IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2019] SGHC 210

Criminal Case No 48 of 2018

Between

Public Prosecutor

And

Sulaiman Bin Jumari

GROUNDS OF DECISION

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

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v
Sulaiman bin Jumari

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Aedit Abdullah J:

Introduction

1 The Accused was charged for the possession of 22 packets of drugs containing not less than 52.75 grams of diamorphine for the purposes of trafficking.

2 The charge against the Accused read as follows:

> That you…on 23 June 2016, at about 4.45 p.m., at Sunflower Grandeur, 31 Lorong 39 Geylang #03-02, Singapore, did traffic in a 'Class A' controlled drug listed in the First Schedule to the Misuse of Drugs Act (Cap 185, 2008 Rev Ed), *to wit*, by having in your possession for the purpose of trafficking, twenty two (22) packets containing not less than 1520.23 grams of granular/powdery substance which was analysed and found to contain not less than 52.75 grams of diamorphine, 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 5(2) and punishable under

> section 33(1) of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed), or alternatively be liable to be punished under section 33B of the same Act.

I convicted him of the charge after the trial. As the Accused did not qualify for the alternative sentencing regime under s 33B of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) ("MDA"), I thus imposed the mandatory sentence of death on him.

Background

3 A statement of agreed facts was entered into evidence under s 267 of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) ("the CPC"). This was signed by the Prosecution and counsel for the Accused. The statement recorded that:

> (a) The Accused was arrested on 23 June 2016 at about 4.45 pm while alone in a rented room in a condominium located along Lorong 39 Geylang, Singapore.[1]
>
> (b) A number of packets containing drugs were recovered from a wardrobe (described in the statement as a cupboard), a bedside table, and the bed in the room.[2]
>
> (c) The drugs that were captured in the charge consisted of two packets wrapped in black tape and one unwrapped packet from a drawer in the wardrobe containing a total of 49.86 grams of diamorphine (Exhibits A1A, A2A and A3) ("the drugs in question"), and packets

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1 Statement of agreed facts ("SOAF") at para 3.

2 SOAF at para 5.

from the bedside table, containing 2.89 grams of diamorphine (which the Accused did not dispute possession of).[3]

(d) The Accused was found in possession of a remote control opening the main gate of the condominium and a bunch keys; a key opening a side gate; a key to the apartment; and a key to the room rented by him.[4]

(e) The Accused's DNA was found on various exhibits, but not on the three packets containing the drugs in question.[5]

(f) The packaging of Exhibits A2A and A3 were found to have been manufactured by the same machine, while the packaging for Exhibits A1A and A3 could have come from the same machine. The heat seal characteristics of Exhibits A1A, A2A and A3 indicated that the same heat sealer was used.[6]

(g) Several statements were recorded from the accused while he was in lock-up and Changi Prison. The voluntariness of these statements was not in issue.[7]

4 What was in dispute were the circumstances of the arrest of the accused, particularly, whether he knew that the three packets of drugs in question that were the subject of the charge were in his room. Also in issue was the

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3 SOAF at para 4.

4 SOAF at para 6.

5 SOAF at para 11.

6 SOAF at paras 12-13.

7 SOAF at paras 14-21.

voluntariness of a statement given by the Accused shortly after the drugs were discovered in his room ("the contemporaneous statement").

The Prosecution's case

5 The Prosecution argued that the evidence had proved that the Accused knowingly possessed the drugs and knew their nature beyond a reasonable doubt.

6 While the Accused was being placed under arrest, he was asked by officers from the Central Narcotics Bureau ("CNB") if he had anything to surrender. The Accused responded "three" while gesturing to the wardrobe. A search of the wardrobe uncovered from a drawer, amongst other things, the three packets containing the drugs in question.[8]

7 The Accused admitted clearly in his contemporaneous statement that the drugs in question belonged to him, that he knew they were diamorphine and that they were intended for both smoking and for sale. The cautioned statement given by the Accused, as well as other evidence, showed that he had sole control and power over access to the room in which the drugs in question were found.[9]

8 The contemporaneous statement was made voluntarily. The Accused was not suffering from drug withdrawal as he could provide specific details which were supported by extrinsic evidence. In the circumstances, full weight should be given to the contemporaneous statement. The Accused was

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8 Prosecution's closing submissions ("PCS") at para 3.

9 PCS at para 51.

opportunistically cherry picking which portions of the contemporaneous statement to rely upon while disavowing the rest.

9 In the alternative, the presumptions under ss 18(1)(*c*) and 18(2) of the MDA applied against the Accused, establishing that he had the drugs in his possession and knew the nature of drugs. These presumptions were unrebutted.[10]

10 The evidence further showed beyond a reasonable doubt that the Accused possessed the drugs in question for the purposes of trafficking.[11]

11 Apart from the Accused's admissions in the contemporaneous statement, he was also found in possession of drug trafficking paraphernalia. Taken together with the sheer quantity of the drugs found in the Accused's possession, it could be inferred that the Accused intended to traffic in the drugs forming the subject of the charge against him.[12]

The Defence's case

12 The Defence denied that the Accused was referring to the drugs in question when he responded "three" to the CNB officers who asked if he had anything to surrender.[13] The Accused was suffering from withdrawal symptoms at the time of the raid and during the recording of the contemporaneous statement.[14]

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10 PCS at paras 60-93.

