Vengedesh asked the Appellant to send a message to Ganesh in Malay which was translated as follows (see [6] and [45]–[46] above): "... Don't play around bro *just now never say got drugs*. Now ask to bring back. Crazy is it. I cannot bring. Quick send someone to take the drugs if not leave the Motorcycle and drugs here" [emphasis added]. Apart from Cpl Vengedesh, Cpl Sollehen was also present with the Appellant during the follow-up operation for four hours from 9.52pm on 24 March 2014 to 2.06am on 25 March 2014. Crucially, Cpl Sollehen confirmed that whatever text messages in Malay that were typed by the Appellant had been done at the *direction* of Cpl Vengedesh, with Cpl Sollehen helping to translate. Essentially, Cpl Vengedesh directed the Appellant in Tamil to draft the text messages; the Appellant drafted them in Malay; then Cpl Sollehen read the messages drafted in Malay and translated them into English for Cpl Vengedesh to verify that they accorded with his instructions before he would instruct the Appellant to send them.

59 For some reason, it appears that this text message was ultimately not received by Ganesh. But nothing turns on this. As the Appellant submits, its existence demonstrates that at the material time, and on the basis of the exchanges between Ganesh and the Appellant which Cpl Vengedesh had heard, Cpl Vengedesh formed the view that as far as Ganesh was concerned, the Appellant did not know about the drugs. This is reflected in his permitting or directing the inclusion of the words “just now never say got drugs” in the text message. Having overheard the phone conversations between the Appellant and Ganesh during the follow-up operation, it would have been illogical and likely fatal to the success of the follow-up operation for Cpl Vengedesh to have instructed the Appellant to draft and send such a message if this was inconsistent with what had earlier been said in the monitored conversations between Ganesh and the Appellant.

60 In this regard, we return to a point we have alluded to earlier at [29]–[30] above. As we noted there, reference was made to such a phone conversation having taken place between Ganesh and the Appellant in the Appellant’s cautioned statement made on 25 March 2014, shortly after the follow-up operation was called off, where he said as follows:

... I am innocent. I am really not aware that there are drugs in the bike. After my arrest, I asked Ganesh through phone in front of the officers to ask, “*Why did he put the drugs in the bike without informing me*”. The conversation was *recorded* by the officer. I plead to the authorities to help me ... [emphasis added]

61 In our judgment, the draft text message and the foregoing extract from the cautioned statement corroborate each other. It was incumbent on the CNB to have followed up on this if it entertained any doubts over the truth of the Appellant’s claims as to what had transpired in the course of the follow-up operation.

62 Further, during re-examination, the Appellant also informed the court that Ganesh's response to the Appellant's question as to why he had not been told of the drugs was: "Forgive me. Bring the motor back to Malaysia" (see [46] above). The Appellant also testified that he had then said to Cpl Vengedesh, "You just heard, right, I'm not involved in this" as the latter had been listening in on his phone call with Ganesh. Cpl Vengedesh reportedly said in reply, "If you do not know about this, you cooperate and help the CNB and tell us who this is supposed to reach".

63 At the appeal, Mr Chua urged us to make a finding in this regard by drawing the appropriate inference from the circumstances surrounding the follow-up operation. In particular, Mr Chua relied on the fact that Cpl Vengedesh had directed the Appellant to send a message in the foregoing terms, coupled with the contents of the Appellant's cautioned statement that was made shortly after the follow-up operation was called off, as irresistible evidence of the fact that during the supervised conversation between Ganesh and the Appellant, the latter had asked Ganesh why there were drugs in the Motorcycle that the Appellant had not known about, and that *at the very least* Ganesh did not refute this. Since Cpl Vengedesh had directed the said message to be sent, it must follow that the supervised conversation did suggest that Ganesh had acknowledged that the Appellant did not previously know about the drugs.

64 The Judge dismissed the Appellant's argument that such an inference could be drawn from that message. He reasoned that the follow-up operation had taken place a few hours after the arrest, and the CNB officers would not have had the time at that stage to assess the veracity of what the Appellant said. Their main concern then was to gather as much information on any other persons who might have been involved. Hence, the Judge found it unsurprising

that the CNB officers went along with the Appellant's version of events for that purpose (Judgment at [56]).

65 With great respect, it seems to us that the Judge's reasoning fails to engage with the Appellant's argument. The question is not whether the CNB officers had come to a firm conclusion on the Appellant's claim having regard to all the evidence. Rather, it is a much narrower question of whether the phone conversation, which the CNB officers were monitoring, supported the Appellant's claim that he was ignorant of the fact that the drugs had been placed in the Motorcycle. This is what he said in his cautioned statement, and this also appeared to be borne out by the terms of the text message that was drafted on Cpl Vengedesh's instructions. The Judge failed to consider this. By focusing on why the CNB officers might have gone along with the Appellant's account, the Judge wholly missed the Appellant's argument which rested not so much on what the *CNB officers* in fact *believed* about the Appellant's guilt or innocence but rather on *what Ganesh had said during the monitored conversations*.

66 We digress to make an observation on the way this part of the investigation was conducted. We consider it unsatisfactory that in attempting to refute the Appellant's argument on this issue, the Prosecution and the authorities were not able to produce any audio records; moreover, the CNB witnesses could not say anything useful as to what in fact had transpired during the supervised conversations with Ganesh because they simply could not recall. All that Cpl Vengedesh could confirm during the trial was that there were "a few calls" received and "a few text messages" sent in the period that he was with the Appellant during the follow-up operation. He could not remember anything about what was spoken. However, he did confirm that he heard the conversations because the calls were made over the speaker, that he had asked the Appellant to speak normally and act as though he had not been apprehended,

and that any phone calls answered or communications made by the Appellant were done under his instructions. Cpl Sollehen's evidence was similarly unhelpful. He could only testify that there were "some" phone calls made from the Appellant to "another party", but could not remember to whom the calls were made and what the contents of the conversations were. We would have expected that these conversations would and should have been taped and transcribed. At the very least, the contents of these conversations should have been detailed and recorded in the contemporaneous diaries and notes kept by the CNB officers. It does not appear that any of these things was done.

67 During the hearing of the appeal, the Prosecution informed us that audio records had been made but then these could not be retrieved due to some data corruption. However, the Prosecution subsequently checked with CNB and informed us that in fact no audio recording had been made at all. Further, the only contemporaneous evidence before the court in relation to the conversations that took place in the course of the follow-up operation was a short extract of the investigation diary, which was vague and lacked details. Coupled with the fact that neither Cpl Vengedesh nor Cpl Sollehen could recall anything of substance in relation to the conversations that took place, this meant that there was a very substantial gap in the evidence as far as the Prosecution's case is concerned. Simply put, there is nothing at all to refute the Appellant's contention as to his conversation with Ganesh and, on the contrary, quite a lot to corroborate it.

68 In our judgment, on the basis of the foregoing analysis, we are satisfied that the conversation between Ganesh and the Appellant did in fact take place; that the Appellant had indeed asked Ganesh why he had put the drugs in the Motorcycle without informing him; that Ganesh had not refuted this and this had all transpired in the hearing of the CNB officers. We base this principally

on the words of the text message and the *unrefuted assertion* to this effect made by the Appellant in his contemporaneous statement and in his subsequent testimony.

