IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2021] SGCA 103

Criminal Appeal No 29 of 2020

Between

Roshdi bin Abdullah Altway

… *Appellant*

And

Public Prosecutor

… *Respondent*

Criminal Motion No 18 of 2021

Between

Roshdi bin Abdullah Altway

… *Applicant*

And

Public Prosecutor

… *Respondent*

In the matter of Criminal Case No 44 of 2019

Between

Public Prosecutor

And

Roshdi bin Abdullah Altway

JUDGMENT

[Criminal Law] — [Statutory offences] — [Misuse of Drugs Act]
[Criminal Procedure and Sentencing] — [Statements] — [Admissibility]
[Criminal Procedure and Sentencing] — [Disclosure]

Roshdi bin Abdullah Altway
v
Public Prosecutor and another matter

[2021] SGCA 103

Court of Appeal — Criminal Appeal No 29 of 2020 and Criminal Motion No 18 of 2021
Sundaresh Menon CJ, Andrew Phang Boon Leong JCA, Judith Prakash JCA, Steven Chong JCA and Chao Hick Tin SJ
11 August 2021

11 November 2021 Judgment reserved.

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

Introduction

1 It is not controversial that the Prosecution owes a duty to the court and to the wider public to conduct matters with the aim of ensuring that the guilty, and only the guilty, are convicted. This in turn gives rise to a related duty to place all relevant material before the court to assist it in determining the truth. The Prosecution's role is therefore not *purely* adversarial but is largely shaped by its particular duty to assist the court. This much was stated in *Muhammad bin Kadar and another v Public Prosecutor* [2011] 3 SLR 1205 ("*Kadar*") (at [200]) and was the basis for our holding that the Prosecution owes disclosure obligations to the Defence in respect of certain unused materials that might be credible and relevant to the guilt or innocence of the accused. More recently, this principle was reiterated in *Muhammad Nabill bin Mohd Fuad v Public*

Prosecutor [2020] 1 SLR 984 ("*Nabill*"), where we further held that the Prosecution was required, in addition, to disclose to the Defence, statements furnished to the police by a "material witness". In *Nabill*, we referred to this duty as the Prosecution's "additional disclosure obligations". A "material witness" was defined in this context as a person "who can be expected to confirm, or conversely, contradict an accused person's defence in material respects" (the "Current Definition"; *Nabill* at [4]). Any reference to a "material witness" or the "materiality" of a witness in this judgment should be understood in this light, unless otherwise specified.

2 In the present appeal, CA/CCA 29/2020 ("CCA 29"), an issue has been raised as to the ambit of the Prosecution's additional disclosure obligations. Because of the way the Defence contends this duty should be applied, the Prosecution invites us to reconsider our holdings in *Nabill* in respect of the definition of a "material witness" and seeks guidance on certain aspects of the scope of that duty. Specifically, guidance is sought as to the process of identifying "material witnesses", the potential consequences of any breach of its additional disclosure obligations, and whether the Prosecution has a positive duty to conduct further investigations once a witness has been identified as "material". As will be evident from our reasoning below, any meaningful discussion of these issues requires a proper appreciation of the Prosecution's critical role in the criminal justice process. We also clarify our reasoning in *Nabill* (at [70]–[71]) as to the evidential burden that an accused person must discharge when raising a defence.

3 Finally, this case also presents us the opportunity to develop the principles articulated in *Ramesh a/l Perumal v Public Prosecutor and another appeal* [2019] 1 SLR 1003 ("*Ramesh*"), which concern the situation where there

has been an alleged "bailment" of drugs. In *Ramesh*, we held that the legislative policy underlying the harsh penalties for trafficking offences in the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) ("MDA") was to target the movement of drugs along the supply chain towards end-users. In the context of a charge of trafficking (or possession for the purpose of trafficking), we held that where a person merely holds drugs as a "bailee" intending to return the drugs to the person who initially gave them to him, "[s]uch a person cannot, *without more*, be liable for trafficking because the act of returning the drugs is not *part of* the process of supply or distribution of drugs" [emphasis in original] (*Ramesh* at [114]). Unfortunately, *Ramesh* appears to have been misinterpreted as standing for the general proposition that a "bailee" who safekeeps drugs with a view to returning them to the "bailor" *can never* be liable for trafficking. *Ramesh* does not stand for such a proposition, as we explain below.

Background

4 The appellant in this case, Roshdi bin Abdullah Altway ("Roshdi"), claimed trial to a capital charge (the "Charge") of having in his possession for the purpose of trafficking 267 packets and 250 straws containing 2,201.22g of granular/powdery substance, which was analysed and found to contain not less than 78.77g of diamorphine (the "Drugs"), an offence under s 5(1)(*a*) read with s 5(2) of the MDA. At his trial below, Roshdi admitted to having both possession of the Drugs and knowledge of their nature. He denied, however, that he had the Drugs in his possession for the purpose of trafficking. Roshdi's defence was that he was just safekeeping the Drugs for a person known as "Aru", to whom he had all along intended to return the Drugs. We refer to this defence as the "safekeeping defence". Based on Roshdi's identification, police

investigations ascertained "Aru" to be one Chandran Prasanna Anu ("Chandran").

5 The High Court judge (the "Judge") who tried the matter rejected Roshdi's safekeeping defence, finding that (a) the Prosecution had proved the element of possession for the purpose of trafficking beyond a reasonable doubt; and (b) alternatively, that Roshdi had failed to rebut the presumption of trafficking in s 17(*c*) of the MDA. The Judge thus convicted Roshdi of the Charge. As Roshdi was not a courier and he had not been issued a certificate of substantive assistance, the Judge imposed the mandatory death penalty on Roshdi under s 33(1) read with the Second Schedule to the MDA: see *Public Prosecutor v Roshdi bin Abdullah Altway* [2020] SGHC 232 (the "GD").

6 CCA 29 is Roshdi's appeal against his conviction and sentence. On appeal, the crux of Roshdi's case is that the Judge erred in finding that he had the Drugs in his possession for the purpose of trafficking. Amongst other things, the Judge is said to have incorrectly admitted and relied upon eight statements that were given by Roshdi to the police. Roshdi also contends that his safekeeping defence ought not to have been disbelieved, and that if it had been believed, the element of possession for the purpose of trafficking would not be made out. Furthermore, Roshdi claims that there was late disclosure by the Prosecution of Chandran's police statements, which amounted to a breach of its additional disclosure obligations. In Roshdi's view, Chandran was clearly a "material witness" and by reason of the Prosecution's omission to call him to testify at trial, it in fact "failed to discharge its burden of proof to rebut Roshdi's safekeeping defence". Since this last-mentioned ground of appeal was not set out in Roshdi's original Petition of Appeal, Roshdi filed CA/CM 18/2021 ("CM 18") seeking leave to advance this argument.

Roshdi's arrest and police statements

7 Roshdi is a 62-year-old Singaporean male. On 14 September 2016, at about 6.15am, officers from the Central Narcotics Bureau ("CNB") arrested Roshdi at the void deck of Block 209B Compassvale Lane. He was carrying a Nokia phone, a set of keys to a unit at Compassvale Lane (the "Compassvale Unit"), cash in the amount of $4,000 and a blue plastic bag containing $14,000 in cash. After his arrest, Roshdi was taken to the Compassvale Unit where he identified the bedroom he occupied. Various exhibits were found under the bed and inside a cupboard in the bedroom, as follows:

(a) 128 packets of granular/powdery substance marked H1A;

(b) 13 straws of granular/powdery substance marked H2A;

(c) 2 packets of granular/powdery substance marked H5A;

(d) 84 straws of granular/powdery substance marked H5C;

(e) 137 packets of granular/powdery substance marked J1A; and

(f) 153 straws of granular/powdery substance marked J2A.

These exhibits comprise the Drugs which form the subject-matter of the Charge. The total weight of the granular/powdery substance found was 2,201.22g and upon analysis, it was found to contain not less than 78.77g of diamorphine (more commonly known as "heroin").

8 In addition, drug paraphernalia such as spoons, pieces of paper, empty packets, empty straws and digital weighing scales were recovered from Roshdi's bedroom. Some smaller quantities of cannabis and cannabis mixture

were also seized, and these formed the subject-matter of two other charges against Roshdi of possession of a controlled drug for the purpose of trafficking. These charges were withdrawn pursuant to s 147(1) of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) ("CPC") upon Roshdi's conviction on the Charge. They are not material for the purposes of this appeal.

9 In the course of police investigations, nine statements were recorded from Roshdi between 14 September 2016 and 27 September 2016 (collectively, the "Statements"):

(a) Staff Sergeant Muhammad Fardlie bin Ramlie ("SSgt Fardlie") recorded the first three contemporaneous statements pursuant to s 22 of the CPC (collectively, the "Contemporaneous Statements"). These are respectively referred to as the "1st", "2nd" and "3rd contemporaneous statements". In these Contemporaneous Statements, Roshdi identified the Drugs as heroin and admitted that they were for sale. He also set out the prices at which the Drugs would be sold and the quantities thereof. When asked who the Drugs belonged to, Roshdi replied, "All belong to me". He later added that he worked for a person named "Aru" and stated that "I only pack and keep the thing. If someone wants I will send."

(b) A cautioned statement was recorded by Assistant Superintendent Prashant Sukumaran ("ASP Sukumaran") on 15 September 2016 at about 3.26am pursuant to s 23 of the CPC (the "Cautioned Statement"). In the Cautioned Statement, Roshdi claimed that he was "just a worker" and that "[t]he one who owns the things is another person".

(c) Between 21 September 2016 and 27 September 2016, Staff Sergeant Ibrahim bin Juasa ("SSgt Ibrahim") recorded five long statements from Roshdi pursuant to s 22 of the CPC (collectively, the "Long Statements"). These statements are respectively referred to as the "1st", "2nd". "3rd", "4th" and "5th long statement". In the Long Statements, Roshdi admitted to receiving, storing, repacking and distributing drugs to customers on multiple occasions from as early as July 2016. Roshdi said that he had been working for "Aru" and that he would sometimes also collect money from "Aru's" customers for the drugs. These drugs included heroin (diamorphine), as well as "*jamak*" or "*ganja*" (cannabis) and "ice" (methamphetamine). Roshdi further said that the Drugs were for sale and explained how he would weigh and pack them for distribution.

The trial

10 The trial took place over several tranches between September 2019 and July 2020. As Roshdi disputed the admissibility of his Contemporaneous Statements and Long Statements (collectively, the "Contested Statements"), an ancillary hearing was held on 25 June 2020 and 30 June 2020. At the conclusion of the ancillary hearing, the Judge held that the Contested Statements were admissible in evidence.

11 The Prosecution adduced the evidence of the relevant CNB officers and others involved in the investigations. At the close of the Prosecution's case, the Judge found that there was a case to answer. On 2 July 2020, the Defence proceeded to open its case with Roshdi testifying in his own defence. Roshdi did not call any other witnesses.

12 Notably, neither side called Chandran as a witness at trial, although four statements had been recorded from him between 19 January 2019 and 24 January 2019 ("Chandran's statements"). The Prosecution disclosed Chandran's statements to the Defence on 23 June 2020, before the Defence opened its case and Roshdi took the stand. The timing of this disclosure is relevant as one of Roshdi's arguments on appeal is that Chandran was a "material witness" and the disclosure of his statements was late and in breach of the Prosecution's additional disclosure obligations.

The parties' cases below

13 Sections 5(1)(*a*) and 5(2) of the MDA provide:

> **5**.—(1) Except as authorised by this Act, it shall be an offence for a person, on his own behalf or on behalf of any other person, whether or not that other person is in Singapore —
>
> (*a*) to traffic in a controlled drug;
>
> …
>
> (2) For the purposes of this Act, a person commits the offence of trafficking in a controlled drug if he has in his possession that drug for the purpose of trafficking.

14 The term "traffic" is defined under s 2 of the MDA as follows:

> "traffic" means —
>
> (*a*) to sell, give, administer, transport, send, deliver or distribute; or
>
> (*b*) to offer to do anything mentioned in paragraph (a),
>
> otherwise than under the authority of this Act, and "trafficking" has a corresponding meaning

15 A charge under s 5(1)(*a*) read with s 5(2) of the MDA comprises three elements: first, possession of the controlled drug; second, knowledge of the nature of the controlled drug; and third, such possession must have been for the

purpose of unauthorised trafficking: see *Muhammad Ridzuan bin Md Ali v Public Prosecutor and other matters* [2014] 3 SLR 721 at [59].

16 In relation to the third element, s 17(*c*) of the MDA provides for the following presumption in the event that an accused person is proved to have had in his possession more than 2g of diamorphine:

> *Presumption concerning trafficking*
>
> 17. *Any person who is proved to have had in his possession more than —*
>
> …
>
> *(c) 2 grammes of diamorphine*;
>
> …
>
> whether or not contained in any substance, extract, preparation or mixture, *shall be presumed to have had that drug in possession for the purpose of trafficking* unless it is proved that his possession of that drug was not for that purpose.
>
> [emphasis added]

17 As mentioned earlier, Roshdi admitted to having both possession of the Drugs and knowledge of their nature (GD at [11]–[12]). As such, the only disputed element was whether Roshdi had the Drugs in his possession for the purpose of trafficking.

18 The Prosecution's case against Roshdi was as follows:

> (a) The Contested Statements were admissible in evidence as they had been made voluntarily by Roshdi. No threat, inducement or promise had been made by the recording officers or was relied upon by Roshdi in furnishing the said statements.

(b) There was sufficient evidence to prove beyond a reasonable doubt that Roshdi had been in possession of the Drugs for the purpose of trafficking.

(c) In the alternative, Roshdi's possession of at least 78.77g of diamorphine gave rise to the presumption of trafficking under s 17(*c*) of the MDA. The onus was therefore on Roshdi to rebut this presumption, which he failed to do. Roshdi's safekeeping defence ought to be rejected.

19 On the other hand, Roshdi claimed that the Contested Statements were not made voluntarily for the following reasons:

(a) Prior to the recording of the 1st contemporaneous statement, SSgt Fardlie allegedly said to Roshdi in Malay, "Now Singapore has a new law. If this thing is not yours, you will not be hanged. You don't be afraid." We refer to this as the "Alleged Fardlie Representation". Roshdi said that he was induced by these words to make the Contemporaneous Statements, believing that because Singapore had a "new law", and the Drugs did not belong to him, he would not be hanged and he did not need to be afraid.