11 PCS at paras 94-120.

12 PCS at paras 94-97.

13 Notes of evidence ("NE") 10 May 2019, p 2 at lines 3-9.

14 Defence's closing submissions ("DCS") at paras 52-55.

13 The Accused did not know that the drugs in question were in his room. Several other persons had access to the room, including on the day the Accused was arrested; the drugs in question could have been placed in the wardrobe drawer without the Accused's knowledge.[15]

14 The Defence argued against the admission of the contemporaneous statement as it was not made voluntarily. Alternatively, it should be excluded as a matter of discretion, or if admitted should be given minimal weight if at all. The statement was procured by inducement as the Accused was made to understand that he would be able to rest and thus obtain relief from his withdrawal symptoms if he would "make it fast".[16] In the alternative, the common law discretion to exclude relevant evidence if its prejudicial effect exceeded the probative value should be exercised. At the time of the giving of the statement, the Accused had not slept in three days, and was under the effects of methamphetamine consumption and withdrawal symptoms from diamorphine consumption. These were corroborated by factual errors showing doubt over its reliability, and he was consistent in his position thereafter.[17]

15 As the only evidence of possession was the contemporaneous statement, the Prosecution failed to prove beyond a reasonable doubt that the Accused had possession of the drugs in question, and even if he did have possession of the packets of drugs, he did not have knowledge that they contained diamorphine.[18]

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15 DCS at paras 60-64, 105.

16 DCS at paras 37-40.

17 DCS at paras 41-59.

18 DCS at paras 64, 81.

16 The presumptions in ss 18(1)(*c*) and 18(2) of the MDA were rebutted on the balance of probabilities. The drugs were not found on his person, nor was his DNA found on any of the packets.[19] He had also given evidence that he only trafficked in lower amounts to avoid a capital charge.[20] Another person, Jepun, also had a set of keys to the room, which was confirmed by Defence witnesses. Various persons had access to the room to consume drugs, with some staying for extended periods.[21] There was no evidence showing actual knowledge of how the drugs in question came to be in the room.

17 There was no evidence showing that the Accused intended to traffic the drugs in question. The Prosecution could not invoke both the presumptions under ss 18 and 17 of the MDA.[22]

18 The Defence also alleged that there were various lapses and deficiencies in investigation, and that alternative explanations could not be ruled out. A reasonable doubt had been raised.[23]

The Decision

19 I was not persuaded to revisit my earlier decision to allow the contemporaneous statement to be admitted; it was not given as the result of any inducement, threat or promise, or any adverse conditions stemming from any

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19 DCS at para 62.

20 DCS at para 63.

21 DCS at paras 67-80.

22 DCS at para 93.

23 DCS at paras 97-108.

drug withdrawal symptoms suffered by the Accused. Its contents were accurate and reliable.

20 I was of the view that the case had been proven against the Accused beyond a reasonable doubt. I accepted that the evidence showed that the Accused had control over the room. The elements of the charge against the Accused were made out: he had actual possession of the drugs in question and knew their nature. The drugs in question were also possessed by the Accused for the purposes of trafficking.

21 As for the Prosecution's alternative case that the presumption under s 18(1)(*c*) of the MDA could apply, I had some concerns about the operation of the presumption, but I could not go behind the Court of Appeal decision in *Poon Soh Har and another v Public Prosecutor* [1977–1978] SLR(R) 97 ("*Poon Soh Har*"). The presumption in s 18(1)(*c*) did not apply to the present case.

22 While the Accused claimed that part of the drugs were to be consumed, there was insufficient evidence of what was to be consumed.[24] I was satisfied that any such consumption was incidental.

23 I accepted that there were shortcomings in the investigation. However, these were not such as to render conviction unsafe.

Analysis

24 The issues to be determined were:

(a) Whether the Accused had possession of the drugs in question;

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[24] Agreed bundle ("AB") at p 317-319.

(b) Whether the Accused had knowledge of the nature of the drugs in question; and

(c) Whether the Accused possessed the drugs in question for the purposes of trafficking.

Much turned on the contemporaneous statement recorded shortly after the arrest of the Accused. Its voluntariness was challenged because of an alleged inducement offered by the recorder, as well as the Accused's suffering from the effects of drug withdrawal.

The contemporaneous statement

25 As the contemporaneous statement was heavily relied upon by the Prosecution to prove its case, it is perhaps more convenient to first address its voluntariness and reliability.

26 The contemporaneous statement, comprising a series of 29 questions and answers, was recorded from 5.55pm to 6.27pm in the rented room, just after the Accused was arrested. It captured the Accused admitting that the three packets containing the drugs in question belonged to him, that they were heroin, and that they were meant for both his consumption and sale.[25] For the two packets wrapped in black tape, he said that the drugs could be repackaged into 10 sets of 10 packets, and that he could sell each set for $800.[26]

27 The Defence took issue with the contemporaneous statement, because of an alleged inducement from the recording officer and the withdrawal

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25 Exhibit P134 at Q1 to Q8.

26 Exhibit P134 at Q1 to Q5.

symptoms that it said the Accused was suffering from. The Defence argued that an ancillary hearing was needed. With the Prosecution, I had some doubts about this, but out of an abundance of caution, an ancillary hearing was held. Following that ancillary hearing at which 17 witnesses, including the Accused, testified, the contemporaneous statement was admitted. However, I allowed the Defence to revisit the issue again in the Defence's closing submissions.

28 The Defence argued against its admissibility because of an inducement emanating from the CNB officer SSS Muhammad Fardlie Bin Ramlie ("the Recorder"), who recorded the contemporaneous statement. Taken together with the withdrawal symptoms the Accused was suffering from, the requirements in s 258(3) of the CPC were satisfied such as to make the contemporaneous statement inadmissible. Alternatively, the Accused's withdrawal symptoms meant that the Court should exercise its discretion, recognised in *Muhammad bin Kadar and another v Public Prosecutor* [2011] 3 SLR 1205 ("*Kadar*"), to exclude the evidence as any probative value was outweighed by the prejudicial effect.[27]

29 The Prosecution took the point that the question raised was not one that went to the admissibility of the contemporaneous statement, but only its reliability. It submitted that one of the situations in which an ancillary hearing would not be triggered was where the statement is alleged to have been irregularly recorded.[28] The Prosecution also submitted that Explanation 2 to s 258 of the CPC rendered the statement admissible automatically.[29] In any

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27 DCS at paras 35-59.

