IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2018] SGCA 13

Criminal Appeal No 33 of 2016

Between

ALI BIN MOHAMAD BAHASHWAN

… *Appellant*

And

PUBLIC PROSECUTOR

… *Respondent*

Criminal Appeal No 34 of 2016

Between

SELAMAT BIN PAKI

… *Appellant*

And

PUBLIC PROSECUTOR

… *Respondent*

Criminal Appeal No 35 of 2016

Between

RAGUNATH NAIR A/L JANARTANAN

… Appellant

And

PUBLIC PROSECUTOR

… Respondent

JUDGMENT

[Criminal law] — [Abetment]
[Criminal law] — [Statutory offences] — [Misuse of Drugs Act]
[Statutory interpretation] — [Construction of statute]

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Sundaresh Menon CJ, Andrew Phang Boon Leong JA and Judith Prakash JA
27 November 2017

5 March 2018 Judgment reserved.

Andrew Phang Boon Leong JA (delivering the judgment of the court):

Introduction

1 On 23 October 2012, at the void deck of a block of flats in Tampines, one Ragunath Nair A/L Janartanan ("Ragunath") handed one Selamat Bin Paki ("Selamat") a bundle containing not less than 27.12g of diamorphine ("the Bundle"). Selamat went on his way to deliver the Bundle to his flatmate, Ali Bin Mohamad Bahashwan ("Ali"), who had instructed him to do so. Selamat was intercepted before he could complete the delivery, and he was then arrested. Shortly thereafter, so too were Ali and Ragunath. The three men were tried jointly by the High Court Judge ("the Judge") on charges under s 5(1)(*a*) of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) ("the MDA") of trafficking in the amount of diamorphine (*ie*, heroin) contained in the Bundle, which was an amount the trafficking of which warrants capital punishment. Ali and Selamat were convicted and sentenced to death. Ragunath, who was also convicted, was

however found to be a courier. As he had been issued with a certificate of substantive assistance, the Judge exercised his discretion under s 33B of the MDA to sentence him to life imprisonment and a mandatory 15 strokes of the cane. Ali, Selamat and Ragunath now appeal against the Judge's decision, seeking to set aside their convictions and sentences.

2 Ali's appeal raises an important question of law. Ali was charged with abetting Selamat to traffic in the diamorphine contained in the Bundle by instigating him to do so. Ali's defence to that charge is that half of the diamorphine was intended for his and Selamat's personal consumption, and that that portion takes the quantity of the diamorphine intended for trafficking below the amount warranting capital punishment. The important question that arises is whether the defence of personal consumption is in principle a valid defence to a charge of abetting another to traffic in drugs. The High Court recently answered this question in the affirmative in *Liew Zheng Yang v Public Prosecutor* [2017] 5 SLR 611 ("*Liew Zheng Yang*"), holding that a buyer who orders drugs from a seller for delivery to himself cannot be liable for abetting the seller in a conspiracy to traffic in the drugs if the drugs were intended solely for the buyer's own consumption. (For convenience, we will refer to any person involved in arranging to receive drugs from another person for his own consumption, such as the buyer in the proposition just stated, as a "consuming-recipient".) It will be observed that the form of abetment involved in *Liew Zheng Yang* was abetment by conspiracy, while the form of abetment involved here is abetment by instigation. However, it is clear that the logic of that decision, if accepted, applies to all types of abetment. In this judgment, we will examine whether *Liew Zheng Yang* was correctly decided.

3 In brief, we are of the view that *Liew Zheng Yang* was correctly decided. In our judgment, a person incurs no criminal liability under s 5 read with s 12

of the MDA for abetting another to traffic drugs to himself if the drugs were intended for his own consumption, that is, if he was a consuming-recipient. He will be so liable only if the Prosecution is able to prove beyond a reasonable doubt that he intended the offending drugs to be passed on from himself to *someone else*, that is, that he himself intended to traffic in the offending drugs. As it turns out, Ali can derive no assistance from this rule because he is unable to establish his case that half the diamorphine in the Bundle was for his and Selamat's own consumption. In addition, even if he were able to establish such a case, it would assist neither of them because there is *no* such thing as a *joint* personal consumption defence: each accused person must be treated individually and independently for the purpose of the charge which has been brought against him, and therefore the amount that Ali intended to consume cannot be credited to Selamat, and vice versa, for the purpose of either of their attempts to establish that the portion of the diamorphine intended for personal consumption takes its total quantity below the amount warranting capital punishment. We are satisfied, moreover, that the evidence led by the Prosecution establishes beyond a reasonable doubt that Ali, Selamat and Ragunath are guilty of the charges on which they have been convicted. Accordingly, we dismiss the appeals. We turn now to explain our decision.

Background facts and charges

4 Ali and Selamat were friends who lived in the same flat in Blk 299B Tampines Street 22. On 23 October 2012, at about 7.45pm, Ali asked Selamat to meet Ragunath at the void deck of Blk 299B. At the meeting point, Ragunath delivered the Bundle to Selamat. Selamat then gave Ragunath a plastic bag containing $5,400 in cash. Selamat proceeded to walk from the void deck to the lift landing of Blk 299B, carrying the Bundle with him. He was arrested at the

lift landing. Ali and Ragunath were arrested shortly thereafter. In due course, one capital charge was brought against each of the appellants, as follows:

(a) A charge against Selamat for the offence of trafficking in a controlled drug under s 5(1)(*a*) of the MDA:

> That you, **1. SELAMAT BIN PAKI**, on the 23rd day of October 2012, at about 7.45 p.m., in the vicinity of Block 299B Tampines Street 22, Singapore, did traffic in a Controlled Drug specified in Class A of the First Schedule of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed), to wit, *by transporting one packet containing 456.2g of granular/powdery substance which was analysed and found to contain not less than 27.12g of diamorphine from the void deck to the lift landing of the said block*, without any authorisation under the said Act or the Regulations made thereunder and you have thereby committed an offence under section 5(1)(a) and punishable under section 33(1) of the said Act, or you may alternatively be liable to be punished under section 33B of the said Act. [emphasis added]

(b) A charge against Ali for the offence of abetting Selamat to traffic in a controlled drug under s 5(1)(*a*) read with s 12 of the MDA:

> That you, **2. ALI BIN MOHAMAD BAHASHWAN**, on the 23rd day of October 2012, at about 7.45 p.m., in the vicinity of Block 299B Tampines Street 22, Singapore, did abet one Selamat Bin Paki, NRIC No.: xxxx, to traffic in a Controlled Drug specified in Class A of the First Schedule of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed), to wit, *by instigating the said Selamat Bin Paki to transport one packet containing 456.2g of granular/powdery substance which was analysed and found to contain not less than 27.12g of diamorphine from the void deck to the lift landing of the said block*, without any authorisation under the said Act or the Regulations made thereunder and you have thereby committed an offence under section 5(1)(a) read with section 12 and punishable under section 33(1) of the said Act, or you may alternatively be liable to be punished under section 33B of the said Act. [emphasis added]

(c) A charge against Ragunath for the offence of trafficking in a controlled drug under s 5(1)(*a*) of the MDA:

> That you, **3. RAGUNATH NAIR A/L JANARTANAN**, on the 23rd day of October 2012, at about 7.45 p.m., in the vicinity of Block 299B Tampines Street 22, Singapore, did traffic in a Controlled Drug specified in Class A of the First Schedule of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed), to wit, *by delivering one packet containing 456.2g of granular/powdery substance which was analysed and found to contain not less than 27.12g of diamorphine to one Selamat Bin Paki, NRIC No.: xxxx*, without any authorisation under the said Act or the Regulations made thereunder and you have thereby committed an offence under section 5(1)(a) and punishable under section 33(1) of the said Act, or you may alternatively be liable to be punished under section 33B of the said Act. [emphasis added]

Proceedings below

Parties' cases

5 The Prosecution's case below was that Ali and Selamat had actual knowledge that the Bundle contained heroin and that the bulk of the heroin in the Bundle was intended to be repacked for sale, although some of it was for Selamat's and Ali's own consumption. The Prosecution submitted that the charges against the two of them were made out because (a) Selamat transported the Bundle from the void deck to the lift landing of Blk 299B with the intention of taking it to the flat to hand to Ali; and (b) Ali had instigated Selamat to traffic in heroin by instructing him to collect the Bundle from Ragunath and by providing him with the money to pay for the Bundle.

6 Both Ali and Selamat admitted that they were consumers and traffickers of heroin. Ali also confessed that he had instructed Selamat to collect the Bundle and had given Selamat money to pay for it. It was not disputed that Selamat collected the Bundle from Ragunath, and that Selamat knew what it contained.

Ali's and Selamat's main defence was that half of the Bundle was for their personal consumption and the other half was for sale. They argued that weight of the diamorphine in the Bundle which was meant for sale was below the 15g required for the offence to warrant capital punishment.

7 In so far as Ragunath was concerned, the Prosecution submitted that by s 18(2) of the MDA, Ragunath having been in possession of the Bundle must be presumed to know the nature of the drug contained in it, and that he had failed to rebut that presumption. Ragunath did not deny that he was the one who delivered the Bundle to Selamat. Ragunath's defence was that he did not know what was in it. He claimed that he was told that it contained medicine for the elderly. Although he was suspicious, he poked and felt the Bundle and thought it contained "something quite big". He thus concluded that the Bundle contained Chinese medicine.

Judgment

8 Following a joint trial, all three appellants were convicted on their respective charges. The Judge's decision is reported at *Public Prosecutor v Selamat bin Paki and others* [2016] SGHC 226 ("the Judgment"), and we now summarise his findings.

Findings against Ali and Selamat

9 The Judge considered that Ali and Selamat were presumed under s 17(*c*) of the MDA to have intended to traffic in the heroin in the Bundle (see the Judgment at [5]–[6]). Accordingly, he considered the key issue to be whether they had rebutted the presumption by proving on a balance of probabilities that less than 15g of the 27.12g of diamorphine was meant for sale (Judgment at [6]). The Judge found that they had failed to do so, for three main reasons.

10 First, the Judge rejected their claim that they consumed about 6g to 8g of heroin a day (Judgment at [10]). He regarded their evidence as to their rates of consumption as comprising bare assertions. Further, the report prepared by their psychiatrist, Dr Munidasa Winslow ("Dr Winslow"), stating that Selamat and Ali were heavy consumers of heroin, did not prove these rates because (a) it was mainly based on Selamat's and Ali's uncorroborated evidence; and (b) Dr Winslow himself accepted that the correlation between the amount of drugs consumed and the consumer's withdrawal symptoms was of a general nature and could vary between individuals.

11 Second, the Judge thought that Selamat's and Ali's cases suffered from an "accounting deficit" (Judgment at [11]). If half of the drugs in the Bundle had in fact been for their personal consumption, they would have made a net loss on the Bundle. This fact undermined the credibility of their personal consumption defence as neither of them had any source of income apart from the revenue obtained from drug trafficking, which meant that Ali and Selamat had to generate a net profit to support their drug habits.

12 Third, the Judge accepted that it was possible that their calculations could have been wrong because their estimation and recollection might have been imperfect, given that they did not keep an accurate account of the amount of drugs that they had sold or consumed (Judgment at [12]). Accordingly, it was still possible that they had intended to consume a substantial part of the offending drugs. However, the existence of this possibility was by itself insufficient to rebut the presumption of trafficking under s 17 of the MDA.

Findings against Ragunath

13 It was undisputed that Ragunath was presumed under s 18(2) of the MDA to know the contents of the Bundle. So the issue was whether he had rebutted that presumption. The Judge found that he had not. Ragunath claimed that he had received a call from a moneylender called "Hari", who told him to collect a packet of "medicine for [the] elderly" from a friend whose motorcycle had broken down at Woodlands and who needed Ragunath's help to deliver the packet to someone. So Ragunath allegedly met Hari's friend and collected a plastic bag containing the Bundle. Ragunath looked into the plastic bag and saw that the Bundle was wrapped in black masking tape and, having poked and felt the Bundle, thought that it contained Chinese medicine.

14 In the Judge's view, these were highly suspicious circumstances. Hari had told Ragunath an "implausible story" (Judgment at [22]). Ragunath's genuine ignorance of the Bundle's contents could not be established upon the claim that he had simply poked the Bundle and accepted Hari's word that it contained medicine (Judgment at [22]). Ragunath "likely knew that what he was carrying inside the Bundle was illegal, but even if he did not know, the circumstances required him to find out" (Judgment at [24]). Furthermore, the Judge did not find Ragunath to be a truthful witness. Although Ragunath claimed that he came to know of Hari's request only on the day of the offence, he was not able to provide a reasonable explanation as to why there was a text message in his phone which had been received a few days before the offence stating the delivery location ("Blk 299B Tampines St 22"). He was also unable to provide a reasonable explanation as to why he had parked his motorcycle elsewhere before taking a taxi to the delivery location instead of heading directly to the delivery location. In the circumstances, the Judge found that

Ragunath had failed to rebut the presumption of knowledge under s 18(2) of the MDA. The charge against Ragunath was therefore made out.

Sentences imposed

15 After judgment was delivered, the Prosecution issued a certificate of substantive assistance to Ragunath. The Judge exercised his discretion under s 33B(1)(*a*) of the MDA to sentence Ragunath to life imprisonment. He also sentenced Ragunath to receive the mandatory minimum of 15 strokes of the cane. In so far as Selamat and Ali were concerned, the alternative sentencing regime under s 33B of the MDA did not apply. The Judge therefore imposed the mandatory death sentence on them.