69 We note that the follow-up operation was conducted with the intention of not alerting Ganesh to the fact that the Appellant had been arrested and was co-operating with the authorities. In fact, the Appellant stated that Ganesh had asked a few times during the follow-up operation whether he had been arrested and he had repeatedly told him he had not been. Cpl Vengedesh had also instructed the Appellant to be “calm and act normal throughout”, and had even brought the Appellant outside the office so that the “nosier” environment would create a more “realistic” impression for Ganesh during the supervised phone conversations. The Appellant, as instructed by the CNB officers, had also used the excuse of having a problem with his autopass to explain his delay in contacting Ganesh.

70 This is further corroborated by the Appellant’s testimony in re-examination about his interaction with Cpl Vengedesh after the supervised conversation (see [46] and [62] above).

71 The Appellant’s general account of the follow-up operation in his statement dated 27 March 2014 is also corroborated by the extract of the investigation diary. We have noted that there was a period during the arrest when the Appellant was not in contact with Ganesh. As this had to be explained to enable the follow-up operation to be conducted, the Appellant was directed to say that he had been delayed by a problem with his autopass. The investigation diary corroborates this account with its record that Ganesh “bought the story that the [Appellant was] settling his autopass”. Various details in the Appellant’s account in his statements regarding the follow-up operation

are also corroborated by entries in the investigation diary: (a) the Appellant was instructed to inform Ganesh when he reached a carpark in Woodlands behind a convenience store; (b) Ganesh told him a white car would be coming to collect the drugs; (c) Ah Boy called and gave the Appellant a Singapore phone number to call for instructions; (d) a Chinese person picked up a call to that number; and (e) the Appellant informed that he was at the fruit stall at the carpark. It thus appears that Ganesh did engage with the Appellant for a time even after the Appellant had questioned him over placing the drugs in the Motorcycle without his knowledge. This too then supports the truth of the Appellant's contention.

72 Hence, on account of:

- (a) the fact that the Appellant's account is broadly corroborated by the extract of the contemporaneous investigation diary;
- (b) the express reference in the Appellant's cautioned statement to his question to Ganesh as to why the latter had planted the drugs without informing the former, which remains unrefuted by the Prosecution; and
- (c) the contents of the text message instructed by Cpl Vengedesh to be sent by the Appellant to Ganesh, which asserted that Ganesh had not told the Appellant that there were drugs planted in the Motorcycle,

we are satisfied that the Appellant did in fact say to Ganesh in the presence of the CNB officers that he did not initially know about the drugs hidden in the Motorcycle, and that Ganesh did not refute this. We return to the analytical framework that we have outlined at [25] above. In our judgment, this aspect of the evidence strongly corroborates the Appellant's case that he had not known about the drugs.

The alleged evidence of a prior arrangement to deliver drugs

73 We turn to consider the matters that the Judge relied on to conclude that there was a prior arrangement between the Appellant and Ganesh and/or Ah Boy to deliver the drugs:

(a) First, the Judge held that the Appellant’s evidence in his statements that Ganesh had called him while he was riding across the Causeway and told him that “all the recipients changed their contact numbers” gave rise to the implication that the Appellant understood what “recipients” meant, had previously been given contact numbers, and was being informed of a change in plans that had previously been agreed (Judgment at [39]–[40]).

(b) Second, the Judge also found it significant that text messages were sent by Ganesh and Ah Boy to the Appellant that evening, which demonstrated that they were trying to contact the Appellant urgently “to inform him of a sudden change to a previously agreed plan” (Judgment at [45]–[48]).

(c) Lastly, the Judge found it significant that the Appellant was carrying the same Singapore SIM card given to him by Ah Boy, as that which the Appellant had used on his two previous drug deliveries. The Judge was of the view that it was unlikely that Ah Boy would have given the same SIM card to the Appellant for purposes unrelated to the drugs business when their relationship was primarily based on their drug deals (Judgment at [49]–[50]).

74 In addition, the Prosecution relied on the fact that the Appellant had told the CNB officers that he should switch to the SIM card that Ah Boy had lent

him in order not to raise any suspicion on Ganesh's part. The Prosecution submitted that this too pointed to the existence of a pre-arranged plan.

75 In examining these pieces of evidence, it is once again crucial to consider whether they demonstrate a pre-existing plan to deliver drugs which might not have included the Appellant, or whether they pointed to the existence of a prior arrangement *with the Appellant* to deliver drugs. We emphasise this because it is clear that there was a plan to deliver the drugs. It is inevitable that the facts will be consistent with the existence of such a plan. The real question, however, was whether the Appellant was knowingly part of this plan.

76 As to the first piece of evidence, we disagree with the Judge that the fact that Ganesh called him while he was travelling to Singapore and told him that the "recipients" had changed their contact numbers clearly implied that there was a prior arrangement with the Appellant for him to deliver drugs in the course of that trip. In our judgment, the terms of the phone call are not sufficient to infer the existence of a prior arrangement with the Appellant. Our principal reason for taking this view is that the statement detailing the conversation cannot be relied on selectively. The Appellant having said that Ganesh did say this, went on to say that having regard to all that had transpired between them, the Appellant was left with the suspicion that Ganesh had planted drugs in the Motorcycle. He accordingly asked Ganesh whether there was "jaman" (drugs) and in response, Ganesh merely laughed off the Appellant's question. It is evident from this that once regard is had to the whole of the Appellant's statement, it emerges that he was maintaining the very opposite of what the Prosecution was contending and what the Judge found by relying on only a part of the statement in question.

77 We turn to the fact that the Appellant had, in the course of the follow-up operation, told the CNB officers that he should switch to the Singapore SIM card to call Ganesh back lest Ganesh suspect that something was amiss (see [74] above). In our judgment, the Prosecution's reliance on this ignores the fact that the Appellant had previously delivered drugs for Ganesh on two occasions and acting in line with those dealings would have been one way to avoid arousing any suspicion. Thus, the fact that the Appellant suggested that he change the SIM card does not necessarily lead to the inference that there was a prior arrangement to deliver drugs involving the Appellant. On the contrary, it is also consistent with the Appellant doing his best to cooperate with the CNB by acting as much as possible as he would have done had he not been arrested. In this context, even if the Accused had not been aware of the drugs, if he had to return a call to Ganesh after he entered Singapore, it would have been perfectly normal for him to have switched to the Singapore SIM card.

78 Nor do we find it significant that Ah Boy had lent the same Singapore SIM card to the Appellant. There is no doubt that Ah Boy and Ganesh meant to hide the drugs in the Motorcycle. If they did this without the Appellant's knowledge, they would nonetheless need him to contact others in Singapore once he got through. Their surmise must have been that once he was across and then learnt that there were drugs in the Motorcycle, he would carry out the deliveries as instructed. From this perspective, they had every reason to lend the Singapore SIM card to the Appellant so that he would not be able to say that he could not make the calls. From the Appellant's perspective, having the Singapore SIM card would make it easier to contact the people he knew in Singapore, such as his girlfriend Revalthi and friend John, which the Prosecution did accept.