28 NE 31 Jul 18, p 18 at lines 15-25.

29 NE 31 Jul 18, p 18 at lines 20-25.

event, it argued that the contemporaneous statement was not obtained by an inducement, and that the Accused was not in fact suffering from withdrawal symptoms at the time.

Inducement

30 Section 258 of the CPC is the provision which governs the admissibility of an accused person's statements. For convenience, the relevant portions are set out:

> **Admissibility of accused's statements**
>
> **258.—**(1) Subject to subsections (2) and (3), where any person is charged with an offence, any statement made by the person, whether it is oral or in writing, made at any time, whether before or after the person is charged and whether or not in the course of any investigation carried out by any law enforcement agency, is admissible in evidence at his trial; and if that person tenders himself as a witness, any such statement may be used in cross-examination and for the purpose of impeaching his credit.
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> …
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> (3) The court shall refuse to admit the statement of an accused or allow it to be used in the manner referred to in subsection (1) if the making of the statement appears to the court to have been caused by any inducement, threat or promise having reference to the charge against the accused, proceeding from a person in authority and sufficient, in the opinion of the court, to give the accused grounds which would appear to him reasonable for supposing that by making the statement he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him.
>
> *Explanation 1* — If a statement is obtained from an accused by a person in authority who had acted in such a manner that his acts tend to sap and have in fact sapped the free will of the maker of the statement, and the court is of the opinion that such acts gave the accused grounds which would appear to the accused reasonable for supposing that by making the statement, he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him, such acts will amount to a threat, an inducement or a promise, as the case may be, which will render the statement inadmissible.

> *Explanation 2* — If a statement is otherwise admissible, it will not be rendered inadmissible merely because it was made in any of the following circumstances:
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> …
>
> (*b*) when the accused was intoxicated;
>
> …

31 The case of *Chai Chien Wei Kelvin v Public Prosecutor* [1998] 3 SLR(R) 619 ("*Kelvin Chai*") held that the test for voluntariness involves both an objective element and a subjective element (at [53]):

> …The test of voluntariness is applied in a manner which is partly objective and partly subjective. The objective limb is satisfied if there is a threat, inducement or promise, and the subjective limb when the threat, inducement or promise operates on the mind of the particular accused through hope of escape or fear of punishment connected with the charge…

32 The Defence alleged that the Accused was told by the Recorder to "make it fast" so the Accused could then rest.[30] At this time, the Accused was labouring under the confluence of a lack of sleep, the effects of methamphetamine consumption and withdrawal symptoms from diamorphine consumption. The Recorder's statement thus amounted to an inducement for the Accused to agree to what was put so the statement recording could be completed, and the Accused could then rest. The Accused's contention was supported by the fact that the statement itself was recorded very briskly over 32 minutes. The Accused also subsequently overheard the Recorder telling another CNB officer that the former wished to attend an event just after the recording of the statement, which supported the point that the contemporaneous statement was recorded hurriedly.

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30 Defence's submissions in the ancillary hearing at para 13.

33 I also noted that there was some suggestion by the Defence in its written submissions for the ancillary hearing that it would have been difficult for the Recorder to have, in the span of 32 minutes, shown the various exhibits to the Accused, recorded the Accused's answers to the 29 questions verbatim, read the contemporaneous statement back to the Accused and obtain his signature on every page.[31] Rather, the statement was not in fact read back to the Accused, and he was only asked to sign upon its completion.[32] While these arguments were included in respect of the Defence's arguments on inducement, they actually appeared to be allegations of non-compliance with the statutory requirements, or even of fabrication of the contemporaneous statement on the part of the Recorder. After all, many of the questions involved the Accused identifying the nature of various exhibits: If these exhibits were not shown to the Accused, it would have been impossible for him to have identified them.

34 The Prosecution argued that there was no inducement. Any exhortation by the Recorder to make it fast, was not true.[33] This allegation was not in fact put to the Recorder during cross-examination.[34] The contemporaneous statement did not support the Accused's contentions: the questions put were open ended, and were not such as to cause a statement to be recorded hurriedly, or to allow the Accused to, as he claimed, just agree to what was put to him.[35] In any case, such an exhortation had no reference to the charge, as required by s 258(3) of

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31 Defence's submissions in the ancillary hearing at para 16.

32 NE 3 August 18, p 59 at lines 6-9.

33 Prosecution's submissions in the ancillary hearing at paras 5-9.

34 Prosecution's submissions in the ancillary hearing at para 7.

35 Prosecution's submissions in the ancillary hearing at para 8.

the CPC and interpreted in *Poh Kay Keong v Public Prosecutor* [1995] 3 SLR(R) 887 ("*Poh Kay Keong*").[36]

INDUCEMENT, THREAT OR PROMISE

35 The alleged exhortation did not operate as an inducement, threat or promise. The objective limb of the test in *Kelvin Chai* required a consideration of whether there was objectively an inducement, threat or promise. I was of the view that there must be some reasonable basis for the accused person's interpretation of what was said as being an inducement, threat or promise. On this score, the alleged inducement was too vague: "make it fast then you go and rest" did not involve any *quid pro quo*, or suggest consequences that would befall the Accused if he failed to give a statement. Certainly, some promise or threat could be read in, on some interpretations, but this would not be enough to raise a reasonable doubt about the voluntariness of the statement.

REFERENCE TO THE CHARGE

36 For completeness, I will deal with the Prosecution's argument that the exhortation had no reference to the charge against the Accused. I was of the view that the requirement should not be narrowly construed, and that the context had to be considered.

37 In *Poh Kay Keong*, the Court of Appeal, in relation to the then s 24 of the Evidence Act (Cap 97, 1990 Rev Ed), which contained similar wording to s 258(3) of the CPC save that it applied only to confessions, held that the phrase "having reference to the charge against the accused" should not be construed strictly and literally. Such an approach would not accord with the legislative

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[36] Prosecution's submissions in the ancillary hearing at paras 10-13.

purpose that a confession brought about as a result of an inducement, threat or promise is unreliable and therefore should be excluded (at [42]). The Court of Appeal went on further to opine that in the course of obtaining a confession, a threat to have an accused person beaten up, or even to have his siblings beaten up, would have the requisite reference to the charge against him (at [41]).