Parties' submissions on appeal

16 Ali, Selamat and Ragunath have appealed against their convictions and sentences. We turn now to summarise their submissions on appeal.

Appellants' submissions

17 Ali argues, first, that the charge against him is defective. The argument is that while the charge alleges that Ali had instigated Selamat to "transport the drugs from the void deck to the lift landing of [Blk 299B]", there is no evidence that this was what Ali had said to Selamat, and accordingly, the charge had not been proved. Second, Ali submits that the Prosecution impermissibly relied on both the presumption of knowledge under s 18(2) of the MDA and the presumption of trafficking under s 17(*c*) of the MDA against Ali when the law is that only one of these may be invoked against any one accused person. Third, Ali submits that his alleged rate of consumption should have been accepted by the Judge, who failed to approach the case with an open mind. Finally, Ali submits that the Judge erred in finding that he was not a mere courier.

18 Selamat also argues that the charge against him is defective as it fails to specify that he intended to transport the drugs to another person. Next, he relies on two facts which he submits are independently sufficient to rebut the presumption under s 17(*c*) of the MDA that he was in possession of the heroin in the Bundle for the purpose of trafficking. The first is the fact that his only purpose for being in possession of the Bundle was to obtain drugs from Ali for his personal consumption. The second is the fact that he did not know how much of the Bundle was meant for sale and how much was for consumption, given that it was Ali who was in control of and who decided such matters, as the Judge had found (see the Judgment at [16]). In addition, Selamat submits that the Judge erred in rejecting Ali's and Selamat's claim that half of the Bundle was for their personal consumption because the Judge (a) gave insufficient weight to their evidence of their own rates of drug consumption; (b) wrongly rejected Dr Winslow's expert report, against which no rebuttal report had been adduced by the Prosecution; and (c) gave undue weight to the accounting deficit in respect of the single Bundle in question.

19 In addition, both Ali and Selamat have made submissions on *Liew Zheng Yang*. Ali's submission proceeds on the assumption that the case was correctly decided. He argues that *Liew Zheng Yang* assists him because he did not intend to deliver half of the heroin in the Bundle to a third party, and therefore did not have the requisite *mens rea* for the offence of abetting another in a conspiracy to traffic in drugs. While Selamat does not place significant reliance on *Liew Zheng Yang*, he argues that it was correctly decided because the decision makes sense as a matter of "logic and principle". To hold otherwise, he argues, would mean that every person in possession of drugs for his own consumption may have committed the offence of abetting another in a conspiracy to traffic drugs to himself, given that he must have obtained the drugs from a supplier. Finally,

in his submissions on *Liew Zheng Yang*, he emphasises that as an addict simply seeking to obtain free drugs from Ali for his own consumption, he is not the kind of person to whom the trafficking provisions in the MDA apply.

20 Ragunath argues that the Judge erred in finding that he had not rebutted the presumption of knowledge in s 18(2) of the MDA. He submits that he must have been unaware of the Bundle's contents because, after collecting it, he took no steps to conceal it and behaved in a "carefree" manner. He also argues that it was reasonable for him to accept Hari's word that the Bundle contained Chinese medicine. He further submits that the facts which the Judge had taken against his credibility are either inconclusive or capable of a neutral explanation. He places no reliance on *Liew Zheng Yang*. This is not surprising as that decision does not impact his case.

Prosecution's submissions

21 In so far as Ali is concerned, the Prosecution submits, first, that his challenge with regard to the drafting of the charge is an afterthought and that, in any case, the charge against him is not defective because it sets out a clearly defined offence. Second, the Prosecution submits that the charge is made out because the undisputed evidence shows that Ali had instigated Selamat to traffic in the Bundle. Third, the Prosecution submits that even though the defence of consumption was argued extensively below, Ali's intention to consume half the heroin in Bundle together with Selamat is irrelevant to whether Ali's charge is made out. The undisputed fact that he instructed Selamat to traffic in the Bundle is sufficient to sustain his conviction. This argument is said to be supported by the decision of this Court in *Chan Heng Kong and another v Public Prosecutor* [2012] SGCA 18 ("*Chan Heng Kong*"). The Prosecution therefore also submits that *Liew Zheng Yang* is inconsistent with that decision and was wrongly

decided. In any case, *Liew Zheng Yang* cannot assist Ali, says the Prosecution, because Ali's personal consumption defence is not made out on the facts.

22 In so far as Selamat is concerned, the Prosecution submits, first, that the elements required to establish the charge of trafficking under s 5(1)(*a*) of the MDA are made out: he had possession of the Bundle, which he knew contained heroin; he transported it from the void deck of Blk 299B to the lift landing; and he intended to deliver it to Ali. Second, the Prosecution submits that the Judge was correct to reject Selamat's personal consumption defence. Not only was it uncorroborated, Selamat also knew that the heroin in the Bundle was predominantly meant for sale. It would have been obvious to Selamat from his interactions with Ali that Ali was selling large quantities of heroin and collecting a stable income from this drug business in order to sustain their habit of drug abuse. Finally, the Prosecution submits that the holding in *Liew Zheng Yang* does not apply to Selamat as it is confined to cases of abetment.

23 In so far as Ragunath is concerned, the Prosecution largely adopts the reasoning of the Judge (see [13]–[14] above) to argue that Ragunath was unable to rebut the presumption of knowledge under s 18(2) of the MDA on a balance of probabilities. In essence, the Prosecution submits that no reasonable person in Ragunath's circumstances could have come to the conclusion that the Bundle contained something "as innocuous as Chinese medicine".

24 Finally, the Prosecution submits that the appeals against sentence have simply no chance of succeeding. Assuming that the convictions are upheld, the sentences imposed on Ali and Selamat are mandatory, and the sentence imposed on Ragunath was the only sentence apart from death the Judge was entitled to pass in exercising his discretion under s 33B(1) of the MDA. Therefore, there is no basis to argue that the sentences should be revised.

25 We will deal first with Ali's and Selamat's appeals, and then with Ragunath's.

Ali's and Selamat's appeals

26 We begin this section of the judgment by considering whether the charges against Ali and Selamat are defective. We will then turn to consider whether *Liew Zheng Yang* was correctly decided. Finally, we will consider, in the light of the applicable law and the relevant facts, whether Ali's and Selamat's convictions should be upheld.

The charges

27 It is logical to begin with Selamat's charge because his offence is the predicate of Ali's. The charge against Selamat states that he committed the offence of trafficking by "transporting [the Bundle] from the void deck to the lift landing of [Blk 299B]" (see [4(a)] above). Indeed, as Selamat says, the charge does not specify the person to whom the Bundle is to be transported. Nevertheless, we do not think that this makes the charge defective.

28 "Transporting" is the continuous form of one of the verbs that the MDA uses to describe an overt act amounting to trafficking under s 5(1)(*a*). In *Ong Ah Chuan and another v Public Prosecutor* [1979–1980] SLR(R) 710 ("*Ong Ah Chuan*"), the Privy Council made clear that transporting refers to the physical act of moving the drugs from one place to another to promote the distribution of the drugs to another (at [10] and [12]). Accordingly, it is implicit in the charge against Selamat that he was not simply alleged to be transporting the Bundle from the void deck to the lift landing of Blk 299B, but to be doing so with the intention to part with possession of the drugs to another person in order to promote the supply and distribution of the drugs.

29 This element of promoting distribution to another could, of course, have been expressly stated in the charge. However, its omission, in our view, does not render the charge defective. Under s 127 of the Criminal Procedure Code (Cap 68, 2012 Rev Ed), no omission to state the details of an offence shall be regarded at any stage of the case as material unless the accused was in fact misled by that error or omission. In the present case, it was clear to Selamat from the outset that he was not being charged for merely taking the drugs from the void deck to the lift landing of Blk 299B. He knew that he was being accused of having done so with the intention of giving the Bundle to Ali, who (in turn) was alleged to have intended to resell the drugs. That is the very reason Selamat and Ali advanced a personal consumption defence.

30 We turn next to Ali's charge. The charge again describes Ali's offence simply as "instigating [Selamat] to transport [the Bundle] from the void deck to the lift landing of [Blk 299B]". Hence, Ali argues that the charges against him are defective as they are not seriously worded and it is implausible that he would have simply told Selamat to transport drugs "from the void deck to the lift landing of the block". We reject this argument. Again, we do accept that perhaps the charge could have stated expressly that Ali had instigated Selamat to take the drugs to *someone*. However, notwithstanding this omission, Ali was left with no doubt as to the substance of the charge he was facing. Indeed, he accepted the fact that he had instructed Selamat to bring the Bundle to him and that he had sought to establish a personal consumption defence jointly with Ali. Accordingly, Ali's challenge on the drafting of his charge is also without merit.

The decision in Liew Zheng Yang

31 We turn next to the decision in *Liew Zheng Yang*, which the Prosecution argues was wrongly decided. That case involved an appeal by the accused,

Liew, against his conviction on two charges of abetting one Xia in a conspiracy to traffic in cannabis under s 5(2) and s 12 of the MDA. Liew's charges alleged that he had an agreement with Xia that Xia would deliver cannabis to him. Having reviewed the evidence, Steven Chong JA came to the view, contrary to the findings of the trial judge, that Liew had ordered the cannabis from Xia purely for his own consumption (at [23]). This led Chong JA to consider the question whether a person in Liew's position, whom we have termed a consuming-recipient, possessed the requisite *mens rea* for the offence of abetting another in a conspiracy to traffic in drugs. Chong JA took the view that he did not. For an accused person to be convicted on a charge of abetting another in a conspiracy to traffic in drugs, it is necessary, Chong JA held, for the Prosecution to prove beyond a reasonable doubt that the accused intended those drugs to be passed to a third party. In his words, "[t]he *mens rea* here must be the intention to traffic the drugs to a third party" (at [39]).

32 Chong JA had two principal reasons for taking this view:

(a) First, for the offence of abetting another in a conspiracy to traffic in drugs, both the buyer who abets, and the seller who is abetted, must have the "common intention to traffic" (at [39]). For the seller's offence of trafficking to be established, any of the acts under s 2 of the MDA – *ie*, to sell, give, administer, transport, send, deliver or distribute – which he commits must be committed with the purpose or intention of distribution to "someone else" (at [40]). That is why it would be a defence for him to establish that the offending drugs were for his own consumption (at [41]). As it is necessary for the buyer and the seller to have the "common intention to traffic", the former must also be proved to have had the intention to distribute the offending drugs to "someone else", *ie*, a third party (at [47]). A buyer who is a consuming-recipient

has no such intention, and therefore cannot be guilty of the abetment offence.

(b) Second, Parliament has always treated drug traffickers and drug consumers differently. This distinction in treatment, Chong JA states, "may be inferred from the severe penalties directed at drug traffickers" (at [43]), in contrast to the lower penalties for drug consumers. Hence, this distinction must also be observed in the elements of the offence of abetting another in a conspiracy to traffic in drugs (at [43]). And such a distinction is observed by permitting the abettor to escape the charge by claiming that the offending drugs were meant for his consumption. Otherwise, "the consumer would be in a worse position than the drug trafficker: unlike the drug trafficker, the consumer would not be able to rely on the defence of consumption" (at [45]).

33 We do not, with respect, agree with the first reason. However, we accept as well as endorse the essence of the second, which is that the policy behind the main offence must inform the application of the rules on accessory liability with regard to that offence. We will first explain why we are unable to accept the first reason. This can be dealt with briefly. In the discussion below, we use the term "accessory liability" to refer generally to liability of the type created under s 107 of the Penal Code (Cap 224, 2008 Rev Ed) ("the Penal Code"), which reads as follows:

> A person abets the doing of a thing who –
>
> (a) instigates any person to do that thing;
>
> (b) engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or

> (c) intentionally aids, by any act or illegal omission, the doing of that thing.

34 We are unable to accept the first reason because, as the Prosecution correctly submits, the general law on abetment does not require an abettor and the person abetted to "share the same *mens rea*" in order for the former to be convicted on a charge of abetment by conspiracy. The *mens rea* for abetment by conspiracy pursuant to s 107(*b*) of the Penal Code is that the abettor must have (a) intended to be party to an agreement to do an unlawful act; and (b) known the general purpose of the common design, and the fact that the act agreed to be committed is unlawful (see the Singapore High Court decision of *Nomura Taiji and others v Public Prosecutor* [1998] 1 SLR(R) 259 at [107]–[110]). Hence, on this analysis, for Liew's charges of abetment by conspiracy to have been made out, he need only have intended an unlawful act to take place pursuant to his and Xia's conspiracy, that unlawful act being Xia's offence of drug trafficking. In a similar vein, where the form of the abetment alleged is instigation, as in Ali's charge in the present case, the charge is made out once it is proved that Ali intended Selamat, whom he instigated, to carry out the conduct abetted, *ie*, to traffic in diamorphine (see the decision of this Court in *Bachoo Mohan Singh v Public Prosecutor* [2010] 4 SLR 137 at [111]; s 107(*a*) of the Penal Code). On this analysis, Liew's and Ali's purported intention to consume the offending drugs is irrelevant.

