IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2019] SGHC 44

Criminal Case No 28 of 2017

Between

Public Prosecutor

And

(1) Andi Ashwar Bin Salihin
(2) Mohd Akebal s/o Ghulam Jilani
(3) Mohammed Rusli Bin Abdul Rahman

JUDGMENT

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

Version No 1: 27 Oct 2020 (22:41 hrs)

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Public Prosecutor
v
Andi Ashwar bin Salihin and others

[2019] SGHC 44

High Court — Criminal Case No 28 of 2017
Chan Seng Onn J
30–31 March, 4–7, 18–19 April 2017, 3–5 April, 14–16, 28 August 2018; 13 November 2018

27 February 2019 Judgment reserved.

Chan Seng Onn J:

Introduction

1 This was a joint trial involving three accused persons – Andi Ashwar Bin Salihin ("Andi"), Mohd Akebal s/o Ghulam Jilani ("Akebal"), and Mohammed Rusli Bin Abdul Rahman ("Rusli"). Each faced capital trafficking charges relating to the same two bundles of drugs that contained, in total, not less than 29.06g of diamorphine.

2 The accused persons were charged as follows:

(a) Andi: One charge of possessing not less than 29.06g of diamorphine for the purpose of trafficking, an offence under s 5(1)(*a*)

read with s 5(2) of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) ("MDA"), punishable under s 33(1) or s 33B of the MDA.

(b) Akebal: One charge of trafficking not less than 29.06g of diamorphine, an offence under s 5(1)(*a*) of the MDA, punishable under s 33(1) or s 33B of the MDA.

(c) Rusli: One charge of abetting Andi by instigating him to traffic in not less than 29.06g diamorphine, an offence under s 5(1)(*a*) read with ss 5(2) and 12 of the MDA, punishable under s 33(1) or s 33B of the MDA.

3 At the end of trial, I reserved judgment. Having considered the evidence and the submissions from parties, I find that the Prosecution has proven the charges against Andi and Akebal beyond reasonable doubt, and I thus convict them accordingly.

4 As against Rusli, I find that the Prosecution has failed to prove beyond reasonable doubt that he had knowledge of *both* bundles of drugs. Therefore, I amended the charge against him to one of instigating Andi to traffic in not less than 14.46g of diamorphine (being the amount of diamorphine in *one* bundle of drugs), and convict him accordingly on this reduced charge.

Facts

Events leading to the drug transaction

5 Between 21 August 2014 and the morning of 22 August 2014, Rusli instructed Andi to collect *obat* (street name for diamorphine) for him from one Bai/Bala.[1] As I will explain in my decision for Akebal below, I am satisfied that the said Bai/Bala was Akebal.

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6 On 22 August 2014, at about 9.06am, Rusli texted the handphone number belonging to Akebal (8286 6224) to Andi.[2] In a separate phone call, Rusli also instructed Andi to make arrangements with Akebal as to where and when to pick up the *obat*.[3]

7 Pursuant to Rusli's instructions, Andi arranged to collect the *obat* from Akebal at Block 716 Woodlands Avenue 7 later that day.[4]

The drug transaction

8 At about 10.20am on the same day, Andi drove to the service road near Block 716 Woodlands Avenue 7.[5] Akebal approached Andi in his car and placed an orange plastic bag[6] containing two bundles[7] of granular/powdery substance on the front passenger seat of Andi's car.[8] Thereafter, Akebal left to take a bus, while Andi drove off to meet Rusli.

Arrest of Andi and Rusli; HSA analysis of drugs

9 At about 11.30am, Andi parked his car at the multi-storey car park at Block 499 Tampines Avenue 9, leaving the orange plastic bag containing the bundles in the car before proceeding up to Rusli's flat.

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1 Agreed Bundle ("**AB**") p 999 at [5].

2 AB p 222, S/No. 9.

3 Notes of Evidence ("**NE**") Day 13 (16 August 2018) p 76 lines 1- 8.

4 AB p 999 at [5].

5 NE Day 6 (18 April 2017) p 32 lines 16 - 18.

6 P64.

7 P66 – P73.

8 AB p 811 at [5], NE Day 1 p 64 lines 28 – 31, p 66 lines 8 – 9.

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10 At about 12.40pm, Andi, Rusli, and another unrelated person left Rusli's flat. Andi returned to his car, while Rusli and the unrelated person went towards Rusli's car, which was parked at a different carpark.

11 At about 12.45pm, Central Narcotics Bureau ("CNB") officers moved in and arrested Andi while he was seated in the driver's seat of his car. No one else had entered or approached the car in the interim.[9] Concurrently, Rusli and the unrelated person were arrested in the carpark where they had gone.[10]

12 Andi's car was searched, and the orange plastic bag ("A1") was recovered. In the orange plastic bag, two black-taped bundles (marked "A1A1"[11] and "A1B1"[12]) were recovered and subsequently found to contain:

(a) For A1A1: 443.5g of granular/powdery substance containing not less than 14.60g of diamorphine;[13]

(b) For A1B1: 444.8g of granular/powdery substance containing not less than 14.46g of diamorphine.[14]

Arrest of Akebal

13 At about 8.25pm on 22 August 2014, outside Sheng Siong Supermarket at Block 6A Woodlands Centre Road, Akebal was arrested by CNB officers. A Nokia handphone ("AK-HP") bearing the number 8286 6224, being the number that was used to communicate with Andi and Rusli, was found on a grass patch

9 Agreed Facts: NE Day 3 (4 April 2017) p 2 line 30 – p 3 line 2.

10 Agreed Facts: NE Day 3 (4 April 2017) p 3 lines 2 – 5.

11 Exhibit P69.

12 Exhibit P74.

13 AB at p 95.

14 AB at p 96.

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beside him when he was arrested.