38 It is clear that the same reasoning applies with equal force to statements of the accused person sought to be admitted under s 258 of the CPC. Statements obtained from accused persons through the use of an inducement, threat or promise are not reliable and should be excluded from evidence. No authority was cited to me for the proposition that a different approach should be applied in construing s 258(3) of the CPC.

39 Here, the alleged exhortation to the Accused was to "[m]ake it fast then you go and rest".[37] On a strict and literal construction, such an exhortation would have no reference to the charge. However, viewed in context, one possible interpretation would be that the object and purpose of the exhortation was to induce the Accused to make a statement in relation to the charge. This would have clearly had reference to the charge against the Accused.

WHETHER THE EXHORTATION WAS IN FACT MADE

40 More importantly, I found that the evidence established beyond a reasonable doubt that the exhortation was not in fact made. The testimony and conditioned statement of the Recorder did not disclose any such exhortation being made. There was nothing to show that the Recorder's evidence should be doubted: he was clear in his denial, and nothing in the circumstances or other

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37 NE 2 Aug 18, p 129 at lines 23-25.

evidence showed any reasonable possibility that the Recorder was wrong or giving false evidence. The Accused's assertion could not then raise any reasonable doubt.

41 If anything, the circumstances seem to point the other way. I accepted the Prosecution's submissions that the use of open-ended questions was not conducive for a statement being recorded in response to such an exhortation.

The Withdrawal Symptoms

THE GENERAL DISCRETION TO EXCLUDE EVIDENCE

42 The Defence invoked the court's common law discretion to exclude relevant evidence if its prejudicial effect outweighed its probative value. The Defence relied on the case of *Public Prosecutor v Dahalan bin Ladaewa* [1995] 2 SLR(R) 124 ("*Dahalan*") for the proposition that drug withdrawal could be a basis for finding that a statement was given involuntarily and that *Kadar* provided a basis for excluding voluntary statements where the prejudicial effect of the evidence exceeds its probative value, even if the evidence is otherwise admissible.

43 The Prosecution, in oral arguments, submitted that Explanation 2 to s 258 of the CPC applied, rendering the statement admissible (see above at [30]).[38]

44 The first question to weigh was whether *Dahalan* survived the introduction of Explanation 2 to s 258 of the CPC, as there was no equivalent provision in either the Evidence Act (Cap 97, 1990 Rev Ed) or Criminal

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38 NE 31 Jul 18, p 18 at lines 15-25.

Procedure Code (Cap 68, 1985 Rev Ed) in force at the time of the decision in that case. I did not find that Explanation 2 was meant to overrule *Dahalan*. The Court of Appeal in *Kadar* identified the discretion exercised by the court in *Dahalan* as the same common law discretion to exclude prejudicial evidence that it went on to apply in excluding the accused person's statement (*Kadar* at [53]). Such statements are not excluded because they are involuntary *per se* (as the Defence appeared to argue), but rather because of the serious concerns with their reliability (*Kadar* at [55]). While the version of the CPC in force at the time of the decision in *Kadar* did not contain Explanation 2, I did not think that its insertion overruled the *Kadar* discretion to exclude prejudicial evidence with respect to statements obtained while an accused person is allegedly labouring under the effects of drug withdrawal. During the second reading of the Criminal Procedure Code 2010 (Bill No 15 of 2010), Minister for Law Mr K Shanmugam clarified the scope of Explanation 2 (*Singapore Parliamentary Debates*, *Official Report* (19 May 2010) vol 87 at col 556):

> Mr Kumar asked if it was fair to use statements made by a person who is so intoxicated that he has not realised the implications of the statements. and the short answer is this: if the person did not know what he was saying, either because he was intoxicated or because of language difficulties, then that is not his true statement and it cannot be used against him. the Court has the task of deciding whether the maker knew what he was saying, and that the statement was made voluntarily.

Even if I had accepted the Prosecution's argument that the term "intoxicated" in Explanation 2 encompassed drug withdrawal symptoms, Explanation 2 did not leave the *Kadar* discretion with no room to operate where an accused person's statement is disputed on grounds of drug withdrawal.

45 It was thus clear that flowing from *Kadar,* the court retains a discretion separate from the statutory provisions, to exclude otherwise relevant evidence if it is prejudicial, and such prejudice could arise from the effect of drug

withdrawal symptoms. But whether any prejudice arose in the present case would depend on the evidence adduced. An ancillary hearing was thus convened under s 279 of the CPC.

WHETHER THE ACCUSED WAS SUFFERING FROM WITHDRAWAL SYMPTOMS

46 It was undisputed that the Accused was found to be suffering from withdrawal symptoms from 25 June 2016 to 27 June 2016.[39] The dispute between the parties was whether the accused was subject to these symptoms at the time of the giving of the contemporaneous statement on 23 June 2016.

47 The Defence argued that he was suffering from withdrawal symptoms at the time of the giving of the statement, relying on evidence from the Accused, another accused person who saw him and the expert opinion of a psychiatrist. The evidence of the arresting officers that he appeared fine should be discounted as they were not medical experts.[40] The doctors who examined him prior to and after his cautioned statement was taken a day later on 24 June 2016 were not specialists, were not focussed on drug withdrawal symptoms and saw the Accused only for a short while. Any drug withdrawal symptoms could also have been temporarily alleviated by showers, which the Accused had before the pre and post statement medical examinations.[41]

48 The Prosecution argued that the medical evidence showed that the Accused was not likely to be suffering from drug withdrawal when the statement was recorded. The Prosecution relied on the evidence of the arresting

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39 Agreed Bundle at p 208-209.