(b) Before the 1st long statement was recorded, SSgt Ibrahim allegedly told Roshdi in Malay, "Those things are not yours, so you don't have to be afraid." We refer to this as the "Alleged Ibrahim Representation". According to Roshdi, this "made [him] calm, so [he could] say whatever [he] want[ed]".

The Contested Statements were therefore said to be inadmissible pursuant to s 258(3) of the CPC.

20 On the main issue of whether Roshdi had the Drugs in his possession for the purpose of trafficking, Roshdi denied this at trial despite what he had said in his Statements. The details of Roshdi's safekeeping defence, which emerged for the first time at trial, were as follows. Roshdi first saw Chandran (whom he referred to as "Aru" in his testimony) at a coffeeshop where Roshdi often delivered contraband cigarettes. The two began conversing after some time and Chandran later asked Roshdi to safekeep and pack drugs for him. Roshdi initially refused to do so but he was eventually persuaded to safekeep drugs for Chandran because Chandran offered him payment (of between $200 and $300 on each occasion). However, Roshdi said that he did not agree to pack drugs because "it would take a long time" and he "[did not] have time for that". Chandran would deliver various drugs including "heroin, [i]ce and cannabis" to Roshdi for safekeeping and these drugs came pre-packed. These deliveries took place "many times" before Roshdi was arrested. If Chandran's customers wanted drugs, Chandran would call Roshdi and either Chandran or his men would then come to collect the drugs from Roshdi. Roshdi claimed that he never sold any of the drugs himself. In respect of the Drugs (and drug paraphernalia seized on the day of Roshdi's arrest), Chandran had asked Roshdi to keep these for him on a night when Chandran wanted to take a flight to India. Roshdi agreed to do so and Chandran said that he would return to Singapore some two or three weeks later and would then take the Drugs back. Roshdi never intended to sell the Drugs and only intended to keep them with a view to returning them to Chandran when he got back from India. It was contended on this basis, supposedly relying on our decision in *Ramesh* (at [110]), that Roshdi did not have the Drugs in his possession for the purpose of trafficking.

21 Roshdi accordingly submitted that the Charge against him should be amended to one of simple possession under s 8(*a*) of the MDA and that he should only be convicted on the amended charge.

Decision below

22 The Judge held that the Contested Statements were admissible, finding that the Prosecution had proved beyond a reasonable doubt that no threat, inducement or promise had been made (or relied upon by Roshdi) in making these statements (GD at [31]).

23 As to the element of possession for the purpose of trafficking, the Judge found that Roshdi's Statements set out a detailed, coherent and consistent narrative of his intention to traffic the Drugs in his possession (GD at [41]). The extrinsic evidence (comprising drug paraphernalia that was stained with diamorphine) supported the narrative in Roshdi's Statements rather than his safekeeping defence at trial (GD at [42]).

24 The Judge disbelieved Roshdi's safekeeping defence. In her view, Roshdi's testimony of how he came to be persuaded by "Aru" to keep the Drugs safe did not withstand scrutiny (GD at [43]). Amongst other things, Roshdi had failed to give a coherent explanation for the material discrepancies between his safekeeping defence at trial and the admissions set out in his Statements (GD at [44]). The Judge thus concluded that the Prosecution had proved the element of possession for the purpose of trafficking beyond a reasonable doubt, and alternatively, that Roshdi had failed to rebut the presumption of trafficking under s 17(*c*) of the MDA (GD at [46] and [49]). Roshdi was accordingly convicted of the Charge.

25 On the issue of sentence, the alternative sentencing regime under s 33B of the MDA was not available as Roshdi was not a courier and he had also not been issued a certificate of substantive assistance (GD at [50]–[51]). Roshdi was accordingly sentenced to death, pursuant to s 33(1) read with the Second Schedule to the MDA.

The parties' submissions in CCA 29 and CM 18

26 Roshdi filed CM 18 to seek leave of court to amend his original Petition of Appeal in CCA 29 to include the argument that the Judge had erred in her decision by failing to properly appreciate the significance of the Prosecution's failure to call Chandran as a witness. This amendment was not objected to by the Prosecution. We do not see any objection either and therefore allow CM 18.

Main arguments on the issues of conviction and sentence

27 Roshdi raises two main arguments on appeal against his conviction. First, it is said that the Judge erred in admitting the Contested Statements into evidence because Roshdi did not make them voluntarily. Second, he contends that the Judge erred in rejecting his safekeeping defence and in finding that he possessed the Drugs for the purpose of trafficking. To this end, Roshdi advances the following contentions:

> (a) First, the Judge failed to analyse the evidence of Chandran's involvement, which ostensibly supports Roshdi's account that he was only safekeeping the Drugs for Chandran. Roshdi's Statements made it clear from the outset that he worked for Chandran and that Chandran was involved in the alleged offence. Roshdi's testimony at trial was

that Chandran had given the Drugs to him for safekeeping pending Chandran's return from his intended trip to India.

(b) Second, Chandran's statements to the police suggested that he was more involved in Roshdi's alleged offence than he cared to admit. Amongst other things, Chandran lied in his earlier statements that he did not know Roshdi, but later admitted that he did. Chandran also said in his statements that he had given Roshdi $3,000 in exchange for Roshdi's help in obtaining documents to allow Chandran to stay in Singapore. If the Judge had taken these matters into account, she might have been more inclined to find that Roshdi's safekeeping defence was true.

(c) Third, as far as the Prosecution's additional disclosure obligations were concerned, Chandran was a "material witness" and the Prosecution had always been aware of his involvement in Roshdi's alleged offence. The Prosecution's late disclosure of Chandran's statements to the Defence in the middle of trial was "harmful to the conduct of [Roshdi's] defence". Chandran's evidence would have gone directly to the purpose for which Roshdi had the Drugs (whether for sale by himself or to return to Chandran). By failing to call Chandran, the Prosecution had "failed to discharge its burden of proof to rebut Roshdi's safekeeping defence".

(d) Fourth, the other evidence found in the Compassvale Unit was insufficient to prove that Roshdi had the Drugs in his possession for the purpose of trafficking.

28 Although Roshdi's Notice of Appeal indicates that he is also appealing against his sentence, his Petition of Appeal and submissions do not advance any other distinct arguments on that issue and we see his appeal against sentence as being consequential to his appeal against his conviction.

29 As against this, the Prosecution submits that the Judge did not err in admitting the Contested Statements because they had been made voluntarily by Roshdi. Furthermore, the Judge was entirely correct to find that the element of possession for the purpose of trafficking had been proved beyond a reasonable doubt, and alternatively, that Roshdi had failed to rebut the presumption under s 17(*c*) of the MDA. Roshdi's conviction and sentence should therefore stand.

Issues relating to Nabill

30 On 12 May 2021, the Prosecution requested leave to file further written submissions on the issues relating to the holdings in *Nabill* that Roshdi had raised (see [27(c)] above). We granted such leave and also allowed Roshdi to file further submissions in reply.

31 In its further submissions, the Prosecution presents a wide-ranging discussion of its additional disclosure obligations in *Nabill*. It outlines a number of proposals which it says would "strike a balance with the public interest in the fair and efficient administration of criminal justice, without diminishing the intent and principles espoused in *Nabill*". In gist, the Prosecution submits as follows:

> (a) First, the Current Definition of a "material witness" laid down in *Nabill* (at [4]) should be narrowed to cover only a witness whom the accused person identifies as the "true culprit", meaning "a person

[whom] the accused alleges committed, or is responsible for, the offence instead of him" [emphasis in original omitted] (the "Proposed Redefinition").

(b) Second, in respect of the process of identifying "material witnesses", the following position is advanced:

(i) The Defence, not the Prosecution, should be responsible for identifying "material witnesses". This is because who may qualify as a "material" witness is entirely dependent on the defence that the accused person intends to run at trial. This is a matter within the knowledge of the Defence and which the Prosecution will often have considerable difficulty in ascertaining. The Defence should therefore have the "duty" of first identifying and explaining which persons are "material witnesses". This identification should generally be done at the pre-trial stage. In some situations, however, the "materiality" of a witness may only become apparent at trial, in which case the onus remains on the Defence at that stage to identify the witness as "material". The Prosecution may then respond to either agree with or dispute the Defence's identification.

(ii) A dispute as to the "materiality" of a witness should be resolved by the court.

(c) Third, where a witness is identified as "material", but the Prosecution does not have any statements that have been recorded from him relating to the accused person's defence, the Prosecution may be expected to pursue reasonable lines of inquiry. However,

notwithstanding what was said in *Nabill* at [77], the Prosecution and law enforcement agencies cannot be subject to a legal duty to conduct further investigations or to record further statements from the witness in question.

(d) Fourth, as to the potential consequences of breach, the court may draw an adverse inference against the Prosecution if it fails to comply with its additional disclosure obligations without reasonable basis.

32 In addition, the Prosecution also contends that there have been instances (including the present) where our reasoning in *Nabill* (at [70]–[71]) has been misinterpreted. It is said that these paragraphs from our judgment in *Nabill* have been read as standing for the proposition that in respect of a material fact in issue, the evidential burden will shift from the Defence to the Prosecution *as long as* the accused person raises a defence that is "not inherently incredible" (the "Purported Interpretation"). The Prosecution urges us to clarify that this is not in fact the case.

33 Finally, the Prosecution accepts that based on the Current Definition in *Nabill,* Chandran is a "material witness" in that he can be expected to materially confirm or contradict Roshdi's safekeeping defence. However, the Prosecution denies that (a) by reason of its omission to call Chandran, it had failed to discharge its "burden of proof to rebut Roshdi's [safekeeping] defence"; and (b) its disclosure of Chandran's statements to the Defence was in any way late.

34 In response to the Prosecution's position regarding the additional disclosure obligations (set out at [31] above), Roshdi argues as follows:

(a) First, the Prosecution's Proposed Redefinition of a "material witness" should be rejected because it gives rise to a real risk that material evidence may not be placed before the court.

(b) Second, as to the process of identifying "material witnesses", the additional disclosure obligations only require the Prosecution to disclose the statement of a "material witness" as and when the "materiality" of the witness becomes apparent to it. The Prosecution's claim that it has considerable difficulty in carrying out its additional disclosure obligations is therefore difficult to understand. If an accused person's statements are "unclear or inconsistent", the Prosecution should simply err on the side of disclosure. This displaces the need for the Prosecution to act as the arbiter of the "materiality" of a witness.

(c) Third, where new "material witnesses" are only identified at trial, *Nabill* (at [77]) does not impose any duty on the Prosecution or the police to record any further statements.

35 In Roshdi's further submissions, he also reiterates his position that (a) the Prosecution's disclosure of Chandran's statements was late and in breach of its additional disclosure obligations; and (b) because of its failure to call Chandran as a witness, the Prosecution has "failed to discharge its burden of proof to rebut Roshdi's safekeeping defence".

The Bailment Question

36 Although neither party initially raised the point, we also considered it significant to explore whether, *assuming* Roshdi's safekeeping defence was to be believed, the element of possession for the purpose of trafficking would

nevertheless be made out. In particular, we were concerned over Roshdi's reliance on our holdings in *Ramesh* (at [110]) to mount the argument that as a "bailee" or safekeeper of the Drugs, he was not in possession of the Drugs for the purpose of trafficking (see [3] and [20] above). Prior to the oral hearing, we therefore directed parties to address us on the following question (the "Bailment Question"):

> … [W]hether and if so how it is relevant, when assessing an alleged 'bailment' of drugs, that (1) the bailee holds the drugs for reward and (2) the bailee knows that the alleged 'bailment' is to enable the further distribution of the drugs. In this regard should be had in particular to [86], [87], [110]–[116] of the judgment in [*Ramesh*] as well as the fact that the accused person in question there was convicted of simple possession and that the remarks at [118] were made in the context of sentencing.

We discuss the parties' submissions on this question at the appropriate points later in this judgment.

Issues to be determined

37 In light of how the parties presented their cases, we develop our analysis in the following manner. The preliminary issue that arises is whether the Contested Statements are admissible in evidence. We deal with this first.

38 We then consider whether Roshdi was correctly convicted of the Charge. As to this, we first set out the law relating to the burden of proof and the evidential burden in criminal cases, and then discuss the submissions that were made in respect of our observations in *Nabill* (at [70]–[71]).

39 In this light, we consider the element of possession for the purpose of trafficking in the present case.

40 This raises a number of distinct aspects. First, we examine Roshdi's safekeeping defence and whether the Judge erred in disbelieving it. We also answer the Bailment Question and further develop the legal principles set out in *Ramesh* in relation to an alleged "bailment" of drugs in the context of a charge of trafficking, or possession for the purpose of trafficking. We then apply this legal position to determine whether, *assuming* Roshdi's safekeeping defence is to be believed, the element of possession for the purpose of trafficking is nevertheless made out.

41 Based on our conclusions in the foregoing analysis, we consider the relevance of the Prosecution's omission to call Chandran as a witness at trial.

42 Finally, we discuss the legal principles governing the Prosecution's additional disclosure obligations in *Nabill*. In particular, we consider the following issues:

(a) First, whether the Prosecution's Proposed Redefinition of a "material witness" is to be preferred over the Current Definition.

(b) Second, in respect of the process of identifying "material witnesses":

(i) Whether the Defence has a duty to first identify "material witnesses" and if it does, when this should be done.

(ii) Whether the court should be left to determine any dispute between the parties as to the "materiality" of a witness.

(c) Third, where a person is identified as a "material witness", but the Prosecution has not recorded any statement from such a witness

touching on the accused person's defence, whether the Prosecution has a positive duty to conduct further investigations and to record further statements from that person.

(d) Fourth, what the potential consequences are of a breach of the Prosecution's additional disclosure obligations.

43 We finally consider whether the Prosecution was in breach of its additional disclosure obligations on the present facts, and if so, what effect this would have on Roshdi's conviction.

