IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2019] SGHC 197

Criminal Case No 8 of 2019

Between

Public Prosecutor

And

Oh Yew Lee

GROUNDS OF DECISION

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

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v
Oh Yew Lee

[2019] SGHC 197

High Court — Criminal Case No 8 of 2019
Kannan Ramesh J
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27 August 2019

Kannan Ramesh J:

1 The accused, Oh Yew Lee, was charged with possessing 25.68g of diamorphine for the purposes of trafficking under s 5(1)(*a*) read with s 5(2) of the Misuse of Drugs Act (Chapter 185, 2008 Rev Ed) ("MDA").

2 Having heard the evidence at the trial, I found that the charge against the accused had been proven beyond a reasonable doubt, and convicted him accordingly. Brief grounds of decision were read at that time. The accused has appealed against my decision. I now set out the full grounds of my decision.

The facts

3 On 1 December 2016 at about 2.45 pm, officers from the Central Narcotics Bureau ("CNB") raided a unit at Blk 21 Chai Chee Road and arrested the accused there. The accused's wife was with him at that time. They were at the unit to visit their friends, Lim Koon Eng Jeremiah ("Jeremiah") and his

sister. Jeremiah was also arrested and has since been convicted on a charge of drug trafficking: *Public Prosecutor v Lim Koon Eng Jeremiah* [2019] SGHC 71. There is no suggestion that Jeremiah's case has any connection with the accused, and I say no more about it.

4 At the time of his arrest, the accused was staying at a nearby unit at Blk 31 Chai Chee Avenue ("the Unit") with his mother. His wife, a citizen of Vietnam and resident there, would also stay at the Unit whenever she visited the accused in Singapore.

5 Following the arrest, at about 3.30 pm, the CNB officers brought the accused and his wife back to the Unit. There, the accused was asked whether he had anything to surrender. Based on information provided by the accused, the officers went to the kitchen and recovered a reusable bag (which they labelled "D1A") hanging from a hook by the window ("D1"), as well as a plastic bag ("E1") and a Samsung Galaxy Note 5 box ("E2") from the cabinet below the stove. Inside "D1A", the officers found a green bag ("D1A1") which contained one large packet of granular substance ("D1A1A1"). Inside "E1", the officers found 37 much smaller packets of granular substance ("E1A"), and inside "E2", they found eight packets of granular substance of the same size ("E2A"). "E1A" and "E2A" therefore comprised 45 smaller packets ("the 45 packets"). Various other items were recovered from the Unit and labelled. The accused's mother was present in the Unit at that time.

6 The exhibits recovered, including "D1A1A1", "E1A" and "E2A" (together, "the 46 packets"), were taken that evening to the CNB Headquarters, where they were photographed and weighed in the presence of the accused at the CNB Headquarters Exhibit Management Room 1. The 46 packets were collectively weighed at 845.87 grams. They were subsequently sent to the

Health Sciences Authority ("HSA") for analysis. Upon analysis, the HSA certified that:

(a) "D1A1A1" was 458.1g of granular/powdery substance containing not less than 15.24g of diamorphine;

(b) "E1A" was 280.0g of granular/powdery substance containing not less than 8.68g of diamorphine; and

(c) "E2A" was 60.91g of granular/powdery substance containing not less than 1.76g of diamorphine.

The total weight of the diamorphine in the 46 packets was therefore 25.68g. The contents of the 46 packets formed the subject matter of the charge. At no point during the trial did the Defence challenge the seizure, transport or analysis of these exhibits, and I was satisfied with their integrity. There was also no real challenge by the Defence to any of the facts I have summarised above.

The Prosecution's case

7 The Prosecution primarily relied on the statements given by the accused to show that he had intended to traffic in the drugs in *all* 46 packets. Furthermore, the accused admitted to having possession of all 46 packets and to knowing that they contained diamorphine. In addition, as the 46 packets amounted to more than 2g of diamorphine, the presumption of trafficking in s 17(*c*) MDA was engaged. The Prosecution thus submitted in the alternative that it could rely on this presumption, which the accused could not rebut.

8 At 4.08 pm, shortly after the drugs were recovered in the Unit on 1 December 2016, a contemporaneous statement was recorded from the accused in the kitchen by SSI Ng Tze Chiang Tony ("SSI Tony") under s 22 of the

Criminal Procedure Code (Cap 68, 2012 Rev Ed) ("CPC") ("the first contemporaneous statement"). This statement recorded the accused being shown the 46 packets, which the accused said all belonged to him and were intended mostly for sale, with a "little" for his own consumption. In particular, SSI Tony testified that what was recorded in the Recorder's Note as "one big packet of granular substances (brown) (transparent)", which was shown to the accused, referred to "D1A1A1". The first contemporaneous statement also recorded the accused as saying that he needed a lot of money for his wife's medical treatment and to support his aged mother. He made it clear that his wife and mother had no connection to the 46 packets.

9 SSSgt Mohamed Rias s/o Rafik ("SSSgt Rias") began recording a cautioned statement under s 23 CPC from the accused at 3.17 am on 2 December 2016, the morning following the accused's arrest ("the cautioned statement"). The accused accepted that he was aware that the cautioned statement was in relation to the 46 packets. This was also set out in the charge which was interpreted to him in Mandarin. The accused was informed that the charge carried the death penalty.