40 Defence's submissions in the ancillary hearing at paras 25-27.

41 Defence's submissions in the ancillary hearing at paras 28-30.

officers and examining doctors, who did not see anything of concern. The doctors in particular saw no withdrawal symptoms and found the Accused to appear alert and well.[42]

(1) THE MEDICAL EVIDENCE

49 Dr Yak Si Mian ("Dr Yak") and Dr Raymond Lim conducted the Accused's pre and post statement medical examinations respectively on 24 June 2016.[43] They both testified that they did not detect any drug withdrawal symptoms in the course of their examinations of the Accused.[44]

50 The fact that both Dr Yak and Dr Raymond Lim did not detect any untoward symptoms pointed strongly against the assertions of the Accused. Though they were not specifically concerned with the identification of withdrawal symptoms, they would have, assuming they performed their examinations properly, been expected to observe at least some of the possible symptoms of withdrawal. Both doctors denied seeing anything of that nature and I did not see any reason to take issue with their examinations of the Accused.

51 The Accused was then referred to the CNB's Cluster Medical Centre for drug withdrawal assessment, which took place from 25 June 2016 to 28 June 2016. During this, he was assessed daily by a different doctor for drug withdrawal symptoms utilising the Clinical Opiate Withdrawal Scale ("COWS"). Based on a report prepared by Dr Edwin Lymen Vethamony dated 15 August 2016, the Accused's COWS score was "13" on 25 June 2016, going

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42 Prosecution's submissions in the ancillary hearing at paras 17-42.

43 AB at p 195; AB at pp 198-199.

44 NE 31 July 18, p 72 at lines 13-19; NE 1 Aug 18, p 115 at lines 18-31.

down to "7" on 26 June 2016 and 27 June 2016.[45] This was in the moderate range for drug withdrawal symptoms. As noted by the Defence, while this was an assessment of the physical symptoms, it would involve both objective and subjective elements, which could lead to differences in the conclusions. On the facts of the case here, what was pertinent was that the COWS score was apparently, when it was administered, at the peak around the 25 June 2016, two days after the contemporaneous statement was given on 23 June 2016.

52 There was disagreement about the COWS score to be given for 26 June 2016, the second day of the drug withdrawal assessment. The Defence expert, Dr Lim Yun Chin ("Dr YC Lim"), indicated that he would have given the Accused a higher score than the "7" given by the examining doctor, because the Accused was having gastrointestinal problems.[46] But, as submitted by the Prosecution, this would not have pushed the Accused's COWS score into anything beyond the range of mild drug withdrawal symptoms.

53 The Defence's arguments were based on the evidence of Dr YC Lim, who testified that withdrawal symptoms could occur six hours after the last consumption of diamorphine and peak from anywhere between six and 72 hours.[47] Based on the reported COWS scores of the Accused from 25 – 27 June 2016, Dr YC Lim extrapolated that the Accused was likely experiencing withdrawal symptoms corresponding to a higher COWS score than the "13" recorded on 25 June 2016.[48]

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45 AB at pp 208-209.

46 NE 21 Aug 18, p 62 at lines 19-31, p 63 at lines 1-4.

47 NE 21 Aug 18, p 89 at lines 10-13.

48 Exhibit D3 at p 4.

54 As against this, the Prosecution relied on the evidence of Dr Lee Kim Huat Jason ("Dr Lee"), a psychiatrist with the Institute of Mental Health. Dr Lee testified that diamorphine withdrawal would show up generally from eight to 12 hours after last use, and peak at 24 to 48 hours.[49] Based on the Accused's claim that he had last consumed heroin on the morning of 23 June 2016, Dr Lee did not expect to observe severe withdrawal symptoms from the Accused during the recording of the contemporaneous statement at about 6pm.[50] At the time of the Accused's arrest and the taking of the contemporaneous statement, the arresting officers and Recorder did not observe any symptoms that would have been expected had the Accused been suffering from severe withdrawal symptoms at the time, *i.e.* drowsiness, diarrhoea, and a running nose. Furthermore, the Accused was according to his own testimony able to function, carrying out his daily activities at the time.

55 I preferred the Prosecution's medical evidence. In any event, there was no significant difference in the assessments of Dr YC Lim and Dr Lee. The evidence of both doctors was that withdrawal symptoms did not operate immediately once consumption of diamorphine stopped: there would have been a time lag before withdrawal symptoms start to manifest. Dr YC Lim's testimony was that the onset of withdrawal symptoms could occur within six hours, with symptoms peaking within 72 hours before subsiding.[51] This was compared to Dr Lee's timeframe of eight to 12 hours for the onset of withdrawal symptoms, with the peak at 24 to 48 hours. The primary difference related to when peak withdrawal symptoms would occur, with Dr YC Lim stating that

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49 NE 1 Aug 18, p 36 at lines 25-27, p 42 at lines 17-21.

50 NE 1 Aug 18, p 42 at lines 1-5.

51 NE 21 Aug 18, p 87 at lines 7-11.

they could occur anywhere between six and 72 hours, and Dr Lee taking the position that they peaked between 24 and 48 hours.

56 To my mind, what mattered most was the severity of the withdrawal symptoms, if any, that the Accused was suffering from at the time of the giving of the contemporaneous statement. Here, the Defence's position that the Accused was indeed suffering from such severe symptoms ran up against the absence of any observation of such symptoms. The arresting officers, Dr Raymond Lim and Dr Yak all testified to not having witnessed such symptoms from the Accused. The Defence argued that the Prosecution witnesses were not reliable on this score as they were not trained medical experts specialising in drug withdrawal. This missed the point: their evidence here was sought not on the basis of the medical expertise or knowledge, but just on whether they did in fact observe anything that could have been withdrawal symptoms. The absence of such evidence pointed against the Defence version of events. The Defence was also unable to show that these witnesses were giving false evidence.