35 The analysis of the *second* reason is more complex. To be sure, we agree with Chong JA that the MDA is intended to operate differentially as between traffickers and mere addicts. We explain this legislative policy in greater detail at [64]–[66] below. However, what is needed is an explanation as to why that policy *entails* the rule in *Liew Zheng Yang*. In this judgment, we attempt to provide that explanation. The explanation involves an analysis of two interrelated dimensions of the nature of the offence of abetting another to traffic

in drugs. The first is the effect of s 12 of the MDA. The second is a well-established common law exception to accessory liability based on the policy behind the main offence. It will be seen that a proper understanding of both dimensions leads to the conclusion that the policy of the MDA must inform the application of the rules on accessory liability with regard to the offences created by it. And it is on the basis of that conclusion that we will turn to examine the history and policy of the MDA, and how they should inform the elements of the offence of abetting another to traffic in drugs.

(1) Section 12 of the MDA

36 The point that we make here is twofold. First, s 12 of the MDA ("s 12") deems a person who has abetted an offence under the MDA to have committed that offence and renders him liable on conviction to the punishment provided for that offence. Second, it is not clear whether s 12 has this effect when the abettor cannot, *by virtue of the very terms and the fundamental character* of the offence which he is alleged to have abetted, have committed that offence himself. Whether in fact s 12 has such an effect is a question that must be answered by having regard to the policy of the statute creating the offence. We turn now to elaborate on this point.

37 Section 12 provides as follows:

> Any person who abets the commission of or who attempts to commit or does any act preparatory to, or in furtherance of, the commission of any offence under this Act shall be guilty of that offence and shall be liable on conviction to the punishment provided for that offence.

38 This provision establishes a statutory offence under which the abettor of an offence under the MDA is deemed to have committed that offence and, more significantly, made liable to be punished as if he has committed that offence

(see the Singapore High Court decision of *Public Prosecutor v Tan Thian Earn* [2016] 3 SLR 269 at [42]). We note parenthetically that this concept of deeming is necessarily embodied within the general provisions relating to abetment as well, just not as explicitly (see, for example, s 109 of the Penal Code). The general purpose of a provision such as s 12 is, of course, to expand the ambit of the operation of one or more primary offences in an appropriate case. In normative terms, it is to extend liability for a primary offence to a party who, even though he has not himself committed that offence, should be treated as if he has. For the purposes of s 12, those primary offences are the offences created by the MDA.

39 The question which arises in this context, then, is whether s 12 is effective to make an abettor liable to be punished as if he has committed an offence under the MDA when he as principal *could not, by the very terms of that offence, have committed it*. The question arises because, in the present case, Ali is, by s 12, ostensibly deemed to have committed the offence of trafficking in a controlled drug under s 5(1)(*a*). This is because he had instigated Selamat to commit that offence. However, assuming that Ali had intended to consume a portion of the drugs which Selamat had trafficked, then Ali cannot by the very terms of s 5(1)(*a*) have committed an offence under that provision, in respect of that portion, as principal. That is because the offence of drug trafficking under s 5(1)(*a*) requires the offender to have intended to transport the offending drug to someone other than himself (*Ong Ah Chuan* at [10] and [12]), whereas Ali had, *ex hypothesi*, intended it for his own consumption.

40 It is not immediately clear what the effect of s 12 is in such a case. It is one thing to state that a provision such as s 12 extends liability for a primary offence to an accessory where the accessory has promoted the commission of an offence which he did not himself commit. It is quite another to state that a

provision such as s 12 extends liability for a primary offence to an accessory ***where the accessory could not, by the very terms of the offence in question, have committed that offence***. That is precisely the case where ***a consuming-recipient*** is charged with abetting another to traffic in drugs. Furthermore, it must be recognised that the underlying normative question is whether liability for that offence should be extended to him because for some morally significant reason he should be regarded as a trafficker and punished like one. It is not, of course, for the courts to make that value judgment. However, to the extent that ***the legislature*** has made such a value judgment through ***the clear policy*** of a statute containing the primary offence in question, it would be remiss for the courts to ignore that policy in applying a provision like s 12. For this reason, it is essential, in our view, to consider whether the application of s 12 of the MDA to a consuming-recipient is precluded or affected in any other way by ***the policy of the MDA itself***.

41 In adopting this line of reasoning, we find ourselves in broad agreement with the dissenting judgment of Kirby J in *Maroney v The Queen* (2003) 216 CLR 31 ("*Maroney*"), a case decided by the High Court of Australia which bears some similarity to the facts of this case and raises similar issues. In that case, the accused, Maroney, was an inmate of a prison. He arranged for a person outside, Watson, to supply another person, Miller, with heroin with a view to supplying it to him (Maroney). Miller was intercepted before he could deliver the drug to Maroney. Maroney was convicted on a charge of "unlawfully supplying a dangerous drug to another" under s 6(1) of the Drugs Misuse Act 1986 (Qld) ("the Queensland DMA"). The charge was aggravated by operation of s 6(1)(*d*) of that act, which imposed a heavier penalty on the supply of a dangerous drug to a person in a correctional facility. And by s 7(1)(*d*) of the Criminal Code 1899 (Qld) ("the Queensland Criminal Code"), Maroney was

deemed to have committed the offence of aggravated supply because he had procured Watson to supply heroin to him in prison. That provision states as follows:

> (1) When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say—
>
> …
>
> (d) any person who counsels or procures any other person to commit the offence.

42 We note that the deeming language in this provision is *even more explicit* compared to s 12 of the MDA, *and* that the provision is located in a statute separate from the Queensland DMA which governs the general criminal law. However, it is clear that both provisions operate similarly to deem a person to have committed an offence to which he was an accessory, under certain circumstances. It should also not escape our attention that the offence of unlawfully supplying dangerous drugs under s 6(1) of the Queensland DMA, like the offence of drug trafficking under s 5(1)(*a*) of the MDA, requires the offending drug to have been intended for someone other than the supplier or trafficker.

43 Maroney argued that s 6(1) of the Queensland DMA impliedly excluded the application of s 7(1)(*d*) of the Queensland Criminal Code. He contended that because the former provision proscribed the supply of drugs "to another", the latter provision would apply only if the accused were someone other than the person supplied. He also relied on the fact that the Queensland DMA punished drug consumers less severely than drug suppliers, such that had Miller completed the offence, Maroney could have been charged with possession, which carried a lighter penalty. Finally, he argued that it was wrong to construe s 7(1)(*d*) of the Queensland Criminal Code so widely that it "produced the result

of convicting the appellant of supplying heroin to himself, as this was artificial and against reason" (at [9]).

44 The majority, comprising Gleeson CJ and McHugh, Callinan and Heydon JJ, rejected these arguments in a brief judgment. Their principal reason was that Watson's act of supplying drugs to Maroney in prison was unambiguously an offence – and, indeed, was the relevant offence in that case – for the purpose of s 7(1)(*d*) of the Queensland Criminal Code (*Maroney* at [10]). This being the case, Maroney must be deemed to have committed the offence which he had procured Watson to commit *even though* he (Maroney) could *not* have committed the offence *as principal* (*Maroney* at [11]).

45 Kirby J disagreed. The crux of his reasoning is to be found in the following passage (*Maroney* at [43]):

> … In textual terms, the appellant cannot be deemed "to have taken part in committing the offence" and to be "guilty of the offence" because an essential element of "the offence" is that the offender must be the *supplier* and not the *recipient* of the dangerous drug. By the terms of the offence, the offender cannot be placed on both sides of the equation. In accordance with [the Queensland DMA], he cannot at once be the person who "supplies" and "the person to whom the thing is supplied" within the institution. No general aiding and abetting provision can change this fundamental character and expression of the offence. The *particularity* of s 6 of the Act excludes the engagement, in the appellant's case, of the *general* provisions of s 7 of [the Queensland Criminal Code]. [emphasis in original]

46 While we agree with the passage just quoted, we appreciate that an important part of Kirby J's reasoning is the argument that the generality of s 7(1)(*d*) of the Queensland Criminal Code, being a provision in a statute governing the general criminal law, cannot override the particularity of s 6 of the Queensland DMA, which creates an offence governed by its own logic and "fundamental character". This argument does not apply to s 12 of the MDA

because s 12 of the MDA – as we have noted at [42] above – does not concern the general criminal law but governs offences specifically under the MDA.

47 Crucially, however, it does not follow from the distinguishing feature just mentioned that a provision such as s 12 which applies to a specific statute *can and does* override the particular logic of the offences contained in that same statute. Just as Kirby J observed of s 6 of the Queensland DMA, we consider that an "essential element" of the offence in s 5(1)(*a*) of the MDA is that "the offender must be the supplier and not the recipient" of the drug, and that "[b]y the terms of the offence, the offender cannot be placed on both sides of the equation" (*Maroney* at [43]). Accordingly, it is not clear to us that s 12 extends liability for a primary offence to an accessory where the accessory could not, by the very terms of that offence, have committed the offence. It is possible to interpret s 12, in so far as it extends liability to other persons, as extending liability to only all other persons who could, in law, be guilty of the offence concerned (see *Maroney* at [58]). As Kirby J observed, such an interpretation would still leave a provision like s 12 with plenty of work to do, so to speak (*Maroney* at [59]). It would, for example, readily cover someone like Miller, through whom Watson was to deliver the heroin to Maroney. And it is people like Miller to whom the label of an accessory to trafficking seems more appropriately to apply.

48 To ascertain the true effect of s 12, then, we must have regard to the policy of the MDA itself. In fact, there is a specialised principle of statutory interpretation that finds its roots in the common law which buttresses our analysis on s 12 and, indeed in our view, *further justifies* the need to have regard to the policy of the MDA. As we shall see, the principle is specialised because it is *tailored* to address the specific issue of whether accessory liability exists for statutory offences which for some reason appear to preclude such liability,

and the principle has, as its principal constituent element, the need to have regard to the relevant *legislative policy* of the statute concerned to decide that specific issue.

(2) R v Tyrrell

49 Turning, then, to the point made towards the end of the preceding paragraph, we note that there is a well-established common law rule that where an abettor is a victim intended to be protected by the offence he has abetted, he cannot be liable as an accessory. The point we make here is that this rule embodies the broader principle that the legislative policy behind a primary offence must inform and indeed exclude, in the appropriate case, the application to that offence of the rules on accessory liability. This principle, in our view, is essentially a specialised principle of *statutory interpretation* that operates by legitimately inviting the question of how the legislature intended to deal with conduct which is *inevitably incidental* to the main offence. We turn now to elaborate on this particular point.

(a) Rationale and nature of the rule

50 The rule was laid down in the English decision of *R v Tyrrell* [1894] 1 QB 710 ("*Tyrrell*"). The defendant was a girl below the age of sixteen. She was charged with and convicted of aiding and abetting a man to have unlawful carnal knowledge of her, that being an offence under s 5 of the Criminal Law Amendment Act 1885 (c 69) (UK). Her conviction was quashed by a five-member Court of Crown Cases Reserved. Lord Coleridge CJ observed that the 1885 Act was "passed for the purpose of protecting women and girls against themselves", and that it was "impossible" that the 1885 Act "can have intended that the girls for whose protection it was passed should be punishable under it for offences committed upon themselves" (at 712). Mathew J agreed,

suggesting the further reason that otherwise, "nearly every section which deals with offences in respect of women and girls would create an offence in the woman or girl", and that the legislature could not have intended this result (at 712). Grantham, Lawrence and Collins JJ concurred (at 713).

51 The rule in *Tyrrell* is well-established in England today (see, for example, David Ormerod, *Smith & Hogan's Criminal Law* (Oxford University Press, 13th Ed, 2011) ("*Smith & Hogan*") at p 240; *Attorney General's Reference (No 53 of 2013)*; *R v Wilson* [2013] EWCA Crim 2544 at [19]). It operates to *exempt* a victim from being an accessory to a crime committed against him or her (see *Smith & Hogan* at p 241). However, as Prof Glanville Williams recognised, its rationale has more extensive implications that the rule as stated (see Glanville Williams, "Victims and other exempt parties in crime" (1990) 10 LS 245 ("*Williams*")). To identify that rationale, Prof Williams poses the question as to whether a prostitute may be convicted for abetting another to commit the statutory offence of living on the earnings of prostitution. He argues that she may not. The reason for this, he suggests, is not principally because she is a victim of the offence; indeed, some might say it is unrealistic to regard her as such because her arrangement with her pimp may be on mutually beneficial terms. Instead, she should be exempted from liability as an abettor because the offence is aimed at discouraging pimps from making profits through prostitution, and not at criminalising prostitutes. The exemption should therefore be based on the implied intention of the statute (see *Williams* at p 256).