The admissibility of the Contested Statements

44 The legal principles governing the admissibility of an accused person's statements are well-settled. As we recently explained in *Sulaiman bin Jumari v Public Prosecutor* [2021] 1 SLR 557 ("*Sulaiman*") at [54], the starting point under s 258(1) of the CPC is that any statement furnished by an accused person in the course of investigations is admissible in evidence at his trial. This is subject to the requirement of voluntariness contained in s 258(3) of the CPC and the court's residual discretion at common law to exclude the evidence where its prejudicial effect outweighs its probative value.

45 In *Chai Chien Wei Kelvin v Public Prosecutor* [1998] 3 SLR(R) 619 (at [53]), this court held that the test of voluntariness under s 258(3) of the CPC has an objective limb and a subjective limb:

(a) The objective limb is concerned with whether there was a relevant threat, inducement or promise.

(b) If there was, then the court proceeds to the subjective limb which is an inquiry as to the *effect* of that threat, inducement or promise on the particular accused person at the material time.

Where an issue is raised as to the voluntariness of a statement, the burden is on the Prosecution to prove beyond a reasonable doubt that it was made voluntarily.

46 At the ancillary hearing in the trial below, SSgt Fardlie and SSgt Ibrahim denied making, respectively, the Alleged Fardlie Representation and the Alleged Ibrahim Representation (the "Alleged Representations") to Roshdi. The Judge accepted their testimony in preference to Roshdi's evidence. At the hearing before us, we were somewhat taken by surprise when Roshdi's counsel for the appeal, Mr Andre Darius Jumabhoy ("Mr Jumabhoy"), asserted that the Judge did not make a finding to this effect (although in fairness, it should be noted that Mr Jumabhoy was not Roshdi's counsel at the trial). We corrected Mr Jumabhoy, pointing him to the transcript of the Judge's remarks at the conclusion of the ancillary hearing on 30 June 2020, where she said:

> *I accept Fardlie and Ibrahim's evidence that* they did not---that *neither of them made these alleged statements.* I find it strange that the accused actually never clarified with Fardlie or Ibrahim at any point on any of the statements and actually he saw Ibrahim over a course of 7 days where these statements were given to Ibrahim. I do find parts of his evidence to be not coherent and therefore not credible. *I therefore find that the prosecution has proved beyond a reasonable doubt that the statements were made voluntarily.* [emphasis added]

47 In the GD (at [23]–[26] and [30]), the Judge went on to explain that *even assuming the Alleged Representations had been made to Roshdi*, the objective and subjective limbs of the voluntariness test would not have been satisfied in any event. We highlighted to Mr Jumabhoy that the Judge's finding of fact,

which she reached after hearing all the evidence, posed a considerable difficulty for his client's case.

48 To challenge the Judge's decision on admissibility, Roshdi raises the following arguments on appeal:

(a) First, contrary to the Judge's finding, there is sufficient evidence to show that the Alleged Representations were actually made to Roshdi. On the day of the arrest, the arresting party had with them a photograph of Chandran (whom Roshdi identified as the person the Drugs belonged to). The CNB must therefore already have known at the time that Chandran was involved and must have had good reasons for thinking that Roshdi's role was simply to keep the Drugs safe for Chandran. This is consistent with Roshdi's account of the "nice" manner in which SSgt Fardlie and SSgt Ibrahim had made the Alleged Representations to him. We will return to this point.

(b) Second, the objective limb of the voluntariness test is satisfied because the Alleged Representations amount to an inducement from SSgt Fardlie and SSgt Ibrahim. The Alleged Fardlie Representation was a "clear offer to procure a non-capital charge in return for a good statement". Although the Alleged Ibrahim Representation was not as explicit standing on its own, it essentially conveyed the same message as the Alleged Fardlie Representation when the two Alleged Representations were taken together.

(c) Third, the subjective limb of the voluntariness test is also fulfilled as Roshdi subjectively relied on these inducements in furnishing the Contested Statements.

49 The last two arguments cannot even begin to be mounted until and unless we are persuaded that the Judge erred in finding that the Alleged Representations had never been made to Roshdi. And, simply put, we do not accept Mr Jumabhoy's submission that the Judge erred in this respect for three main reasons.

50 First, as a purported statement of law, the Alleged Fardlie Representation was incorrect and the CNB officers would have known this. Singapore's anti-drug laws are not generally concerned with questions of ownership, but with what a person does with the drugs. Hence, the fact that drugs do not *belong* to a suspect does not mean that the suspect "will not be hanged". In short, the "new law" referred to in the Alleged Fardlie Representation does not exist. In the specific context of a charge of trafficking in diamorphine under s 5 of the MDA, the threshold for capital punishment prescribed by the Second Schedule is trafficking in more than 15g of diamorphine. Mr Jumabhoy submitted that in 2012, Parliament introduced an alternative sentencing regime under s 33B of the MDA, pursuant to which the court has the discretion to sentence a convicted person to suffer the lesser punishment of life imprisonment where certain statutory requirements are met. However, this regime is only applicable where the offender is issued a certificate of substantive assistance or had suffered from a particular abnormality of mind in committing the offence, in which case the inquiry shifts to whether the offender's conduct falls within the very narrow confines of the relevant provision: see for instance our decision in *Zainudin bin Mohamed v Public Prosecutor* [2018] 1 SLR 449 at [80]–[84], [92] and [101]. It is inconceivable that as CNB officers, SSgt Fardlie and SSgt Ibrahim would not have known that the ownership of the drugs is not *determinative* of an offender's liability for capital punishment.

51 That being the case, if Roshdi's account is to be believed, SSgt Fardlie and SSgt Ibrahim must both have *knowingly* misrepresented the law to Roshdi in making the Alleged Representations to him. There is simply no basis at all to think that the two CNB officers would have done so. Indeed, prior to the recording of the relevant statements, Roshdi and the two CNB officers had never even met each other.

52 Further, on Roshdi's account, it is not at all clear what the two CNB officers hoped to obtain from him by making the Alleged Representations. In particular, we cannot fathom why the CNB officers would tell an arrested drug suspect to *deny* that the drugs seized were his. Before us, Mr Jumabhoy advanced a theory that the operation on 14 September 2016 was in fact targeted at Chandran. As set out at [48(a)] above, Roshdi contends that at the time of his arrest, the CNB already knew of Chandran's involvement and that Roshdi was merely safekeeping the Drugs for Chandran. Supposedly, SSgt Fardlie and SSgt Ibrahim therefore wanted to induce Roshdi to incriminate Chandran.

53 With respect, this theory is speculative, and it was categorically denied by the Prosecution. On the day of Roshdi's arrest, the CNB had brought along and presented Roshdi with a photo board of some 20 male subjects, from which Roshdi identified Chandran as "Aru". This fact, *in itself*, is circumstantial and cannot support the inference that the CNB officers must already have had specific knowledge of Chandran's involvement with Roshdi's drug activities.

54 To compound this, if there was substance in Roshdi's theory, SSgt Fardlie and SSgt Ibrahim would hardly have been so ambiguous about what exactly they were after or wanted Roshdi to say. The Alleged Fardlie Representation was "Now Singapore has a new law. If this thing is not yours,

you will not be hanged. You don't be afraid." Nothing in this alleged representation would remotely suggest to Roshdi that he was being encouraged to give a statement incriminating Chandran. As the Judge noted at [23] of the GD, the Alleged Fardlie Representation "did not suggest any particular preference or promise upon any particular course of action, whether explicitly or implicitly". The Alleged Ibrahim Representation that "[t]hose things are not yours, so you don't have to be afraid" was even more vague and would have been just as futile in achieving the CNB officers' purported objective. If the CNB officers were trying to get Roshdi to provide more information on Chandran, it would have been a straightforward matter for them to simply state this rather than to leave Roshdi to undertake an implausible degree of guesswork. Further, there would have been nothing improper in the CNB officers telling Roshdi that he might obtain a certificate of substantive assistance if he came within the specified circumstances. There was no need at all for them to have undertaken such an indirect and obscure approach, if this indeed was what they were after.

55 Second, we find Roshdi's account implausible because after SSgt Fardlie purportedly made the Alleged Fardlie Representation, Roshdi made no effort to inquire further about the "new law" that would supposedly help him avoid the capital punishment. This is wholly incompatible with Roshdi's own testimony, which was that based on his knowledge of the law, he thought he was "dead" after he was caught with the Drugs. Roshdi claimed that he could remember the Alleged Fardlie Representation so clearly because when he was told of the "new law", he "became alive" again and felt that he had gotten his "life back". Given the apparently significant impact that the Alleged Fardlie Representation had on him, it strikes us as incredible that Roshdi took SSgt Fardlie's alleged words at face value without any further inquiry. More

importantly, when the Cautioned Statement was recorded from Roshdi on the *very next day* (15 September 2016), Roshdi was specifically informed that if convicted of the charge against him, he was liable to be sentenced to death. Roshdi's evidence was that SSgt Ibrahim also told him the same thing before recording the 1st long statement on 21 September 2016. Yet, even though this would have run counter to the assurances that he claimed he had been given, at *no time* did Roshdi seek to clarify the discrepancy with ASP Sukumaran or SSgt Ibrahim.

56 We note that this is a point that was also taken into account by the Judge at [26] and [30] of the GD. Although the Judge's reasoning there was set out in the context of finding that Roshdi did not subjectively rely on the Alleged Representations, this is also clearly relevant to the anterior question of whether the Alleged Representations were made in the first place.

57 On appeal, Roshdi attempts to explain away his omission to seek any further clarifications on two grounds:

> (a) First, when the charge in the Cautioned Statement was read by ASP Sukumaran to Roshdi on 15 September 2016, it was explained to Roshdi that he was "liable" to be sentenced to death. The Judge failed to consider that based on the natural meaning of the word "liable", this merely meant that a death sentence was "one of the likely outcomes, but not the only outcome". Roshdi's apparent lack of reaction shows that he genuinely believed that he had nothing to be afraid of because of what he had been told.

(b) Second, the Judge's reasoning also ignores the fact that any dispute would be resolved at trial. As Roshdi told his lawyer what had transpired, his lawyer would properly raise the issue during the trial.

58 With respect, these submissions bear the hallmarks and sophistication of a legal mind that cannot reasonably or realistically be attributed to Roshdi. Further, as we pointed out to Mr Jumabhoy, if indeed Roshdi had such a sophisticated understanding of the law, then it is even more implausible he would have swallowed without reservation the false assurances allegedly given by the CNB officers regarding the "new law".

59 We observe that at [25] of the GD, the Judge also noted that Roshdi had a long-standing suspicion of CNB officers and so would have been expected to be sceptical (rather than trusting) of anything allegedly said by SSgt Fardlie. On appeal, Roshdi contends that the Judge had ignored the fact that his suspicion of CNB officers was nuanced. Whether his distrust of CNB officers was nuanced or not, we find it incredible that Roshdi would have been so accepting of the Alleged Representations when these ran counter to what he in fact believed was the position at law, and that he then said nothing when the caution was administered and he was specifically informed that he faced the prospect of capital punishment if convicted.

60 Third, the answers that were in fact given by Roshdi in the 1st contemporaneous statement after the Alleged Fardlie Representation was purportedly made make it impossible for us to accept Roshdi's account. The material part of the Alleged Fardlie Representation was, "*If this thing is not yours*, you will not be hanged." [emphasis added] However, when Roshdi was

then asked by SSgt Fardlie who the Drugs belonged to, he answered, "All belong to me." The relevant extract is reproduced below:

> Q1: Pointing to the exhibits which was recovered in the bedroom [of the Compassvale Unit], 'What are all these?'
>
> A1: 'Drug.'
>
> Q2: 'What drug?'
>
> A2: 'There are heroin, ice and ganja.'
>
> …
>
> Q4: 'All that belong to whom?'
>
> A4: 'All belong to me.'
>
> Q5: 'What for?'
>
> A5: 'To sell.'
>
> …

61 We think that taking Roshdi's answer in its proper context, what Roshdi possibly meant by his answer was that the Drugs were in his custody or possession. Nevertheless, if the Alleged Fardlie Representation had been made and if Roshdi believed it to the point of thinking he had been given a second chance at life, it is inconceivable that Roshdi would then immediately confirm that the Drugs "belong[ed]" to him instead of making sure to specifically deny this fact in particular, especially when this is now his primary contention. Roshdi did also say in the same statement that, "Actually I worked for this person. … His name is Aru. I only pack and keep the thing. If someone wants I will send". But having explicitly said that the Drugs "belong[ed]" to him, Roshdi did not state anywhere else in the Contemporaneous Statement that the Drugs were in fact owned by or belonged to "Aru". Given Roshdi's case that he thought he had got his "life back" when the Alleged Fardlie Representation was made to him, we would have expected Roshdi to be extremely clear about stating that the Drugs were not his. Yet, it was only in his Cautioned Statement

recorded on the next day (15 September 2016) that Roshdi stated for the first time that "[t]he one who owns the things is another person".

62 As the Prosecution pointed out and Mr Jumabhoy confirmed, Roshdi did not dispute that the contents of the Statements were an accurate record of what he had said. Mr Jumabhoy submitted, however, that as a matter of principle, we should not take into account the contents of the statement when considering its admissibility as evidence. It seems to us that his argument rested on the notion that a statement had to be admitted first, before its contents could be considered.