57 I did not accept portions of the medical expert evidence of Dr YC Lim, particularly his backwards extrapolation of the Accused's COWS scores to conclude that he would have been suffering from more severe withdrawal symptoms at the time of the taking of the contemporaneous statement. Dr YC Lim's arguments in favour of an extrapolation was not supported. He did not conduct the examinations in question on the Accused. His extrapolation was also contradicted by the observations of Dr Raymond Lim and Dr Yak. It seemed to me unlikely that the Accused could have been suffering from severe withdrawal on 23 June 2016 when the contemporaneous statement was recorded, demonstrate no observable withdrawal symptoms on 24 June 2016, and then exhibit withdrawal symptoms again from 25 – 27 June 2016. This went against his own account of how withdrawal symptoms typically manifest in a

sigmoid curve, with the symptoms going up "very fast" before declining at a gentle pace.[52] Further, as noted by the Prosecution, his report was partly based on the assumption that the Accused was indeed suffering from withdrawal at the time of the giving of the contemporaneous statement. This was based on the Accused's own reporting, which was the very thing to be proven. I accepted that withdrawal is a complex condition, but when viewed in that light I concluded that the Defence did not raise any reasonable doubt.

(2) THE EVIDENCE FROM THE OTHER WITNESSES

58 The Defence adduced the evidence of one Zainudin Bin Atan ("Zainudin"), who had been arrested at about 6pm on 23 June 2016 and saw the Accused at an exhibit room. Zainudin testified that the Accused appeared to be "blur" and was "dozing off".[53] It was argued by the Defence that this showed that the Accused was indeed not able to give his statement voluntarily.

59 This evidence was not relied upon substantially in the Defence's submissions. In any case, Zainudin's observations had to be weighed up against the other evidence examined above. Zainudin's testimony essentially was that the Accused appeared tired and sleepy. This did not indicate that the Accused was suffering from drug withdrawal, much less drug withdrawal of the sort that would have cast doubts on the reliability of the contemporaneous statement. Zainudin's testimony also had to be seen against the testimony of Dr Yak and Dr Raymond Lim, who had examined the Accused the next day on 24 June 2016 and did not observe him to have been suffering from any withdrawal symptoms.

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52 NE 21 Aug 18, p 88 at lines 5-7, 19-23.

53 NE 21 Aug 18, p 41 at lines 1-9.

(3) CONCLUSION ON THE WITHDRAWAL SYMPTOMS

60 I was not persuaded that the Accused was indeed suffering from any withdrawal symptoms at the time of the making of the contemporaneous statement. As noted above, I preferred the evidence of the Prosecution as regards the medical evidence. There was insufficient evidence supporting the Accused's version that would raise any reasonable doubt. Turning then to the drug withdrawal, I accepted that this could operate as a separate ground on which a court could exercise its common law discretion to exclude evidence where its prejudicial effect outweighs its probative value, as indicated by the guidance given by the Court of Appeal decision in *Kadar*. However, the mere fact that an accused person is suffering from drug withdrawal is not by itself sufficient to give rise to relevant prejudice, but must be such as to raise serious doubts as to the reliability of the statement (*e.g.* if there are doubts whether the statement is in fact that of the accused person).

61 I accepted the evidence of the Prosecution witnesses that the Accused was not at the point of the recording of the contemporaneous statement in such a state. The arresting officers and medical examiners were clear on this. Other aspects of the evidence adduced, including that of the Accused at the exhibit room, could be explained on other grounds. I thus found that the statement was given voluntarily.

62 I should also note that the Prosecution had relied on the cogency of the very statement that was to be admitted to show that the Accused was not suffering from any withdrawal symptoms. I was of the view that this was begging the question: the statement had to be shown to be admissible from other evidence before it could be considered as evidence itself.

Possession

63 The Court of Appeal's decision in *Adili Chibuike Ejike v Public Prosecutor* [2019] SGCA 38 at [31] ("*Adili*"), which was released on 27 May 2019 after my decision in the present case, clarified the law in relation to the element of possession for the purposes of offences under s 5 and s 7 of the MDA:

(a) First, possession for the purposes of the MDA entails physical possession, and knowledge of the item held in possession. It is not necessary that the accused person knows of the nature of the item, that is, whether it is a controlled drug or otherwise (at [31])

(b) Second, knowledge of the existence of the item is distinguished from knowledge as an element of trafficking and importation under s 5 and s 7 of the MDA respectively, that is, knowledge of the specific drug (at [32]–[33], citing *Zainal bin Hamad v Public Prosecutor and another appeal* [2018] 2 SLR 1119 and *Obeng Comfort v Public Prosecutor* [2017] 1 SLR 633).

(c) Third, inadvertent possession on the part of an accused person, such as when the drugs are planted on him without his knowledge, would not satisfy the legal requirements of possession (at [34]).

(d) Fourth, possession for the purposes of offences under s 5 and s 7 of the MDA is distinguishable from that under s 8(*a*), which requires knowledge of the nature of the drugs found to either be proven or presumed under s 18(2) (at [35]).

Proof of actual possession

64 From the contemporaneous statement, the Accused knew that the drugs in question were in his room, and further admitted to ownership of them:[54]

> Q1: Pointing to the two black bundles recovered from the cupboard. "What is this?"
>
> A1: "Heroin."
>
> Q2: "Whose is it?"
>
> A2: "Mine."
>
> …
>
> Q6: Pointing to a plastic pkt containing granular substance recovered from the cupboard. "What is this?"
>
> A6: "Heroin."
>
> Q7: "Whose is it?"
>
> A7: "Mine."

This alone would be sufficient to satisfy the possession element of the charge against the Accused under s 5 of the MDA.

65 The reliability of the contemporaneous statement was buttressed by the fact that it was corroborated by extrinsic evidence. In the contemporaneous statement, the Accused accurately identified the nature of various drug exhibits and was even able to state that the exhibit marked A4 contained fake drugs.[55] There was no way for the Recorder to have known this prior to the completion

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54 Exhibit P137.