10 The accused's cautioned statement stated, "I have nothing to say and please give me another chance". It is relevant that in this statement, following the word "say", there was a quotation mark which was struck through and to which the accused had appended his signature. SSSgt Rias testified that this cancellation was made and the words following it added as the accused had indicated that he wanted to say more during the recording process. In other words, the accused added the words "and please give me another chance" after he had given his initial response that he had nothing to say, suggesting that the accused carefully considered his response to the s 23 CPC caution.

11 On 4 December 2016 at 3.40 pm, the Investigation Officer, ASP Mohammad Imran bin Salim ("ASP Imran") recorded an investigative statement from the accused under s 22 CPC ("the 4 December statement"). In this statement:

(a) The accused said that his wife had a chronic medical condition and received treatment in Singapore, the costs of which were shared between the accused and her.

(b) The accused also gave an account of what happened in the Unit following his arrest. He recounted how he directed the CNB officers to the *baifen* (which was the accused's term for heroin or diamorphine) contained in "D1A", "E1" and "E2". He then gave a statement to a CNB officer in which he said that the *baifen* belonged to him and that most of it was for selling.

(c) According to the accused, he started taking *baifen* again in December 2014 and the last time he took it was 29 November 2016. He would consume *baifen* once or twice a week, and the amount he would consume on each occasion was half the size of his last finger.

Before the accused signed the 4 December statement, it was read and interpreted back to him. He then made amendments, confirmed that it was accurate and signed it.

12 On 5 December 2016 at 2.57 pm, ASP Imran recorded an investigative statement from the accused under s 22 CPC ("the 5 December statement"). Before the 5 December statement was recorded, the 4 December statement was read back to the accused and he declined to make any amendments.

13 The 5 December statement recorded the accused as having been shown photographs of the 46 packets, "D1A", "D1A1", "E1" and "E2", as well as photographs of the locations in the Unit where they had been found. In this statement, the accused said that:

(a) The 46 packets belonged to him and he intended to sell them.

(b) The 45 packets found in "E1A" and "E2A" had been repacked by the accused for distribution. The accused described these smaller packets as "*babalong*".

(c) The accused bought his supply of *baifen* from a supplier he knew as "Botak". "Botak" was introduced to the accused by a friend who went by the name of "Turtle". "Botak" first contacted the accused in the middle of August 2016. The first contact resulted in the accused's first transaction with him (which is described in (d) below). Thereafter, "Botak" would call the accused on his mobile phone on a regular basis to ask him if he wanted to buy *baifen*. The accused, however, did not have "Botak"'s contact information, and "Botak" would call him from a different number each time. If the accused agreed to buy *baifen* from "Botak", "Botak" would arrange for delivery the next day. "Botak" sold *baifen* in terms of *batu*, and one *batu* could fill 60 small packets or "*babalong*".

(d) Sometime in the middle of August 2016, the accused bought half a *batu* from "Botak" for $2,100. This was his first transaction with "Botak". The second transaction happened about three weeks after that when the accused bought one *batu* for $3,800. On each occasion, the accused was informed of a location near the Unit where the drugs would be left. The accused would pick up the drugs from that location and

leave his cash payment at the same place. "Botak" would call the accused shortly thereafter to inform him that payment had been received.

(e) Sometime in the beginning of November 2016, "Botak" called the accused again. The accused asked for the price of two *batu*, and "Botak" informed him it was $7,600. The accused asked for a discount but "Botak" said no. The accused agreed to the price. The next day, "Botak" called the accused at about 3 or 4 pm and informed him that his order was placed in the basket of a bicycle parked at the void deck below the Unit. There, the accused found a black plastic bag containing two bundles wrapped with newspaper. The accused placed the money in the basket and took the bag. As the accused was on his way up to the Unit, "Botak" called him to say that he had collected the money. This was the third and final transaction with "Botak", and the source of the 46 packets which form the subject matter of the charge.

(f) When the accused was back in the Unit, he unwrapped the newspapers and found two *batu* of *baifen*. He hung one packet up on a hook (*ie*, the manner in which "D1A1A1" was found), and repacked the other packet into 60 smaller packets, which he stored under the stove (*ie*, in the same manner in which the 45 packets were found).

Before the accused signed the 5 December statement, it was read and interpreted back to him. He then made amendments, confirmed that it was accurate and signed it.

14 On 6 December 2016 at 10.43 am, ASP Imran recorded another investigative statement from the accused under s 22 CPC ("the first 6 December statement") in which the accused said that he would sell each small packet of

baifen to his customers for $120–$150. He also said that he had completed selling the one *batu* that he had purchased from "Botak" in the second transaction before "Botak" called him in the beginning of November 2016 in relation to the third transaction. Before the 6 December statement was recorded, the 5 December statement was offered to be read back to the accused. He, however, declined the offer.