Preliminary finding: One bundle usually contained slightly less than 15g of diamorphine

14 It was not disputed at trial that the common practice of the parties was to deal in bundles of granular/powdery substances weighing about 450g each, and that such bundles would usually contain just below the capital threshold of 15g of diamorphine.[15]

Andi's and Rusli's defence: one bundle only

15 Given their common practice, Andi's and Rusli's primary defence was that they each had knowledge or intended to deal with only *one*, rather than both bundles of *obat*. This was allegedly because Rusli was "conscious and careful", and would traffic in one bundle of *obat* only, given that anything more than one bundle could attract capital punishment.[16] In this case, each bundle of *obat* contained slightly less than 15g of diamorphine (14.60g and 14.46g respectively).

16 Accordingly, the Defence urged me to amend the charges faced by Andi and Rusli by reducing the amount of diamorphine in their respective charges to reflect the diamorphine content of *one* bundle only.

Akebal's defence: misidentification

17 On the other hand, Akebal denied any involvement, and claimed that Andi and the CNB officers had wrongly identified him as the person who had

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15 NE Day 11 (14 August 2018) p 91 lines 4 – 26, p 92 lines 13 – 16; NE Day 13 (16 August 2018), p 62 lines 21 – 25.

16 NE Day 11 (14 August 2018), p 41 lines 15 – 25, p 42 lines 1 – 8.

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passed the orange plastic bag containing the bundles to Andi.

18 In support, Akebal attempted to show that he was dressed in a different top than what the CNB officers and Andi had observed.

19 He also claimed that Andi's positive identification of him in Andi's statements were flawed as Andi could have been suffering from drug withdrawal at the material time.

20 Finally, while he accepted that the handphone AK-HP had been found in his possession at the time of his arrest, he claimed that the phone had been in his friend's possession during the drug transaction, and had only been returned to him shortly before his arrest.

My decision in relation to Andi

21 I reject Andi's defence that he only had knowledge of being in possession of one bundle of *obat*.

Elements of the offence

22 The required elements for a charge of trafficking under s 5(1)(*a*) of the MDA are as follows (see *Muhammad Ridzuan bin Md Ali v Public Prosecutor and other matters* [2014] 3 SLR 721 at [59]):

(a) possession of a controlled drug (which may be proved or presumed pursuant to s 18(1) of the MDA, or deemed pursuant to s 18(4) of the MDA);

(b) knowledge of the nature of the drug (which may be proved or presumed pursuant to s 18(2) of the MDA); and

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

23 Only the first element regarding "possession" was in dispute. Andi readily admitted that he knew that the orange plastic bag contained diamorphine,[17] and that he intended to traffic in them by passing them to Rusli.[18]

Possession of diamorphine

24 To prove that Andi was in possession of the drugs, the Prosecution must prove that the accused (a) had physical control over the drugs and that he (b) knew "of the existence of the thing itself" (*Fun Seong Cheng v Public Prosecutor* [1997] 2 SLR(R) 796 ("*Fun Seong Cheng*") at [53]–[56]).

25 Hence, proving that Andi had physical control over the orange plastic bag containing the drugs was insufficient; the Prosecution had to further prove that he knew of the existence of *both* bundles of drugs which contained the diamorphine.

26 Nonetheless, as the orange plastic bag containing the bundles of *obat* were in Andi's physical possession during his arrest, s 18(1)(*a*) of the MDA is triggered such that there is a presumption that Andi was in possession of the entire quantity of drugs (*ie*, both bundles).

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17 AB p 999 at [4] – [5]; NE Day 11 (14 August 2018) p 14 lines 6 – 8, p 81 lines 8 – 9.

18 AB p 1008 at [13] – [14]; NE Day 11 (14 August 2018) p 14 lines 6 – 8, p 14 line 25 – p 15 line 4.

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The presumption of possession was not rebutted

27 Having considered the evidence before me, I am not satisfied that the presumption of possession has been rebutted on a balance of probabilities. I explain my findings below.

28 On 26 August 2014, Andi stated in his long statement that while he knew that the orange plastic bag contained *obat*, he did not know *how much obat* it contained.[19]

29 However, while Andi testified during trial that his previous assignments for Rusli had involved only *one* bundle of drugs,[20] he also admitted that he was not concerned with how much *obat* he received.[21] In fact, he agreed that he was willing to collect and deliver the *obat* regardless of how much there was.[22]

30 This was because he would be paid in accordance with the number of bundles he collected.[23] Hence, the more bundles he collected, the more he would be paid by Rusli.[24]

31 As a result, even though Andi admitted that the orange plastic bag which contained the bundles had no zip[25] and was "very easy to open",[26] he did not look into the bag to check how many bundles he had received during the

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19 AB p 999 at [4].