52 This reasoning was employed by the Alberta Court of Appeal in *R v Murphy* [1981] AJ No 22 ("*Murphy*"), where it was faced in an actual case with the very question posed by Prof Williams. The court, after a survey of Canadian and US authorities, accepted the defendant prostitute's submission to this effect: "A prostitute commits no offence under the [Canadian] Criminal Code by

earning her living from sexual commerce: Parliament has not sought to penalize her for doing so. That statutory immunity, it is said, ought not to be eroded by a side wind", *ie*, by the law on accessory liability (at [11]). In an illuminating passage at [19], the court locates the concept of a victim's being exempt from liability for participating in an offence ***within a broader principle of giving effect to the policy behind that offence***:

> When the victim of an offence is a party to its commission by one means or another, the victim may be charged with its commission if the statute so provides. Such is not the case here. Otherwise, as I understand the common law, such circumstance is available to the accused victim as a defence when it is supported by legislative policy. … I adopt the following passage from Glanville Williams: Criminal Law – The General Part, 2nd edition, page 673–4 as applicable to the circumstances of the present case:
>
> > One may submit with some confidence that a person cannot be convicted of conspiracy when there is a recognized rule of justice or policy exempting him from prosecution for the substantive crime. Thus, on facts like *Sharpe*, just referred to, the law of conspiracy could not be used to undermine the privilege against self-incrimination, nor the rule that an offender does not commit a further offence by concealing the evidence of his guilt. Again, where D and E jointly publish a defamatory libel, and E had privilege and D has not, it seems beyond doubt that the protection given to E by the law of privilege could not be circumvented by charging him with conspiracy to libel.
> >
> > The true solution of the problem is to decide it in exactly the same way as the analogous problem whether a person can be brought within a statutory prohibition as principal in the second degree. It is recognized that this question is to be answered by reference to policy, …

53 We respectfully agree with this reasoning. Thus explained, the principle in *Tyrrell* properly expands beyond offences which protect a particular class of persons. The principle extends to persons whom the legislature did not intend to make liable for committing the main offence. The principle is "based on the policy of the penal statute" (see *Williams* at 257). Or as Prof Brian Hogan put

it, the "appropriate test" is whether establishing accessory liability would be to "defeat the purpose of the statute" (see Brian Hogan, "Victim as Parties to Crime" [1962] Crim LR 683 at 690). We shall refer to this as "the extended principle in *Tyrrell*".

54 We turn next to examine the nature of this principle so that its scope is properly understood. Its unusual nature was noted by Prof Andrew Ashworth, who without doubting its correctness has nevertheless called it a "curious rule" (Andrew Ashworth, "Child Defendants and the Doctrines of the Criminal Law" in James Chalmers (ed), *Essays in Criminal Law in Honour of Sir Gerald Gordon* (Edinburgh University Press 2010) at 47). A number of other commentators conceptualise the rule in *Tyrrell* as a rule of statutory interpretation or at least as an expression of applying the general rules thereof. Thus, while Prof Michael Bohlander is willing to regard the rule in *Tyrrell* as "a general rule of English law" and as a "principle", he observes that "in most cases one would be able to characterise it as an issue of general statutory interpretation" (Michael Bohlander, "The Sexual Offences Act 2003 and the Tyrrell principle – criminalising the victims?" [2005] Crim LR 701 at 702). For this proposition, Prof Bohlander cites A P Simester and G R Sullivan, *Criminal Law: Theory and Doctrine* (Hart Publishing, 2nd Ed, 2003) at pp 231–232, where the learned authors of that treatise observe that "the common law principle espoused in *Tyrrell* is of uncertain scope" and that its application "depends on the purpose of the relevant legislation, and arises only if the statute is directed toward protecting an identified class of persons." (We have seen, of course, that the rule is capable of wider application.) Beyond these commentators, however, *Tyrrell* appears to be somewhat under-theorised.

55 In our judgment, the extended principle in *Tyrrell*, which we endorse, ought to be regarded as a specialised rule of statutory interpretation. It is clear

that it has the nature of an interpretive rule because it operates to deny the expected effect – *ie*, that of imposing accessory liability – of the combined operation of the statutory provisions on abetment (s 107 of the Penal Code and also, in this case, s 12 of the MDA) and the statutory provision defining the main offence which is said to be abetted (in this case, s 5(1)(*a*) of the MDA). Such effect is denied by the extended principle in *Tyrrell* on the basis that Parliament must not have intended the effect. The critical question, then, is on what basis such intent is inferred. It is the context which invites that process of inference, in our view, which makes this a "specialised" rule and which must be properly conceptualised. That context, in our view, is elucidated by a concept called "inevitably incidental conduct", which we now turn to explain.

(b) Inevitably incidental conduct

56 Inevitably incidental conduct, as its name suggests, is conduct other than that of the main offender which is inevitably an incidence of the main offence. For example, inevitably incidental to the offence of living on the earnings of a prostitute under s 146(1) of the Women's Charter (Cap 353, 2009 Rev Ed) is the prostitution of a woman or girl. Inevitably incidental to the offence of unlawful carnal knowledge under s 5 of the Criminal Law Amendment Act 1885 (c 69) (UK) is the act of a girl below the age of sixteen having intercourse with the main offender. And inevitably incidental to the offence of drug trafficking under s 5(1)(*a*) of the MDA is the intended receipt of the offending drugs. The question is whether the prostitute, the under aged girl and the intended recipient of the drugs are truly to be regarded as accessories to the main offence in which they participated by reason of the general law on abetment. In other words, does inevitably incidental conduct *automatically* attract accessory liability?

57 This question, in our view, begins the process which we mentioned a moment ago of inferring Parliament's intention with regard to whether accessory liability exists (see [55] above). This is a legitimate inquiry because where the legislature has criminalised conduct the commission of which inevitably involves the participation of a party other than the main offender, *it is reasonable to assume that the legislature* ***must have also considered*** *whether and how to criminalise such participation*. It is therefore entirely appropriate and indeed necessary to ask what the legislature considered in that regard. In the case of prostitutes in relation to the offence of living on the earnings of a prostitute, our legislature intended specifically not to criminalise the act of prostitution itself – inevitably incidental as it is to that offence – but, instead, to criminalise those who seek to profit from or encourage it (see *Singapore Parliamentary Debates*, *Official Report* (5 May 1999) vol 70 at cols 1434–1435 (Wong Kan Seng, Minster for Home Affairs)). In the case of intended recipients in relation to the offence of drug trafficking, it could well be argued that in so far as they are purely drug ***addicts***, our legislature intended specifically to criminalise them through the offences of unlawful possession and consumption and *not* through the offence of drug trafficking, which is reserved for drug *traffickers*. It will be demonstrated below where the MDA's policy is analysed that this is in fact the case.

58 The foregoing outlines what we mean by the process of inferring Parliament's intent which forms the substance of the extended principle in *Tyrrell*. As a rule of statutory interpretation, that principle is "specialised" because inevitably incidental conduct is a unique impetus for looking beyond the text into Parliament's intent. Not all offences involve inevitably incidental conduct. The offence of murder under s 300 of the Penal Code, for example, does not involve such conduct. The commission of the offence of murder does

not inevitably involve participation by someone other than the main offender. So it is not useful to ask whether Parliament had intended to deal with such participation in some way other than imposing accessorial liability. By contrast, it is an inevitable incidence of the offence of trafficking under s 5 of the MDA that the drugs trafficked must be intended for someone other than the trafficker, and in so far as that someone participated in the trafficker's offence, it is eminently reasonable to ask how Parliament intended to treat him.

59 We consider this reasoning to be supported by the decision in *Tyrrell* itself. In that case, Mathew J gave a *negative* answer to the question whether inevitably incidental conduct *automatically* attracts accessory liability. He stated that to uphold the defendant's conviction would entail the result that nearly every section which deals with an offence in respect of women and girls would create an offence in the woman or girl (see [50] above). Mathew J's reasoning is in fact embodied in the present case in the observation, made by Chong JA (see *Liew Zheng Yang* at [2]) and Selamat and with which the Prosecution itself agrees, that the Prosecution's position would entail that *virtually every person* in possession of drugs for his own consumption would be liable for abetting another to traffic in drugs. The solution implicit in Mathew J's reasoning, of course, is to ask whether ***the policy*** of the penal statute truly provides for the criminalisation of such inevitably incidental conduct.

60 The approach just canvassed has much to commend it. It is adopted widely in the United States (see Dennis J Baker, *Reinterpreting Criminal Complicity and Inchoate Participation Offences* (Routledge, 2016) at p 149 note 24). Thus, it was stated in the United States Court of Appeals (Sixth Circuit) decision of *US v Daniels* (2001) 653 F3d 399 at 413, as follows: "When a crime inherently requires 'two to tango', but the statute is not intended to punish the victim of the crime – as in the case of prostitution or the manufacture

of pornography – federal courts regularly apply a common-law exception to conspiratorial or accomplice liability". In the Superior Court of New Jersey (Appellate Division) decision of *Club 35, LLC v Borough of Sayreville* (2011) 420 NJ Super 231 it was observed thus: "[C]onduct 'inevitably incident' to the conduct constituting an offence is not punishable unless the offence is defined to include it".

61 In England, the Law Commission of England and Wales has in a consultation paper proposed that the rule be formally enshrined in statute, although that proposal has not been taken up (see The Law Commission of England and Wales, *Assisting and Encouraging Crime: A Consultation Paper* (Consultation Paper No 131, 1993) (Chairman: The Honourable Mr Justice Brooke)). It is nevertheless instructive to set out their consideration of the issues raised by inevitably incidental conduct (at p 207 of the paper). The following passage sets that out, and also contains remarks that are particularly relevant to the issue in the present case, that is, accessorial liability for the offence of drug trafficking on the part of a consuming-recipient:

> *Conduct inevitably incident to the substantive offence*: Exemption of the victim of a crime from accomplice liability does not wholly address the problems that arise. The commentators on the [Model Penal Code] ask, as examples, the questions whether a woman should be deemed an accomplice to a criminal abortion performed on her, whether the man who has intercourse with a prostitute ought to be liable as an accomplice to the act of prostitution, *whether the purchaser is an accomplice to an unlawful sale*, the unmarried party to a bigamous marriage as an accomplice of the bigamist, the bribe-giver an accomplice of the taker. Such situations mark the *interface of conflicting policies as to whether the normal principles of accessory liability ought to apply*; there is in these cases an ambivalence in public attitudes towards the behaviour in question that makes enforcement difficult at best; if liability is pursued to its fullest theoretical extent, public support might be wholly lost. On the other hand, *a total reliance on prosecutorial discretion could lead to intolerable inconsistency*. … [emphasis added]

62 In our judgment, the extended principle in *Tyrrell* may be conceptualised as a specialised rule of statutory interpretation which operates by inviting the question of how the legislature intended to deal with conduct which is inevitably incidental to the main offence. The concept of inevitably incidental conduct is the central *analytical tool* by which the court ascertains the true conduct sought to be penalised by the offence-creating statute in question. We note of course that there may be *other* analytical tools by which a court might be compelled to look at legislative policy to ascertain such conduct, but we shall leave this issue to be addressed in an appropriate future case. Our closing observation here is that whether conduct is "incidental" or "essential" for the purposes of the statutory offence is necessarily a matter of legislative intention and, more specifically, the legislative policy of the particular statute. This only emphasises the theme of the analysis thus far, which is that ***the legislative policy behind the main offence must inform the application of the rules on accessory liability to the statutory offence in question***.

63 Applied to the offence of abetting another to traffic in a controlled drug under s 5(1) of the MDA, the question prompted by the extended principle in *Tyrrell* is whether Parliament intended a consuming-recipient to be made liable and punished for committing the offence of trafficking in a controlled drug. This, in turn, entails an examination of the legislative policy of the MDA, which we turn now to do.

(3) Policy of the MDA

64 The MDA was enacted in 1973 to address the growing problem of drug abuse at that time. Central to the statute's design was heavy punishment for drug traffickers and rehabilitation for drug addicts. Thus it was observed in Andrew

Phang Boon Leong, *The Development of Singapore Law: Historical and Socio-legal Perspectives* (Butterworths 1990) at p 232:

> To return to the Act itself, we find a clear distinction drawn between a trafficker and an addict. A drug trafficker was viewed as 'the most abominable of all human beings if he can be deemed "human". He is a merchant of "living death" which he brings to a fellow human being. He, therefore, deserves the maximum punishment'. Provision was made, on the other hand, for the addict insofar as rehabilitation was concerned. A balance of sorts was thus sought to be struck.

65 This dichotomy between the trafficker and the addict in the design of the MDA finds unequivocal support in the speech of the Minister who moved the Second Reading of the Bill which became the 1973 version of the MDA. He explained the distinction by referring to the fact that the MDA provided less severe punishments for drug addicts compared to those for drug traffickers and to the fact that the Act would establish rehabilitative measures to help drug abusers kick their addiction (*Singapore Parliamentary Debates*, *Official Report* (16 February 1973) vol 32 at cols 417–418 (Chua Sian Chin, Minister for Health and Home Affairs)):

> [I]t is not all punishment written into this Bill. A clear distinction has been made between the drug addict and the trafficker and pedlar. I am moving an amendment at the Committee Stage to remove the provision of a minimum sentence of two years for a second or subsequent offence for smoking, self-administering or consuming a controlled drug as provided in the Second Schedule to clause 29 … For those addicts who wish to stop this vicious habit, there are provisions under clause 33(3) for them to volunteer for treatment at an approved institution. Any statement given for the purpose of undergoing treatment will not be admissible as evidence against him in any subsequent prosecution. Anyone who has been addicted to any of the controlled drugs and especially those who have had their first acquaintance with such a drug can take advantage of this provision to have himself rehabilitated. Powers have also been provided for the Director, Central Narcotics Bureau, under clause 33, to require any person, whom he has reasonable grounds to suspect to be an addict, to be medically examined and, if necessary, to undergo treatment

> at an approved institution. All outpatient clinics and centres have been organised to provide for treatment of drug addicts. A referral clinic has been established at the Outram Road Hospital. A second one is planned for Alexandra Hospital. A special ward for the hospital care of addicts will be opened within the year.