15 In the accused's investigative statement recorded by ASP Imran on 7 December 2016 at 2.25 pm under s 22 CPC ("the 7 December statement"), the accused said that he hung "D1A1A1" in his kitchen because he intended to repack that packet into small packets for sale after he had finished selling the existing small packets (*ie*, "E1A" and "E2A"). He also said that all of the small packets of *baifen* were packed for the purposes of sale, although he would take some *baifen* from those packets for his own consumption once or twice a week. He reiterated that his mother and wife were unware of the 46 packets and that he sold *baifen* because he needed money to pay for his wife's medical treatment and medicine. Before the accused signed the 7 December statement, it was read and interpreted back to him. He declined to make amendments, confirmed that it was accurate and signed it.

16 About seven months after his arrest, the accused gave another investigative statement to ASP Imran under s 22 CPC on 11 July 2017 at 2.40 pm ("the July 2017 statement"). The accused was shown photographs that included "D1A1A", "E1A" and "E2A" and specifically asked to whom they belonged. The accused said that they were his, thereby confirming that all 46 packets belonged to him. Before the accused signed the July statement, it was read and interpreted back to him. He then made an amendment, confirmed that it was accurate and signed it.

The Defence's case

17 At trial, the accused accepted that he was in possession of the 46 packets, and that he knew that they contained *baifen*, which he understood to be heroin or diamorphine. In respect of the 45 packets, "E1A" and "E2A", the accused also accepted that he intended to sell them, although he would also remove small portions of diamorphine (about the size of his last finger) from these packets on an *ad hoc* basis twice to thrice a week to consume. This was consistent with his position in his investigative statements, save that the amount and rate of consumption was slightly different (see [11(c)] above). Nothing, however, turns on this difference.

18 However, at trial the accused disputed the account in his investigative statements in relation to "D1A1A1". According to the accused, although "Botak" had delivered two *batu* of *baifen* to him on that occasion (the third transaction), the accused had only ordered one *batu* and paid $3,800 for the same. When he opened the plastic bag at his void deck and saw two bundles, the accused claimed that he did not find anything amiss, as the previous delivery (in relation to the second transaction) of one *batu* had also come in two bundles. The accused said that when he was on his way back to the Unit, "Botak" did call him, not to inform him that he had received the accused's money, but instead that an additional *batu* had been delivered by mistake. "Botak" told the accused that he could simply use one *batu* (which the accused subsequently divided into the 45 packets) and hold on to the other *batu*, which had a pink sticker on it (*ie*, "D1A1A1"), which "Botak" would arrange for someone to collect from the accused. However, no one came to collect the extra *batu*, and the accused had no means of contacting "Botak" to enquire further. The accused therefore stored the drugs in "D1A", which he hung on "D1" in the kitchen of the Unit pending collection by "Botak". The accused added that this delivery

had occurred around 20 November, and not early November as recorded in his statements. The accused argued that he could not have ordered two *batu*, as he did not have sufficient funds to pay the asking price of $7,600. Notably, there was no challenge to the voluntariness of the various statements that were recorded from the accused.

19 It was apparent that there were marked differences between the account in the accused's testimony and in his statements. Crucially, the accused disavowed the purchase of one *batu* ("D1A1A1") while accepting that he had purchased the quantity represented by "E1A" and "E2A". This was crucial, because "D1A1A1" alone comprised 15.24g of diamorphine, while the collective quantity of diamorphine represented by "E1A" and "E2A" was 10.44g. Thus, if "D1A1A1" was not taken into account, the total quantity of diamorphine in the possession of the accused for the purpose of trafficking would fall from 25.68g to 10.44g, removing the possibility of the death penalty being imposed.

20 The Defence offered two reasons to explain the large discrepancies between the account presented in the accused's statements and his account in court. First, it was said that the accused gave statements that implicated himself in order to protect his wife and mother from being investigated. In this connection, in his testimony the accused alleged that SSI Tony had told him during his arrest in Jeremiah's flat that if he did not "cooperate", his wife would be implicated. This was, however, neither explored with nor put to SSI Tony. Second, the Defence argued that the accused's statements were not accurately recorded. As regards the investigative statements, it was put to ASP Imran, who recorded the statements, and Mr Wong Png Leong ("Mr Wong"), who interpreted them, that Mr Wong did not accurately convey the accused's account to ASP Imran. The accused alleged that he had specifically told Mr Wong that

"D1A1A1" was not his, it was delivered by "Botak" by mistake and he did not intend to sell it. The accused alleged that Mr Wong was "scrolling" on his mobile phone while the statements were being recorded and generally not paying adequate attention to the accused's responses. This was done in the presence of ASP Imran, who did not correct Mr Wong's behaviour. It was therefore alleged that the errors were because Mr Wong had been distracted by his use of his mobile phone during the statement recording, and ASP Imran lied in his testimony in court to hide that fact. As for the first contemporaneous statement, it was put to SSI Tony that when he asked the accused about the drugs seized (see [8] above), he had not shown the accused the exhibits containing "D1A1A1". This was subsequently contradicted by the accused when he testified that he had expressly told SSI Tony "D1A1A1" did not belong to him. This part was not, however, put to SSI Tony.