55 Exhibit P137 at Q9-Q23.

of the Health Sciences Authority's analysis. To my mind, this was strong evidence of the reliability of the contemporaneous statement.

66 Even if I was wrong on the admissibility of the contemporaneous statement and the weight to be placed on it, possession would still have been made out on other evidence.

67 The drugs in question were found in a wardrobe in a room occupied by the Accused. I accepted the evidence of the arresting officers that the drugs in question were recovered from a drawer in the wardrobe, alongside other drug exhibits which the Accused admitted to ownership of.[56] While the Accused disputed that the other drug exhibits were recovered from that drawer, claiming instead that they were located in a different drawer in the wardrobe, I did not accept his evidence. The testimony of the arresting officers was that exhibits recovered from different locations in the wardrobe would have been marked with different letters to identify where they were found.[57] This procedure was adopted with respect to exhibits recovered from other locations in the room, with exhibits from the bedside table being marked with the prefix "B" and exhibits from under the Accused's bed being marked with the prefix "C". As against this, the Accused's testimony on where the other drug exhibits were located was inconsistent. During the ancillary hearing, the Accused testified that an electronic weighing scale (Exhibit A7) and some polka-dotted pink packets (Exhibit A8) were located *beside* the top drawer,[58] whereas during the main trial

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56 NE 31 July 18, p 80 at lines 1-31.

57 NE 2 Aug 18, p 41 at lines 2-26.

58 NE 3 Aug 18, p 77 at lines 26-30.

his version was that they were kept *in* the top drawer.[59] These inconsistencies led me to reject the Accused's account of where the drug exhibits, including the drugs in question, were recovered from.

68 There was nothing adduced that would substantiate the Accused's version of the drugs in question having been put there by anyone else. The drugs in question were not hidden away as a secret stash: they were found in a drawer in a wardrobe used by the Accused. His clothes and various other personal effects were elsewhere in the wardrobe. That room he was in was also the only room that he occupied in the rented flat. His bed, where he appeared to spend a considerable time in while in the room was right next to the wardrobe, and the packages would have been in his direct line of sight. Even if he were under the influence of drugs at various points, he would have noticed the packages in his moments of lucidity. For someone to have left the drugs there without his knowing of it was beyond any reasonable belief.

69 Given all of this, the necessary inference was that the Accused had ownership of and actually possessed the drugs in question. The possibility that the drugs were those of another person, put into the room, without the knowledge of the Accused was untenable and against all reasonable doubt.

Presumption under s 18(1)(c).

70 There was some question of whether possession of the drugs in question could be presumed under s 18(1)(*c*), which reads:

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[59] NE 26 Feb 19, p 72 at lines 26-32.

> **Presumption of possession and knowledge of controlled drugs**
>
> **18.—**(1) Any person who is proved to have had in his possession or custody or under his control —
>
> …
>
> (*c*) the keys of any place or premises or any part thereof in which a controlled drug is found…
>
> shall, until the contrary is proved, be presumed to have had that drug in his possession.

71 There was no question of wilful blindness in the present case, unlike in *Adili*.

72 The Prosecution argued that the presumption applied and was not rebutted. The Accused had the keys to his room in his possession, and the drugs were found in that room. The Accused failed, the Prosecution contended, to rebut that presumption.[60]

73 The Defence argued that the presumption could not apply as a person named Jepun also possessed a set of keys to the room in which the drugs in question were found. The room was also, at various times, used by the Accused and various other persons to consume drugs.[61]

74 What needed to be determined were the following issues:

(a) How the presumption in s 18(1)(*c*) of the MDA operates;

(b) Whether the presumption was triggered in the present case; and

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60 PCS at paras 64-80.

61 DCS at para 67.

(c) If the presumption was triggered, whether the Appellant had rebutted it on a balance of probabilities.

75 The presumption in s 18(1)(*c*) of the MDA requires that it be proven that the accused person had the keys to the room or premises where drugs are found in his possession, custody or control. In the present case, there was no doubt that the Accused had the material keys in his possession.

76 Given the nature of the presumption, which goes to proving the possession element of an offence under s 5 of the MDA, a possible reading would be that it must be proved that the keys found in the Accused's possession are the only keys to the room: if someone else possessed a copy of the keys, there would be little justification for any sort of presumption to apply. This appeared to be the reasoning adopted by the Court of Appeal's decision in *Poon Soh Har*, where it found that the presumption was inapplicable as the accused person in that case did not have all the keys to the letterbox in which the drugs were found.

77 The Prosecution argued that *Poon Soh Har* was distinguishable as it was concerned with a situation in which the keys were held by multiple occupants, who were accepted as having copies of the keys in question.[62] In contrast, there was no agreement in the present case on whether another person held keys to the rented room. The Prosecution did not accept the Accused's claim that another person, Jepun, also held copies of keys to the room where the drugs in question were found.[63]

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62 PCS at para 69.

63 PCS at para 76.

78 I was of the view that there was force in the view that, for the presumption in s 18(1)(*c*) to be triggered, it must be shown that there were no others who could have had access to the premises; if multiple persons had access because they held copies of the keys, then it is difficult to see why a presumption that can only be rebutted on the balance of probabilities should be triggered. That appeared to me to be the basis of the decision in *Poon Soh Har*.