63 We disagree. In *Sulaiman*, we dealt with the question of whether the accused person's contemporaneous statement was admissible in evidence. There, the accused person claimed his statement had been made involuntarily because the recording officer had offered an inducement by telling him to "make it fast then you go and rest". The suggestion was that the recording officer was offering to rush through the statement-taking so that the accused person could then rest. At [56]–[58], we affirmed the trial judge's finding that no inducement had been offered, taking into consideration the fact that the *contents* of the statement did not at all bear out the accused person's allegation that the statement-taking had been rushed in any way. The accused person also alleged that he had been suffering from drug withdrawal symptoms at the material time, and his statement should therefore be excluded as a matter of the court's discretion at common law. This too was rejected. At [85]–[87], we found that the accused person was not suffering from any significant drug withdrawal symptoms and that *the accused person's coherent and clear answers* in his statement reinforced this finding. We specifically held (at [85]) that in determining whether the statement should be excluded, the court is entitled to consider the contents of the statement itself:

> We now consider the contents of the contemporaneous statement which, as mentioned, contained highly incriminating admissions. In our opinion, *the court is entitled to examine the contents of an impugned statement in its determination of whether it should be excluded or not.* This is particularly so in situations such as the present where the allegations centred on the level of alertness and consciousness of the person making the statement. The paramount concern of the court here is the reliability of the statement and it would be artificial and against common sense not to look at the contents of the statement when deciding whether there was prejudicial effect that outweighed its probative value. This is because the answers in the statement may reveal facts which were known only to the person making the statement or details which could not have been uttered by a person who was so mentally exhausted or confused or who was drifting in and out of consciousness. [emphasis added]

64 Indeed, we see no reason why the court should be precluded from examining the contents of the impugned statement when its admissibility is being contested. The court in this context and at this stage is not examining the contents of the statement as evidence pertaining to the substantive charge against the accused person. Rather, it is doing so as evidence of the factual circumstances surrounding the recording of the statement, which are directly relevant to the question of admissibility. In truth, in such circumstances, it would be "artificial and against common sense" not to look at what was said during the recording itself (see *Sulaiman* at [85]).

65 Mr Jumabhoy finally pointed out in his oral submissions that the search of the Compassvale Unit on 14 September 2016 had concluded at 8.28am. During the search, the door to Roshdi's bedroom was left open. However, when SSgt Fardlie later took Roshdi into the bedroom at 9am to record the 1st contemporaneous statement, the bedroom door was left only slightly ajar. SSgt Fardlie and Roshdi were alone there and no one else could hear the two men. Mr Jumabhoy suggested that the way in which the 1st contemporaneous

statement was recorded was odd and that no explanation was offered for why it needed to be done this way "if nothing untoward was going to be said".

66 We have already explained why we do not accept the submission that the Alleged Representations were made. The fact that SSgt Fardlie had recorded Roshdi's statement alone in the bedroom with the door left slightly ajar is wholly unpersuasive and insufficient as a ground for revisiting that conclusion. Nonetheless, if Roshdi's case was that SSgt Fardlie had done this for the purpose of improperly inducing Roshdi to make a particular statement, then it was incumbent on the Defence to have put this to SSgt Fardlie at the trial. As Mr Jumabhoy conceded, this was not done and SSgt Fardlie never had the opportunity to explain himself. Further, as we pointed out at the hearing, the Judge was fully cognisant of all the circumstances surrounding the recording of the 1st contemporaneous statement but nonetheless concluded that the Contested Statements were admissible (see GD at [22]).

67 We therefore affirm the Judge's finding that the Alleged Representations had not been made and this ends the inquiry as to the admissibility of Roshdi's Contested Statements. Nonetheless, for completeness, we explain briefly why even assuming that the Alleged Representations had been made to Roshdi, the objective and subjective limbs of the voluntariness test would not be satisfied in any case.

68 In our judgment, as an objective matter, the Alleged Representations do not constitute a threat, inducement or promise. Following from what we have said at [52]–[54] above, it is unclear from the Alleged Representations what exactly Roshdi was supposedly being induced to say or do. In the final analysis, the Alleged Representations were much too vague and ambiguous to constitute

a promise or inducement of any sort and there is certainly no threat at all to speak of. The Alleged Representations would give Roshdi no reasonable grounds for supposing that an advantage could be gained or an evil of temporal nature could be avoided by taking a particular course, leaving aside the difficulty that no such course was even suggested.

69 We also agree with the Judge that subjectively, the Alleged Representations did not operate on Roshdi's mind when he gave the Contested Statements. As discussed at [55]–[59] above, Roshdi has no explanation for why he failed to seek any clarification about the vague assurances allegedly given to him in the light of what he in fact believed was his predicament. Roshdi's claim that he believed and relied on these assurances also cannot be reconciled with the fact that he never denied in the 1st contemporaneous statement that the Drugs belonged to him (see [60]–[61] above).

70 In the circumstances, the Judge's finding that the Contested Statements were made voluntarily cannot be impugned. There is also no basis for excluding the Contested Statements in the exercise of our discretion. It will be apparent from our discussion at [90]–[91] below that the Contested Statements are highly probative of Roshdi's intention to traffic in the Drugs. Roshdi himself makes no attempt to suggest that there is any prejudicial effect exceeding such probative value. The Contested Statements are therefore admissible and were correctly relied on by the Judge.

Whether Roshdi was correctly convicted of the Charge

71 We now consider the question of Roshdi's conviction.

The law governing the burden of proof and the evidential burden

72 The law governing the burden of proof and the evidential burden in criminal cases is well-established. As explained in *Public Prosecutor v GCK and another matter* [2020] 1 SLR 486 ("*GCK*") at [130], the "legal burden" is the burden of proving a fact to the requisite standard of proof and this is encapsulated in ss 103 and 105 of the Evidence Act (Cap 97, 1997 Rev Ed) ("EA"). The legal burden does not shift throughout the trial. The Prosecution always bears the legal burden of proving the charge against the accused person *beyond a reasonable doubt*.

73 The accused person may, however, sometimes bear the legal burden of rebutting a statutory presumption or proving certain statutory defences and exceptions to liability. Thus, s 107 of the EA provides that an accused person must prove that he comes within any of the "general exceptions in the Penal Code [Cap 224, 2008 Rev Ed]" or "any special exception or proviso contained in any other part of the [same code], or in any law defining the offence". In such situations, the legal burden is on the accused person to prove, *on the balance of probabilities*, the existence of such facts (see, in this regard, Jeffrey Pinsler, *Evidence and the Litigation Process* (LexisNexis, 6th Ed, 2017) ("*Pinsler*") at para 12.012).

74 The "evidential burden", on the other hand, is the burden to adduce sufficient evidence to raise an issue for the consideration of the trier of fact (*GCK* at [132]).

75 In *GCK* (at [133]), this court explained that in criminal cases, the evidential burden generally lies on the Prosecution, which has to "satisf[y] its evidential burden on [the] issue by adducing sufficient evidence, which if

believed, is capable of establishing the issue beyond reasonable doubt" (citing Colin Tapper, *Cross and Tapper on Evidence* (Oxford University Press, 12th Ed, 2010) ("*Cross and Tapper"*) at p 122). The evidential burden in respect of certain facts may, however, lie on the Defence in the first instance depending on the nature of the accused person's defence and the fact in issue that is raised. The evidential burden can shift to the opposing party once it has been discharged by the proponent (see *Nabill* at [69]; and *Public Prosecutor v BPK* [2018] SGHC 34 at [144]–[145]).

76 We considered these issues in *Nabill* and according to the Prosecution, our observations there at [70]–[71] have been misinterpreted. The Prosecution suggests that these paragraphs might lead one to conclude that by reason of our decision in *Nabill,* all the Defence has to do is to make an assertion that is not inherently incredible and this, in and of itself, will suffice to shift the evidential burden to the Prosecution. This is what we referred to earlier as the Purported Interpretation of *Nabill*. We note that these paragraphs were situated within a wider discussion at [68]–[82] as to why the Prosecution's omission to call a "material witness" could result in a finding that it had failed to discharge its evidential burden in respect of a material fact in issue and/or the drawing of an adverse inference against it. We also emphasise that the entirety of that section of the judgment repays careful reading. But we now focus on the paragraphs in question and, for convenient reference, we reproduce [68]–[71] of the judgment:

> *The Prosecution's evidential burden and the drawing of adverse inferences*
>
> 68 The principles relating to the Prosecution's burden of proof were the subject of our recent decision in [*GCK*]. There, we explained that embedded within the concept of proof beyond a reasonable doubt is the Prosecution's legal burden to prove the charge against the accused person beyond a reasonable doubt and its evidential burden to adduce sufficient evidence to

address facts that have been put in issue (see *GCK* at [130] and [132]). The latter burden might also rest on the Defence, depending on the nature of the defence and the fact in issue that is being raised (see *GCK* at [133]).

69 As regards the evidential burden, it is well established that this is a burden which can shift between the parties. This burden was explained in *Britestone Pte Ltd v Smith & Associates Far East, Ltd* [2007] 4 SLR(R) 855 at [58] as follows:

> … [The evidential burden] is more accurately designated the evidential burden to produce evidence since, whenever it operates, the failure to adduce some evidence, whether in propounding or rebutting, will mean a failure to engage the question of the existence of a particular fact or to keep this question alive. As such, this burden can and will shift.

70 In our judgment, *the Question in the present case squarely engages the Prosecution's evidential burden to adduce sufficient evidence to rebut a defence raised by the accused person that has properly come into issue. We are concerned here with the narrow situation where an accused person has advanced a* ***specific*** *defence which identifies* ***specific*** *material witnesses and the Prosecution, despite having had access to these witnesses, has chosen not to call them.*

71 In this specific situation, it seems obvious to us that the Prosecution ought to call the material witnesses in question if it is necessary to do so in order to discharge its evidential burden. *To be clear, the Prosecution would not need to call these witnesses if it is satisfied that it can rely on other evidence to discharge its evidential burden*, such as, for example, close circuit television ('CCTV') records which directly contradict the accused person's defence. *Neither would there be any question of the Prosecution having to discharge its evidential burden by calling these witnesses if the accused person's defence is patently and inherently incredible to begin with. Subject to these obvious limitations, the Prosecution runs a real risk that it will be found to have failed to discharge its evidential burden on material facts in issue if the Defence has adduced evidence that is* ***not inherently incredible*** *and the Prosecution fails to call the relevant material witnesses to rebut that evidence.*

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

77 With respect, we are unable to see how the last two of these paragraphs can reasonably be read to suggest that in respect of material facts in issue, the evidential burden will necessarily shift from the Defence to the Prosecution as long as the accused person raises an assertion that is "not inherently incredible". The Purported Interpretation is plainly incorrect, both as a reading of *Nabill* and as a proposition of law because it rests on a failure to understand what the evidential burden entails. For this, we need only to reiterate what we said in *Nabill* at [69]. The evidential burden is the burden to produce sufficient evidence to keep a question of fact alive. If one side has raised credible evidence and the other side fails to engage with that or rebut it, then that other side will have failed to discharge *its* evidential burden.

78 *Nabill* (at [70]–[71]) was explicitly concerned with the situation where an accused person was advancing a specific defence and had discharged the evidential burden of raising sufficient evidence. In the language used in *Nabill* at [70], this was a situation where the specific defence raised by the accused person had "properly come into issue". In such circumstances, the evidential burden then shifts to the Prosecution to "adduce sufficient evidence to *rebut* [the] defence raised" [emphasis added]. This, in fact, is entirely straightforward and uncontroversial. We then made two elaborations at [71] which were meant to clarify the position for the Prosecution. First, because this discussion concerned the duty to call a "material witness", we emphasised that the Prosecution would not have to call a material witness if the Prosecution could discharge its evidential burden by recourse to other evidence (such as closed circuit television recordings). Second, and really by way of reiterating the initial point, which is the necessity for *the Defence* to first raise sufficient evidence to put a defence properly in issue, we said there would be no question of the Prosecution having to discharge its evidential burden by calling a material

witness "*if the accused person's defence is patently and inherently incredible to begin with*" [emphasis added]. To put it simply, where this is the case, the accused person would not have raised sufficient evidence to put his defence properly in issue.

79 None of this bears directly on the adequacy of the evidence that must be adduced by either side. Where the overall legal burden is on the Prosecution, the accused person's evidential burden is to point to such evidence as is capable of generating *a reasonable doubt*. Hence, in *GCK* (at [145]), this court held:

> … [*W*]*hat the Defence needs to do to bring the Prosecution's case below the requisite threshold is to point to such evidence that is* ***capable of generating a reasonable doubt***: see *Pinsler* at para 12.009. If the Prosecution fails to rebut such evidence, it will necessarily fail in its overall burden of proving the charge against the accused person beyond a reasonable doubt. … [emphasis added in italics and bold italics]

80 Where the legal burden instead rests on the accused person to prove certain statutory defences and exceptions to liability (see [73] above), the accused person's burden will typically be to point to such evidence as is capable of proving the existence of the relevant facts on the *balance of probabilities*.

81 In either case, it goes without saying that if the accused person's evidence is *inherently incredible*, he would have failed to discharge his evidential burden of properly putting his defence into issue. As we noted in *Gobi a/l Avedian v Public Prosecutor* [2021] 1 SLR 180 ("*Gobi*") at [57(d)] (citing *Nabill* at [70]–[71]), there would be no question of the evidential burden shifting to the Prosecution to rebut the accused person's defence simply because "a hopeless defence … raises nothing to rebut".

82 These principles (at [79]–[81] above) are well-settled and entirely in line with the established law set out in *GCK* at [129]–[149]. *Nabill* did *not* change the established law governing the operation of the legal and evidential burdens in criminal cases. Indeed, in *Nabill*, we specifically began our analysis of the legal and evidential burdens at [68]–[69] by affirming the established law in *GCK*. In *Moad Fadzir bin Mustaffa v Public Prosecutor* [2020] 2 SLR 1364 (at [16]), it was also stated that "[t]his court's pronouncements [in *Nabill*] concerning the evidential burden did not result in any change in the law".

83 That *Nabill* involved a straightforward application of existing law is also evident from our reasoning on the facts of that case itself. There, the appellant ("Nabill") was convicted of a capital charge of having diamorphine in his possession for the purpose of trafficking (the "first charge") and another capital charge of having cannabis in his possession for the purpose of trafficking (the "second charge"). In respect of the first charge, it was undisputed that Nabill had possession of the diamorphine and knowledge of its nature, and the sole issue was whether Nabill had rebutted the presumption of trafficking under s 17 of the MDA. As for the second charge, Nabill admitted that he had possession of the drug. The issue was whether Nabill had rebutted the presumption of knowledge under s 18(2) of the MDA, and if not, whether he possessed the cannabis for the purpose of trafficking.

84 In respect of the first charge, we examined in *Nabill* the evidence relating to whether Nabill had the diamorphine in his possession for the purpose of trafficking (at [97]–[135]). We found that Nabill's defence was not incredible and that the trial judge had erred in rejecting the two key assertions that made up Nabill's defence (*Nabill* at [94], [104], [118], [119] and [122]). In all the circumstances, *we accepted Nabill's assertion* that he had the diamorphine in

his possession in order to return it to certain other persons and therefore that he had rebutted the presumption of trafficking in s 17 of the MDA: see *Nabill* at [137]. Nabill's conviction on the first charge was accordingly set aside and he was convicted on an amended charge of simple possession under s 8(*a*) of the MDA.