21 When the accused gave his evidence, he supplemented his reasons for the alleged inaccuracies in his investigative statements. The accused claimed that before the recording of the 5 December statement, he had asked if he could make a phone call home, but was told that he would have to give his statement first; he was therefore not paying attention when the statement was read back to him, as all he could think about was the death penalty and his promised call home. Both these points were not put to ASP Imran. The accused said his mind was a blank and he therefore did not notice all the inaccuracies in the statement. The accused also claimed that when the cautioned statement was recorded, he had pointed out to SSSgt Rias that he should only be charged for 45, not 46, packets, but that SSSgt Rias had ignored him. This was also not put to SSSgt Rias. He did not insist on his objection being recorded as he was not aware that he could.

My decision

The law

22 The elements of the offence under s 5(1)(*a*) read with s 5(2) MDA are well-established. The Court of Appeal in *Muhammad Ridzuan bin Md Ali v Public Prosecutor and other matters* [2014] 3 SLR 721 summarised them as follows at [59]:

(a) Possession of a controlled drug;

(b) Knowledge of the nature of the drug; and

(c) Proof that possession of the drug was for the purpose of trafficking (which was not authorised).

23 In the present case, it was clear that possession and knowledge of the nature of the drug were made out (see [17] above). A further result of this was that, since the quantity of the diamorphine in question exceeded 2g, s 17(*c*) MDA applied such that the accused was presumed to have had the 46 packets in his possession for the purpose of trafficking, unless he proved otherwise on a balance of probabilities. The burden was therefore on the accused to show that the 46 packets or a part thereof were not for trafficking.

24 In its recent decision in *Ramesh a/l Perumal v Public Prosecutor and another appeal* [2019] 1 SLR 1003, the Court of Appeal held that a person who possesses drugs with the intention of returning them to the person from whom they had received the drugs does not have the requisite intention to traffic (at [114]). Therefore, if the accused succeeded in showing that he intended to return "D1A1A1" to "Botak", he would rebut the presumption that he was in possession of "D1A1A1" for the purpose of trafficking, and the charge against him would have to be amended to omit the weight of diamorphine found in

"D1A1A1". The Prosecution accepted this in its submissions. The result would have been that the amended charge would no longer have attracted the possibility of the imposition of the death penalty.

Whether the accused had the drugs in his possession for the purposes of trafficking

25 As such, the question that arose for my determination in the present case was whether the accused had rebutted the presumption of trafficking by showing on a balance of probabilities that he did not order "D1A1A1", that "D1A1A1" consequently did not belong to him, and that he merely retained it in his possession with the intention that it be returned to or collected by "Botak". It was clear on the present facts that these were facets of a single inquiry.

26 As noted earlier, the Prosecution's case against the accused on this issue rested primarily upon the accused's statements. As was also noted earlier, the Defence did not challenge the voluntariness of any of the statements. Instead, as I outlined at [18]–[21] above, the accused's defence lay solely on challenging their accuracy. At the outset, it must be noted that this defence faced significant obstacles. The accused implicated himself in relation to his ownership of and intention to traffic in "D1A1A1" in a consistent account spread across a number of statements. These ranged from the first contemporaneous statement taken shortly after his arrest, to the cautioned statement, and to the investigative statements, up to and including the July 2017 statement. Three points were significant. First, after each statement was recorded, it was read back to the accused in Mandarin and he was invited to make such corrections as he deemed fit. He did so on some occasions but not on others. In particular, he made amendments to the 5 December statement, which covered in detail the circumstances of the third transaction, and the July 2017 statement, where he

acknowledged that the 46 packets were his. Second, apart from the incriminating contents of each of these statements, on each occasion the accused also had a renewed opportunity to recant his previous admissions as he was extended the invitation to have the previous statement read back in Mandarin and to make amendments if necessary. It was pertinent that he declined the invitation with regard to the 5 December statement and the 7 December statement, accepting the invitation only with regard to the 4 December statement. Third, the accused made a specific addition to his cautioned statement, which showed a proper application of his mind to what was being recorded (see [10] above). This is particularly significant as he was aware at that time that he could possibly face the death penalty. Thus, the accused had every opportunity to correct significant factual errors in the investigative statements and yet did not.

27 The fact that there was no record of the accused having done anything to correct the alleged material inaccuracies therefore called for a cogent explanation, if the accused's defence was to be believed. These statements were also taken by three different sets of recorders and interpreters – SSI Tony, who recorded and interpreted the first contemporaneous statement; SSSgt Rias and Mr Ee Soon Huat ("Mr Ee"), who respectively recorded and interpreted the cautioned statement; and ASP Imran and Mr Wong, who respectively recorded and interpreted all the subsequent statements. This further reduced the likelihood of serious errors or misfeasance being repeated across the statements.

28 It was therefore important to consider in closer detail some of the statements individually. Again, each of them posed significant obstacles to the accused's defence. Some of these obstacles arose from the wavering and inconsistent nature of the defence as it emerged in the course of the trial.

The cautioned statement

29 First, I considered the cautioned statement. It was important to recall the circumstances of its recording. The recording of the cautioned statement began at 3.17 am with the writing and interpretation of the charge, which referred to 46 packets of drugs weighing about 845.87g, and of the notice under s 23 CPC. It was only at 3.57 am that the accused was asked what he had to say. The accused was aware that the quantity of drugs for which he had been charged could determine whether he faced the death penalty. I was therefore satisfied that the accused would have been aware that he was being asked to state his defence in relation to all 46 packets, and that he had ample time to absorb this and consider what he wanted to say. Indeed, the accused did not challenge this. His sole point was that he had asked for the 46 packets to be amended to 45 packets.