20 NE Day 11 (14 August 2018), p 82 lines 3 – 5.

21 NE Day 11 (14 August 2018), p 60 line 20 – p 61 line 4, p 81 lines 10 – 12.

22 NE Day 11 (14 August 2018), p 68 lines 7 – 9.

23 NE Day 11 (14 August 2018), p 81 lines 17 – 30.

24 NE Day 13 (16 August 2018), p 58 lines 7 – 12.

25 Exhibit P64.

26 NE Day 11 (14 August 2018), p 80 line 31 – p 81 line 5.

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transaction.[27] Further, Andi also admitted that the orange plastic bag felt "heavy" and could therefore have contained either one *or* two bundles of *obat*. Yet, he did not check it.[28]

32 Andi's cavalier attitude in relation to the contents of the orange plastic bag was unsurprising. In contrast with Rusli who was allegedly apprehensive of dealing in more than one bundle due to the capital punishment that could ensue,[29] Andi admitted to having previously collected up to *three* bundles of *obat* in assignments for one Azman.[30]

33 Finally, Andi admitted that Rusli neither informed him that he would be collecting only one bundle of drugs,[31] nor was there any agreement between himself and Rusli that he would collect only one bundle for Rusli.[32]

34 Therefore, taking his case at the highest, Andi merely *assumed,* based on his previous assignments for Rusli, that he would be collecting one bundle of drugs only. However, such is plainly insufficient to rebut the s 18(1)(*a*) MDA presumption, especially since Andi readily admitted that he noted, based on his experience, that the orange plastic bag was heavy and could therefore contain "one or two" bundles of *obat*.[33] Accordingly, I find that Andi has failed to rebut s 18(1)(*a*) MDA presumption. Hence, he is legally presumed to have had

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27 NE Day 11 (14 August 2018), p 81 lines 6 – 7.

28 NE Day 11 (14 August 2018), p 85 lines 15 – 25, p 85 lines 30 – 31, p 87 lines 26 – 30, p 88 lines 1 – 11.

29 NE Day 12 (15 August 2018), p 111 lines 10 – 19; NE Day 13 (16 August 2018), p 47 lines 29 – 30.

30 AB p 1011 at [19]; NE 14 August 2018 p 57 lines 11 – 14.

31 NE Day 11 (14 August 2018) p 68 lines 1 – 7.

32 NE Day 11 (14 August 2018) p 88 lines 22 – 24.

33 NE Day 11 (14 August 2018), p 85 lines 15 – 25, p 88 lines 1 – 11.

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possession of *both* bundles of *obat.* This presumption operated on two levels: Andi had physical control of *both* bundles *and* knowledge "of the existence of the thing itself (*ie* the *two* bundles present inside the orange plastic bag)"

35 Having regard to the totality of the evidence and the unrebutted presumption, I am driven to conclude that Andi either had knowledge, or was wilfully blind, to the two bundles of drugs in the orange plastic bag. As the elements of the charge are proved beyond a reasonable doubt, I convict him accordingly.

My decision for Akebal

36 I reject Akebal's defence that he had been incorrectly identified as the person who had passed the orange plastic bag containing the two bundles of drugs to Andi. Accordingly, I convict him of the charge.

Principles in dealing with identification evidence

37 The principles in dealing with identification evidence were distilled by the Court of Appeal in a three-step test in *Heng Aik Ren Thomas v Public Prosecutor* [1998] 3 SLR(R) 142 ("*Thomas Heng*") at [33]–[36]:

> (a) First, does the case against the accused depend wholly or substantially on the correctness of the identification evidence which is alleged by the Defence to be mistaken?
>
> (b) If so, is the identification evidence of good quality, taking into account the circumstances in which the identification by the witness was made? A non-exhaustive list of factors may be considered to determine if the identification evidence was of good quality:

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(i) the length of time that the witness observed the accused;

(ii) the distance at which the observation was made;

(iii) the presence of obstructions in the way of the observation;

(iv) the number of times the witness had seen the accused;

(v) the frequency with which the witness saw the accused;

(vi) the presence of any special reasons for the witness to remember the accused;

(vii) the length of time which had elapsed between the original observation and the subsequent identification to the police; and

(viii) the presence of material discrepancies between the description of the accused as given by the witness and the actual appearance of the accused.

(c) If the quality of the identification evidence is assessed to be poor, is there any other evidence which goes to support the correctness of the identification? Such supporting evidence has to be evidence that makes the judge sure that there was no mistake in the identification.

38 Applying the *Thomas Heng* framework, as Akebal was only arrested at about 8.25pm on 22 August 2014, some 10 hours after the drug transaction with Andi had taken place, it was undisputed that the Prosecution's case depended substantially on the correctness of the CNB officers' and Andi's identification of Akebal (see [37(a)] above).

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39 In respect of the second question (as referred to in [37(b)] above), I am satisfied that the identification evidence of Senior Station Inspector David Ng ("SSI Ng") and Andi is of good quality. I explain my findings below.

Events leading to Akebal's arrest

40 On 22 August 2014, at about 9am, SSI Ng received information on Andi and Rusli.[34] With the information, his party of officers tailed Andi's car until it came to a stop at Block 716 Woodlands Avenue 7,[35] being the place where the drug transaction took place.

41 At about 10.15am, SSI Ng was dropped off by a CNB vehicle along a driveway leading to Block 716 Woodlands Avenue 7.[36]

42 He then walked to the void deck of Block 716, where he spotted a male Indian carrying an orange plastic bag standing about 5 – 10 metres away from him.[37] From the short distance, SSI Ng observed the man's face for about 30 seconds.[38]

43 At about 10.20am, Staff Sergeant Sunny Chien ("SSgt Sunny Chien"), who was observing Andi's vehicle, reported that a male Indian carrying an orange plastic bag had approached Andi's vehicle from the left passenger seat door,[39] before placing the orange plastic bag on the passenger seat.[40] The male Indian then walked away from the car,[41] and Andi drove off with the car.[42]

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34 AB p 811 at [2].