79 Finally, the Judge placed considerable reliance on the way in which Ah Boy and Ganesh tried to contact the Appellant that fateful evening. We disagree with the Judge’s assessment of this. It is true that Ganesh and, to a limited extent, Ah Boy were trying with some urgency to contact the Appellant as demonstrated by the following text messages sent to both of the Appellant’s phones as follows (translated and unabbreviated):

- (a) At 6.39pm, from Ah Boy: “Did not bring cigarettes”
- (b) At 6.59pm, from Ganesh: “Don’t come in. Call me”
- (c) At 7.02pm, from Ganesh: “YOU CALL ME. Don’t call Boy”
- (d) At 7.06pm, from Ah Boy: “Call me Ganesh urgent”
- (e) At 7.24pm, from Ganesh: “Bro answer la my call”
- (f) At 7.38pm, from Ganesh: “Bro quick lah. Boss scold me”
- (g) At 7.41pm, from Ganesh: “Call bro”
- (h) At 7.54pm, from Ganesh: “Call please”
- (i) At 8.38pm, from Ganesh: “Message me can or not ... don’t be like this”
- (j) Also at 8.38pm, from Ganesh: “Call”
- (k) At 8.45pm, from Ganesh: “Call”
- (l) At 9.12pm, from Ganesh: “Call”

80 The Judge concluded that it would be illogical for Ah Boy and Ganesh to do this absent an arrangement to which the Appellant was party, because otherwise it might have alarmed the Appellant and resulted in him aborting his trip to Singapore (Judgment at [48]). The Judge also concluded that they were

anxiously trying to contact the Appellant to advise him of a change of plan. With respect, we are unable to follow this line of reasoning. First, the notion that the Appellant might be so alarmed by these messages as to abort the trip only makes sense if one starts from the premise that he was not aware of the drugs and deduced that something sinister was afoot just from the number and frequency of the messages. Secondly, the fact that Ganesh and Ah Boy were frantically trying to contact the Appellant says nothing about the latter's knowledge of the drugs. The point is that Ganesh and Ah Boy knew the drugs were there and at some stage, whether or not the Appellant was in on the plan, they would need to contact him. The Appellant was stopped at the Woodlands Checkpoint at 7.35pm and he could not respond to any calls or text messages from then. The text messages spanned the period from 6.39pm to 9.12pm. If Ganesh and Ah Boy had planted valuable drugs in the Motorcycle without the Appellant's knowledge, *Ganesh and Ah Boy* would understandably want to try to contact the Appellant urgently. The inference to be drawn from the text messages sent by Ganesh and Ah Boy cannot extend to imputing a prior arrangement *with the Appellant* when all they demonstrate is urgency on the part of *Ganesh and Ah Boy*. Finally, we do not see any basis for inferring that there was some change of plan.

81 For these reasons, we consider that the Judge erred in his conclusion that there was a prior arrangement among Ganesh, Ah Boy *and the Appellant* to deliver the drugs that day.

The lack of objective evidence

82 Next, we also note that the Appellant's account is not contradicted by the objective evidence. The absence of any trace of the Appellant's DNA on the three black bundles, the screwdriver, the four screws, the scarf and the seat

compartment lid (see [9] above) is consistent with the Appellant's account that he was not the person who hid the drugs in the Motorcycle. There is no objective evidence that establishes that the Appellant had touched or opened the compartment lid, placed the drugs into the Motorcycle, used the screwdriver, or unscrewed the compartment lid. We accept that the absence of a DNA trace does not prove that the Appellant did not in fact touch the relevant materials because there might be other possible explanations for this, including the degradation of DNA traces or even a conscious attempt to clean the relevant surfaces. But, even if it does not prove this fact, it certainly adds to the other evidence before the court, which supports the Appellant's version of the events.

83 As for the screwdriver found under the seat, nothing turns on this. It became an issue at trial because it was thought that the screwdriver might have been there to enable the Appellant to remove the lid and access the drugs. However, no transferred materials were found between the screwdriver and the four screws used to secure the seat compartment lid. Hence, it did not appear that the screwdriver had been used in this way. A further question was raised as to whether the screwdriver *could* be used for this purpose. Whether the screwdriver was indeed used or could be used on the screws of the seat compartment lid did not go towards establishing any knowledge on the part of the Appellant about whether the drugs were planted. The Judge considered that the presence of the screwdriver was probative because it meant the Appellant was equipped with the tools to access the seat compartment lid. In this regard, he concluded (at [9] of the Judgment) that:

... The evidence of forensic scientist Ms Leong Wai Ying on the first day of trial shows that, if the screwdriver were tilted at an angle, its blade could penetrate the slots on the screw heads by between 67% and 97%. The conclusion I drew from these numbers is that using this screwdriver to unscrew the seat compartment lid *would not have been a very difficult task*. [emphasis added]

84 However, two observations may be made. First, it was purely speculative that the screwdriver was there to enable the Appellant to access the drugs. Secondly, the Judge's conclusion was in fact unsupported by either the expert report or the expert's evidence in court. In the first place, the percentages that the Judge had referred to had been derived by the Judge on his own by calculating, using the measurements in the report, the depth of the blade of the screwdriver that could be inserted into the slots of the four screws when *tilted* at an angle with respect to the lengths of the slots. The Judge did not consider the fact that when *aligned* with the length of the slots of the screws, the blade of the screwdriver could actually only be inserted into the slots of the screw heads up to between 35% and 49% of the depth of the slots. The report did not offer any view regarding whether it would have been possible to use this screwdriver to unscrew the seat compartment lid if the blade of the screwdriver had been inserted into the slots of the screws at an angle, as compared to if it were aligned with the length of the slots. Also, the forensic expert's express testimony, when asked if she could say whether the screwdriver could have been used to unscrew the screws since the blade of the screwdriver could be inserted to a certain extent, was that she was "unable to comment" because no such experiment had in fact been done. This is entirely understandable, given that the purpose of this expert report was only to "examine the physical characteristics of the screwdriver ... and the screws ... and determine if the blade of the screwdriver ... could be inserted into the slots of the screws", and "examine the screws ... for the presence of transferred materials that could have originated from the same sources as the materials from the screwdriver". In our judgment, the Judge's conclusion that the screwdriver could have been used to unscrew the lid was thus, with respect, unsupported and impermissible. To arrive at the conclusion that he had reached, he ought *at least* to have invited the expert to comment, in the light of her findings in the report, as to whether it would be

possible to unscrew the seat compartment lid if the blade of the screwdriver had been inserted into the slots of the screws *at an angle* or if not, whether the seat compartment lid could be unscrewed if the blade of the screwdriver could be inserted, while aligned with the length of the slots, *only to between 35% and 49% of the depth of the slots*.

85 In any event, we reiterate that even if it could be concluded that the screwdriver *could* or *was indeed* used to unscrew the seat compartment lid, nothing turns on this because the objective evidence did not establish that the Appellant had actually used the screwdriver *to unscrew the seat compartment lid* and *placed the bundles in the fenders* or that he even knew of their presence there.