30 As noted earlier, ASP Imran and Mr Wong had no involvement in the recording of the cautioned statement – instead, the cautioned statement was recorded by SSSgt Rias, with Mr Ee serving as the interpreter. When SSSgt Rias and Mr Ee took the stand, the Defence did not suggest to either of them that there was any inaccuracy or other impropriety in the recording of the cautioned statement. In particular, Mr Ee was not challenged as to the accuracy of his interpretation or his concentration and focus on his responsibilities. On the other hand, counsel for the Defence suggested to SSSgt Rias and Mr Ee in cross-examination that the accused had admitted to the charge in his cautioned statement because he was nervous and wanted to protect his family, though he did not convey this to them. This suggested that he was providing his statement in relation to all 46 packets. When it came to the accused's cross-examination, however, the accused admitted that by the time the cautioned statement was

recorded, he was no longer in fear of his family members being implicated in the drugs seized from his unit.

31 The accused's position on the cautioned statement shifted significantly in his evidence-in-chief. He asserted *for the first time* that he had pointed out to SSSgt Rias that he was only trafficking in the 45 packets, and not all 46 packets. According to the accused, SSSgt Rias "said nothing", and the accused did not insist on his objection being noted by SSSgt Rias. In cross-examination, the accused added, "I admitted to the 45 packets … what could I do if they slot this in?" I found the accused's evidence in this regard quite extraordinary. Given the accused's understanding of the perilous situation he was in, I found it inexplicable that he would not have insisted on ensuring that his statement was absolutely accurate. I also found it difficult to understand how the accused could have thought that his options were solely between persuading SSSgt Rias to amend the charge to 45 packets, or admitting to the charge in relation to 46 packets. The accused was well aware that the purpose of the cautioned statement was to state his defence, if any, to a charge that potentially carried the death penalty. It would therefore only have been natural for him to explain that he did not intend to traffic in "D1A1A1". SSSgt Rias's refusal to amend the charge had no bearing on this, and the accused could have refused to sign the statement if his position, particularly on a matter of such significance, was not accurately recorded.

32 Two further points were pertinent. First, the accused *did* indicate that he wanted to amend his initial statement and was allowed the opportunity to do so (see [10] above). It was telling that instead of amending his statement to add that "D1A1A1" was not his, the accused did so in order to plead for leniency, reinforcing the implication that he was admitting to the charge. Second, it was not suggested to either SSSgt Rias or Mr Ee that the accused pointed to only the

45 packets as being his and had been ignored. An allegation of this gravity ought to have been vigorously picked up in the cross-examination of both of them. Indeed, no conceivable reason was offered as to why SSSgt Rias and Mr Ee would refuse to record what the accused claimed to have said, given the importance of what he allegedly said and the charge he faced.

33 Instead, the cross-examination was on a different basis (see [20] above). The accused's counsel suggested to SSSgt Rias and Mr Ee that the accused took responsibility for the drugs in order to protect his family. I could only conclude that this must have been on the accused's instructions. However, in his evidence-in-chief, the accused then testified that by his words in the cautioned statement he only intended to admit to the offence in respect of the 45 packets and suggested that SSSgt Rias ignored this fact. There was obviously an inherent tension between these two positions. Given that the accused had never denied that he possessed the 45 packets for the purpose of trafficking, the only false admission that he could make in order to protect his family was to admit that "D1A1A1" was his as well. On the other hand, the accused's assertion that he had not admitted responsibility for "D1A1A1" suggested that he could not have been lying to protect his family. To protect his family, he would have had to explain how "D1A1A1" came to be in his possession as the charge he faced related to that bundle as well. This he did not do. One or both of these two positions might have been afterthoughts. The accused's case was therefore inherently lacking in credibility.

34 As such, I did not accept the accused's account in relation to his cautioned statement. There was no good reason for the accused to have failed to mention even a hint of a defence in relation to "D1A1A1". Instead, the cautioned statement amounted to an admission to the charge and a plea for leniency. It was relevant to note that this theme – that "D1A1A1" was in the

accused's possession for the purpose of trafficking – was consistently repeated in the first contemporaneous statement and several of the investigative statements.

The 5 December statement

35 The 5 December statement was critical. There, the accused gave a detailed account of the circumstances surrounding the offence. At trial, the Defence attacked the integrity of this statement by arguing that it had been improperly interpreted by Mr Wong. In cross-examination, the accused explained he did not notice the errors when the statement was read back to him because he had been distracted at the time by the prospect of the death penalty and his promised call home (see [20]–[21] above). I pause here to note that these were not independent explanations, but complementary ones.

36 Both of these explanations were implausible. In relation to the Defence's allegation that the statement was inaccurately recorded, this was what counsel put to the interpreter, Mr Wong, in cross-examination:

> Q Mr Wong, my instruction is that---by my client is that during the recording of this statement, he mentioned that you are distracted because you were using your mobile device quite---you were referring to your mobile device quite frequently. Do you agree?
>
> A I disagree.
>
> Q I'm putting it to you that to---during the recording of the statement, you were using the---your mobile device. And as such, *you did not fully understood what he was trying to tell you.*
>
> A I disagree.
>
> Q So I'm putting it to you that *the statement that you have translated did not accurately reflect what he told you* during the interview.
>
> A I disagree.