79 The Prosecution raised the case of *Public Prosecutor v Tan Lye Heng* [2017] 5 SLR 564 ("*Tan Lye Heng*"), in which the scope of the decision in *Poon Soh Har* was discussed. The Prosecution seemed to be arguing that Steven Chong JA ("Chong JA") in *Tan Lye Heng* expressed some concerns about the effect of *Poon Soh Har*.[64] This was not of much assistance as the conclusion ultimately reached by Chong JA was that *Poon Soh Har* had not been overruled and remained good law:

> 118 … none of the cases post-*Poon Soh Har* considered the applicability of the presumption in a situation where the accused does not have possession of *all* the keys to the premises where the controlled drugs were found. Hence, I would be slow to conclude that these subsequent Court of Appeal cases have implicitly overruled *Poon Soh Har*. However, in the light of the recent pronouncements by the Court of Appeal in *Raman Selvam*, *Sharom* and *Obeng Comfort*, it would be timely to revisit *Poon Soh Har* when the opportunity should arise in future. [emphasis in original]

80 I could not disregard the Court of Appeal's decision, and I could not conclude that *Tan Lye Heng* laid down a different test. In *Tan Lye Heng*, it was not disputed that another person had the keys, leaving the presumption displaced. I did not read *Tan Lye Heng* as requiring that possession by multiple persons be undisputed before the presumption could be found to be rebutted.

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64 PCS at paras 78-80.

Given the consequences of the operation of s 18(1), I agreed that the onus should lie on the prosecution to show that there was no other person in possession of the keys before the presumption was triggered. In any event, the presumption was not necessary as I found, above, that the Accused knew that the drugs in question were there and that they belonged to him, meaning that the element of possession was made out.

Knowledge of nature of drugs

81 I found that the Accused knew that the drugs in question were diamorphine. This flowed from his contemporaneous statement, where he expressly admitted that he knew that the drugs in question were diamorphine (see [64] above).

Presumption under s 18(2)

82 In any event, the presumption of knowledge under s 18(2) of the MDA would have operated against the Accused, and it would not have been tenable for him to rebut it.

83 Section 18(2) of the MDA reads:

> (2) Any person who is proved or presumed to have had a controlled drug in his possession shall, until the contrary is proved, be presumed to have known the nature of that drug.

84 The Accused's case was that he did not have possession of the drugs in question as they were placed in the wardrobe by someone else without his knowledge. It was not his case that the drugs in question were in his possession but he did not know that they were diamorphine, and he did not lead any evidence to that effect. Given that I found against the Accused on the issue of possession of the drugs in question (see [64]–[69] above), it followed that the

presumption of knowledge under s 18(2) of the MDA would have gone unrebutted.

Possession for the purposes of trafficking

85 I was satisfied that it was proven beyond a reasonable doubt that Accused had the drugs to traffic.

86 In the contemporaneous statement, the Accused admitted that the drugs in question were for sale, and further detailed the profit he expected to earn:[65]

> Q1: Pointing to the two black bundles recovered from the cupboard. "What is this?"
>
> A1: "Heroin."
>
> Q2: "Whose is it?"
>
> A2: "Mine."
>
> Q3: "What is it for?"
>
> A3: "For smoke and sale."
>
> Q4: "How do you sell?"
>
> A4: "I make set. One set I sell $800/-."
>
> Q5: "that two bundle can get how many set?"
>
> A5: "About 100 pkt. About 10 sets."
>
> Q6: Pointing to a plastic pkt containing granular substance recovered from the cupboard. "What is this?"

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65 Exhibit P137

A6: "Heroin."

Q7: "Whose is it?"
A7: "Mine."

Q8: "What is it for?"
A8: "Same also. For smoke and sale."

87 Other evidence also indicated that the Accused had intended to traffic the drugs in question. As noted by the Prosecution, the Accused was found with drug trafficking paraphernalia. The quantity of the drugs in question also indicated that the Accused had intended to traffic them.[66] The drugs forming the subject of the charge against the Accused had a gross weight of 1520.23 grams and were found to contain 52.75 grams of diamorphine. This was more than three times the amount required to attract capital punishment. While the Accused claimed to have had some of the drugs in question for consumption, this was not substantiated by any evidence from him. Indeed, any defence of consumption would have contradicted the Accused's claim that he did not know of the three packets containing the drugs in question (comprising 49.86 grams of diamorphine). He could not, given his stance, have been able to consistently allege that any of the drugs in question would have been for his consumption.

88 The fact that the Accused had other packets of drugs in his possession, at least some of which was meant for sale, was also incriminating: the Accused was involved in the drug trade by his own admission, and was not a pure consumer. Against this backdrop, the irresistible inference was that the drugs in question were meant for sale, rather than being purely for consumption as well.

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66 PCS at paras 96-97.

89 The presumption under s 17(*c*) of the MDA was thus not necessary, but would have been applicable, though the Prosecution did not invoke it. The facts above would have meant that the Accused could not have rebutted that presumption on the balance of probabilities.

90 As for the Accused's claims that he only trafficked in a non-capital amount of diamorphine,[67] this was simply a bare assertion. The evidence established that the Accused intended to traffic in the drugs in question. It was also apparent from the Accused's testimony at trial that he did not know what amount of diamorphine would attract a capital charge.[68] In the circumstances, I rejected the Accused's claim that he only intended to traffic in a non-capital amount of diamorphine.

Miscellaneous

91 The Accused took issue with various aspects of the investigations, alleging that there were various leads that were not followed through. Any such allegation of insufficient investigation could not take the Accused very far: the burden was on the Prosecution to prove its case beyond a reasonable doubt, and if there were any shortcomings resulting in insufficient evidence, that would have been grounds for an acquittal. As it was, whatever shortcomings existed were not such as to undermine the Prosecution's case.

Sentencing

92 The Accused, having been convicted of the charge was subject to sentencing under s 33B of the MDA, which prescribes the death penalty unless

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67 DCS at para 92.

68 NE 26 Feb 19, p 87 at lines 15-21.

the accused person is a courier and either has a certificate of substantive assistance or is found to have been suffering from an abnormality of mind. As the Accused was found to have had the drugs for sale, he did not qualify for the alternative sentencing regime, and accordingly the death sentence was passed against him.

Aedit Abdullah
Judge

April Phang, Zulhafni Zulkeflee and Desmond Chong for the Prosecution;
Anand Nalachandran (TSMP Law Corporation), Lim Wei Ming, Keith (Quahe Woo & Palmer LLC), and Koh Weijin, Leon (N S Kang) for the accused.