86 In the result, we find that the forensic evidence (or the lack of it), if anything, corroborates the Appellant's defence that he did not know of the drugs in the Motorcycle.

The Appellant's motivations in entering Singapore

87 As part of the Appellant's defence, he also claimed that even though he had not made prior arrangements with either his girlfriend or his friend in Singapore, he had entered Singapore to spend time with them because he was feeling vexed and upset due to his personal circumstances.

88 The Judge noted certain logical inconsistencies in the Appellant's version of the events (Judgment at [24]–[38]). However, we do not think that these inconsistencies make it implausible that the Appellant had indeed hoped to meet John and Revalthi, and that his trip was decided upon without much thought or planning.

89 The Appellant's financial circumstances were indeed dire, so much so that he had to borrow money from Ganesh and Ah Boy. He was married with two young children, but could not provide for his family since he was unemployed at that time. The Appellant was also looking for a job in Singapore while he was living on the money he had borrowed from Ganesh in February 2014. During that period, he had been travelling between Johor Bahru and Singapore to attend interviews in Singapore. In his cautioned statement, the Appellant also mentioned that John had told him that he would recommend him a job in Singapore.

90 The Appellant's birthday was on 23 March and the Appellant had met with an unfortunate traffic accident that very day. Further, the Appellant's girlfriend Revalthi actually testified in court that she had spoken to the Appellant on his birthday and had in fact arranged to meet him on the day after. Both the Appellant and Revalthi were also consistent in their account that Revalthi was in fact trying to contact the Appellant on 23 March 2014, but she could not reach him. In the circumstances, we find that it was not implausible that the Appellant had come to Singapore on an impromptu basis hoping to meet either his friend or girlfriend in an ultimately vain attempt to raise his spirits.

Conclusion

91 In all the circumstances, we are satisfied that the Appellant has discharged the burden of proving, on a balance of probabilities, that the drugs were not in his possession because they had been placed in the Motorcycle without his knowledge. In the circumstances, there is no need to consider the question of whether the Appellant knew the nature of the drugs (see [21]–[22] above).

92 There was no doubt in this case that Ganesh and Ah Boy wanted to transport the drugs into Singapore. The only question was whether the Appellant was part of this plan. In the face of his consistent stance that he was not, it was necessary to evaluate the surrounding objective evidence to see whether those were inconsistent with his version of the events or whether they were consistent with both possible versions.

93 Most crucially, we are satisfied that in the course of the supervised conversation between Ganesh and the Appellant, the Appellant had asked Ganesh why he had not informed him of the drugs and Ganesh had not refuted this assertion. Taking this into account cumulatively with the entire case before the court, including the Appellant's consistent defence, his shock and confusion upon the discovery of the bundles, his evidence of the follow-up operation which is corroborated by the investigation diary and the absence of any objective evidence linking the Appellant to the drugs, we find that the Appellant's defence is made out and that he has successfully rebutted the presumption in s 21 of the MDA.

94 We therefore allow the appeal and acquit the Appellant of the charge brought against him.

Sundaresh Menon
Chief Justice

Judith Prakash
Judge of Appeal

Tay Yong Kwang JA (dissenting):

Introduction

95 I have had the advantage of reading in draft the judgment of the majority of Menon CJ, with which Prakash JA concurs, and which I shall refer to as the majority Judgment. For ease of reference, I adopt the same abbreviations and references used in the majority Judgment, unless otherwise stated.

96 In the evening of 24 March 2014, the Appellant rode the Motorcycle from Malaysia into Singapore. At the Woodlands Checkpoint, he was arrested after ICA officers found two black bundles of a substance hidden in the left fender of the Motorcycle. Upon a further search, another black bundle was discovered in the right fender of the Motorcycle. These three bundles formed the subject of the following capital charge against the Appellant:

That you, **GOPU JAYA RAMAN**, on 24 March 2014 at about 7:48 p.m., at the Motorcycle Arrival Lane, Woodlands Checkpoint, Singapore, in a motorcycle bearing license plate number WWR 1358, did import into Singapore three bundles containing not less than 1351.4 grams of granular powdery substance which was analyzed and found to contain not less than 46 grams of diamorphine, a “Class A” controlled drug listed in the First Schedule to the Misuse of Drugs Act, Chapter 185, Rev. Ed. 2008, without authorisation under the said Act or the Regulations made thereunder and you have thereby committed an offence under section 7 punishable under Section 33(1) of the said Act.

97 It was undisputed that the Appellant was the person in charge of the Motorcycle at the time of arrest. Pursuant to s 21 of the MDA, he is therefore presumed to have been in possession of the controlled drugs. The burden is on him to establish, on a balance of probabilities, that he did not know that the drugs were in the Motorcycle (see *Obeng Comfort* at [35], dealing with a similar presumption under s 18(1) of the MDA). By virtue of s 18(2) of the MDA, any person who is proved or presumed to have had a controlled drug in his

possession shall, until the contrary is proved, be presumed to have known the nature of that drug.

98 The Appellant claimed trial to the charge and sought to rebut the above statutory presumption of possession by asserting that he did not know that there were drugs hidden in the Motorcycle. He claimed that he was tricked into delivering the drugs by the persons who lent him the Motorcycle in Malaysia. He had borrowed the Motorcycle because he wanted to visit his girlfriend and a friend in Singapore to celebrate his birthday which fell on 23 March, one day before the arrest. The Judge rejected this defence and convicted the Appellant on the charge. In relation to sentence, after the Public Prosecutor stated that the Appellant would not be granted a certificate of substantive assistance under s 33B(2)(b) of the MDA, the Judge imposed the mandatory death sentence. No finding was made as to whether the Appellant was a courier within the meaning of s 33B(2)(a) of the MDA.

99 The Appellant appealed against both the conviction and sentence. The majority decision of this Court is to allow the appeal and to acquit the Appellant on the single charge. I hold a contrary view and would dismiss the appeal for the reasons that I will now go on to furnish in this judgment.

The Appellant's case

100 I first set out the Appellant's version of events as narrated by him in his statements to the police and in the trial below. In essence, his defence was that he did not know that there were drugs hidden in the Motorcycle and that, although he had previously delivered drugs to Singapore using the same motorcycle, he was tricked into doing so on the occasion stated in the charge.

101 The Appellant, who is a Malaysian citizen, had been working in Singapore in various jobs from 2010. Subsequently, in early 2014, he stopped working here and went back to Johor Bahru. He needed money for his children's school fees and took a loan of RM4,000 from one "Ganesh", to whom he was introduced in January 2014. To discuss the repayment of the loan, the Appellant met Ganesh and one "Ah Boy", who was Ganesh's business partner, at a restaurant in Johor Bahru a few weeks before his arrest. The Appellant informed Ganesh that he was unable to repay the loan, and Ganesh became angry and stormed off. Ah Boy stayed back and told the Appellant that if he could not repay the loan, he had to work for them by bringing drugs into Singapore. Ah Boy told the Appellant that the full loan could be settled "within 2 or 3 trips". If the Appellant refused, Ganesh would send his men to "disturb" the Appellant's family. To ensure the safety of his family and to repay the loan, the Appellant agreed to deliver drugs into Singapore.