> Chung Your Honour, I have no further questions.
>
> [emphasis added]

This must be seen in light of what the accused actually contested in respect of his 5 December statement in his evidence-in-chief. The most material parts of this statement which the accused challenged were as follows:

> 21 … The 'baifen' that I hung on the hook and the ones that were already packed into smaller packets were **bought** at the same time. **All of the 'baifen' belongs to me. I had bought them to sell to my customers.** I know that selling 'baifen' is wrong. **I had bought 2 big packets of 'baifen' from 'Botak' sometime in the beginning of November.** 'Botak' is a Malaysian. I cannot remember exactly when I had bought the **2 packets**. …
>
> …
>
> 26 A day before I had **bought the 2 big packets** of 'baifen' from 'Botak' sometime in the beginning of November, he had called me in the afternoon. I cannot remember the exact time. 'Botak' asked me if I wanted to buy some more 'baifen'. I said 'ok' and **asked him for 2 'batu'**. 'Botak' told me that the price of 2'batu' is $7600. **I asked him if there is any discount for 2 'batu' but he said no. I agreed to the price** …
>
> 27 … Like the first 2 times, as I was climbing up the stairs to my unit, **'Botak' called to tell me that he had already collected the money**. He also did not say how much he had collected. …
>
> [emphasis added in bold]

37 According to the accused, each reference above to him having "bought" two *batu* or packets from "Botak" was incorrect. Instead, he would only have referred to buying one *batu*. Specifically, the accused claimed that he had admitted only to buying one *batu* which he repacked into 45 packets and sold to his customers, and denied buying the other *batu* with the intention to sell. In relation to paragraph 26 of the 5 December statement, the accused said that he had asked "Botak" for only one *batu*, but "Botak" had informed him of his own accord that two *batu* would cost $7,600. The accused claimed he had told the

interpreter that he had rejected "Botak"'s offer because he could not afford the sum, and claimed that he never asked "Botak" if there was any discount for two *batu*. He had therefore only agreed to purchase one *batu* for $3,800. In relation to paragraph 27, the accused denied telling the interpreter that "Botak" had called to inform him that he had collected the money. Instead, "Botak" called the accused to inform him that the delivery of an additional *batu* was a mistake (see [18] above). In addition, the accused claimed that each time he was recorded in the paragraphs above as referring to the "beginning" of November, he had in fact said "mid-November". When the accused was asked in cross-examination how each of these discrepancies came about, he maintained his case, as was put to Mr Wong and ASP Imran, that it was the interpreter's mistake.

38 It was readily apparent that if the accused's account were to be believed, what had transpired during the recording of the 5 December statement could not be said to be "mistakes". This was not a case where Mr Wong did not accurately translate what the accused had said. The allegation was far more insidious. Indeed, the true allegation must have been that Mr Wong had persistently translated "one *batu*" as "two *batu*", deliberately ignored the accused's denial in relation to "D1A1A1", and entirely concocted sentences such as the one in which the accused asked "Botak" for a discount for two *batu*. *In other words, Mr Wong must have deliberately changed the accused's account so as to frame him.* The only alternative to this postulation (which was in any case not put forward by the Defence) was that it was ASP Imran who made these changes, but this also could not have taken place without Mr Wong's knowledge and acquiescence. The allegation that Mr Wong had been distracted because he was using his mobile phone during the statement recording, which had been flatly denied by both Mr Wong and ASP Imran, could not remotely account for what

must have happened if the accused's account were true. In addition, this explanation required the court to accept that the accused did nothing when he saw Mr Wong fiddling with his phone instead of paying attention to the statement recording because he felt he had no right to ask Mr Wong to pay attention. This was after all the explanation the accused gave when questioned as to why he did not ask Mr Wong to pay attention. Here, like at [31] above, I found the accused's self-professed pliancy unbelievable. Further, if the accused had such deep concerns about Mr Wong's lack of focus, he would surely have asked for a change of interpreter for subsequent investigative statements. Instead, Mr Wong continued to serve as the interpreter for all the subsequent statements. This was telling. Given all of the foregoing, the only reasonable conclusion I could draw was that the accused's evidence was not honest, but an afterthought.

39 The explanation that the interpreter mistakenly translated the accused's statement, however, was simply unable to account for the fact that all the statements had been read back to the accused before he signed them. As a result of this step, the mistranslations would have been clear to the accused. To counter this, the accused added that he was not paying attention when the statements were read back to him. This was yet another explanation that was all too convenient. The fact that the accused had made numerous amendments throughout his investigative statements made this explanation significantly less plausible. To be fair to the accused, I did not place much weight on amendments that corrected misspellings or made minor editorial changes to the statement. As the Defence had told the court that the accused was unable to understand English, it seemed more likely that these amendments were noticed by the statement recorder during the reading back of the statement, and who then informed the accused of the necessary corrections. On the other hand, at various

points in the statements, the accused had made substantive amendments, such as by inserting entire sentences to add ancillary factual information. For example, in the 5 December statement at paragraph 29, after the typewritten paragraph describing how the accused repacked the *baifen*, a handwritten sentence was inserted explaining that it took about one and a half hours for the accused to finish repacking. This additional information, which was in any case of tangential relevance to the charge, could not have come from anyone other than the accused. The accused clearly paid more attention during the statement recording process than he sought to portray in court.