85 As to the second charge, we similarly scrutinised the evidence at [143]–[156] to determine whether Nabill had knowledge of the nature of the cannabis. This incorporated (at [145] of *Nabill*) our earlier analysis of Nabill's defence (at [104]–[114]) in relation to the first charge. We ultimately found on the facts that there was *no reason to disbelieve Nabill's defence* (at [146]) and given the failure of the Prosecution to discharge its evidential burden, we held at [157] that Nabill had successfully rebutted the presumption of knowledge in s 18(2) of the MDA. Nabill was accordingly acquitted of the second charge.

86 It is apparent that in respect of the relevant issues for each charge, we concluded that Nabill had successfully shifted the evidential burden to the Prosecution only after a lengthy and comprehensive analysis of the evidence. It follows that having properly put his defence in issue, Nabill succeeded because on the totality of the evidence before the court, Nabill had discharged his burden to the requisite standard of proof.

87 In the present case, the Prosecution bears the legal burden of proving the Charge against Roshdi beyond a reasonable doubt. As mentioned, the elements of possession and knowledge are made out given that Roshdi has admitted to them. The only disputed element is that of possession for the purpose of trafficking. Since the Prosecution relies on the presumption under s 17(*c*) of the MDA to contend that Roshdi had the Drugs in his possession for the purpose of

trafficking, the legal burden is on Roshdi to rebut the presumption of trafficking and he also bears the evidential burden of adducing sufficient evidence to raise an issue for the consideration of the trier of fact (see *Nabill* at [70]–[71]).

88 Bearing this in mind, we turn to the remaining steps in the analysis to consider whether the element of possession for the purpose of trafficking is made out.

Whether the element of possession for the purpose of trafficking is made out

Roshdi's safekeeping defence

(1) Whether the Judge erred in disbelieving Roshdi's safekeeping defence

89 In finding that the element of possession for the purpose of trafficking was made out, the Judge relied upon Roshdi's admissions in the Statements and disbelieved his safekeeping defence (see [23]–[24] above). Roshdi's four contentions against the Judge's finding have been set out at [27] above. The Prosecution's rebuttals, in brief, are that: (a) Roshdi's Statements contain highly probative admissions of his intention to repack the Drugs for sale; (b) the extrinsic evidence confirms this; (c) Roshdi was not safekeeping the Drugs for Chandran; and (d) Roshdi was not a credible witness.

90 In our judgment, the Judge was correct not to accept Roshdi's safekeeping defence as a matter of fact. As the Judge noted at [32]–[38] and [41] of the GD, Roshdi gave a textured and clear account in his Statements as to the role he played in receiving, packing, selling and distributing drugs. At the earliest opportunity that he had to explain himself after his arrest, Roshdi admitted in his 1st contemporaneous statement that he had the Drugs in his possession for sale (see the extract at [60] above). Roshdi also listed the prices

which the Drugs would be sold at and said that he would "pack and keep the thing" and "[i]f someone wants [he] will send".

91 In the 5th long statement, Roshdi also specifically said that the exhibits making up the Drugs (namely, H1A, H2A, H5A, H5C, J1A and J2A) were for sale. He further mentioned: (a) that he was instructed by "Aru" to sell the packets marked H1A and J1A at between $70 and $80 per packet; (b) how he would pack the straws marked H2A with diamorphine to prepare them for sale; and (c) that in respect of J2A, he would put 36 straws of diamorphine into an empty cigarette box to prepare it for sale. As to the various drug paraphernalia that had been seized, Roshdi admitted that the digital weighing scales were used to weigh and pack drugs and he also described the process by which he packed the diamorphine into straws. These detailed explanations all point strongly to the fact that Roshdi had the Drugs in his possession for the purpose of trafficking. As the Judge noted (at [41] of the GD), there is no explanation for why Roshdi would know the precise pricing details of the Drugs if his role had been just to safekeep them.

92 It was only at trial that Roshdi claimed *for the first time* that his role was limited to safekeeping and that he had intended to return the Drugs to Chandran on Chandran's return from India (see [20] above). On appeal, Mr Jumabhoy submitted that Roshdi's evidence from the outset was that the Drugs were owned by someone else and that he was working for Chandran (see [27(a)] above). Crucially, however, Roshdi *never* said in his Statements that he was only *safekeeping* the Drugs for Chandran, which was the nub of his defence at trial. The claim that Roshdi was only safekeeping the Drugs was simply inconsistent with everything else he said in his Statements about the Drugs (see at [91] above.)

93 At [44] of the GD, the Judge assessed and found Roshdi's explanations for the discrepancies between his Statements and his safekeeping defence at trial to be incoherent. We broadly agree with this. We only add that even if the Drugs did belong to someone else and Roshdi was working for Chandran, this was not inconsistent with Roshdi having the intention to traffic in the Drugs (see GD at [34]). It is common knowledge that in the drug trade, many traffickers deal in drugs delivered to them by someone else and they do so under the direction of other persons who are further up the chain of command within the drug syndicate.

94 In addition to this, if indeed Roshdi's alleged safekeeping defence is genuine, we find it incredible that Roshdi would have omitted to mention such a significant fact in his Statements given all the other details as to his trafficking activities that he *did* admit to.

95 As for Roshdi's second contention on appeal, this is to the effect that the Judge failed to properly scrutinise the evidence relating to Chandran's involvement (see [27(b)] above). We do not see any merit in this argument.

96 By way of brief background, Chandran was first identified when he entered Singapore on 19 January 2019 and was arrested in connection with the present matter. Assistant Superintendent Yang Rongluan ("ASP Yang") was in charge of the investigations. Although Chandran was initially charged with abetting Roshdi to commit drug trafficking, Chandran was eventually granted a discharge not amounting to an acquittal on 19 March 2019 and repatriated that same day. According to ASP Yang's testimony, this was because her investigation findings did not disclose that Chandran had any involvement relating to the Drugs found in Roshdi's possession.

97 Chandran furnished a number of statements to the CNB and these provide little support for Roshdi's safekeeping defence. The thrust of Chandran's account in his statements was as follows. In 2016, Chandran was looking for a job in Singapore before his visitor's pass expired. A friend referred him to Roshdi, who told him that he could assist in getting Chandran a job. Chandran gave Roshdi $3,000 for this purpose. During the period that Chandran was still awaiting Roshdi's response, Chandran left Singapore because his visitor's pass was about to expire. He went to stay in Batam from 14 to 23 August 2016 and intended to re-enter Singapore on a new visitor's pass. However, his attempt to enter Singapore on 23 August 2016 was unsuccessful and he returned to Batam and stayed there from 24 to 29 August 2016. On 29 August 2016, Chandran was allowed back into Singapore on a one-day special pass so that he could take a flight from Singapore to India. On 30 August 2016, he flew to India. About two days after Chandran returned to India, Roshdi informed Chandran that Chandran's job application was unsuccessful and that he would not return Chandran the $3,000 unless Chandran came back to Singapore. Chandran did not pursue the matter any further.

98 Given this version of events, there is nothing to suggest that the evidence of Chandran's involvement should have made the Judge more "predisposed to believe Roshdi's account". Save that Chandran had wanted to remain in Singapore but in the circumstances was compelled to return to India, nothing in Chandran's statements coheres with Roshdi's claim that Chandran was involved in drug trafficking and had delivered the Drugs to him for safekeeping. We therefore dismiss Roshdi's second contention.

99 As for Roshdi's third contention (at [27(c)] above), this concerns the Prosecution's alleged breach of its additional disclosure obligations and we address this at [178]–[182] below.

100 Turning to the fourth contention, some of the drug paraphernalia seized from Roshdi's bedroom (including spoons, various pieces of paper and digital weighing scales) were stained with diamorphine and/or had Roshdi's DNA on them (see GD at [42]). Roshdi's argument is that this evidence is insufficient to prove that he had the Drugs in his possession for the purpose of trafficking. On the other hand, the Prosecution's position is that this evidence contradicts Roshdi's defence that he was only safekeeping the Drugs for Chandran and shows that Roshdi was in fact involved in packing diamorphine.

101 In our judgment, the extrinsic evidence is consistent with Roshdi's admissions in his Statements that he had used the drug paraphernalia to weigh and pack drugs. At the same time, the said evidence is *also* consistent with Roshdi's safekeeping defence. Roshdi's testimony at trial was that Chandran was engaged in trafficking drugs, gave him pre-packed drugs, and was the one who had handed him the drug paraphernalia in question before leaving for India. On Roshdi's account, the possibility that the said paraphernalia had been given to him *already stained* with diamorphine cannot be ruled out. In similar vein, even if Roshdi had been given the paraphernalia for safekeeping, it is plausible that his DNA would be found on the items. We therefore find that the extrinsic evidence does not point strongly one way or the other.

102 However, taking all the evidence together in the round, it is clear that the Judge was entitled to disbelieve Roshdi's safekeeping defence. Indeed, Mr Jumabhoy conceded that if the Contested Statements were found to be

admissible, Roshdi's safekeeping defence would not be tenable. For all these reasons, we are satisfied that the available evidence strongly points to the conclusion that Roshdi had the Drugs in his possession for the purpose of trafficking and the Judge was therefore entitled to come to this finding. In any event, *even if* we were to assume that Roshdi had a safekeeping arrangement with Chandran, we are satisfied that the element of possession for the purpose of trafficking would nevertheless be made out. We explain this next.

(2) The legal position with respect to an alleged "bailment" of drugs and the Bailment Question

103 We begin with a discussion of our holding in *Ramesh*, which concerned two related criminal appeals. For present purposes, the relevant facts of *Ramesh* can be briefly stated. The appellant in the first appeal ("Ramesh") and the appellant in the second appeal ("Chander") were drivers engaged by a company based in Malaysia that made deliveries to locations in Singapore. On 26 July 2013, Chander drove Ramesh into Singapore in a lorry (the "first lorry"). After clearing the Woodlands Checkpoint, Chander drove to a carpark along Woodlands Road where another lorry (the "second lorry") was parked. At some point during the journey, Ramesh received a blue bag ("D1") containing four bundles of diamorphine (the "D bundles") from Chander. At the carpark, Ramesh alighted from the first lorry and boarded the second lorry, carrying D1 with him. Chander and Ramesh then drove off separately. When Ramesh arrived in the second lorry at the premises of a certain building, he was arrested by CNB officers. The CNB officers searched the second lorry and found D1, which contained the D bundles. Chander had also been arrested at the same premises just shortly before that, and other drugs were seized from the first lorry.

104 Ramesh was charged with possession of the D bundles for the purpose of trafficking and Chander was charged with trafficking by delivering the D bundles to Ramesh. Two other trafficking charges were also brought against Chander, but they are not material for present purposes.

105 In respect of the charge against Ramesh, the Prosecution's primary case was that Ramesh had agreed to deliver the D bundles to a third party recipient in Bedok at Chander's behest. However, there was no evidence as to who Ramesh was supposed to deliver the drugs to or how much he was offered for delivering them. Furthermore, Chander's evidence was also that Ramesh had been extremely reluctant to deliver the bundles. We concluded in all the circumstances that there could be other reasons for Ramesh agreeing to take the D bundles. At least one reasonable possibility was that Ramesh was merely safekeeping the D bundles for Chander and had intended to return them to him later that day (*Ramesh* at [87]). This defence was reasonably available on the evidence. The Prosecution then submitted, in the alternative, that *even if* Ramesh had intended to return the D bundles to Chander, that intended act would have constituted "trafficking" as defined in s 2 of the MDA such that Ramesh would nonetheless have been in possession of the D bundles for the purpose of trafficking.

106 It was in this context that we examined in *Ramesh* the legal position with respect to what was loosely described as a "bailment" of the drugs. For this purpose, an alleged "bailment" of drugs refers to a situation where an accused person (as a "bailee") receives drugs from another person (the "bailor") intending to return the drugs to that person and in fact does so. The question in *Ramesh* was whether in such a situation, the accused person "traffics" in such drugs by returning them to the "bailor" (see *Ramesh* at [100]).

107 Before we elaborate, we clarify our use of certain terminology. As explained in *Ramesh* at [100], the use of the term "bailment" in this context is not concerned with the law of bailment, and the determination of property rights as between the "bailor" and "bailee" is not in issue. The use of the term "bailment" also does not entail the legal incidents of a relationship of bailment. Instead, we use the term as a convenient shorthand to refer to a situation where a person initially entrusts drugs to an accused person, and the accused person receives the drugs intending only to return them to that person.

108 At [103] of *Ramesh*, we began the analysis by noting that the definition of "traffic" in s 2 of the MDA is "to sell, give, administer, transport, send, deliver or distribute" or to offer to do any of these things. On its face, it was not clear whether the word "deliver" should include the act of returning drugs to a person originally in possession of them (*Ramesh* at [105]). Taking a purposive approach to interpretation, we concluded (at [108]–[109]) that in enacting the MDA and imposing harsh penalties for trafficking offences, Parliament was not simply concerned with addressing the movement of drugs *per se*, but the *movement of drugs along the supply chain towards the end-users.* The legislative intention was to target those involved in the supply and distribution of drugs.