102 The Appellant admitted that he did deliver drugs on behalf of Ganesh and Ah Boy on two previous occasions on 10 and 12 March 2014, although he did not know what sort of drugs they were and did not bother finding out. On both occasions, Ganesh instructed the Appellant to go to Ah Boy to take the same motorcycle which he rode into Singapore on the day of his arrest. Ah Boy showed the Appellant where the drugs were hidden in the Motorcycle. They were placed on the seat compartment lid. As explained by the Judge (see the Judgment at [6]), the Motorcycle's seat could be lifted up to reveal the opening to the fuel tank and a storage compartment. To refuel the Motorcycle, the rider would need to lift up the seat, thereby exposing the storage compartment, referred to in the Judgment as the seat compartment lid. The seat compartment lid was secured to the Motorcycle by four screws. If the screws were removed, the seat compartment lid could be removed to reveal an empty space on the inside of the Motorcycle's fenders. The space inside the fenders was not

completely sealed off by the seat compartment lid because there were gaps at the back of the seat compartment lid which allowed a person standing behind the Motorcycle, using a torch, to peer into it.

103 On 24 March 2014, the bundles of drugs were found inside the fender beneath the seat compartment lid, unlike the two previous occasions of delivery where the drugs were placed on the seat compartment lid. On that day, the Appellant did check for drugs on the seat compartment lid and found none, not knowing that the drugs were hidden beneath it. However, there were a scarf and a screwdriver found on the seat compartment lid. The Appellant claimed that he had used the scarf on the two previous drug deliveries to cover the drugs from view. He did not know whose scarf it was. He also said that the screwdriver was always kept there but it did not belong to him and he had never touched it before.

104 On the two previous occasions of delivery, the Appellant was also given a Singapore SIM card to contact the intended recipients of the drugs in Singapore. Ganesh would send him the recipients' numbers by way of SMS. After entering Singapore, the Appellant would contact the recipients and deliver the drugs to them. On both occasions, he then went to meet his girlfriend, Revalthi, who worked in Singapore as a security guard. As a result of the two drug deliveries, half of the loan of RM4,000 was regarded by Ganesh as settled. The remaining half was still outstanding.

105 On the night of 23 March 2014, which was the Appellant's birthday and one day before the Appellant's arrest, he had a motorcycle accident and suffered injuries to his chest and his right leg. This was corroborated by a letter from Alexandra Hospital stating that the Appellant had informed the doctor attending to him during his medical examination conducted on 25 March 2014 at 10.39am in Alexandra Hospital that he had suffered such injuries, although he told the

doctor that the road accident in Malaysia was on 22 March 2014. The next morning, on 24 March 2014, he called Ganesh and asked for a loan of RM150 so that he could seek medical treatment from a doctor. Ganesh asked the Appellant why he should get the loan since the Appellant was not working for him. Nevertheless, Ganesh asked the Appellant to see Ah Boy after the Appellant promised that he would repay the RM150 loan.

106 The Appellant met Ah Boy at about 2.40pm that day. Ah Boy asked the Appellant if he could deliver “10 stones” (of drugs) the next day. The Appellant was told that the loan of RM4,000 would be fully repaid after this third drug delivery and that he would be able to earn some cash as well. However, the Appellant refused this offer because he did not wish to deliver drugs anymore. He insisted that he needed just RM150 to see the doctor. Ah Boy called Ganesh to inform him about what the Appellant had said. After the call, Ah Boy passed the Appellant the RM150 that he had requested. The Appellant then went to see the doctor and subsequently returned home at about 4pm.

107 After reaching his home, the Appellant called Ganesh. This time, he asked to borrow the Motorcycle because he wanted to visit Revalthi in Singapore to celebrate his birthday, which was on the previous day. It was not disputed that the Appellant had not made any prior arrangements to meet Revalthi that evening. The Appellant’s explanation for not informing Revalthi before he entered Singapore was that he wanted to surprise her and bring her for dinner. Before meeting Revalthi, he had intended to meet a friend named John whom he had befriended while working in Singapore. He also did not make any appointment to meet John. He said in his statements that he was confident that Revalthi would meet him even if she was busy and that John, his good friend, would normally be free during the night time.

108 In reply to the Appellant's request, Ganesh mentioned again that he was "doing everything for [the Appellant] but [the Appellant] refused to do anything for him". The Appellant promised to settle all his debts after getting a job and Ganesh relented. He then asked the Appellant to go and get the Motorcycle from Ah Boy.

109 At around 6pm, the Appellant met Ah Boy who passed him the keys to the Motorcycle, which had also been used in the previous two drug deliveries. Ah Boy also handed over to the Appellant the same Singapore SIM card used in the previous two drug deliveries but this time, it was for the Appellant's personal use. After taking the Motorcycle, the Appellant rode it to a petrol station to refill the fuel tank. He also bought two packets of bread there. According to him, he checked under the seat of the Motorcycle, which was "the usual place where the drugs were placed but nothing was found". He did a check because he was asked earlier to deliver "10 stones" to Singapore and had refused to do so. Therefore, he checked to see if Ganesh and Ah Boy had put any drugs inside the Motorcycle for him to bring into Singapore.

110 The Appellant then proceeded to the Johor Bahru checkpoint and cleared that checkpoint at about 7pm. While riding from there towards the Woodlands Checkpoint, he received a call from Ganesh. In his statements given to the police, the Appellant said that Ganesh told him to call him once he reached Woodlands. This made the Appellant suspicious and he asked Ganesh why he needed to make the call to him. Ganesh replied that "all the recipients changed their contact numbers. So once you reached [W]oodlands you call me". At the trial, the Appellant disputed this part of his statements and testified that Ganesh had simply replied, "Call me, just call me", without any mention of the recipients. The Appellant then asked Ganesh whether there was "jaman", a term used by the Appellant to describe drugs, placed in the Motorcycle. Ganesh

simply laughed and reminded the Appellant to call him after clearing the Woodlands Checkpoint. The Appellant admitted in his statements that after this call from Ganesh, “I confirmed that there are drugs inside the bike”. In another part of the statements, he said that at that point in time, “I know there must be drugs in the bike”. Further on, he said, “It is only after crossing the Malaysia custom and receiving Ganesh call then I am aware that I have drugs”. Nevertheless, he rode on as he was already in Woodlands Checkpoint and “[t]here was no path to turn back, so I have to go”. He was too afraid to inform the Singapore authorities about the presence of drugs in the Motorcycle because they would make him bear all the responsibility for the drugs.

111 At about 7.46pm at the Woodlands Checkpoint, the Appellant was stopped and a strip-search of his body and a full vehicle search were conducted. Besides two mobile phones and the Singapore SIM card in his wallet, the Appellant had only RM55 and no Singapore currency on him. A scarf and a screwdriver were found beneath the seat of the Motorcycle. The three bundles of drugs were then found inside the fenders of the Motorcycle, beneath (rather than on) the seat compartment lid. According to the Appellant, this was a different location from the previous two occasions when he delivered drugs into Singapore (see [102] above). When the first two bundles were discovered, the immigration officer who conducted the search testified that the Appellant looked “confused” and “lost” and said in Malay, “What’s that? That’s not my bike”.