40 The accused's explanation as to *why* he did not pay attention during the statement recording also did not stand up to scrutiny. The accused's claim that his mind was on the promised phone call to his family depended on the prior fact of ASP Imran having promised him such a call, but this likewise was never put to ASP Imran or Mr Wong – suggesting that it was another afterthought. Even if I believed that the accused was eagerly awaiting the opportunity to call his family, I could not accept that, during the recording of a statement four days after his arrest, the accused had been so overborne by thoughts of the death penalty and his family that he could not pay attention to what had been recorded in a statement which could well have a crucial bearing on the very thing that was weighing on his mind, *ie*, whether he would face the death penalty. Indeed, the fact he was worried about the death penalty and his family would have compelled him to state facts which disavowed "D1A1A1".

41 In addition, the accused's testimony suggested that there was only one occasion when he had requested to make a phone call, and this was during the recording of the 5 December statement. According to the accused, he was eventually allowed to make a phone call that day, although no one picked up. It was not suggested that the accused requested to make any further calls. If it were

true that the accused could not focus during the 5 December statement, that made it hard to understand why the accused declined to have the 5 December statement read back to him at the start of the recording of the first 6 December statement, knowing that he had not been paying attention the day before. After all, on 6 December, the accused was no longer anxiously waiting to make his phone call. Taken as a whole, there were far too many gaps in the accused's explanations for them to have any credibility. Consequently, I had no reason to doubt the accuracy and reliability of the 5 December statement.

42 For the sake of completeness, I also considered the accused's claim that he could not have been able to afford to pay $7,600 for the drugs (see [18] above). However, I was satisfied that what evidence there was pointed the other way. On the first occasion the accused bought drugs from "Botak", he spent $2,100 on half a *batu* ([13(d)] above). These drugs could be repacked into about 30 small packets ([13(c)] above) for sale at $120–$150 each ([14] above), earning the accused about $3,600–$4,500. The accused then spent $3,800 on one *batu* ([13(d)] above), which could be repacked into about 60 small packets, earning the accused about $7,200–$9,000. The accused's total proceeds from these transactions would thus have been about $10,800–$13,500. From a cash flow perspective (and not a profit and loss perspective, since the accused's contention was that he did not have enough cash to pay $7,600), the accused would only have spent $3,800 of these proceeds on acquiring the drugs, since he had to pay the original $2,100 before he could sell any of the drugs, and so must have had acquired that sum from other sources. Thus, by the time he came to make the third purchase of two *batu*, the accused would have been left with about $7,000–$9,700 in cash from his drug trafficking activities. Effectively, the accused would "roll" his funds from one transaction to the other. I also noted that the accused had said he had an income of about $1,000 a month from

working odd jobs. It would therefore have been far from impossible for the accused to have paid $7,600 for two *batu* in the hopes of increasing the scale of his operations and thus his future earnings. Indeed, this was how the accused had explained his operations in the first 6 December statement, the contents of which he did not challenge:

> 34 … This was how I managed to buy more 'baifen' from 'Botak' each time he called me. I used the money I made to 'roll' for a new supply of 'baifen'. The remaining money that I made after buying more 'baifen' was used as daily expenses for myself and my wife. …

To be clear, nothing in my view turned on the precise details of the accused's financial position. I considered the accused's finances only to the extent necessary to be satisfied that it was *not improbable*, based on the evidence available, for the accused to have bought the quantity of drugs for which he was charged.

The first contemporaneous statement

43 The accused's challenge to his admissions recorded in the first contemporaneous statement ran into the same difficulties that I highlighted at [33] above. One part of the accused's allegations (see [20] above) was that he took responsibility for the drugs in the first contemporaneous statement in order to protect his family from being investigated, and in this connection, SSI Tony had earlier threatened to investigate his wife if he did not "cooperate". However, the other part of the allegations was that SSI Tony never showed the accused "D1A1A1" when recording the first contemporaneous statement, and the accused's admission to ownership and his intention to sell in the statement therefore referred only to the 45 packets. These positions were maintained in the accused's testimony and in the cross-examination of SSI Tony respectively. The tension between the two positions lay in the fact that the only reason for the

accused to give a false statement to protect his family was because of "D1A1A1", since by the accused's own account, he was in fact guilty of trafficking in the remaining drugs, and had no qualms about admitting responsibility for them. The argument that the accused had not been shown "D1A1A1" was therefore at odds with the argument that the accused only admitted to trafficking in "D1A1A1" to protect his family. It was difficult to give credence to either argument other than as an afterthought. Further, although the accused's counsel tried to suggest to SSI Tony that the accused was eager to protect his family when giving his first contemporaneous statement, it was never put to SSI Tony that at any point he had threatened to implicate the accused's wife. This cemented the impression that the accused was laying embellishment over embellishment as the trial progressed in order to recant his first contemporaneous statement.