35 NE Day 6 (18 April 2017) p 32 lines 16 - 18.

36 Exhibit P316; NE Day 6 (18 April 2017) p 31 line 31 – p 32 line 8.

37 NE Day 6 (18 April 2017) p 32 line 29 – p 33 line 9.

38 NE Day 6 (18 April 2017) p 32 lines 23 – 26.

39 AB p 811 at [5], NE Day 1 p 64 lines 28 - 31

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44 Shortly thereafter, SSI Ng saw the male Indian again at a sheltered walkway leading towards a main road. Subsequently, the male Indian boarded bus No. 964.[43]

45 SSI Ng reported this fact over the communications set, and instructed Staff Sergeant Goh Jun Xian Eric ("SSgt Goh") to tail the male Indian,[44] whom SSI Ng described to be wearing a grey T-shirt with blue jeans.[45]

46 SSgt Goh tailed bus No. 964 until Woodlands Bus Interchange, where he saw a male Indian wearing a grey T-shirt and blue jeans alighting the bus and waiting for bus No. 913.[46] There was no other person matching SSI Ng's description.[47] He then boarded bus No. 913 together with the male Indian, and he sat about two rows in front of the male Indian.[48] Subsequently, SSgt Goh alighted bus No. 913 with the male Indian, and followed him towards Block 1 Marsiling Road before losing sight of him.[49]

47 Thereafter, together with SSgt Sunny Chien, SSgt Goh proceeded to the Woodlands area to look out for the male Indian. At about 8.25pm on the same day, SSgt Goh reported that he had spotted the same male Indian wearing a grey T-shirt and blue jeans[50] seated outside Sheng Siong Supermarket at Block 6A

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40 NE Day 1 p 66 lines 8 – 9.

41 NE Day 1 p 67 lines 11 – 13.

42 NE Day 1 p 67 lines 27 – 29.

43 AB p 812 at [7], NE Day 6 (18 April 2017) p 37 lines 14 – 17, p 61 lines 8 – 9.

44 AB p 812 at [7].

45 AB p 812 at [7], NE Day 2, p 7 line 17, p 13 line 26.

46 AB p 859 at [5], NE Day 2 p 7 lines 21 – 31.

47 NE Day 2 p 14 lines 30 - 31.

48 NE Day 2 p 16 line 12.

49 NE Day 2 p 17 lines 18 – 24.

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Woodlands Centre Road.[51] The male Indian was subsequently arrested and established to be Akebal.

SSI Ng's identification

48 SSI Ng and SSgt Goh testified that Akebal was the same male Indian whose face they had seen.[52] However, I give less weight to SSgt Goh's identification, given that he had followed the male Indian based on the description provided by SSI Ng, and that he had not seen the male Indian's face *prior to* or *during* the drug transaction.[53]

49 As for SSI Ng, I am satisfied that his identification evidence is of good quality. First, he had observed the male Indian's face from a short distance of 5 – 10 metres for about 30 seconds. There were also no obstructions at the time of his observation, given that there was no one else in the vicinity.[54]

50 Furthermore, SSI Ng had special reasons to remember the face of the male Indian, given that his party had been following Andi, whom they knew would likely be involved in a drug transaction. As a result, when SSI Ng observed the male Indian behaving suspiciously[55] while holding an orange plastic bag that could contain the drugs for the transaction, it was natural for him to pay particular attention and remember his face.

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50 NE Day 2 p 20 line 28 – p 21 line 6.

51 AB p 860 at [14], NE Day 2 p 20 lines 24 – 27.

52 NE Day 6 p 38, lines 8 – 11, p 58 lines 7 – 9; NE Day 2 p 18 lines 10 – 16.

53 NE Day 2 p 10 lines 27 – 30.

54 NE Day 6 p 36 lines 4 – 6.

55 NE Day 6 p 35 lines 2 – 3.

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Andi's identification

51 I also found Andi's identification evidence to be of good quality.

52 First, not only did Andi see Akebal's face during the drug transaction, Andi also testified that he had spoken to Akebal during the transaction, giving him additional time to look at Akebal face-to-face:[56]

> Q: Did he knock at the glass first before he open the door? He just straightway open the door?
>
> A: He just open the door.
>
> Q: Just open the door. Then he just opens the door, how do you see his face?
>
> A: You---because *he bent down and I got to see his face*.
>
> …
>
> Q: Mean he's---he put---he puts in and then he say, "Okay, okay", you said, "Okay" and then left?
>
> A: Okay, yes.
>
> Q: Closed the door and left?
>
> A: Correct.
>
> Q: So ***when you're talking to him, you was looking at him***?
>
> A: Yes.
>
> Q: And ***when you're looking at him, you're looking at his face*** obviously, right?
>
> A: Yes, right.
>
> Q: Which is why you're *very sure* based on looking at his face at that time that *that person is the same as the 2nd accused Mohd Akebal*?
>
> A: Yes, correct.

53 This was also the second occasion that Andi was receiving drugs from Akebal.[57] During the first occasion on 11 August 2014, Andi was able to see

[56] NE Day 11 (14 August 2018) p 78 lines 5 – 10 and 15 – 26.