66 The premises of the distinction drawn by the Minister in 1973 still exist today and, accordingly, that distinction remains valid. No doubt the penalties for the offences of possession and consumption have increased; in particular, minimum penalties have been instituted for second and subsequent offences of such a nature (see *eg*, s 33A of the MDA). However, these penalties are intended for recalcitrant offenders and hard-core addicts (see *Singapore Parliamentary Debates*, *Official Report* (1 June 1998) vol 69 at cols 42–43 (Chua Sian Chin, Minister for Health and Home Affairs)). In any case, they hardly approach the penalties that a drug trafficker might expect, even if he is a first time offender. Where the trafficking was of a large quantity of the offending drugs, he may be liable to face the gallows or to be imprisoned for life for just one trafficking offence (see the Second Schedule of the MDA). In addition, the MDA still provides for an addict's treatment and rehabilitation. Thus, Part IV of the MDA perpetuates the existence of drug rehabilitation centres to which suspected drug addicts may be admitted for their addiction to be treated, and each addict's case is under constant review to determine whether he should be discharged (see ss 34(1) and 38(1) of the MDA).

67 It is unnecessary to elaborate further on the content of this distinction because it is well-established and is not seriously in doubt. What requires further examination, however, is the conceptual issue of how the existence of that distinction might affect the definition of the elements of a particular offence under the MDA. Such is the nature of the question whether a consuming-recipient may be liable for abetting another to traffic drugs to himself, and

importantly, *Liew Zheng Yang*'s negative answer to that question is not the first time that the cases have invoked the distinction between a trafficker and an addict to explain the requirements of an MDA offence. In our view, it is necessary and instructive to consider a selection of those cases in order to clarify the boundary beyond which the attempt to preserve that distinction must yield to competing considerations arising from ***the legislature's own intentions***. We will then demonstrate that *Liew Zheng Yang* does not in fact cross that boundary and that the distinction must therefore remain ***preeminent*** in understanding the scope of a consuming-recipient's liability as an accessory to the offence of drug trafficking.

68 We turn, first, to the familiar case of *Ong Ah Chuan* (see also [28] above). In that case the Privy Council construed the word "transport" in s 3 of the 1973 MDA (which created the offence of drug trafficking) to mean moving drugs from one place to another "to another person" (at [10]). Lord Diplock, who delivered the judgment of the Board, proffered a number of reasons for adopting this construction. One of those reasons was that "the evident purpose of the Act is to distinguish between dealers in drugs and the unfortunate addicts who are their victims" (at [10]). In Lord Diplock's view, this reason, taken together with the ordinary meaning of the word "traffic" and the ordinary meaning of the six other verbs in s 3 which described the various kinds of overt acts which constitute trafficking (*ie*, sell, give, administer, send, deliver and distribute), made it clear that the word "transport" necessarily involves promoting the distribution of drugs to another person. The differential treatment of traffickers and addicts, being the evident policy of the statute, therefore served as a reason for the construction adopted which was complementary to the textual features of the provision being construed.

69 We turn next to the unusual decision of this Court in *Ng Yang Sek v*

Public Prosecutor [1997] 2 SLR(R) 816 ("*Ng Yang Sek*"). The accused was found to be in possession of raw opium in excess of the amount warranting capital punishment, and he was charged with two counts of trafficking under s 5 of the 1985 MDA. The trial judge found that he was a practitioner of Chinese medicine and that the opium he had was intended to be used solely for the manufacture of medicinal plasters. Nonetheless, the trial judge convicted him on the charges and sentenced him to death. The Court of Appeal set aside the convictions. The crux of the Court's reasoning was that "[t]he opium in the appellant's possession was never meant or even remotely contemplated to be used in a manner associated with drug addiction" (at [41]). The court implicitly accepted that distributing plasters containing opium fell within the technical definition of trafficking (at [37]); that must be so, considering that it involves distributing a controlled drug to "another person", in the words of *Ong Ah Chuan*. However, the court held that the broader principle behind *Ong Ah Chuan* is that the court should not "sacrifice the object pursued by Parliament on the altar of formalism" (at [38]), citing the Quebec Court of Appeal decision in *Regina v Rousseau* (1991) 70 CCC (3d) 445 *per* Dube J. And that object, in the context of the MDA, consisted in imposing the harsh penalties of the statute only on those who are properly to be characterised as drug dealers, by means of a purposive interpretation of the relevant offence-creating provision. Thus the court observed (at [36] and [46]):

> Although there are no authorities directly on point, in the seminal case of *Ong Ah Chuan v PP* [1979–1980] SLR(R) 710, the Privy Council declined to interpret the s 2 definition of "trafficking" literally. It was stated by their Lordships that the mere physical conveyance of drugs is not "transporting" under s 2 if it is not accompanied by the ultimate purpose that the drugs be distributed (see also *Tan Meng Jee v PP* [1996] 2 SLR(R) 178). *The underlying rationale of these cases is that, if the law does not give these verbs such an interpretation, there is no distinction between drug dealers and drug addicts engaged in the physical transporting of drugs, the one of distribution and the other for his own consumption. …*

> …
>
> In our judgment, it is clear beyond doubt that the appellant's conduct should not attract the disapprobation that is reserved for the drug dealers who exploit the vulnerability of addicts and who spread the poison of narcotic addiction in society. The dangers associated with the appellant's possession of drugs, eg that they could inadvertently fall into the wrong hands, are under the scheme of the Act to be punishable under s 8 and not s 5. In our opinion, it is unarguable that Parliament did not intend that the legislation operate in such a way as held by the trial judge and contended for by the Prosecution. These interpretations are unduly formalistic and pay undue deference to the letter of the law, not its object.
>
> [emphasis added]

In the event, the court substituted the accused's charges with charges of possession of a controlled drug, on which he was convicted.

70 Conceptually, it must be appreciated that the reasoning adopted by the court in *Ng Yang Sek* entails, in cases with a similar factual context, an additional mental element for the offence of trafficking, namely, that trafficking is made out only when the distribution or the relevant overt act is for the purpose of feeding the drug addiction of another person: see *Ng Yang Sek* at [44]. Of course, the accused will be presumed to have such a purpose where the quantity of the offending drug he is found to be in possession of is such as to trigger the presumption under s 17 of the MDA. Where the quantity of the drug does not trigger that presumption, *Ng Yang Sek* implies that the Prosecution must prove beyond a reasonable doubt that the accused had that purpose. In our judgment, this result is sensible and, in the context of the present analysis, provides a positive example of how the distinction between a trafficker and an addict may properly affect the definition of a specific offence under the MDA.

71 A contrasting example may be found in the final case to be discussed here. In the Singapore High Court decision of *Adnan bin Kadir v Public*

Prosecutor [2013] 1 SLR 276 ("*Adnan (HC)*"), the accused brought 0.01g of diamorphine across the Causeway from Johor Bahru supposedly for his own consumption. He was convicted of the offence of importing a controlled drug under s 7 of the MDA. On appeal, Chan Sek Keong CJ set aside his conviction on the basis that the word "import" under s 7 did not extend to a person who had brought a controlled drug into the country purely for his own consumption, *ie*, a consuming-importer, in the language of this judgment. This result, in Chan CJ's view, was dictated by the policy of the MDA, which drew a distinction a trafficker and an addict. He consequently held that it was for the Prosecution to prove beyond a reasonable doubt that the accused had brought the drug into Singapore for the purpose of trafficking. Chan CJ explained at [50]:

> The question then is whether the reasoning in *Ong Ah Chuan* and *Lau Chi Sing (CA)* applies where the charge is one of importation. The reasoning in those cases applies with equal force where the charge is one of importation as, in my view, Parliament did not intend the scope of the offence of importation to include the case of the accused person brining into Singapore drugs for his personal consumption. The offence of importation is, in substance, trafficking across national borders. The enactment of the 1973 MDA and its subsequent amendment in 1975 to impose more severe punishments was *expressly intended to combat drug trafficking while at the same time creating and preserving a distinction between drug dealers, who would bear the full brunt of the harsh penalties, and drug addicts, who would not* (see [15]–[17] above). This dual objective of our drugs legislation has been consistently reiterated over the years when the scope of the mandatory death penalty was widened to include opium, cannabis, cocaine and methamphetamine … Interpreting the offence of importation to include importation for the purpose of personal consumption would be *inconsistent with Parliament's intention to maintain the distinction between the more harmful activity to the general public of a drug trafficker and the less harmful activity of a drug addict bringing in drugs for his own consumption.* The same reasoning would apply in the case of the offence of exportation. [emphasis added]

72 This Court did not agree with Chan CJ's reasoning when the Prosecution brought a criminal reference to question the correctness of the holding of *Adnan (HC)*. In *Public Prosecutor v Adnan bin Kadir* [2013] 3 SLR 1052 ("*Adnan (CA)*"), which the Prosecution in the present case relies upon, the Court held that the true meaning of the word "import" in s 7 of the MDA was that which was provided for in s 2(1) of the Interpretation Act (Cap 1, 2002 Rev Ed) ("IA"), that is, simply the bringing of an object into the country, and that this definition did not require the object to be brought in for a particular purpose. This definition prevailed because (a) s 2(1) of the IA provides that the IA's definition of words "shall" apply unless the written law expressly provides otherwise or unless there is something in the subject or context in consistent with such construction; (b) the MDA itself does not define the word "import"; and (c) the IA's definition of that word was consistent with the MDA's subject and context. In relation to part (c) of this line of reasoning, it was held that there was no inconsistency between the IA's definition of the word "import" and the legislative intent behind the MDA. To the extent that the distinction between a trafficker and an addict was a critical part of that intent, it was not sufficient to show that Parliament had intended to apply s 7 *only* to persons who import drugs for the purpose of trafficking (see [48] and [50]). Moreover, the distinction could still be maintained by imposing more lenient sentence on a consuming-importer convicted under s 7 (at [51]).

73 The question which then arises is this: what is the explanation for the difference in approach in *Ng Yang Sek* and *Adnan (CA)*? Specifically, why is the distinction between trafficker and addict capable of affecting the elements of the offence of trafficking but not the elements of the offence of importation, even though importation is, in Chan CJ's words, essentially "trafficking across national borders" (*Adnan (HC)* at [50])? It is not sufficient simply to state that

Adnan (CA) concerned the different offence of importation because s 2(1) of the IA allows the court to choose not to adopt the IA's definition of a statutory word if the statute's subject and context demand otherwise. In our judgment, the only principled answer to the question is that there is evidence of legislative intent to the effect that s 7 does extend to consuming-importers. Such evidence was indeed discussed by the court in *Adnan (CA)*. It related to the fact that harsher penalties were imposed for importation compared to trafficking. This Court observed that this difference was explicable on the basis that Parliament considered the prospect of fresh drugs infiltrating Singapore to be such a great menace that it justified the blanket imposition of tough penalties to deter drug importation regardless of the purpose for which they were imported: *Adnan (CA)* at [56]. And it found support for this view in the parliamentary debates (see *Adnan (CA)* at [56], citing *Singapore Parliamentary Debates*, *Official Report* (16 February 1973) vol 32 at col 415 (Chua Sian Chin, Minister for Health and Home Affairs) and *Singapore Parliamentary Debates*, *Official Report* (20 November 1975) vol 34 at cols 1381–1382 (Chua Sian Chin, Minister for Health and Home Affairs)). Accordingly, the distinction in the MDA's policy between trafficker and addict is not sufficient to preclude the extension of s 7 to the consuming-importer.

74 By contrast, there is no evidence that Parliament intended a consuming-recipient to be deemed as a trafficker and to be punished like one. In fact, the policy of the Act indicates precisely ***the opposite***. It may be concluded from this that Parliament cannot have intended a consuming-recipient, by operation of s 12, to be deemed a drug trafficker and punished as such. The operation of s 12 to achieve this last-mentioned outcome contradicts the very logic of the distinction between a trafficker and an addict which successive versions of the MDA have preserved. The extended principle in *Tyrrell* also compels us to give

weight to that distinction, which leads us to the view that Parliament cannot have intended to criminalise consuming-recipients under the offence of drug trafficking. Borrowing the words of Yong CJ in *Ng Yang Sek* at [41], we consider that the consuming-recipient "does not fall within the class of offenders which Parliament had in mind when it enacted s 5 of the [MDA]". Ultimately, the criminal law requires the elements of an accessory offence to be normatively consistent with the rationale of the main offence and that, in our judgment, would scarcely be achieved by reading and applying the MDA in way that treats an addict as if he were a trafficker.

(4) The applicable rule

75 The result is that we endorse the *ratio decidendi* of *Liew Zheng Yang*. A person incurs no criminal liability under s 5 read with s 12 of the MDA for abetting another to traffic drugs to himself if the drugs were intended for his own consumption, that is, if he was a consuming-recipient. He will be so liable only if the Prosecution is able to prove beyond a reasonable doubt that he intended the offending drugs to be passed on from himself to *someone else*, that is, that he himself intended to traffic in the offending drugs. In other words, the Prosecution must show that he was *not* a consuming-recipient. The corollary is that a person will escape a charge of abetting another to traffic in drugs if the court finds that there is reasonable doubt arising from the possibility that he was the intended recipient of the offending drugs and that he did intend to consume them himself.