44 Here, it was worth considering the 4 December statement. Although the 4 December statement did not contain any direct account of the offence, it was relevant here because in that statement the accused recounted the recording of the first contemporaneous statement (see [11(b)] above). In that recount, the accused moved directly from explaining how "D1A1A1", "E1A" and "E2A" were seized to how he had told SSI Tony that the *baifen* belonged to him. This was another opportunity where one would expect the accused to point out either that he had lied to SSI Tony to protect his family, or that SSI Tony had wrongly recorded an admission in respect of the 46 packets when the accused had only admitted to ownership of the 45 packets, if either of those stories were true. The accused did no such thing in the 4 December statement, once again suggesting that he had concocted those assertions. It was also relevant that the accused had made corrections in this statement before signing it, and did not assert that these portions had been incorrectly recorded.

The 7 December statement and the July 2017 statement

45 The 7 December statement and the July 2017 statement may be addressed together, because they both made the same, simple point: in both statements, the accused confirmed once again that "D1A1A1" belonged to him and that he intended to sell its contents (see [15]–[16] above). Furthermore, the accused has conspicuously failed to offer any explanation for these repeat confessions. As the Prosecution correctly pointed out, the first time these statements were addressed at the trial was when the accused was confronted with them during cross-examination. In both cases, the accused's only response was to simply assert that he could not have said those things, because they did not fit within his version of events. This entirely inadequate response only underlined the serious discrepancy between the accused's repeated confessions in his statements to possessing "D1A1A1" with the intention of trafficking the drugs therein, and the series of weak explanations he gave at trial to explain these confessions away. It was relevant that there had been no allegation here that Mr Wong was fiddling with his phone and therefore not paying attention to what the accused was saying. It was also relevant that the accused had made corrections to the July 2017 statement before signing it.

46 I therefore concluded at the same point at which I began, which was the consistency of all the accused's statements taken as a whole, from the first contemporaneous statement, to the cautioned statement, to the series of investigative statements ending seven months after the accused's arrest. In this long line of statements, recorded by a number of different CNB officers and interpreters, not once did the accused recant any of his earlier confessions; instead, in many of them he further confirmed that all the drugs seized were intended by him for sale. The accused's position required me to accept that CNB officers and interpreters palpably failed to discharge their duties – in some

instances deliberately concocting versions of the facts that were severely prejudicial to the accused and contrary to what he was saying, and in others refusing to record what he was saying. Since not a shred of evidence (other than bald assertions which emerged only during the trial) has been offered in support of these serious allegations, I did not accept them.

47 For the reasons above, I concluded that the accused's statements had been accurately recorded and were reliable, and that the accused's account in court was a desperate and unconvincing series of lies designed to explain away his highly incriminating statements. The accused did not raise a reasonable doubt, let alone sufficient proof on a balance of probabilities, to challenge the cogent evidence that he had possessed "D1A1A1" together with the remaining 45 packets for the purpose of trafficking. I therefore convicted him on the charge.

Sentence

48 Although the charge I convicted the accused of carried the mandatory death penalty, s 33B MDA provides the court with a discretion not to impose the death penalty in two limited sets of circumstances, set out in ss 33B(2) and 33B(3) respectively.

49 A prerequisite for both ss 33B(2) and 33B(3) to apply was a finding that the accused was acting as a courier in the terms of ss 33B(2)(*a*) or 33B(3)(*a*) (which are materially identical). The Prosecution submitted that the accused did not satisfy this prerequisite, and the Defence made no submission to the

contrary. I agree that it was clear that the accused was not merely acting as a courier. As the Court of Appeal explained in *Public Prosecutor v Chum Tat Suan and another* [2015] 1 SLR 834 at [62], the accused's intention to sell the drugs that are the subject of the charge clearly takes him out of the scope of ss 33B(2)(*a*) and 33B(3)(*a*). In the present case, it followed from my acceptance of the reliability of the first contemporaneous statement, the 5 December statement, and the 7 December statement (see [8], [13(a)] and [15] above), just to take the clearest examples, that the accused intended to sell the drugs in "D1A1A1", "E1A", and "E2A", save for small quantities which he might remove for his own consumption. To be clear, it is well-established that regardless of whether the accused had sold any of the drugs, his *intention* to do so was sufficient to take him out of the scope of ss 33B(2)(*a*) and 33B(3)(*a*): *Zamri bin Mohd Tahir v Public Prosecutor* [2019] 1 SLR 724 at [17]. Section 33B was thus inapplicable to the accused on this basis.

50 The Prosecution also informed me that it would not be issuing a certificate of substantive assistance under s 33B(2)(*b*) in respect of the accused. As such, s 33B(2) would have been inapplicable to him in any case.

51 As s 33B MDA did not apply, I imposed the mandatory death penalty on the accused.

Kannan Ramesh
Judge

Tan Wee Hao, Nicholas Wuan Kin Lek and Samuel Yap (Attorney-General's Chambers) for the Prosecution;
Chung Ting Fai (Chung Ting Fai & Co), Prasad s/o Karunakarn (K Prasad & Co) and Ng Wai Keong Timothy (Timothy Ng LLC) for the accused.