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Akebal "very clearly" as he had given Akebal a lift from Woodlands Checkpoint to Akebal's house at Block 716 Woodlands Road.[58]

54 Crucially, Andi had stated in his 26 August 2014 statement that Akebal told him to meet him as soon as possible as he wanted to go for his urine test,[59] which Akebal indeed reported for shortly after the drug transaction.[60] If Andi had not dealt with Akebal, there would have been no reason for him to have known of Akebal's urine test when he gave his statement as he did not then know about Akebal's defence of misidentification.

55 Furthermore, Andi had identified Akebal as the person whom he had transacted with in a statement taken on 26 August 2014, just 4 days after his arrest.[61] While Akebal argued that Andi was suffering from drug withdrawal during the recording of said statement, Akebal's own expert witness conceded that Andi was likely to be "more clearheaded" by the time the statement was taken.[62] This was because the statement was taken about 4 days after Andi's initial arrest, meaning that his withdrawal symptoms were likely to be "past its peak".[63]

56 In fact, Andi had been admitted to the Changi Prison Complex Medical Centre ("CMC") for drug withdrawal observations after his arrest. There, his recorded Clinical Opiate Withdrawal Scale ("COWS") score fell from 14/48

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57 NE Day 11 p 65 lines 17 – 26; AB p 1012 at [23].

58 NE Day 11 p 66 lines 26 – 30, line 67 lines 1 - 3.

59 AB p 999 at [5].

60 NE Day 3 p 53 line 16; NE Day 11 (14 August 2018) p 119 lines 12 – 28.

61 AB p 1004.

62 NE Day 14 (28 August 2018) p 6 lines 8 – 10.

63 NE Day 14 (28 August 2018) p 7 lines 17 – 20.

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(moderate withdrawal) on 23 August 2014 to 11/48 (mild withdrawal) on 24 August 2014 and finally to 5/48 (mild withdrawal) on 25 August 2014,[64] when Andi was discharged well from CMC.[65] Akebal's own expert witness testified that he did not expect Andi's withdrawal symptoms to go higher after his discharge on 25 August 2014.[66]

57 Hence, when Andi's statement was eventually taken on 26 August 2014, he was likely sufficiently present to identify Akebal, especially as the Investigating Officer who recorded his statement testified that there was no evidence of Andi displaying any drug withdrawal symptoms when his statement was taken.[67]

58 In totality, therefore, I find Andi's identification evidence to be of good quality.

Akebal's claims as to his attire

59 At trial, Akebal alleged that he had been misidentified by SSI Ng and Andi, given the discrepancies between the Prosecution's witnesses' description of the male Indian's attire and the alleged attire that Akebal was wearing at the time of the drug transaction.

60 Akebal claimed that he was wearing a white long sleeved T-shirt with blue sleeves[68] on the morning of 22 August 2014 as he had to report for a urine

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64 NE, Day 10 p 6 lines 10 – 15.

65 NE, Day 10 p 6 line 22 – p 7 line 30.

66 NE, Day 14 p 75 lines 15 – 16.

67 NE, Day 8 (4 April 2017) p 44 lines 25 – 30.

68 Exhibit 2D3.

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test that day and thus had to cover up the tattoos on his arms.[69] This was in accordance with the urine supervision procedure.[70]

61 In contrast to Akebal's claim as to his attire, the Prosecution's witnesses ("**PWs**") had varying accounts as to the male Indian's attire:

(a) SSI Ng testified that the male Indian was wearing a *dark-coloured* short sleeved T-shirt with blue jeans,[71]

(b) SSgt Sunny Chien and SSgt Goh testified that the male Indian was wearing a *grey* short sleeved T-shirt with blue jeans,[72] and

(c) Andi testified that the male Indian was wearing a *light-coloured* short sleeved *shirt*.[73]

62 As a starting point, I do not think that Akebal's actual attire on the day of the drug transaction is crucial to the quality of the identification evidence. Herein, SSI Ng's and Andi's identification evidence were based on Akebal's *face*, not his attire. While I note the varying accounts of the male Indian's alleged attire on the day of the drug transaction, the Prosecution's witnesses had given their testimony in 2017 or 2018, some three to four years after the drug transaction had taken place. As noted in *Ng Kwee Leong v Public Prosecutor* [1998] 3 SLR(R) 281 at [17], allowance must be given for human fallibility in recollection. Hence, I did not think the discrepancies were material, especially since I find that Akebal's claim as regards his attire was *uncorroborated*.

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69 NE Day 11 (14 August 2018) p 105 lines 5 – 9, p 118 lines 8 – 31.

70 NE Day 3, p 56 lines 25 – 27; NE Day 11 (14 August 2018) p 118 lines 20 – 31.

71 NE Day 6 p 35 lines 18 and 30.

72 NE Day 1 p 65 lines 6 – 13; NE Day p 7 line 30.

73 NE Day 11 (14 August 2018) p 76 lines 8 – 10.

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63 First, Akebal only reported for his urine test at 12.22pm on 22 August 2014,[74] almost 2 hours after SSI Ng and SSgt Sunny Chien had observed the drug transaction between the male Indian whom they identified to be Akebal and Andi. Given the significant break in time, it was not implausible for Akebal to have been wearing a short-sleeved top during the transaction and changed prior to reporting for his urine test. That he had allegedly reported for his urine test on 22 August 2014 in a long sleeved T-shirt was therefore not corroborative.

64 Secondly, while Akebal's brother, Abdul Rashid ("Abdul"), had testified that Akebal was wearing a white long-sleeved jersey with blue sleeves on 22 August 2014,[75] I find Abdul's evidence to have been specifically tailored to assist Akebal's defence.