76 The rule would operate in the following way. A court faced with an accused person charged with abetting another to traffic in drugs must be satisfied that the accused is not a consuming-recipient before convicting him on the charge. If there is evidence that the accused was the intended recipient of

the drugs which form the subject matter of the charge, then the Prosecution has the burden of proving beyond a reasonable doubt that he intended to traffic in the offending drugs. The accused will ordinarily not be presumed under s 17 of the MDA to have such an intention because he will not, as an alleged abettor, usually have had the drugs in his possession. And in so far as he attempts to say that those drugs were intended wholly or partly for his own consumption, that attempt will go towards raising a reasonable doubt as to whether he intended to traffic in the offending drugs. Also, it is possible for a person to be a consuming-recipient in respect of a certain portion of the offending drugs and also to have an intention to traffic in the remaining portion.

77 If, however, there is no evidence that the accused is the intended recipient of the drugs or if he is not alleged by the Prosecution even to have been such a recipient but instead to have abetted another to traffic in drugs in some other manner or capacity (*eg*, by directing a courier to deliver drugs to a client), that would preclude the possibility of his being a consuming-recipient. The same is true where the accused himself denies being the intended recipient of the offending drugs because even if that is a false denial, he would be contradicting himself by also claiming that the drugs were meant for his own consumption, and therefore such a claim would *ex hypothesi* be devoid of merit. In such situations, there would be no reasonable doubt that the accused is not a consuming-recipient, and the Prosecution will correspondingly not have to prove that he intended to traffic in the offending drugs.

78 So explained, the *ratio* of *Liew Zheng Yang* may be understood as a narrow but principled exception to the traditional rules of abetment. The exception takes the form of an additional *mens rea* element to be proved where an accused person is alleged to be abetting another to traffic drugs to himself. That element is that the accused as abettor is required to have himself intended

to traffic in the offending drugs. It is a narrow exception because like the principle in *Ng Yang Sek* (see [70] above), it comes into play only where there is evidence of a specific fact, namely, the accused person's being the intended recipient of the offending drugs, without which the drugs cannot possibly have been for his own consumption. And it is a principled exception because it exists to give effect to the clear policy of the statute creating the primary offence in question, namely, the MDA.

(5) Prosecution's submissions

79 We shall complete the analysis here by addressing the Prosecution's submissions on *Liew Zheng Yang*. In summary, we do not, with respect, find merit in any of them.

80 The Prosecution argues, first, that Chong JA erred in finding in *Liew Zheng Yang* that the cannabis was meant for Liew's own consumption. We find this submission irrelevant to the present appeals. This Court has *no* power to review the *factual* findings made in *Liew Zheng Yang* because it is a separate case. Even if the correctness of that decision were being challenged on a criminal reference to this Court, we would also have had no power to review Chong JA's factual findings.

81 Second, the Prosecution submits that the *ratio* of *Liew Zheng Yang* is inconsistent with the decision of this Court in *Chan Heng Kong* (see also [21] above). The Prosecution relies on [27]–[28] of that judgment, which reads as follows:

> We turn now to the issues pertaining to [the accused person's] conviction. In respect of the defence of consumption raised by [the accused] at the trial, the question which we have to decide is whether this defence is relevant to the offence which [Chun

> Heng] was charged with. The Judge rejected this defence, holding (at [71] of the GD):
>
> > [The accused] claimed in court that he consumed some five straws of heroin per day. Firstly, the charge against [the accused] relates to instigation and the trafficking of heroin alleged concerns Choong Peng. There was no doubt that Choong Peng was collecting the heroin on [the accused person's] behalf and would pass it on to him. That amounted to delivery of, or at least an offer to deliver, the heroin (see the definition of "traffic" in s 2 MDA). [The accused person's] *intention concerning the heroin and his alleged addiction and consumption habit would therefore be irrelevant to the charge. As the Prosecution observed, even if all 30 sachets in question were meant for* [*the accused person's*] *consumption, the charge would have been made out. …*
> >
> > [emphasis added]
>
> We agree with the Judge's decision on this point. We also agree with the Judge that [the accused person's] defence of consumption was not factually tenable.

82 The Prosecution is correct to observe that this part of *Chan Heng Kong* endorses the view that a person is capable in law of abetting the trafficking of drugs to himself for his own consumption. However, the correctness of that view was not argued before this Court in that case. The accused there had simply attempted to prove that the offending drugs were for his personal consumption and had made no submission as to why, if that were established, he should not be liable as an abettor of the trafficking offence. In the event, he was unable to show that the drugs were for his own consumption (at [29]–[30]), so he would not have succeeded anyway. That also distinguishes *Chan Heng Kong* from *Liew Zheng Yang* on the facts. In any case, in the light of what we have said in this judgment, we consider that this part of *Chan Heng Kong* should no longer be followed.

83 Third, the Prosecution argues that to the extent that *Liew Zheng Yang* entails that a consuming-recipient should be convicted on a charge of attempted

possession of a controlled drug instead of abetting his seller in a conspiracy to traffic in a controlled drug, it creates a potential for substantial and unjustifiable disparity in sentencing outcomes as between a consuming-recipient and his supplier when their culpability is "largely similar". We are unable to accept this argument for three reasons. First, it is not clear to us when precisely their culpability would in fact be "largely similar". Second, the argument overlooks the fact that penalties prescribed for trafficking are not merely retributive but are also deterrent in rationale: They are harsh with a view to reducing the harm that has conventionally been more directly associated with the supply and circulation of drugs within society (see [64] above and *Singapore Parliamentary Debates*, *Official Report* (16 February 1973) vol 32 at col 417 (Chua Sian Chin, Minister for Health and Home Affairs)) than with the addicts themselves (who are of course by no means to be seen as mere victims). Hence, raising an argument from a potential sentencing disparity on the ground of culpability does not, with respect, take the Prosecution's argument very far. Third, it is ultimately for Parliament to determine and calibrate the appropriate sentences for individual offences. If it is thought that the demand for controlled drugs should be suppressed more forcefully, it is open to Parliament to take the necessary measures. Indeed, that is exactly what was done when Parliament introduced, in 1998, the long-term imprisonment regime for repeat drug consumption offenders (see *Singapore Parliamentary Debates*, *Official Report* (1 June 1998) vol 69 at cols 42–44 (Wong Kan Seng, Minister for Home Affairs)). It is certainly not for this Court to seek to achieve a similar objective by maintaining the availability of trafficking as an offence for which a person may be liable as an accessory even when the offending drugs are meant for his own consumption.

84 Fourth, the Prosecution argues that the *ratio* of *Liew Zheng Yang* undermines the efficacy of the MDA by making it nearly impossible for the Prosecution to prove that an accused person charged with abetting another to traffic in drugs intended the drugs to end up with a third party when the accused person elects not to give evidence. That is because the presumption of trafficking under s 17 of the MDA, which is triggered by the fact of possession of the offending drugs, will not apply to him given that he usually will not have obtained such possession, as we have noted at [76] above. We are unable to accept this submission for two reasons. First, it is a circular argument. It presupposes that such an accused person should in fact be liable for abetting another to traffic in drugs in the first place. However, that is the very presupposition that *Liew Zheng Yang* has called into question and, without it, there would be no reason to complain about the impossibility of proving the offence. Second, the burden of proving the elements of a criminal offence beyond a reasonable doubt has always been on the Prosecution. There is therefore no mischief in requiring the Prosecution, before proceeding on a charge of abetting another to traffic in drugs, to have a basis independent of the result of cross-examining the accused on which to submit that the accused did intend the offending drugs to be given to someone else and not merely for his own consumption.

85 Finally, the Prosecution argues that the Public Prosecutor should be trusted to exercise its discretion in good faith to prosecute consuming-recipients for abetting another to traffic in drugs only when it is appropriate to do so. In this regard, we should state that our endorsement of the *ratio* of *Liew Zheng Yang* is not intended to make any suggestion of any abuse of prosecutorial discretion that has occurred or may occur. Instead, having considered the centrality of the distinction between the trafficker and the addict to the design

of the MDA as well as the application of that distinction to the elements of the offence of abetting another to traffic in drugs, we are simply of the view that the legislature did not intend this to be a matter of prosecutorial discretion in the first place. In other words, the Prosecution's submission here presupposes that there is a discretion of the type it describes when, in our view, there is not.

Application of the personal consumption defence to Ali and Selamat

86 As we have concluded that *Liew Zheng Yang* was correctly decided, it is necessary for us to consider whether the rule in that case, as we have articulated it at [75]–[78] above, applies to Ali and Selamat. It will be recalled that the Judge accepted that Ali and Selamat were entitled to run the personal consumption defence, and the Judge was therefore concerned with whether, taking into account the amount of heroin they intended jointly to consume, they had proved on a balance of probabilities that less than 15g of the 27.12g of diamorphine in the Bundle was for sale and had therefore rebutted the presumption of trafficking under s 17(*c*) of the MDA (see the Judgment at [6]).

87 With respect, we consider that the Judge erred in two respects in taking this approach. First, as Ali never came into possession of the Bundle, the presumption of trafficking cannot be triggered, and the Judge was wrong to hold otherwise. Second, the Judge erred in presupposing that Ali and Selamat could in principle submit that they each intended to traffic in *only* the amount of heroin stated in each of their charges *less* the total amount of drugs which they *together* intended to consume out of that amount. As we will explain, this method of deduction is wrong in principle and, in any event, the idea that they intended jointly to consume the offending heroin is not made out on the facts.

88 Despite these difficulties, we consider that the Judge was correct in finding that the amount of drugs intended to be trafficked by Ali and Selamat exceeded the capital threshold. In fact, the Judge's findings are *fortified* by our ruling that the personal consumption defence cannot be applied in a joint fashion as the Judge had presupposed. On this basis, we find that Ali's and Selamat's appeals ought to be dismissed. We turn now to elaborate on the reasons just given.

(1) Burden and standard of proof in the present case

89 The Judge held that the burden was on Selamat *and Ali* to prove on a balance of probabilities that less than 15g of the 27.12g of diamorphine in the Bundle was for sale. This is true for Selamat, who had possession of the Bundle, but not Ali. Indeed the Prosecution accepted that the statutory presumption does *not* apply to Ali in further submissions on this specific issue which we directed the parties to file after the oral hearing of these appeals.

90 Section 17(*c*) of the MDA provides as follows:

> **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.

91 It is clear from the provision that the statutory presumption of trafficking only applies to an accused person who is proved to have had possession of the

offending drugs. This proposition is well-established (see, for example, the decisions of this Court in *Lim Lye Huat Benny v Public Prosecutor* [1995] 3 SLR(R) 689 ("*Benny Lim*") at [17] and *Mohd Halmi bin Hamid and another v Public Prosecutor* [2006] 1 SLR(R) 548 ("*Mohd Halmi*") at [8]). The Prosecution therefore has to prove the fact of possession in order to trigger the presumption of trafficking in s 17 (see the decision of this Court in *Public Prosecutor v Wan Yue Kong and others* [1995] 1 SLR(R) 83 at [16]). And to prove the fact of possession, the Prosecution must prove that "there is first, physical control over the controlled drug, and second, knowledge of the existence of the thing itself, that is the existence of the controlled drug, but not the name nor nature of the drug" (see the decision of this Court in *Sim Teck Ho v Public Prosecutor* [2000] 2 SLR(R) 959 at [13] *per* Yong Pung How CJ).

(a) Burden and standard of proof for Selamat

92 The presumption therefore does apply to Selamat, who had both physical control over the drugs and knowledge of their existence. Here, it should be noted that this Court in *Benny Lim* and *Mohd Halmi* observed that invoking the presumption of trafficking would usually only be necessary or appropriate where the accused had "passive physical possession of drugs", but not where he was doing more than that, such as where he was transporting and was in the process of delivering the drugs to another (see *Benny Lim* at [17], approved in *Mohd Halmi* at [8]). As this Court held in *Mohd Halmi* at [8]:

> The presumption in s 17 applies only in situations where a person is, in the words of this court in *Lim Lye Huat Benny v PP* [1995] 3 SLR(R) 689, "proved" to be in possession of controlled drugs, but apart from mere possession, had not done any of the acts constituting trafficking as set out in s 2.

93 These observations, however, were made in the particular context of those appeals, where the appellants concerned admitted that they had intended

to deliver the goods to another, but asserted that they did not know that the goods they were delivering were controlled drugs. The court in both cases held that the relevant presumptions were the presumptions of possession and knowledge under ss 18(1) and 18(2) of the MDA, which should not be conflated or combined with s 17. The latter presumption "only applies where a person was proved to be in possession of a controlled drug and not merely presumed to be in possession of a controlled drug" (see the decision of this Court in *Low Kok Wai v Public Prosecutor* [1994] 1 SLR(R) 64 at [37], cited in *Mohd Halmi* at [9]).

94 In the present case, by contrast, it is appropriate to apply s 17 because, as we have said, Selamat was in possession of the Bundle. His defence is that he and Ali intended to consume half of the drugs in the Bundle. Selamat's defence is essentially that he lacked the requisite *mens rea* for the offence of trafficking. Hence, s 17 is relevant because the provision "presumes both *actus reus* and *mens rea* to be present once possession is proved" (see the decision of this Court in *Lee Ngin Kiat v Public Prosecutor* [1993] 1 SLR(R) 695 at [22]). The Judge was therefore correct in holding that the burden is on Selamat to prove his defence on a balance of probabilities.