112 After the search, officers from the CNB, including Cpl Vengedesh, who could speak and understand Tamil, took a statement from the Appellant at about 8pm. The Appellant gave the CNB officers the contact details of Ganesh and Ah Boy. In addition, he informed them that Ganesh would be expecting him to switch the SIM card in his mobile phone to the Singapore SIM card and call him

as soon as possible. He agreed to assist the CNB to identify and arrest the intended recipients of the drugs. As part of this follow-up operation, which took place from around 9.45pm on 24 March 2014 to about 3am on the next day, the Appellant talked to various individuals over the phone under the directions of the CNB officers. This included several calls between the Appellant and Ganesh. The conversations with Ganesh were in Tamil and were heard by Cpl Vengedesh who had instructed the Appellant to turn on the speaker phone and not to give any indication that he had already been arrested in Singapore. The Appellant was apparently able to convince Ganesh that he was delayed in the checkpoint because of some problems with his autopass. In the Appellant's cautioned statement, recorded under s 23 of the CPC, he stated as follows: "... After my arrest, I asked Ganesh through phone in front of the officers to ask, 'Why did he put the drugs in the bike without informing me'. The conversation was recorded by the officer ...".

113 However, the Appellant did not state what Ganesh's reply to his question was. In his long statements recorded under s 22 of the CPC, he also did not mention what Ganesh's reply was. At the trial, the Appellant also did not adduce any evidence on this point during examination-in-chief and cross-examination. It was only in re-examination, when defence counsel asked the Appellant about the conversation between him and Ganesh, which Cpl Vengedesh was said to have heard over the phone's speaker, that the Appellant informed the court about Ganesh's response in the following manner:

"I said, "Hello, aneh". He asked, "Hello, brother". "Hello, big brother". He---sorry, he said, "Hello" and he asked, "Where are you?" I said, "Woodlands Checkpoint". And I asked, "Why?" He said, "There is jaman inside. You bring it back to Malaysia". Then I said, "Why did you not tell me when I came to take the motor?" He said, "Forgive me. Bring the motor back to Malaysia." And I refused. He said, "You only have to bring". I--I responded angrily, "I can't bring. You get someone else to take".

114 After that, Cpl Vengedesh told the Appellant, “If you do not know about this, you cooperate and help the CNB and tell us who this is supposed to reach”. Another call then came from Ganesh. Cpl Vengedesh asked the Appellant to ask, “Who to give?”, to which Ganesh replied that the recipient would call the Appellant. As part of the CNB’s follow-up operations, the Appellant also sent an SMS to Ganesh at 1.43am on 25 March 2014, again under the CNB officers’ directions. That SMS, in short-form Malay, was translated to: “Still how long more to wait. I’m not a dog. kl2 (?) do like that only. don’t play around bro just now never even tell there are brg. now ask to bring back. crazy is it. I can’t bring. quick send somebody to take the brg if not leave the mtr and brg here.” It was accepted that “mtr” referred to the Motorcycle and that “brg” was “barang” (or thing) in Malay and that it was a street term for drugs. However, the SMS was not received by Ganesh as the sending failed. Apparently, by that time, Ganesh had already turned off his phone. The Appellant’s counsel put to Cpl Vengedesh that the Appellant had told him specifically that he did not know there was “barang” in the Motorcycle and that was why Cpl Vengedesh directed the sending of that SMS. Cpl Vengedesh replied that he could not remember the Appellant telling him that. However, Cpl Vengedesh agreed that it would be illogical for him to direct the Appellant to send that SMS if the Appellant had not said that he did not know about the “barang”. The Appellant’s case is that this SMS and his evidence on the supervised conversations between Ganesh and himself corroborated his defence that he was tricked by Ganesh and Ah Boy into delivering the drugs into Singapore and that he did not know about the bundles of drugs that were hidden in the Motorcycle.

The Prosecution’s evidence on the telephone calls

115 At the hearing of this appeal, the Prosecution informed the Court that there was an audio recording of the telephone calls made and received by the

Appellant after his arrest on 24 March 2014. These calls occurred between 9.52pm on 24 March 2014 and 2.06am on 25 March 2014. The Prosecution also informed the Court that the said audio recording could not be retrieved due to data corruption.

116 On 10 October 2017, the Prosecution sent a letter to the Court, copied to the Appellant's solicitors, to correct the above information and to apologize for the inaccurate information. Paragraph 3 of this letter stated:

We have since confirmed with [CNB] that there was no audio recording made in this case. There was a miscommunication between the trial DPPs and the CNB officers as to whether any audio recording was specifically made in this case. CNB has informed that they have only started making audio recordings in some cases since 1 May 2015. The use of audio recording is subjected to the availability of functioning recording devices, and when it is reasonably practicable to do so (e.g. when there is sufficient time to set up the audio recording device before the traffickers/intended recipients call the accused). Hence, not all applicable cases have audio recordings made.

117 Besides Cpl Vengedesh, there was another CNB officer, Cpl Sollehen, listening to the telephone conversations between the Appellant and his contacts. Cpl Sollehen was essentially on escort duty and was not assisting actively in the liaison between Cpl Vengedesh and the team of officers involved in the CNB's follow-up operations to arrest the recipients of the drugs. He could not understand what was spoken in Tamil but was conversant in Malay. He therefore helped translate to Cpl Vengedesh the phone messages typed in Malay by the Appellant.

118 During cross-examination at the trial, Cpl Vengedesh said he could not remember exactly what was said between the Appellant and Ganesh over the telephone calls. However, exhibit P61, which comprised four pages of the investigation diary for this case, gave a flavour of what was transpiring between

about 10pm on 24 March 2014 and about 2am on 25 March 2014. These four pages were recorded by two other CNB officers. Cpl Emman Sufiyann bin Abu Bakar started the recording and later handed over the task to W/SSgt Nurshilawati binte Hosaini. The entries in the investigation diary showed that in the first telephone call between the Appellant and Ganesh, the latter apparently believed the Appellant's story that he was delayed because of his autopass problem. In the next call, Ganesh told the Appellant to park his Motorcycle near the 7-11 shop in Woodlands. Later, Ganesh told the Appellant to call him once he was out of the checkpoint. At about 10.30pm, Ganesh told the Appellant to take the stuff back to Malaysia. The Appellant then said to Ganesh sarcastically, "Are you playing around?" Ganesh said he would call again. In the next call, Ganesh said there would be a white car going to the scene and the driver would call once he arrived. In the next call, Ganesh asked the Appellant "to bring back" but the Appellant said he was afraid he would be caught. Ganesh then said he would send the Appellant by SMS a number for him to call. Later, the Appellant sent an SMS to ask Ganesh to "hurry up". He then called Ganesh. Ganesh insisted that the Appellant bring the drugs back because no one wanted to collect them. The Appellant insisted that he did not want to do so and Ganesh said he would call again. In the next call, Ganesh again told the Appellant to bring the drugs back but the Appellant said he could not. At about 11.52pm, Ganesh called again to repeat the request and then said he would send a number for the Appellant to call for instructions.