65 To begin, Abdul conceded during trial that he could not remember what he himself was wearing a year or two ago, let alone on the day of Akebal's arrest.[76] Hence, it was extremely unlikely for him to have remembered Akebal's attire on the day of Akebal's arrest.

66 While Abdul alleged that he remembered Akebal's outfit as it had been hanging on the wardrobe since Akebal's arrest,[77] Abdul later admitted that the Defence had instructed him to "go back home and look for this jersey which is the long sleeve jersey with blue sleeves and white top".[78] It was therefore not a case whereby Abdul remembered Akebal's attire on the day of his arrest.

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74 NE Day 3 p 53 line 16; NE Day 11 (14 August 2018) p 119 lines 12 – 28.

75 NE Day 12 (15 August 2018) p 97 lines 9 – 11.

76 NE Day 12 (15 August 2018) p 100 lines 11 – 27.

77 NE Day 12 (15 August 2018) p 101 lines 10 – 16.

78 NE Day 12 (15 August 2018) p 101 lines 20 – 23.

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Rather, Abdul was specifically led to the attire that Akebal claimed to have worn so as to buttress Akebal's defence.

67 Accordingly, I find Abdul's evidence unreliable, and disregard it entirely. Thus, Akebal's uncorroborated claims as to his attire do not diminish the quality of SSI Ng's and Andi's identification evidence.

The phone evidence supports the correctness of the identification

68 As for the third step of the *Thomas Heng* test (at [37(c)] above), even assuming that SSI Ng's and Andi's identification evidence are not of sufficiently good quality, the phone evidence corroborates their identification of Akebal as the male Indian who had dealt with Andi.

69 In this regard, the phone records show that there were multiple phone calls exchanged between the user of handphone AK-HP and Rusli and Andi on 22 August 2014:[79]

S/N	Time	Detail	Duration
1	9.00am	Call from Rusli to AK-HP	34 secs
Rusli sends AK-HP's contact number to Andi at 9.06am[80]			
2	9.13am	Call from Andi to AK-HP	37 secs
3	9.36am	Call from AK-HP to Andi	13 secs

[79] Rusli and AK-HP: AB p 667 S/No. 4

Andi and AK-HP: AB p 585 S/No. 32 – 35; p 586 S/No. 30 – 32.

[80] AB at p 222.

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4	9.54am	Call from Andi to AK-HP	26 secs
5	10.09am	Call from Andi to AK-HP	34 secs
6	10.12am	Call from Andi to AK-HP	36 secs
7	10.17am	Call from AK-HP to Andi	11 secs
8	10.21am	Call from AK-HP to Andi	22 secs

70 As stated earlier at [13], AK-HP was found next to Akebal during his arrest. In his statement to the CNB on 28 August 2014, Akebal stated that he had used AK-HP daily, and that he had not lent the phone or the SIM card therein to anyone.[81]

71 During trial, however, Akebal claimed that he had passed AK-HP to one Bala at around 11pm on 21 August 2014, before the drug transaction and incriminating calls with Andi and Rusli took place.[82] Such a handover of AK-HP to his friends was allegedly a frequent arrangement as the SIM card in AK-HP was not registered in Akebal's name, and could therefore be used by his friends to do "illegal things".[83]

72 According to Akebal, he would often pass AK-HP to his friends because he had another phone, being an iPhone 5.[84] However, he could not recall the

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81 AB p 1094 at [28].

82 NE Day 12 (15 August 2018) p 17 lines 11 – 31.

83 NE Day 12 (15 August 2018) p 16 lines 11 – 12.

84 NE Day 12 (15 August 2018) p 18 lines 2 – 8.

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number of the said iPhone 5, allegedly because he seldom used the number therein.[85]

73 Furthermore, the alleged iPhone 5 was neither seen nor recovered by the CNB officers who had arrested Akebal, even though there had been a physical check conducted around the vicinity where Akebal was arrested.[86] Given the investigative value of any message or call record that could be retrieved from any phone belonging to Akebal, the CNB officers would have had no reason to ignore an iPhone 5 should one have been lying around in the vicinity as alleged by Akebal.

74 Additionally, when I pointed out to Akebal that he could not have had AK-HP in his possession at the time of his arrest had he indeed passed them to a friend, Akebal conveniently claimed that he actually took the phone back from Bala at 5.30pm on 22 August 2014, just prior to his arrest.[87] This belated point suggested to me that he was making up his evidence as he went along.

75 In the circumstances, I find Akebal's claim that he had passed his phone to Bala during the material time to be improbable, especially since it directly contradicts Akebal's own statement to the CNB on 28 August 2014. Thus, the phone records in relation to AK-HP serve to corroborate Andi's and SSI Ng's identification of Akebal as the male Indian who had dealt with Andi.

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85 NE Day 12 (15 August 2018) p 22 lines 20 – 21, p 29 line 3.

86 NE Day 14 (28 August 2018) p 90 lines 5 – 9, p 92 lines 13 – 14, p 93 line 26 – p 94 line 15.

87 NE Day 12 (15 August 2018) p 21 lines 1 – 12.

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Elements of the charge made out against Akebal

76 Given my finding that Akebal was correctly identified as the male Indian, the presumptions under ss 18(1)(*a*) and 18(2) of the MDA are triggered as the orange plastic bag containing the two bundles were in his possession before he passed it to Andi. Hence, Akebal is presumed to have had the two bundles of *obat* in his possession and to have known the nature of the drugs (being diamorphine). Akebal did not adduce any evidence to rebut the presumptions.