109 In this light, we continued in *Ramesh* (at [110]) as follows:

> 110 The implications of this legislative policy on the interpretation of the MDA are demonstrated in the decision of the Privy Council in *Ong Ah Chuan* … where Lord Diplock construed the word 'transport' in s 3 of the 1973 MDA to mean moving drugs from one person to another (at [10]), rather than simply from one place to another. … [Lord Diplock] concluded that supplying or distributing addictive drugs to others is the evil against which s 3 (the provision in the 1973 MDA which created the offence of trafficking) was directed. We agree with

> the views of Lord Diplock and, ***in our judgment, a person who returns drugs to the person who originally deposited those drugs with him would not ordinarily come within the definition of 'trafficking'. It follows that a person who holds a quantity of drugs with no intention of parting with them other than to return them to the person who originally deposited those drugs with him does not come within the definition of possession of those drugs 'for the purpose of trafficking'.*** There is a fundamental difference in character between this type of possession and possession with a view to *passing the drugs onwards* to a third party. In the former situation, the returning of the drugs to a person who already was in possession of them to begin with cannot form part of the process of disseminating those drugs in a particular direction – *ie*, from a source of supply towards the recipients to whom the drugs are to be supplied – because the act of returning the drugs runs counter to that very direction. On the other hand, in the latter situation, the intended transfer of the drugs to a third party is presumptively part of the process of moving the drugs along a chain in which they will eventually be distributed to their final consumer. [emphasis in original in italics, emphasis added in bold italics and bold underlined italics]

110 It is the sentence that has been underlined in bold italics above which Roshdi relies on in this appeal. On this basis, Roshdi argues that since he was merely safekeeping the Drugs for Chandran and had intended all along to return them to Chandran, he did not have the Drugs in his possession for the purpose of "trafficking" as defined in the MDA. This, however, rests on a fundamental misapprehension of our holding in *Ramesh*.

111 In *Ramesh* (at [110]), we began with the observation that "a person who returns drugs to the person who originally deposited those drugs with him would not *ordinarily* come within the definition of 'trafficking'" [emphasis added]. The key thrust of our reasoning in *Ramesh* (at [110]) was that the *mere act* of receiving drugs from and returning them to a "bailor" would not *ordinarily* be sufficient in itself to make out the element of trafficking. This is because such a transfer would not necessarily form part of the process of distributing drugs to

end-users, which is what underlies the principal legislative policy behind the MDA. This may be contrasted with a transfer of drugs onwards to a third party, which would "presumptively" be part of the process of moving the drugs along a chain in which they will eventually be distributed to their final consumer.

112 This is made clear at [114] of *Ramesh*, where we specifically stated that if "a person … merely holds the drugs as 'bailee' with a view to returning them to the 'bailor' who entrusted him with the drugs in the first place", "[s]uch a person cannot, *without more*, be liable for trafficking because the act of returning the drugs is not *part of* the process of supply or distribution of drugs" [emphasis in original]. We set this statement out in context as follows:

> 114 … [W]hile we have endorsed Lord Diplock's observation that the ordinary meaning and statutory definition of traffic in the MDA contemplates the existence of a supplier and a party to whom the drugs are supplied, and while we have also found that Parliament's objective under the MDA was to address the movement of drugs towards end-users, *this should not be taken as any suggestion that establishing the offence of trafficking or possession for the purpose of trafficking requires the Prosecution to prove that the accused was moving the drugs closer to their ultimate consumer. In the vast majority of cases, it can reasonably be assumed that the movement of drugs from one person to another, anywhere along the supply or distribution chain, was done to facilitate the movement of drugs towards their ultimate consumers. It is clear, however, that this assumption does not hold true in the case of a person who merely holds the drugs as 'bailee' with a view to returning them to the 'bailor' who entrusted him with the drugs in the first place.* ***Such a person cannot, without more, be liable for trafficking because the act of returning the drugs is not part of the process of supply or distribution of drugs.*** [emphasis in original omitted; emphasis added in italics, bold italics and bold underlined italics]

113 This was also stated in the introduction of our judgment in *Ramesh* (at [4]):

> … As we shall explain, *where an individual merely returns drugs to the person from whom he received them, this* ***without more*** *does not come within the definition of trafficking*. Similarly, where an individual is in possession of drugs for the intended purpose of returning them to the person from whom he received them, such an individual cannot be said to possess those drugs for the purpose of trafficking. [emphasis added in italics and bold italics]

114 On the facts in *Ramesh,* there was no evidence as to what Ramesh was to do with the D bundles (see *Ramesh* [86]–[87] and [116]). In these circumstances, we concluded that the fact that Ramesh had taken the D bundles intending to return them to Chander could not, without more, amount to possession for the purpose of trafficking (*Ramesh* at [88] read with [114]–[115]).

115 *Ramesh* (at [110]) did *not* establish the general proposition that any "bailee" who receives drugs intending to return them to the "bailor" will *never* be liable for trafficking (or possession for the purpose of trafficking). Much will depend on the circumstances. In our judgment, the key inquiry is whether the "bailee" in question *knew or intended* that the "bailment" was in some way part of the process of supply or distribution of the drugs.

116 This logically follows from a purposive interpretation of the term "traffic" in the MDA. As we stated in *Ramesh* (at [108]–[110]), the legislative policy behind the MDA is to target those involved in the supply and distribution of drugs within society. A "bailee" who engages in a "bailment" arrangement *knowing or intending* that the "bailment" would be part of this process of supply and distribution falls within the class of persons targeted by that legislative policy. Conversely, in the absence of such knowledge or intention, the "bailee" cannot be said to be "trafficking" in a purposive sense.

117 While we are concerned here with the "bailee's" subjective state of mind at the material time, the requisite knowledge and/or intention may be inferred from the *surrounding objective facts*, including the "bailee's" own conduct and any other relevant circumstances.

118 In our view, factors which may indicate that the "bailee" knew or intended that the "bailment" was part of the process of distribution may include the following:

(a) The "bailment" in question was part of a systematic arrangement for safekeeping drugs, rather than an isolated, spontaneous or one-off occurrence.

(b) The "bailee" was to receive some kind of remuneration or reward for safekeeping the drugs.

(c) The "bailee" knew that the "bailment" was meant to assist in evading detection by the authorities (as is the case when the "bailee's" role is to provide a safehouse for drugs).

These factors are not exhaustive. Equally, no single factor is necessarily determinative. The weight to be given to any of them will depend on all the circumstances.

119 We add for completeness that whilst the presence of the factors at [118] above could point towards a finding that the accused person was trafficking in drugs or in possession of drugs for the purpose of trafficking, their *absence* does not mean that the "bailee" was therefore not acting as part of the process of supply or distribution. The key inquiry is whether the "bailee" knew or intended

that the "bailment" in question was part of the process of supplying or distributing drugs. If so, he would be liable *even if* he did not receive any reward, the "bailment" was a one-off occurrence, or its purpose was not to evade detection.

120 Finally, we reiterate the point made at [114] of *Ramesh* that in establishing the fact of trafficking (or possession for the purpose of trafficking), there is *no requirement* that the Prosecution must prove that the accused person was moving the drugs in a particular direction closer to their ultimate consumer. It would be naive to think that drug syndicates engage only in the uni-directional movement of drugs from supplier to dealer to consumer. Instead, in the bid to evade detection by the authorities, there will often be twists and turns in the chain of supply and distribution, with suppliers, couriers, safekeepers, dealers and other operators forming links in a circuitous chain.

121 We now apply these principles to the present facts.

(3) Whether, assuming that Roshdi's safekeeping defence is believed, the element of possession for the purpose of trafficking is nevertheless made out

122 The crux of Roshdi's safekeeping defence that was mounted at trial is that he was only keeping the Drugs safe for Chandran and had intended all along to return them to Chandran (see [20] above). At the hearing before us, the Prosecution submitted that on the totality of the evidence in this case, even assuming Roshdi's belated account as to the safekeeping defence was accepted, this nonetheless sufficed to amount to trafficking. Mr Jumabhoy contended otherwise.

123 As the Judge noted in the GD (at [48]), Roshdi's testimony was that he knew the nature of the Drugs that he was allegedly safekeeping for Chandran. This was part of a systematic arrangement in which Roshdi would keep drugs for periods of time for Chandran in exchange for money. According to Roshdi, he had initially declined to help Chandran in this way but he was later persuaded to do so by Chandran's offer to pay him between $200 and $300 for each delivery. Roshdi was thus a "bailee" of the Drugs for reward. Importantly, Roshdi knew that Chandran was engaged in trafficking diamorphine (amongst other drugs). Roshdi testified that when Chandran's customers wanted the drugs, he would deliver the drugs that he was allegedly safekeeping either to Chandran or to Chandran's couriers. This is precisely what trafficking entails. In respect of the Drugs in question, Chandran apparently could not sell them before his trip to India and he handed the Drugs to Roshdi for safekeeping until his intended return some weeks later.

124 In these circumstances, Roshdi was undoubtedly aware that by supposedly safekeeping the Drugs for Chandran, he was facilitating the process of their intended sale and distribution. Roshdi's intended act of returning the Drugs to Chandran would therefore fall within the purposive interpretation we have given to the terms "delivery" and "trafficking" as set out the MDA. It follows that even on the case that Roshdi mounted at trial, he would nevertheless have been in possession of the Drugs for the purpose of trafficking.

125 We also note that Roshdi would alternatively have been liable for abetment of trafficking by aiding, which is an offence under s 5(1)(*a*) read with s 12 of the MDA but as this was not the charge pressed against him, we say no more on this.

The Prosecution's omission to call Chandran as a witness

126 To summarise the position thus far, we have held that the Judge did not err in disbelieving Roshdi's safekeeping defence. We also considered that *even if* Roshdi's case that he was safekeeping the Drugs was accepted, the element of possession for the purpose of trafficking would nevertheless be made out. This leads to the inevitable conclusion that on his own evidence, Roshdi was in possession of the Drugs for the purpose of trafficking and that in any event, Roshdi has no grounds to rebut the presumption of trafficking in s 17(*c*) of the MDA. That being the case, there is no question of the evidential burden ever having shifted to the Prosecution to rebut Roshdi's safekeeping defence. To reiterate what we have said, a hopeless defence raises nothing to rebut (*Gobi* at [57(d)]).

127 In that light, we turn to Roshdi's third contention (at [27(c)] above) which is that Chandran was a "material witness" and that the Prosecution's omission to call him to testify means that it has "failed to discharge its burden of proof to rebut Roshdi's safekeeping defence".

128 Chandran could notionally be considered a "material witness" in that he could be expected to confirm or contradict Roshdi's safekeeping defence in material respects. However, as just discussed, the so-called safekeeping defence is *no defence at all*. The burden is on Roshdi to rebut the presumption in s 17(*c*) of the MDA and he has done nothing to this end. Given that the evidential burden never shifted to the Prosecution to rebut Roshdi's safekeeping defence, it was wholly unnecessary for the Prosecution to call Chandran as a witness for that purpose.

Principles governing the Prosecution's additional disclosure obligations

129 We deal finally with the issues relating to the Prosecution's additional disclosure obligations in *Nabill*. These were raised in the context of the disclosure by the Prosecution of Chandran's statements. The disclosure was made as soon as it became evident that Roshdi might be attempting to mount a defence based on the contention that he was safekeeping the Drugs for Chandran. As we have held that this was a hopeless defence in the present circumstances, the question of the additional disclosure obligations does not in fact arise. Nonetheless, as the point was canvassed before us, we make some brief observations on this.

130 In *Nabill,* we held that the Prosecution has a duty to disclose to the Defence statements given by a "material witness", where the said witness is not a prosecution witness. A "material witness" was specifically defined as a witness who could be expected to confirm or contradict an accused person's defence in material respects. This is the Current Definition that we referred to above. Our key holdings in *Nabill* may be summarised thus:

(a) The Prosecution has a duty to disclose the statements of all material witnesses to the Defence (*Nabill* at [39]).

(b) As to timing, the Prosecution ought to satisfy its additional disclosure obligations:

(i) when it files and serves the Case for the Prosecution on the accused person, if the statutory criminal case disclosure regime (the "CCD regime") applies; or

(ii) at the latest, before the trial begins, if the CCD regime does not apply.

These timelines are the same as those which apply in respect of the Prosecution's disclosure obligations set out in *Kadar* at [113] (the "*Kadar* obligations"). Like the *Kadar* obligations, the Prosecution's additional disclosure obligations constitute a "continuing obligation which only ends when the proceedings against the accused person (including any appeal) have been completely disposed of" (*Nabill* at [50]).

131 These key holdings essentially flowed from the fundamental premise that the Prosecution owes a duty to the court and to the wider public to ensure that only the guilty are convicted, and that all relevant material is placed before the court to assist it in its determination of the truth (*Nabill* at [37] and [47]; see also, *Kadar* at [200]). In this regard, we emphasised in *Nabill* that the Prosecution acts at all times in the public interest, and that it was therefore generally unnecessary for the Prosecution to adopt a strictly adversarial position in criminal proceedings.

132 Any meaningful discussion of the Prosecution's additional disclosure obligations must be informed by a proper appreciation of the Prosecution's fundamental duty to assist the court in *the court's* determination of the truth. In this light, we discuss the following issues in turn:

(a) First, whether the Prosecution's Proposed Redefinition of a "material witness" should be preferred over the Current Definition.

(b) Second, in respect of the process of identifying "material witnesses":

(i) whether the Defence has a duty to first identify "material witnesses" and if it does, when this identification should be made; and

(ii) whether the court should be left to determine any dispute between the parties as to the "materiality" of a witness.

(c) Third, where a witness is identified as a "material witness", but the Prosecution has not recorded any statements from the witness relating to the accused person's defence, whether the Prosecution has a positive duty to conduct further investigations and to record further statements from the witness.

(d) Fourth, the potential consequences of a breach of the Prosecution's additional disclosure obligations.

133 The essence of the parties' submissions on these issues have already been outlined at [30]–[35] above. Before dealing with these points, we highlight that based on *Nabill,* the Prosecution's additional disclosure obligations do not presently extend to the statements of a "material witness" who is also a prosecution witness. As to whether the statements of such a witness ought to be disclosed, we expressly left this issue open in *Nabill* (at [50]) because it did not arise on the facts. We do so again here as it is also not an issue in the present case. However, we reiterate the provisional views expressed in *Nabill* (at [54]–[56]) that if a prosecution witness has given a statement which is inconsistent with his testimony at trial, the Prosecution would generally be required to disclose such a statement to the Defence as part of its *Kadar* obligations.

(1) The definition of a "material witness"

134 According to the Prosecution, the Current Definition of a "material witness" should be narrowed to cover only a witness whom the accused person identifies as the "true culprit" responsible for the offence instead of him. Two arguments are advanced in support of this Proposed Redefinition.