119 Past mid-night, the Appellant messaged Ganesh to ask how long he had to wait. There was no reply. At 12.46am, when the Appellant tried to call Ganesh, his phone was already turned off. A few minutes later, Ah Boy called the Appellant to say that Ganesh had already sent the number to the Appellant. He then said he would call Ganesh to confirm that fact. Subsequently, Ah Boy called again and gave a Singapore telephone number for the Appellant to call

for instructions. The man whom the Appellant spoke to at this number at about 1.12am asked the Appellant where he was and the Appellant said that he was still at the fruit stall. That man then told him not to call again and to go to sleep. At about 2.06am, the Appellant tried to call another Singapore number supposedly belonging to the same man but there was no answer. Although this was not recorded in the investigation diary, it will be recalled that the Appellant tried sending Ganesh an SMS message at 1.43am (at [114] above).

My decision

Knowledge that the drugs were hidden in the Motorcycle

120 In my judgment, the Appellant's evidence, taken as a whole, showed that the Appellant knew that the bundles of drugs had been hidden in the Motorcycle and therefore could not rebut the statutory presumption against him under s 21 of the MDA on a balance of probabilities. In arriving at this conclusion, I will begin by examining the circumstances leading to the Appellant coming to Singapore in the evening of 24 March 2014, before turning to consider all the other evidence before the trial court.

The reason for coming into Singapore on 24 March 2014

121 It is important to note that the Appellant had no employment in Singapore during that time and no appointment with either John or Revalthi to meet them that evening. The Appellant admitted that he was not even sure if John would have been free to meet him that evening. John was not found or produced as a witness but he could not have added anything material to the case anyway since the Appellant said there was no prior arrangement for them to meet on 24 March 2014.

122 As for Revalthi, the Appellant's statements indicated that he intended to look for her at her home in the Ang Mo Kio housing estate, surprise her and "bring her for dinner to celebrate [his] birthday." However, she was working that night at Bras Basah Road, as the Appellant would have known. He changed his evidence in oral testimony and claimed that he actually intended to go to Revalthi's workplace and that it was "possible" that she would have had at least 10 to 15 minutes to spare during her breaks to meet him. Revalthi said in court that she called the Appellant at midnight to wish him on his birthday. Her evidence was not precise as to which day that was because she was not sure about the date of the Appellant's birthday and said at first that it was 23 March but then corrected it to 24 March. Nevertheless, she would presumably have been referring to the midnight of 22 March 2014 as the Appellant's birthday was on 23 March 2014. She said that she had asked him to celebrate his birthday with her but he said that he was meeting his friends and would go to meet her in the morning on the day after his birthday. The day after her night shift ended, Revalthi tried to call the Appellant many times but could not reach him. The next day, she returned to work the night shift again. In cross-examination, Revalthi said that she had met the Appellant two or three times before his birthday but she was unable to remember the dates.

123 In my opinion, the Appellant's explanation for wanting to come to Singapore in the evening of 24 March 2014 was not credible. The Appellant was involved in a motorcycle accident the previous day and his injuries obviously required medical attention, necessitating his approach to Ganesh for a loan of RM150. It is therefore difficult to understand why there was such an urgent need for him to come into Singapore only a few hours after seeing the doctor. He was desperately short of money and had to borrow just so he could go see a doctor. Yet, in his injured state, he was prepared to spend the precious money that he had just borrowed on fuel for the Motorcycle in order to make an

impromptu trip to Singapore with only RM55 in hand. His birthday was already past. Any plan to meet Revalthi on 24 March 2014 was supposed to be in the morning after her night shift and Revalthi could not contact him at all on 24 March 2014. In those circumstances, his story about making an unplanned trip across the border on a borrowed motorcycle, with borrowed money and with just the hope of meeting John and/or Revalthi was simply not credible. Rather, the facts indicated that the Appellant had an urgent task to perform that evening and any meeting with his friends thereafter would have been peripheral or merely incidental to the primary purpose of his visit to Singapore. That primary purpose, as the evidence showed, was to deliver drugs and after that was done, he might go to look for Revalthi just as he had done in the previous two drug deliveries (see [104] above).

124 The Appellant's explanation of how he managed to borrow the Motorcycle from Ganesh and Ah Boy was also incredible. By his own account, he had been pressurized into making the previous two drug deliveries on 10 and 12 March 2014 because he could not repay his debt to Ganesh. Additionally, on 24 March 2014, half of the loan of RM4,000 was still owed by him. Given that Ah Boy had informed the Appellant from the outset that he would be required to make "two or three" drug deliveries, a third drug delivery was part of the deal, and hence would clearly be within the Appellant's contemplation from the start. Given these background facts, how did the Appellant suddenly have the courage and the bargaining power to reject the request to do a third delivery of drugs to Singapore, particularly when he had no money to pay even a fraction of what was outstanding on the original loan and also when there was no indication that the threat to his family from Ganesh had abated in any way?

125 It was also illogical that Ganesh and Ah Boy would grant the Appellant the further loan of RM150, allow him to borrow the Motorcycle and hand to

him the Singapore SIM card out of goodwill, soon after he had refused to make the third delivery. The Singapore SIM card was the same SIM card used in the previous two drug deliveries. There was no reason why Ganesh and Ah Boy, who had threatened the Appellant's family a few weeks earlier and who were not pleased that the Appellant had refused to do a third delivery of drugs, would suddenly become so kind and caring towards the Appellant. This was particularly so as the Appellant still owed half the original loan and could only promise that he would pay in full when he was employed. At that time, he was out of work and there was no evidence that some prospective lucrative employment was coming his way.

126 Further, the Motorcycle that was handed over to the Appellant was the same one used for the familiarization visits to Singapore and the previous two drug deliveries. The events of 24 March 2014 showed the same methodology of drug delivery as the previous two occasions. These were the same items provided to the Appellant on the previous two occasions for the specific purpose of smuggling drugs into Singapore. They were the drug dealers' business assets and had never been lent to the Appellant for personal use. The drugs were also concealed within the Motorcycle. Even though the Appellant claimed that the concealed drugs on the first two occasions were more easily detectable and accessible, the methodology was essentially the same – bundles of drugs hidden from view within the component parts of the Motorcycle.

127 There were references in the Appellant's statements to the police about Ganesh informing him over the phone that "all the recipients changed their contact numbers" (see the Judgment at [39]). I agree with the Judge that these statements were neither coerced nor concocted by the CNB officer who recorded the Appellant's statements. It would have been strange for the statement recorder, who had recorded the rest of the Appellant's statements

accurately, to have specifically made up the repeated references to “the recipients”. The irresistible inference is that the Appellant wished to distance himself from these statements at trial because they indicated that there was a pre-arranged plan between Ganesh and the Appellant to deliver drugs on that day before the phone call. Otherwise, the reference by Ganesh to the recipients would not have made any sense to the Appellant during the call.