77 Furthermore, as Akebal has been determined to be the male Indian who SSgt Sunny Chien witnessed delivering the orange plastic bag containing the drugs to Andi, I find that Akebal had trafficked the two bundles of drugs which were in his possession pursuant to s 5(1)(*a*) read with s 2 of the MDA.

78 In the premises, I convict Akebal of his charge.

My decision for Rusli

79 For the reasons below, I find that the Prosecution has failed to prove beyond reasonable doubt that Rusli had knowledge of *both* bundles of drugs. I therefore amend the charge against him to reflect the diamorphine content of *one* bundle of drugs only (14.46g), and convict him accordingly.

Elements of the charge

80 To prove the charge of abetment by instigation against Rusli, the Prosecution has to prove:

(a) The *actus reus* of the instigation, being "active suggestion, support, stimulation or encouragement" of Andi's trafficking

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offence (*Chan Heng Kong and another v Public Prosecutor* [2012] SGCA 18 at [34]),

(b) The *mens rea* of the instigation, being "knowledge of all essential matters constituting the primary offence" (*Public Prosecutor v Koh Peng Kiat* [2016] 1 SLR 753 ("*Koh Peng Kiat*") at [26] – [27]), and

(c) That Rusli, being the intended recipient of the drugs, *intended* to traffic in the drugs (as opposed to consuming it) (*Ali bin Mohamad Bahashwan v Public Prosecutor and other appeals* [2018] 1 SLR 610 ("*Ali bin Mohamad*") at [75] – [78]).

81 Only element (b) relating to Rusli's knowledge is substantially disputed. Relating to the *actus reus*, Rusli admitted in his statement[88] and at trial[89] that Andi had collected the drugs on his instructions, and this was corroborated by Andi.[90] Further, Rusli did not contend that the drugs were for his personal consumption, and hence element (c) does not arise for consideration.

Knowledge of both bundles of drugs

82 Therefore, to prove the charge against Rusli, the Prosecution must establish the *mens rea* of Rusli's instigation, being "knowledge of all essential matters constituting the primary offence" (*Koh Peng Kiat* at [26] – [27], see also *Public Prosecutor v Mohamad Yazid Bin Md Yusof and others* [2016] SGHC 102 at [33]).

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88 AB p 1048 at [7].

89 NE Day 13 (16 August 2018) p 33 lines 2 – 7, p 69 line 21 – p 70 line 5.

90 AB, p 999 at [5].

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83 For the primary offence of trafficking drugs, two components of knowledge are readily apparent.

84 First, it must be shown that the abettor had knowledge of the *nature* of the drugs in question (*Public Prosecutor v Zulkarnain bin Kemat* [2018] SGHC 161 at [61]). This aspect was undisputed, as Rusli admitted that he knew that the black bundles which Andi had collected on his behalf contained *obat*.[91] This relates to knowledge under the second element of the charge of trafficking (see [22(b)] above).

85 Secondly, it must be shown that the abettor had knowledge "of the existence of the thing itself" (*Fun Seong Cheng* at [53] – [56]), this being an "essential matter constituting the primary offence" (*Koh Peng Kiat* at [26] – [27]) of trafficking. This relates to knowledge under the first element of the charge of trafficking, under the limb of possession (see [22(a)] and [24] – [25] above).

86 Hence, the Prosecution must prove beyond reasonable doubt that Rusli had knowledge of *both* bundles. However, as Rusli never came into possession of the orange plastic bag, the s 18(1) MDA presumption does not apply to assist the Prosecution.

Law in relation to wilful blindness

87 The Prosecution submitted that Rusli knew, by virtue of him being wilfully blind, that Andi would collect two bundles of *obat*.[92]

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91 AB p 1047 at [6].

92 Prosecution's Closing Submissions at [111].

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88 The Court of Appeal observed in *Tan Kiam Peng v Public Prosecutor* [2008] 1 SLR(R) 1 ("*Tan Kiam Peng*") at [123] that wilful blindness was treated as the legal equivalent of actual knowledge.

89 To establish wilful blindness, there has to be an *appropriate level* of suspicion that led to a refusal to investigate further (*Tan Kiam Peng* at [125]). As further explained in *Tan Kiam Peng* at [127]:

> [W]ilful blindness necessarily entails an element of *deliberate* action inasmuch as to the extent that the *person concerned has a clear suspicion that something is amiss* but then embarks on a *deliberate decision not to make further inquiries* in order to avoid confirming what the actual situation is … [emphasis added]

90 In this regard, wilful blindness is to be distinguished from constructive knowledge (*Roper v Taylor's Central Garages (Exeter) Ltd* [1951] 2 SLR 284 at 289, endorsed in *Tan Kiam Peng* at [135]):

> There is a vast distinction between a state of mind which consists of *deliberately refraining from making inquiries*, the result of which the person does not care to have, and a state of mind which is merely *neglecting to make such inquiries as a reasonable and prudent person would make*. … The case of shutting one's eyes is actual knowledge in the eyes of the law; the case of merely neglecting to make inquiries is not knowledge at all – it comes within the legal conception of *constructive knowledge, a conception which, generally speaking, has no place in the criminal law*. [emphasis added]

91 Hence, the mere neglect to make an inquiry which a reasonable person would have made does not amount to wilful blindness.