135 The first argument is that the ordinary rule in litigation is that a party bears the burden of interviewing and calling those witnesses he thinks will advance his case. On the Prosecution's reading of *Nabill* (at [45]–[46] and [77]), it would be unfair to place this burden on the accused person where the accused person would have to elicit self-incriminating evidence from a witness. In such a situation, the Prosecution's additional disclosure obligations would help place the accused person in a position to make an informed choice as to whether to call the witness, who may end up contradicting his defence. These unique considerations *only* apply, however, to witnesses who are alleged to be the "true culprits". For all other witnesses, the ordinary rule in litigation should apply and their statements should not be the subject of the Prosecution's additional disclosure obligations. There is no reason to assume that such other witnesses will falsely incriminate the accused person if called by the Defence to testify.

136 The Prosecution's second argument is that there are also cogent public policy reasons for reasonably limiting the disclosure of witness statements. In particular, it is said that the broad disclosure of witness statements may disincentivise witnesses from coming forward to assist in investigations and expose them to the risk of being harassed by the accused person.

137 With respect, we do not find either of the Prosecution's arguments persuasive. In *Nabill,* we explained that there are *two* key rationales for imposing the additional disclosure obligations on the Prosecution:

> (a) First, the Prosecution might, despite acting in good faith, inadvertently fail to disclose statements which might tend to support the defence. It would be an intolerable outcome for the court to be deprived of relevant evidence that might potentially exculpate the accused person simply because the Prosecution erred in assessing the significance of certain evidence (*Nabill* at [44] and [53]). We have seen instances of this, for example, in *Public Prosecutor v Wee Teong Boo and other appeal and another matter* [2020] 2 SLR 533 (at [131]–[132]) which concerned the Prosecution's *Kadar* obligations.
>
> (b) Second, the accused person ought to have access to all relevant information in order to make an informed choice in deciding whether or not to call a "material witness" (*Nabill* at [45]–[47]). The Defence would be at a distinct disadvantage if it is not aware of what the witness has previously said in the course of police investigations, and this would not reflect a satisfactory balance between ensuring fairness to the accused person and preserving the adversarial nature of the trial process.

138 Contrary to the Prosecution's first argument, these two rationales do not apply only to witnesses "who may be the true culprit". Rather, these rationales are generally engaged whenever there is a witness who can be expected to materially confirm or contradict the accused person's defence.

139 Returning to first principles, the court's ultimate objective is to seek the truth and achieve a just outcome through a fair process (*Nabill* at [47]; *Kadar* at [86]). To this end, all *relevant* material ought to be placed before the court and the Prosecution's additional disclosure obligations are meant to help ensure that this is done. A criminal prosecution is quite unlike other types of litigation because of the intense public interest in the proper outcome of a prosecution. Where a witness can be expected to confirm or deny material aspects of an accused person's defence, it is obvious that the statements of such a witness would potentially be material to the case and to the court's determination of the truth.

140 If the Prosecution has the statements of such a witness and does not intend to call him to testify, the said statements should generally be made available to the Defence so that the Defence can make an informed choice as to whether to call that witness (see *Nabill* at [45]–[47]). Otherwise, the Defence would suffer the disadvantage identified at [137(b)] above, which we have found to be unsatisfactory. This is so *whether or not* the witness in question is identified as the "true culprit".

141 Where there is a possibility that the witness might be the "true culprit", this *strengthens* the second key rationale for the Prosecution's additional disclosure obligations. As explained in *Nabill* (at [45]), the Defence would be at an *even greater* disadvantage when deciding whether to call such a witness because it would have the additional difficulty of eliciting self-incriminating evidence from the witness without having had sight of his earlier statements. This does not, however, mean that the second key rationale identified in *Nabill* is limited to such witnesses.

142 As for the Prosecution's second argument, we accept that there is a broad public interest in ensuring that witnesses are not unduly disincentivised from providing information to law enforcement agencies in a free and candid manner. Nevertheless, where the witness in question can be expected to confirm or contradict the accused person's defence in *material respects, any* public interest in encouraging the free and candid disclosure of possibly relevant information to the investigating authorities cannot trump the importance of ensuring that the court has access to evidence that may be relevant to the accused person's defence and that can help to ensure that only the guilty are convicted.

143 We therefore do not accept the Prosecution's Proposed Redefinition of a "material witness". As will be seen from the rest of what we have to say on this, this position is not onerous to the Prosecution.

(2) The process of identifying "material witnesses"

144 The Prosecution contends that under the current law, the duty to identify "material witnesses" is placed solely on the Prosecution even though who qualifies as a "material witness" is *entirely dependent on the defence that the accused person intends to run at trial*. This is said to be a matter "exclusively within the knowledge of the Defence", which the Prosecution may not be able to discern from the accused person's statements or the Case for the Defence ("CFD") (if any is filed) prior to trial. The Prosecution claims that as a result, it faces considerable difficulties in determining whether a witness is "material", especially where (a) the account of events given in the accused person's statements is unclear or inconsistent; (b) the accused person fails to disclose any defence until trial; or (c) the accused person raises a defence at trial that is inconsistent with his statements.

145 According to the Prosecution, the identification of "material witnesses" should therefore be a matter within the responsibility of the Defence. Specifically, the Prosecution proposes as follows:

> (a) The Defence should bear the "duty" of first identifying persons whom it considers "material witnesses" by naming such persons and explaining why they are material. The Defence should generally make this identification at the pre-trial stage within a reasonable time upon its receipt of the Prosecution's list of witnesses.
>
> (b) Inevitably, there may be cases where a witness can only be identified as "material" as a result of the accused person's evidence at trial. In such cases, the onus should be on the Defence to (i) notify the court that the person is a material witness; (ii) explain why the witness is material; and (iii) clarify why the identification was not made earlier.
>
> (c) If there is any dispute as to the "materiality" of a witness, the parties should apply to the court for a ruling on the issue.

146 With respect, we disagree with these proposals save for the obvious point that the court will necessarily be the final arbiter of any dispute put before it, including one as to the "materiality" of a witness. If one considers the Prosecution's proposals with detachment, it would be evident that their effect would be to mandate the identification of any lines of defence at an early stage by requiring the Defence to identify its "material witnesses" aside from the accused person. This is not something that the court should do.

147 In our view, the Prosecution's proposal effectively transforms what is meant to be a disclosure obligation borne by the Prosecution into *a duty falling*

upon the Defence to outline its case prior to trial. This is out of touch with the purposes that the additional disclosure obligations are meant to achieve. As we have stressed (at [137] above), these obligations are fundamentally meant to:

> (a) address the risk that the Prosecution may inadvertently fail to disclose statements which tend to support the accused person's defence, with the result that the court may be deprived of relevant evidence; and
>
> (b) assist the Defence in assessing whether to call a "material witness" by requiring the Prosecution to disclose that witness's statement.

148 These obligations are not meant to *compel* the Defence to disclose its intended case before the commencement of trial or any earlier than it would otherwise be required to. Indeed, requiring the Defence to do so would be incongruent with the adversarial position that an accused person occupies in criminal proceedings in relation to the Prosecution.

149 In this vein, we have pointed out (in *Nabill* at [173]) that the strict rules of criminal procedure require the Prosecution to first establish a *prima facie* case at trial before the Defence can even be called or invited to set out material aspects of its case:

> 173 … [*I*]*n criminal proceedings, there are strict rules of procedure which provide that it is for the Prosecution to first prove a* prima facie *case before the Defence may be called or even invited to set out material aspects of its position.* Section 230(1)(*j*) of the CPC provides that the court may only call on an accused person to give his defence if it is satisfied that there is some evidence which is not inherently incredible and which, if accepted, would satisfy each and every element of the charge

> against the accused person. … [emphasis in original omitted; emphasis added in italics]

150 It is true that pursuant to the CCD regime, the Prosecution and Defence may be required to exchange relevant information as to their respective cases before the commencement of trial. Nevertheless, not all criminal cases are governed by the CCD regime. Furthermore, as we observed in *Public Prosecutor v Li Weiming and others* [2014] 2 SLR 393 ("*Li Weiming*") (at [24]–[27]), CCD disclosures are made on a *quid pro quo* basis. Even under the CCD procedure, it is "the Prosecution [which] first lays its cards on the table" and this is "an acknowledgment that it is the duty of the Prosecution to [first] prove its case beyond [a] reasonable doubt" (*Li Weiming* at [26]).

151 Aside from this, it is inaccurate to suggest that at all stages of a criminal proceeding, the identification of a "material witness" under *Nabill* is dependent on the defence that the accused person ultimately runs *at trial*. The correct position is that *at each stage* of a criminal proceeding, the "materiality" of a witness is assessed only by reference to such defences as the accused person may have disclosed at that point in time.

152 Generally, at the pre-trial stage, the only sources of information from which an accused person's defence can be discerned would be the accused person's statements and the CFD (if one is filed). Accordingly, the "materiality" of witnesses at this stage can only be assessed by reference to any defences disclosed by the accused person in those documents and/or any other materials provided to the Prosecution. The Prosecution's additional disclosure obligations go no further than this. In particular, and contrary to what was suggested by the Prosecution before us, the additional disclosure obligations do not require the Prosecution to speculate as to any defences that have not been identified by the

Defence. As we clearly stated in *Nabill* (at [52]), "the triggering of the additional disclosure obligations is itself a response to a defence which the accused person has *already* alluded to in his statements to the investigating authorities" [emphasis in original]. If, as the Prosecution contemplates, the accused person's statements are so unclear that one cannot reasonably be expected to discern the accused person's defence, then the Prosecution's additional disclosure obligations would not be triggered. It is as simple as that.

153 Because this is a continuing obligation, at trial and in any subsequent appeal, "materiality" will be assessed by reference to the defences which the accused person has raised at that point in time. Where "the relevance of a particular material witness's evidence only becomes apparent after the accused person has testified at the trial", we have already stated in *Nabill* (at [50]) that "[the] witness's statement should be disclosed to the Defence *at that juncture*" [emphasis in original omitted, emphasis added in italics].

154 Seen in this light, the difficulties that the Prosecution contends it faces in complying with its additional disclosure obligations are not substantial. We envisage that there are at least four scenarios which may arise, and the legal position with respect to the Prosecution's additional disclosure obligations in each scenario is entirely straightforward:

(a) The first scenario is where the accused person raises a defence in his statement. If the Prosecution has the statement of a witness who can be expected to materially confirm or deny that defence, then the Prosecution is required to disclose the statement.

(b) The second is where the accused person raises a defence for the first time at trial. Similarly, if the Prosecution has a statement of a

witness who can be expected to materially confirm or deny that defence, it ought to disclose the statement to the Defence *at that juncture*.

(c) The third scenario is where the accused person's statements or testimony at trial are so unclear that there is no reasonably discernible defence. In such a situation, the Prosecution's additional disclosure obligations would not be triggered.

(d) The fourth scenario builds upon the scenarios in [154(a)] and [154(b)] above – the accused person mentions a particular defence in his statements and raises another defence at trial which is either a departure from or inconsistent with what he had said in his statements. In such a situation, the same principles apply: if the Prosecution has the statement of a witness who can be expected to materially confirm or contradict the defence that has been raised, the Prosecution need only disclose that statement *at the point* that the defence in question is raised and not before.

155 We reiterate that nothing in *Nabill* requires the Prosecution to guess or speculate as to the defences the accused person might raise. The significant limit to the Prosecution's additional disclosure obligations is that they are only triggered *if and when* (a) the accused person raises a defence; *and* (b) the Prosecution has a statement of a witness who may be expected to materially confirm or contradict that defence. At the hearing, we put forward the four scenarios set out above together with the corresponding legal positions and the Prosecution could not identify any other difficulties it might encounter with the identification of "material witnesses" that might fairly be said to hinder its

ability to comply with its additional disclosure obligations. The only point it then raised was that it was uncertain whether it had a duty to conduct further investigations when a "material witness" is identified. We deal with this at [162]–[167] below.

156 Given what we have said above, the general process of identifying "material witnesses" should be as set out in the following paragraphs.

157 At the *pre-trial stage*, it is for the Prosecution to disclose the statements of witnesses whom it thinks are "material" based on the accused person's statements (as well as the CFD, if and when one is filed). This should take place in accordance with the timelines set out in *Nabill* (at [50]), which we referred to at [130(b)] above. If the Prosecution has any doubt as to whether a witness is "material", it should generally err on the side of disclosure (*Nabill* at [48]). The reason the duty is placed on the Prosecution is that the Prosecution alone knows what statements it has. This is also in accord with the Prosecution's fundamental duty to actively ensure that all relevant evidence is placed before the court. As explained earlier, the Prosecution's additional disclosure obligations are only limited to defences which can reasonably be discerned from the information it has and it is not required to speculate on the accused person's intended defence at trial. The Prosecution is therefore not subject to an unduly onerous burden.

158 Once the Prosecution has made its initial disclosures, the Defence can decide whether it wishes to notify the Prosecution of any *additional* witnesses whom it also considers to be "material". However, there is *no duty* compelling the Defence to do so. Nevertheless, as envisaged in *Nabill* (at [53]), if the defence which the accused person intends to run at trial is genuine, it will often be in the interest of the Defence to identify such additional witnesses at an early

stage so that it can obtain their statements prior to trial. This would enable the Defence to better prepare for trial and make a more informed choice as to whether to call the witness in question.

159 Where the Defence does decide to seek the statements of such additional witnesses prior to trial, we agree with the Prosecution that it is only reasonable that the Defence explain to the Prosecution (and/or the court, if necessary) why the additional witnesses are "material". This may be done either by reference to the defences already mentioned in the accused person's statements, and/or the defences which the accused person intends to raise at trial. If the "materiality" of the additional witness can only be explained by reference to a *new* defence not contained in the accused person's statements, this may mean that the accused person will have to disclose aspects of his new defence earlier than he may otherwise have wished to. Nonetheless, it is only reasonable that the accused person be required to do so if he wishes to obtain the statements of such a witness in advance.

160 *Once trial begins and in any subsequent appeal*, it is incumbent upon *both* the Prosecution and the Defence to identify any new "material witnesses" at the earliest opportunity. The "materiality" of such witnesses will be ascertained by reference to defences which the accused person may have raised in his statements, as well as any new defences which he runs at trial. Given that the Prosecution would be privy to these matters, we do not think that compliance with its additional disclosure obligations would be unduly burdensome.