(b) Burden and standard of proof for Ali

95 The statutory presumption of trafficking does not, however, apply to Ali as he never came into possession of the Bundle. As we have noted earlier, the Prosecution accepts this. Accordingly, applying the rule in *Liew Zheng Yang*, the Prosecution must in this case prove beyond a reasonable doubt that Ali did intend to traffic in at least a capital proportion of the offending heroin.

96 For completeness, we make, by way of corollary, the observation that in the unlikely event that a consuming-recipient has come into possession of the offending drugs, s 17 would apply (*cf* [76] above). However, in such a case, it is unlikely that the Prosecution would proceed against him with an abetment charge. A much more appropriate charge would be one of possession for the purpose of trafficking under s 5(1)(*a*) read with s 5(2) of the MDA. In such a case, he would be presumed to have the offending drugs in his possession for the purpose of trafficking, and the burden would be on him to prove on a balance of probabilities that he had no such purpose because, for example, the drugs were for his own consumption.

(2) Joint personal consumption defence

97 We come now to the Judge's assumption that the personal consumption defence can operate to deduct from the quantity of the offending heroin in each charge the total amount of the drugs which Ali and Selamat *together* intended to consume out of that quantity. In our judgment, this is, with respect, wrong for two reasons.

98 First, as a matter of principle, each accused person must be treated individually and independently for the purpose of the charge which has been brought against him. Therefore, the amount that Ali intended to consume cannot be credited to Selamat, and vice versa, for the purpose of either of their attempts to establish that the portion of the heroin intended for personal consumption takes its total quantity below the capital amount. Only the amount of heroin which Ali and Selamat each intended to consume may be deducted from the amount of the offending heroin stated in their respective charges. To be clear, we do not rule out the possibility that, in an *exceptional case*, the facts *may* warrant a finding that the co-accused persons were operating as a joint-entity,

such as where the co-accused persons both paid for the drugs, which jointly belonged to them, and they jointly intended to consume all of the offending drugs. But that is far from the position in the present case.

99 Second, on the facts, it was Ali who paid for and had full ownership of and control over the drugs in the Bundle. He also kept all the profits from the sale of the drugs. In his statements, he expressly stated that he would "treat" Selamat to the heroin, implying that it was in his discretion whether and how much heroin Selamat would receive. Selamat, by contrast, had a mere expectation to receive some amount of heroin to feed his addiction. In no sense did Ali and Selamat jointly intend to consume part of the offending heroin. And therefore, Ali did have the intention to traffic in the drugs in the Bundle in so far as he intended (a) to *sell* them to third parties; and (b) to *give* them to Selamat, be it out of friendship or as remuneration for his assistance in dealing with drugs. The second point is particularly crucial. It follows from the definition of "traffic" in s 2 of the MDA (set out at [28] above) which expressly includes "to … give".

100 In this regard, we refer to the decision of this Court in *Muhammad Jefrry v Public Prosecutor* [1996] 2 SLR(R) 738. In that case, it was held that the accused person's act of sharing drugs with his girlfriend gratuitously for the latter's consumption constituted trafficking within the definition of s 2 of the MDA (at [123]–[126]). Thus, the drugs consumed by the girlfriend were not deducted from the quantity of drugs trafficked by the accused and were instead held to form part of the overall quantity of drugs that the offender had trafficked (at [127]). In our judgment, the same analysis applies to this case in relation to the heroin which Ali intended to "share" with Selamat for the latter's personal consumption. These drugs were still intended to be trafficked by Ali, and there is no basis for us to deduct their quantity from the charge against him. Therefore,

for Ali, the only amount of heroin which may fall within the scope of the personal consumption defence is the amount of the heroin that he had himself intended to consume. As we will show, that amount would clearly *not* reduce the quantity of drugs in the charge against Ali such as to bring that quantity below the threshold for the imposition of capital punishment.

101 Ironically, Selamat's contention that Ali had full control over the drugs in the Bundle undermines his own personal consumption defence. That contention means that Selamat was simply a *courier* who was carrying out Ali's instructions to transport the Bundle to the flat. Thus, all Selamat had was an expectation that Ali would give him drugs in return and would continue to allow him to live in the flat. Those drugs may well not even come from the Bundle. Separately, Selamat's case that he was a mere courier goes simply to his *motive* for committing the offence. It does not change the fact that he had the intention to part with possession of the drugs which were in the Bundle. If Selamat's defence were accepted, it would mean that any drug courier who delivered drugs to feed his own habit of consumption would not be liable.

Evidence on Ali's and Selamat's personal consumption of heroin

102 Having clarified the applicable principles, we proceed to assess the evidence in this case on Ali's and Selamat's personal consumption of heroin.

103 The Bundle contained 456.2g of granular/powdery substance which was analysed and found to contain not less than 27.12g of diamorphine. Therefore, in order to uphold Ali's and Selamat's sentences of death, we must be satisfied that at least 15g of diamorphine (*ie*, the amount in net weight that attracts the imposition of capital punishment: see the Second Schedule of the MDA) or approximately 252.3g of the drugs in the Bundle (in gross weight) was intended

to be trafficked. Here we reiterate that the personal consumption defence in this case may be applied to deduct from Ali's and Selamat's respective charges only the *individual* amount of heroin which *each* of them had intended to consume, and that there is *no legal basis* to deduct the *total* amount of the drugs which they had intended together to consume from the amount in both their trafficking charges. This analysis necessarily leads us to find that:

(a) for Ali, it is established beyond a reasonable doubt that he did intend to traffic most of the heroin in the Bundle, and certainly above the capital amount, in so far as he intended (i) to sell at least half of the Bundle for profit; and (ii) to give a substantial portion of the remaining heroin to Selamat; and

(b) Selamat has failed to rebut the presumption against him under s 17 of the MDA as the bulk of the heroin in the Bundle in his possession were intended to be transported by him to Ali for the purposes of trafficking.

104 The important point is that it was *never* Ali's or Selamat's case below that *either* of them intended individually to consume *half* of the drugs in the Bundle. Rather, their evidence was always premised on the assertion that ***together*** they intended to consume that amount. For the reasons stated earlier, that is plainly insufficient to reduce the amount of drugs specified in the individual charges against Ali and Selamat to below the capital amount. This is *even if* we accept Ali's evidence that he would consume one packet of 8.4g of heroin (gross weight) each day and Selamat's evidence that he was given a ration of 6g of heroin per day by Ali. Even on these consumption rates, it is clear that neither Ali nor Selamat could have individually consumed half of the heroin in the Bundle within the five to six days that Ali claimed he expected to finish

selling and consuming the entire quantity of heroin in the Bundle. This is precisely the reason why they sought to rely on their *aggregate* consumption rates.

105 *In any event*, the assertion that half of the Bundle was intended to be consumed by Ali and Selamat together is itself *an incredible one*. It does not match their *own evidence* on their rate of consumption and the number of days the supply was meant for. As noted by the Prosecution, the numbers do not add up. If Ali and Selamat had really intended to consume half of the heroin in the Bundle within five to six days, as Ali testified, then they would have had to consume about 38g to 45.6g of heroin each day, which is almost three times Ali's and Selamat's alleged total consumption rate of 14.4g of heroin per day (8.4g per day for Ali plus 6g per day for Selamat).

106 To deal with these difficulties, Ali submits on appeal that he may have wrongly calculated the number of days he intended to sell and consume the heroin in the Bundle, and that it is "highly plausible that Ali meant that the sale of half of the bundle (on its own) would take 5–6 days or that Ali and Selamat would be able to consume half the bundle within 5–6 days or that he himself intended to consume the entire half bundle". Ali also says that he "could have made [an] arithmetic mistake where the drugs were intended to last approximately 27 days". These submissions are purely speculative and are not substantiated by any evidence. In fact, they clearly contradict Ali's and Selamat's consistent position that they intended, *together*, to consume half of the heroin in the Bundle, with no suggestion by them in either their statements or testimony at trial that they individually intended to consume the same amount.

107 Next, we highlight two further difficulties in Ali's and Selamat's evidence with regard to their rates of consumption. First, their evidence with regard to the frequency of their supply of heroin suggests that the heroin in the Bundle was predominantly meant for trafficking and not consumption. Ali's evidence is that he and Selamat started selling drugs in July 2012, about four months before his arrest in October 2012. In his long statement, Ali stated that they ordered half "balls" (or half-pound bundles) of heroin on at least eight occasions from July to October 2012 after which they started to buy one "ball" of heroin (such as the Bundle which is the subject matter of the present appeals). At trial, Ali similarly testified that from August to September 2012 there were six orders for half a pound of heroin, and from September to October 2012 there were two orders for one pound of heroin, including the order on 23 October 2012. In our view, the fact that they were ordering large quantities of heroin on a regular basis indicates that the drugs were predominantly being trafficked rather than consumed.

108 Second, the inference that the heroin in the Bundle was predominantly meant for trafficking is corroborated by the fact that there was a large amount of heroin, totalling 241.04g (gross weight), which was recovered from the flat. Ali admitted that these drugs were at least partly for consumption. Based on their alleged total consumption rate of 14.4g per day, this amount of heroin would have lasted them at least 16 days. Therefore, the notion that they intended specifically to set aside half of the heroin in the Bundle for consumption is fanciful. Indeed, Ali's own evidence was that the heroin for his and Selamat's consumption would normally come from the "powdery heroin" left over after the larger pieces were packed for resale, and that he did not specifically apportion or set aside a certain amount from each order of heroin for personal consumption. Perhaps most significantly, during cross-examination, Ali

accepted the specific suggestion that the large quantity of heroin found in his house meant that he already had enough heroin for the purpose of his and Selamat's consumption, which in turn suggested that the bulk of the heroin in the Bundle was meant for sale and not for consumption:

> Q … Mr Ali, I put it to you that 1 pound of drugs you ordered on 23rd October, the bulk of it was meant for selling. Agree or disagree?
>
> A I agree.
>
> Q All right. I put it to you that in fact you already had sufficient drugs in the house before you ordered that 1 pound for you to consume and to share with Ali---I'm sorry---share with Selamat.
>
> A I agree.

109 Against the weight of the above evidence, Ali and Selamat make three principal submissions. We find none of them persuasive.

110 First, it is said that Ali and Selamat are in the best position to give evidence on their rate of consumption. While this is true, it cannot be the case that their evidence should be taken at face value, regardless of whether it is corroborated by any objective evidence. In the present case, both Ali and Selamat acknowledged that their assertions on their consumption rates were estimates. In fact, they were "bare assertions", as observed by the Judge (Judgment at [10]). In any event, and as noted above, even on Ali's and Selamat's own evidence, the numbers simply do not add up.

111 Second, reliance is placed on the fact that both Ali and Selamat have a long history of drug abuse, stretching back to their teenage years. Selamat was first admitted to a Drug Rehabilitation Centre in 1984, while Ali reported first smoking heroin in 1974. It is argued that this history is consistent with their being heavy abusers of drugs. In our judgment, this fact is, with respect, neither

here nor there. It does not address the issue of Ali's and Selamat's purpose for the heroin in the Bundle, which is the subject matter of the charges against them. While the fact that they are heavy abusers may lend some credibility to their assertions as to their consumption rates, it could also be argued that it was precisely because they needed to continue funding their serious addiction that Ali and Selamat would have planned to make a substantial profit from the resale of the Bundle.

112 The same difficulties apply to the third piece of evidence which Ali and Selamat rely on – the reports by Dr Winslow on their withdrawal symptoms. While the reports support the fact that Ali and Selamat are heavy abusers of heroin, they do not shed light on the specific issue of what Ali and Selamat intended to do with the heroin in the Bundle which they received on 23 October 2012.

113 In addition, there are two other problems with relying on the reports, as noted by the Judge. First, the statements in the reports on how much heroin Ali and Selamat consumed per day are based entirely on what they reported to Dr Winslow. Dr Winslow readily acknowledged this on the stand. Second, and again as Dr Winslow accepted, the reports do not actually prove that Ali's and Selamat's self-reported consumption rates are accurate. They merely state that it is "plausible" that Selamat abused 6g per day and "possible" that Ali abused 6–8g of heroin per day given various factors such as their withdrawal symptoms, their drug history and tolerance. For Selamat, who exhibited a range of withdrawal symptoms, Dr Winslow accepted that an addict who takes a lower amount (and as low as 1g of heroin (gross weight) per day) could also exhibit the same symptoms as those experienced by Selamat because the correlation between the amount of opiates consumed and the severity of withdrawal symptoms was of a general nature. Ali, by contrast, "did not report experiencing

any withdrawal symptoms" at the time of and after his arrest despite allegedly abusing a higher amount of heroin than Selamat on a regular basis. In addition, Dr Winslow pointed out that it was difficult to assess Ali's withdrawal symptoms (or lack thereof) since he had also abused various other drugs including "ice" and "ganja". Thus, the reports do not assist Ali's and Selamat's cases. Nor is it surprising that the Prosecution chose not to adduce a rebuttal report, given that Dr Winslow's reports themselves are, with respect, deeply equivocal.

114 Hence, considering all of the above, our judgment is that there is no reasonable doubt that the bulk of the heroin in the Bundle – at least 15g of the heroin (if not more) – was intended to be trafficked by Ali, especially after one includes the heroin that he intended to give to Selamat. Selamat has also failed to rebut the statutory presumption against him under s 17 of the MDA as the bulk of the heroin in the Bundle in his possession was intended to be transported by him to Ali for the purposes of trafficking. Accordingly, we dismiss their appeals.