128 The Appellant’s narrative about how he came into possession of the Motorcycle which contained the drugs and why he decided to come to Singapore in the circumstances of 24 March 2014 was simply unbelievable. He claimed to have been tricked by Ganesh and Ah Boy into bringing the loaded Motorcycle into Singapore. As explained above, the drug dealers were not the sort of people who would negotiate or cajole. According to the Appellant, they certainly meant business on the first two drug deliveries. There was absolutely no reason for them to need to resort to trickery on the third occasion, especially when half the original debt was still owing by the Appellant and he needed a further loan for urgent medical attention. The Appellant’s story undermined his credibility and cast serious doubt on his claim that he did not know that the drugs were hidden in the Motorcycle.

The Appellant’s admission about the previous two drug deliveries

129 Based on the Appellant’s self-inculpatory statements that he had imported drugs into Singapore on two earlier occasions in March 2014, it could be argued that these statements, which were given voluntarily by the Appellant, showed that he was someone who would tell the truth even when it was against his interests to do so. However, I do not think that these admissions necessarily bolster the Appellant’s credibility. They were unlikely to have any adverse consequences because nothing was said about the nature or the quantity of the

drugs on the previous occasions. Ultimately, these self-inculpatory statements must be considered in the context of the Appellant's evidence as a whole.

The telephone calls and messages after the arrest

130 I now consider the evidence on the supervised telephone conversations between the Appellant and Ganesh during which Ganesh purportedly asked for forgiveness for not informing the Appellant that there were drugs hidden in the Motorcycle (see [113] above). It is unfortunate that Cpl Vengedesh was not able to recall the telephone conversations that took place after the Appellant's arrest and had taken no notes. However, one must remember that he was in the midst of being the liaison man between the Appellant and Ganesh on the one hand and the team of CNB officers in the follow-up operations on the other. The Appellant's belated account that Ganesh allegedly asked for forgiveness during one of the telephone calls was not put to Cpl Vengedesh. It was also not mentioned anywhere in the Appellant's statements given to the police or during his examination-in-chief and cross-examination at trial. If Ganesh had indeed said "forgive me" to the Appellant during the supervised telephone call, then this would have been a vital piece of evidence which the Appellant would doubtlessly have focused on in his statements or at least in his initial evidence in court. The fact that he did not do so strongly suggested that his testimony during re-examination was merely an afterthought and should be disbelieved.

131 The investigation diary also did not record that words of this nature were uttered by Ganesh. If the Appellant was so certain that Ganesh had asked for forgiveness, why did he not ask for the two CNB officers who recorded the investigation diary to be cross-examined so that his counsel could test this evidence with them?

132 The SMS which the Appellant tried to send to Ganesh at 1.43am on 25 March 2014 (see [114] above) could not get through. Although it was sent under the directions of the CNB officers, that did not mean that they accepted the Appellant’s denial of knowledge about the drugs. It was only towards the end of the time-sensitive follow-up operations by the CNB to try to apprehend the intended recipients of the drugs, when Ganesh and Ah Boy appeared to have realized that the Appellant had been arrested, that the CNB officers allowed that SMS to be sent. As the sending failed because Ganesh had turned off his phone by then, we cannot speculate on what Ganesh’s response might have been to that SMS.

133 Having considered the more salient points in this appeal, I now discuss the other issues.

The SMS messages before the Appellant cleared the Johor Bahru checkpoint

134 I accept the Judge’s finding that the Appellant might not have seen the various SMS messages which were sent to him by Ganesh and Ah Boy before he cleared the Johor Bahru checkpoint (see the Judgment at [45]–[46]). In any event, the contents of these messages do not indicate clearly whether the Appellant knew or did not know that the Motorcycle contained hidden drugs.

The searches and the arrest

135 The evidence that the Appellant looked “confused” and “lost” when the drugs were found is equivocal. Both an innocent person and one who is guilty-conscious could have reacted in such a manner upon arrest. In the Appellant’s statements, he said that he became “suspicious” after receiving the telephone call from Ganesh after he had cleared the Malaysian checkpoint. He also said that Ganesh’s words caused him to “know”, “confirm” or become “aware” that

there were drugs hidden in the Motorcycle (see [110] above). The Appellant asserted that he truly did not know about the drugs and only came to suspect or know that he had been tricked into making a third delivery into Singapore just when he rode the Motorcycle into Woodlands Checkpoint. However, his conduct during the body and vehicle searches by the ICA officers was not consistent with his assertion of innocence. By the time the ICA officers made it clear that they were going to do a thorough search of the Motorcycle, the Appellant would have realized that he would be saddled with any drugs found in the Motorcycle. At that stage, surely an innocent man, with the frame of mind that the Appellant had claimed he was in after that telephone conversation with Ganesh, would have told the officers about his misgivings about the borrowed motorcycle. Instead, the Appellant kept silent throughout the search and then claimed that he did not know about the bundles of drugs when they were discovered. The Appellant claimed that he was afraid of informing the officers about the possibility of the presence of drugs in the Motorcycle because they would make him bear all the responsibility for the drugs. Even if that may be so, why did he not at least mention upon the discovery of the drugs or upon his arrest that Ganesh, Ah Boy or someone in Johor Bahru had tricked him into riding the Motorcycle into Singapore with drugs hidden inside? I accept that this point, on its own, is not determinative of guilt. Nevertheless, it undermines further the overall credibility of the Appellant.

The DNA evidence

136 Finally, the Judge was of the view that the DNA evidence was inconclusive on whether the Appellant had used the screwdriver to unscrew the seat compartment lid (see the Judgment at [8]). I see no reason to disagree with this. However, even if the Appellant was not the person who had concealed the drugs in the Motorcycle, that alone did not mean that he did not know that there

were drugs in the Motorcycle when he took possession of it from Ah Boy. On the contrary, the evidence as a whole pointed to the conclusion that he did have such knowledge.

Conclusion on the presumption of possession under s 21 of the MDA

137 Considering the totality of the evidence adduced at trial, I agree with the Judge that the Appellant has failed to rebut the presumption under s 21 of the MDA. The evidence pointed clearly to the conclusion that this was the Appellant's third drug delivery or import into Singapore to repay the loan that he had taken. Unfortunately for the Appellant, unlike the previous two occasions, the third delivery was unsuccessful.

Knowledge of the nature of the drugs

138 As the Appellant has failed to rebut the presumption under s 21 of the MDA that he was in possession of the controlled drugs in the Motorcycle, it follows that he is also presumed by virtue of s 18(2) of the MDA to have known the nature of those drugs. As the Appellant's defence was focused solely on proving that he did not know that he was carrying drugs, he has not adduced any evidence to rebut the presumption under s 18(2) of the MDA. The presumption under s 18(2) of the MDA therefore also stands unrebutted.

Conclusion

139 On the totality of the evidence, I agree with the Judge below that the Appellant is guilty as charged. I would therefore dismiss the appeal against conviction. As the death penalty is mandatory on the facts here, I would also dismiss the appeal against sentence.

Tay Yong Kwang
Judge of Appeal

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