161 In the event that a dispute arises as to the "materiality" of a witness, it goes without saying that either party can apply to the court for a ruling.

(3) Whether the Prosecution has a duty to conduct further investigations

162 The next issue that was raised concerns [77] of *Nabill*. For ease of reference, that paragraph states:

> This suggests, and indeed, leads to the inference that ***questions on material aspects of*** [***Nabill's***] ***defence were not posed to these material witnesses when their statements were being recorded***. In this regard, two important aspects of [Nabill's] defence which emerged from his last four statements to the CNB (the account given by [Nabill] in his first six statements being … essentially untrue) were that (a) he did not know that Faizal would be bringing the trolley bag to the Flat on 26 January 2016 and had been asleep when Faizal arrived at the Flat with the trolley bag; and (b) he only discovered the trolley bag and the diamorphine in the Flat the following afternoon. It would appear that Faizal might not have been asked questions relating to his purpose of bringing the trolley bag to the Flat on 26 January 2016 and whether he had handed the trolley bag to [Nabill] or to the Helper. It would also appear that the Helper might not have been asked whether she was the one who had placed the trolley bag in the storeroom and what [Nabill] had been doing when Faizal arrived at the Flat with the trolley bag. ***If that was indeed the case, then, with respect, regardless of whether Faizal's and the Helper's statements were recorded before or after*** [***Nabill's***] ***last four statements to the CNB, we cannot see any justification for the Prosecution not having asked Faizal and the Helper these questions, which would have confirmed or, conversely, contradicted the two aforesaid aspects of*** [***Nabill's***] ***defence in material ways. If the statements of Faizal and the Helper had been recorded before*** [***Nabill's***] ***last four statements to the CNB, further statements could have been taken from them in relation to the questions outlined above had their initial statements been neutral to [Nabill]. This would likewise be the position if the two aforesaid aspects of*** [***Nabill's***] ***defence had only emerged at the trial, even though this might conceivably have necessitated an adjournment of the trial***. After all, returning to first principles, the Prosecution is duty-bound to place before the court all relevant material to assist it in its determination of the truth. In our judgment, it would be quite unfair to expect the Defence, *in place of* the Prosecution, to pose to material witnesses questions which may confirm or, conversely, contradict the accused person's defence in material ways. The accused person might not have the ability or resources to

> mount a reasonably robust investigation to find out what evidence a material witness might give. Further, as a practical matter, it might be difficult for the Defence to elicit evidence from a material witness if such evidence would necessarily incriminate the witness. [emphasis in original in italics; emphasis added in bold italics]

163 According to the Prosecution, *Nabill* (at [77]) might be interpreted as suggesting that where a new "material witness" is identified but the Prosecution does not have any statements from that witness relating to the accused person's defence, the Prosecution has a *legal duty* to conduct further investigations and to record further statements from that witness.

164 At the same time, the Prosecution also submits that this is *not* in fact the correct understanding of *Nabill*. However, as a matter of caution, it submits that if it was subject to such a duty, this would lead to various difficulties, such as (a) law enforcement agencies being forced to urgently divert their resources to investigate the new "material witness"; and (b) proceedings being adjourned for potentially long periods, which may adversely affect the quality of the evidence given by witnesses. The Prosecution fully accepts that it may be expected to pursue reasonable lines of inquiry, but submits that it should not have any legal duty to conduct further investigations.

165 Roshdi responds to this by asserting that *Nabill* (at [77]) does not impose any such duty of investigation on the Prosecution in the first place, nor is there any basis for such a duty. Instead, the court's remarks at [77] were made in the context of the particular facts of the case.

166 With respect to the Prosecution, we cannot see how our observations in *Nabill* (at [77]) can be interpreted as imposing a legal duty on the Prosecution and law enforcement agencies to conduct further investigations. We note that

the parties in fact agree on this. It is neither disputed nor controversial that the Prosecution is generally expected to pursue reasonable lines of inquiry. This is in line with the sentiment that we expressed in *Kadar* (at [117]). It would, however, be inappropriate for the court to impose a legal duty on the Prosecution or law enforcement agencies to conduct further investigations, given that it is not our role to direct the exercise of the Executive's functions. As we stated in our clarificatory judgment in *Muhammad bin Kadar and another v Public Prosecutor and another matter* [2011] 4 SLR 791 (at [14]):

> … [T]he Prosecution's duty of disclosure as stated at [113] of *Kadar* certainly does not require the Prosecution to search for additional material. … We do not know of a power under Singapore law that empowers a court to *compel* investigative agencies (which are executive bodies) to adopt a code of practice purely by way of judicial pronouncement. [emphasis in original]

167 The position is simply that *if* the Prosecution chooses not to pursue any further investigations, it takes the risk that it will be found to have failed to discharge its evidential burden in respect of the facts that have properly come into issue, as in fact transpired in *Nabill*.

(4) The consequences of a breach of the Prosecution's additional disclosure obligations

168 Lastly, we were invited to clarify the consequences that would flow from a breach of the Prosecution's additional disclosure obligations. As we indicated at the hearing, the consequences of any breach will necessarily depend on all the facts at hand. There is no stock answer to this question. Given the myriad of factual possibilities, we do not think it is helpful or necessary to attempt a comprehensive discussion of the potential consequences that may result. We have already stated in *Nabill* (at [48], citing *Kadar* at [120]) that a breach may, in appropriate cases, result in a conviction being overturned:

> … [T]he consequences of non-disclosure could be severe. As we stated in *Kadar* … at [120]:
>
> > … [T]here is no reason why a failure by the Prosecution to discharge its duty of disclosure in a timely manner should not cause a conviction to be overturned if such an irregularity can be considered to be a material irregularity that occasions a failure of justice, or, put in another way, renders the conviction unsafe …

169 It suffices to add that on any particular set of facts, the court is well able to determine for itself the impact that any breach of the Prosecution's additional disclosure obligations may have.

(5) Other remarks regarding the Prosecution's concerns

170 It seems to us that the Prosecution's various concerns over complying with its additional disclosure obligations can be adequately addressed by the following five points, some of which have already been developed in the course of our analysis above.

171 The first is that whilst the process of identifying "material witnesses" should be initiated by the Prosecution based on the defences that it is aware of at the time, the Defence may also seek the statements of any additional witnesses whom it considers to be "material". If it does so, we agree that the Defence ought to *explain* why the additional witnesses are "material" and the Prosecution can then either agree or disagree with the Defence's position. If there is a dispute as to "materiality", either party can apply to the court to decide the issue.

172 Second, it is uncontroversial, and indeed a matter of common sense, that defences which are mounted at a later stage will invite more scrutiny. Where an accused person belatedly raises a new defence, he takes a real risk that he is less

likely to be believed. It is well-established that if an exculpatory fact is withheld, the court may justifiably infer that that fact is an afterthought and untrue, unless there are good reasons for the accused person's omission to mention it earlier (*Ilechukwu Uchechukwu Chukwudi v Public Prosecutor* [2021] 1 SLR 67 at [152]). The court, as a trier of fact, is perfectly capable of evaluating the credibility of an accused person's defence, as and when the issue is raised.

173 In any case, the additional disclosure obligations will only be triggered in response to a defence that the Prosecution is made aware of. Further, there is no general legal duty on the Prosecution and law enforcement agencies to conduct further investigations simply because a new "material witness" is identified. It is for the Prosecution to decide whether further investigations are necessary to ensure that it is able to discharge its legal and evidential burdens.

174 The third point is that where there is any dispute or uncertainty as to whether the Prosecution's additional disclosure obligations have been triggered, it is open to the parties to apply to the court for directions. As creatures of the common law, the Prosecution's additional disclosure obligations are not based on a set of rigid prescriptions. Instead, they are based on principles that guide the parties' general conduct of their cases, but which retain a degree of flexibility that enables them to be adapted to the specific context.

175 The fourth point is that where the Defence intends to allege a breach of the Prosecution's additional disclosure obligations, it should in fairness give the Prosecution an opportunity to respond before putting the allegations before the court. This is not only because the court needs a full picture of the facts in order to assess any alleged breaches, but also because any such allegations may

amount to an accusation of professional misconduct against the deputy public prosecutors who had conduct of the matter.

176 As to the latter, in *Imran bin Mohd Arip v Public Prosecutor and another appeal* [2021] SGCA 91 at [97]–[99], we recently reminded all counsel of their professional duties under r 29 of the Legal Profession (Professional Conduct) Rules 2015. It goes without saying that allegations that the Prosecution dishonestly or knowingly withheld evidence that it ought to have disclosed to the Defence should never be made lightly. We expect all counsel to assiduously observe these basic rules of professional conduct, which are meant to protect the administration of justice in the courts.

177 The fifth and final point is that the consequences of a breach of the Prosecution's additional disclosure obligations will ultimately depend on all the facts at hand. The most critical question is whether, in all the circumstances, the Prosecution's breach is so egregious that it occasions a failure of justice or otherwise renders the conviction unsafe. On any particular set of facts, the court is well able to determine the impact that any breach of the Prosecution's additional disclosure obligations may have.

Whether the Prosecution breached its additional disclosure obligations on the present facts

178 In the present case, the Prosecution disclosed Chandran's statements to the Defence on 23 June 2020, which was before the Defence opened its case on 2 July 2020. We note that in Roshdi's written submissions, he initially claimed that the disclosure took place on 1 July 2020. At the hearing before us, however, Mr Jumabhoy accepted that 23 June 2020 was the correct date.

179 According to Roshdi, Chandran was a "material witness" and the Prosecution had been aware from the outset of his involvement in the alleged offence. It is argued that Chandran's "materiality" as a witness was apparent from the contents of Roshdi's Statements, or at the very latest, from the questions put to ASP Yang by defence counsel on 1 July 2020. As such, once our decision in *Nabill* was released in March 2020, the Prosecution should supposedly have disclosed Chandran's statement within a reasonable time thereafter. The actual disclosure took place only some months later on 23 June 2020 in the middle of trial, and it is alleged that the disclosure was late and prejudicial to the conduct of Roshdi's defence.

180 We are amply satisfied that Roshdi's arguments are without merit and the Prosecution was not in breach of its additional disclosure obligations in respect of Chandran's statements. We agree with the Prosecution that its obligation to disclose Chandran's statement was triggered at the earliest on 2 July 2020, which was when Roshdi raised the safekeeping defence for the first time in his evidence-in-chief. It was only at that stage that Roshdi's contention could reasonably be discerned and Chandran's statements had already been disclosed to the Defence by then.

181 Prior to Roshdi's evidence-in-chief, Chandran simply could not be considered a "material witness" because Roshdi had not, until then, said anything to the effect that he was only safekeeping the Drugs for Chandran.

182 Indeed, Roshdi's Statements contained highly incriminating admissions indicating that he had the Drugs in his possession for the purpose of trafficking (see [90]–[91] above). At the hearing before us, Mr Jumabhoy submitted that Roshdi did mention in the Statements that he worked for Chandran and that the

Drugs belonged to someone else. But, as we have already explained at [92] above, this is entirely consistent with Roshdi having the intention to traffic in the Drugs and could not possibly be seen as a defence. Mr Jumabhoy submitted that there were sufficient threads in Roshdi's Statements to suggest that the safekeeping defence was *one of the possible defences* that Roshdi might raise. We see nothing in Roshdi's Statements that could reasonably have given rise to that view. We reiterate that the Prosecution cannot be expected to guess or speculate on the accused person's defences.

Conclusion on the issue of conviction and sentence

183 In summary, we hold that the Contested Statements are admissible in evidence. As regards the correctness of Roshdi's conviction, the question is whether the Prosecution had proved that Roshdi was in possession of the Drugs for the purpose of trafficking or whether Roshdi has rebutted the presumption of trafficking in s 17(*c*) of the MDA. In our judgment, the Judge did not err in disbelieving Roshdi's safekeeping defence. The available evidence strongly points to the conclusion that Roshdi had the Drugs in his possession for the purpose of trafficking.

184 In any case, *Ramesh* does *not* establish a general proposition that a "bailee" who safekeeps drugs and returns and/or intends to return them to the "bailor" will *never* be liable for trafficking (or possession for the purpose of trafficking). Rather, in deciding whether the act or intended act of returning drugs to the "bailor" constitutes "trafficking" as defined in the MDA, the test is whether the "bailee" in question *knew* that the "bailment" was part of the process of supply or distribution of drugs or *intended* it to be. Even on Roshdi's own safekeeping defence, he would have been found to be in possession of the

Drugs for the purpose of trafficking since he was clearly aware that he was holding the Drugs as part of the process of distribution.

185 Thus, based on the Contested Statements, the Prosecution has established the element of possession for the purpose of trafficking beyond a reasonable doubt. In any case, Roshdi has failed to rebut the presumption of trafficking in s 17(*c*) of the MDA. We therefore affirm Roshdi's conviction on the Charge. Where a person is convicted under s 5(1)(*a*) read with s 5(2) of the MDA for trafficking in more than 15g of diamorphine, the punishment prescribed under s 33 read with the Second Schedule to the MDA is death. Roshdi does not contend on appeal that *if* his conviction stands, the alternative sentencing regime in s 33B of the MDA is available. Roshdi was not issued a certificate of substantive assistance and he is in any event not a courier (see GD at [50]). There is therefore no basis for us to set aside or otherwise substitute the death sentence imposed by the Judge.

186 Roshdi's appeal against his conviction and sentence is accordingly dismissed.

Sundaresh Menon
Chief Justice

Andrew Phang Boon Leong
Justice of the Court of Appeal

Judith Prakash
Justice of the Court of Appeal

Steven Chong
Justice of the Court of Appeal

Chao Hick Tin
Senior Judge

Andre Darius Jumabhoy, Low Ying Ning Elaine and Priscilla Chia Wen Qi (Peter Low & Choo LLC) for the appellant in CA/CCA 29/2020 and the applicant in CA/CM 18/2021;
Hri Kumar Nair SC, Francis Ng Yong Kiat SC, Jiang Ke-Yue, Senthilkumaran s/o Sabapathy, Jaime Pang and Keith Jieren Thirumaran (Attorney-General's Chambers) for the respondent in CA/CCA 29/2020 and CA/CM 18/2021.