Ragunath's appeal

115 Ragunath's appeal rests primarily on challenging the Judge's finding that he had failed to rebut the presumption of knowledge under s 18(2) of the MDA on a balance of probabilities. He also seeks to challenge the Judge's assessment that he was not a truthful witness. We will first consider generally the evidence relating to Ragunath's case, and then we will examine his grounds of appeal against that evidence.

The evidence

(1) Ragunath's background

116 Based on Ragunath's statements, he was in "serious financial difficulty" at the time of his arrest. He was terminated from his job as a baggage coordinator in Singapore two months before the arrest as he had fought with his supervisor. He then found a job as a security officer in Johor Bahru, Malaysia which paid RM900 per month. This was a large drop in his income as he was previously paid about $1,600 to $2,000 a month. Furthermore, only he and his father were working to support his entire family, and his brother needed RM5,000 for surgery to remove a tumour on his neck. As Ragunath needed money urgently, he asked his friend, Hari, an illegal moneylender, for a loan on 23 October 2012 which led him to deliver the Bundle on Hari's behalf.

117 This was not Ragunath's first exposure to drugs. After he was arrested, his urine was tested and found positive for amphetamine and cannabis. In his statements, he admitted that he had smoked "ice" twice on the day before the arrest after his friends told him that it would keep him awake. But he claimed that he had smoked "ice" on only those two occasions in his life. He denied smoking cannabis. He claimed that on the day before his arrest, he had met up with a few friends who were smoking "self made cigarette[s]". He also claimed that he had never seen heroin before and did not know what the drug looked like.

(2) The transaction on 23 October 2012

118 Ragunath's evidence is that on 23 October 2012, at about 12pm, he was at home in Johor Bahru when he called Hari to obtain a loan of RM5,000. Hari asked Ragunath to bring him a copy of his Identity Card. Ragunath did so at

about 2.30pm. Hari then told Ragunath to "come back at 10pm" to collect the loan. So Ragunath returned to his house.

119 At about 5.30pm, Ragunath left for Singapore. He entered the country through Woodlands Checkpoint. He stated that his purpose for visiting Singapore was to hang out and "have some fun" with his best friend "Sathish", who worked at Changi Airport and was receiving his pay that day.

120 On the way to Singapore, Ragunath received a call from Hari telling him to call him when he reached Singapore. Ragunath reached Woodlands Checkpoint at about 6pm and called Hari. In the call, Hari asked for Ragunath's help. Hari told him about a friend whose motorcycle had broken down at Woodlands. Hari told Ragunath to collect "something from him" and to hand it to someone who would call him. Ragunath asked Hari what the item to be delivered was, and Hari told him that it was "medicine for [the] elderly", and that it was not to be opened as "the oral medicine will be spoiled". We note that this evidence in his long statement and at trial – that he thought that the item to be delivered was medicine – contradicts what he had told the Central Narcotics Bureau ("CNB") in his contemporaneous statement when he was first questioned on what he had been asked to deliver; on that occasion, he claimed that the Bundle contained "foodstuff".

121 After obtaining from Hari a description of the person whose motorcycle had broken down, Ragunath proceeded to meet that person at the railway station at Woodlands Checkpoint. Ragunath saw that the Bundle was in a plastic bag and wrapped in a black masking tape. He admits that he was suspicious when he received the Bundle. That is why he pressed on the top of the Bundle, whereupon he felt "something quite big" and about 5cm-long. He says that "[i]t felt like medicine for elderly just like what Hari told me. So I decided to deliver

the bundle". After he left the railway station, he received a call and a text notifying him of the delivery location's address, which was "Blk 299B Tampines St 22".

122 Ragunath then went to Giant Hypermarket at Tampines to park his motorcycle. He then caught a taxi to Blk 299B. He alleges that he had chosen to do so because he did not know how to get to the delivery location, and that he parked his motorcycle at the Hypermarket because he had previously worked there and parking was free. He never opened the Bundle to check its contents.

123 When Ragunath reached the delivery location, he made a call to the person who had texted him the address of the delivery location. Selamat then came to meet him. Selamat collected the Bundle and handed Ragunath a plastic bag containing cash, informing him that it was money "for the Ah Long". After the two parted ways, Ragunath was arrested.

124 According to his statements, for delivering the Bundle, Ragunath was to receive from Hari $100 as well as the loan of RM5000. Ragunath claims that he did not find it suspicious that he was given so much money "just to deliver something" as he was in need of money and had agreed to help Hari "without thinking too much". At trial, he shifted his evidence and testified that the amount should be RM100 instead of $100, and that he thought that this RM100 was his commission for collecting "Ah Long money" rather than for delivering the Bundle.

(3) The text messages in Ragunath's mobile phone

125 Numerous deleted text messages were recovered from a mobile phone seized from Ragunath, which he admits was for his use and was in his possession prior to the day of the transaction. These messages, which were sent

in September and October 2012, contained addresses in Singapore. Crucially, there were two messages, sent on 20 October 2012 and 23 October 2012, which contained the address "Blk 299B Tampines St 22".

126 When cross-examined on his activities and movements in Singapore based on his text messages, Ragunath was unable to explain why those addresses were in his handphone. He simply said, "I've not been to these places", even though the dates and time of the messages coincided with the periods that he was in Singapore.

127 When cross-examined on the texts on 20 October 2012 and 23 October 2012 containing the address of Blk 299B, Ragunath's responses were as follows:

Q	Can you explain why was this address in your handphone on 20th of October 2012?
A	I can't recall exactly but I'm not too sure if it is Hari or someone who sent me the message on that day.
Q	But Mr Ragunath, your evidence was that this was your first time that you had gone to Block 299B Tampines Street 22 on the 23rd of October 2012 because you were unfamiliar. Agree?
A	Yes.
Q	And Mr Ragunath, do you agree that the timing that this message was sent on the 20th October 2012 corresponds to the timing that you were in Singapore on that day itself?
A	I could have been here during that time but maybe Hari --- maybe Hari could have told me to go to that place but I did not go there. I've not been to that place.
Q	But Mr Ragunath, earlier on, you said that on the 23rd of October 2012 was the first time you received the instructions from Hari to go to Block 299B Tampines Street 22.

A	Yes. On the 20th, Hari told me that I have to collect the money but --- but in the end, he said there is no need to.
Q	So let's get your evidence straight, Mr Ragunath, are you saying that you already knew about going to Block 299B Tampines Street 22 even before the 23rd of October 2012?
A	He said must go --- he said I have to go but I did not go.
Q	So, in other words, Mr Ragunath, are you admitting that you did not tell the truth when earlier, you said that 23rd of October 2012 was the first time that you knew that you had to go to Block 299B Tampines Street 22?
Interpreter	Can you please repeat that, DPP?
Low	Yes.
Q	So Mr Ragunath, in your earlier evidence, you had said that 23rd of October 2012 was the first time you knew you had to go to Block 299B Tampines Street 22.
…	
Q	But you now say otherwise.
Interpreter	Your Honour, he wants me to repeat that.
A	I --- the reason being --- because on the 20th of October, I did not go to that place. That's the reason I could not recall if that was the address they had sent me before that.

Analysis of the evidence

128 Having considered the evidence as a whole, our judgment is that the Judge was right in finding that Ragunath had failed to rebut the statutory presumption of knowledge. We begin the analysis with the applicable principles for rebutting the presumption under s 18(2) of the MDA, which were set out by this Court in *Obeng Comfort v Public Prosecutor* [2017] 1 SLR 633 at [37]:

> … The court assesses the accused's evidence as to his subjective knowledge by comparing it with what an ordinary,

> reasonable person would have known or done if placed in the same situation that the accused was in. If such an ordinary, reasonable person would surely have known or taken steps to establish the nature of the drug in question, the accused would have to adduce evidence to persuade the court that nevertheless he, for reasons special to himself or to his situation, did not have such knowledge or did not take such steps. It would then be for the court to assess the credibility of the accused's account on a balance of probabilities. …

129 In the present case, there are serious difficulties with Ragunath's evidence which strongly suggest that his account of being under the impression that he was helping Hari deliver a bundle of oral medicine for the elderly is simply not credible.

130 First, when first questioned about the contents of the Bundle in his contemporaneous statement, Ragunath informed the CNB that it contained "foodstuff". In his long statements and at trial, however, he claimed that Hari had informed him that it contained "medicine for [the] elderly". This suggests that his later evidence was an afterthought.

131 Second, Ragunath's initial position in his statements was that the only purpose of travelling to Blk 299B was to deliver the Bundle, and that Hari had promised to pay him $100 for making the delivery. He made no mention of the fact that he was also to collect "Ah Long" money from Selamat, and made it seem as though it was Selamat who had of his own accord asked him to return money to Hari. In court, however, he took the position that the purpose of the trip was also to collect "Ah Long" money, and that he was being paid RM100 for doing so. This shift in evidence is material as Ragunath's earlier evidence that he was promised remuneration for the delivery alone clearly implies that he must have known that the Bundle did not merely contain "oral medicine". It also creates further logical difficulties as it invites the question why Ragunath would

have been asked to deliver medicine to someone from whom he was supposed to collect "Ah Long" money.

132 Third, Ragunath claims that 23 October 2012 was the first time he knew of and visited Blk 299B. However, this assertion is clearly contradicted by the objective evidence of the text message containing the very same address sent to him on 20 October 2012. When questioned on these text messages, he was evasive. At first, he testified that he could not recall the messages and was not sure if it was Hari or someone else who had sent the messages to him. A few moments later, he sought to explain that it was Hari who had instructed him to collect "Ah Long" money from that address on 20 October 2012, but later said that there was "no need to". From the exchange, it is clear that his evidence lacked credibility and that he was changing his narrative to suit his defence.

133 Fourth, it is odd that Ragunath decided to park his motorcycle at the Hypermarket and take a taxi to the delivery location instead. Although he claims that this was because he did not know how to get there, it is inconsistent that he would have been willing to bear the expense of a taxi fare just to complete the delivery when, according to him, he was in "serious financial difficulty" at the time. In our view, the more plausible explanation is that he wanted to avoid detection.

134 Fifth, Ragunath was unable to explain his activities in Singapore or any of the text messages containing addresses in Singapore received on 24 September 2012, 29 September 2012, and 2 October 2012, even though he admitted that the mobile phone was for his use and was in his possession prior to his arrest. In his submissions, he claims that this was because he was unable to recall what had happened four years ago and, at the same time, he suggests that those addresses were related to the various occasions when he had entered

Singapore to collect money on Hari's behalf. There is no evidence to support the latter assertion. In fact, in Ragunath's first long statement, which was recorded within a week of his arrest, his evidence was that he had entered Singapore primarily to visit his friend "Sathish" and for other personal reasons; this plainly does not square with the text messages which he received.

135 Therefore, the evidence as a whole indicates that Ragunath has been less than truthful, and that his narrative of the events leading up to his arrest cannot be accepted at face value. It also indicates that he knowingly made a delivery of drugs on 23 October 2012 in return for payment, and that his account of the events of that day are largely untrue.

136 In any event, even if Ragunath's account were to be believed, the circumstances under which he had received the parcel were highly suspicious. Indeed, Ragunath himself admitted that his suspicions were aroused when he received the packet wrapped in black masking tape, which is why he proceeded to press the Bundle to check its contents. Hence, even on his own narrative, Ragunath must have suspected that he was delivering drugs. Ragunath was no stranger to drugs, having smoked "ice" just the day before. As Hari had promised him $100 for delivering the Bundle, Ragunath must have suspected that the Bundle could not have contained something as innocuous as "oral medicine". Hence, we agree with the Judge that Ragunath's claim of ignorance and his assertion that he had simply accepted Hari's word must be rejected.

137 Ragunath's submissions emphasise his "carefree conduct" and the fact that he received the Bundle in a public place (*ie*, the Woodlands railway station). This goes towards showing, he says, that there was nothing suspicious about the circumstances in which the Bundle was handed to him and it was reasonable to accept that Ragunath's suspicions were not aroused at the time. But there is no

evidence beyond this that he was "carefree". And we note that Ragunath's own evidence was that he was suspicious when he received the Bundle, which is why he "pressed to feel what is inside the bundle".

138 The circumstances of the present case are thus entirely distinct from those in *Harven a/l Segar v Public Prosecutor* [2017] 1 SLR 711, which Ragunath relies on. In that case, the accused person's evidence on the events before, during and after the offence was generally consistent, and his conduct in handling the relevant bundle corroborated his lack of knowledge of the drugs. There was also no evidence to suggest that he had been promised any sort of reward for bringing the bundles into Singapore. By contrast, Ragunath's testimony lacked credibility, and it would have been clear to him, given the circumstances in which he received the Bundle as well as the compensation of $100 he was promised for the delivery, that he was handling illicit substances.

139 For the reasons above, we dismiss Ragunath's appeal against his conviction. His appeal against sentence is necessarily also dismissed as he has received the minimum possible sentence in law.

Conclusion

140 Accordingly, we dismiss all three appeals.

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

Hassan Esa Almenoar, Yong Pui Yu Liane (R Ramason & Almenoar) and Diana Foo (Tan See Swan & Co) for the appellant in Criminal Appeal No 33 of 2016;
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