92 With these principles in mind, I find that the Prosecution has failed to establish beyond a reasonable doubt that Rusli had knowledge of *both* bundles of drugs.

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One bundle defence

93 As elicited above, the central plank of Rusli's defence hinged on his expectation that Andi would only collect one bundle of drugs on his behalf.[93] The Prosecution submitted that this was an afterthought that was not supportable by evidence.[94]

94 However, even prior to trial, Rusli had repeatedly stated in his statements and to his attending medical officers that he expected to receive one bundle of *obat* only:

(a) In his statement dated 1 September 2014, he stated that "[t]he first two times that Andy did the pick-up from Bala for me, there were only 1 'batu' of *obat* each time. I am *surprised that there are 2 'batu' of obat* found with Andy on the day of our arrest."[95] Andy refers to Andi[96] while Bala refers to the user of AK-HP, whom I have found to be Akebal.[97] Furthermore, 1 'batu' of *obat* corresponded to a bundle of *obat*.

(b) In his account to Dr Subhas Gupta ("Dr Gupta"), it was reported that he "had *asked the co-accuse* [sic] *to collect a 'ball' (more than 400 grams) of Obat* from Woodlands in the morning of the alleged offence but the co-accused collected two 'balls' instead";[98] and

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93 NE Day 13 (16 August 2018) p 45 lines 15 – 16, p 46 lines 20 – 25, p 49 lines 1 – 8 and lines 26 – 28.

94 Prosecution's Closing Submissions at [120].

95 AB p 1049 at [14].

96 AB p 1048 at [9].

97 AB p 1048 at [8]; NE Day 13 (16 August 2018) p 75 lines 27 – 31, p 76 lines 1 – 11.

98 Exhibit 3D2 at [16].

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(c) In his statement to Dr Sharon Lu ("Dr Lu"), it was reported that "he had never met "Bala" before their arrest and he was *surprised and upset that "Bala" had passed "Andi" 2 balls* when he claimed that he had only ordered "1 ball"."[99]

[emphasis added in *italics*]

95 It was undisputed that the "balls" referred to bundles. As seen from his above statements, Rusli's one bundle defence was evidently not an afterthought. Nonetheless, the Prosecution rightfully pointed out that he had been inconsistent in accounting for this alleged expectation. In particular, during his examination-in-chief ("EIC")[100] as well as in his statements to Dr Lu and Dr Gupta, Rusli claimed to have specified for one bundle of *obat* only.

96 However, under cross-examination, Rusli then claimed that he *did not* specifically order one bundle, and that he had merely assumed that it would be one bundle given that he had ordered one bundle from Akebal previously.[101] When Deputy Public Prosecutor Wong Woon Kwong ("DPP Wong") pointed out to Rusli that this was inconsistent with his EIC and his statements to Dr Lu and Dr Gupta, Rusli claimed that he could not remember if he had specified for one bundle or not.[102]

97 Given the inconsistencies, the Prosecution submitted that Rusli's claim that he had expected to receive only one bundle was fabricated.[103] I do not agree.

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99 Exhibit 3D3 at [14].

100 NE Day 13 (16 August 2018) p 2 lines 21 – 26.

101 NE Day 13 (16 August 2018) p 49 line 1 - 50 line 10.

102 NE Day 13 (16 August 2018) p 50 lines 11 – 21, p 82 lines 7 – 16, p 82 line 23 – p 83 line 10.

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98 First, in spite of the inconsistencies, Rusli was *consistent* right from the beginning that he expected to receive *one* bundle only; the only inconsistency related to whether he had expressly specified for one bundle. Faced with a charge carrying the death penalty, it is not inconceivable that Rusli would attempt to buttress his defence by stating that he had in fact taken the extra precaution of expressly ordering one bundle. However, when presented with the inconsistency, Rusli rightly did not press the point,[104] and instead admitted that he did not expressly tell Andi to collect one bundle only.[105]

99 More significantly, Andi also testified that his arrangements with Rusli always involved one bundle,[106] and that when he received instructions from Rusli, there was "no reason for [him] to expect that there would involve more than one bundle."[107]

100 Rusli explained that he did not dare to deal in more than one bundle given the capital punishment that could ensue.[108] This alleged precaution was corroborated by the fact that both the bundles in this case contained just below the capital amount of diamorphine (14.60g and 14.44g), and the accused persons gave undisputed evidence that packing the bundles as such was the common practice.[109]

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103 Prosecution's Closing Submissions at [119] – [129].

104 NE Day 13 (16 August 2018) p 81 line 24 – p 82 line 1, p 85 lines 3 – 5.

105 NE Day 13 (16 August 2018) p 2 lines 8 – 9, p 45 lines 15 – 21.

106 NE Day 11 (14 August 2018) p 56 lines 2 – 11.

107 NE Day 11 (14 August 2018) p 62 line 27 – p 63 line 5.

108 NE Day 12 (15 August 2018) p 111 lines 10 – 19; NE Day 13 (16 August 2018), p 47 lines 29 – 30.

109 NE Day 11 (14 August 2018) p 91 lines 4 – 26, p 92 lines 13 – 16; NE Day 13 (16 August 2018), p 62 lines 21 – 25.

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101 In fact, Rusli's admission of his failure to: (1) specifically order one bundle of *obat*;[110] (2) tell Andi that he would not accept delivery of two bundles;[111] and (3) confirm with Akebal that he would be delivering one bundle to Andi only[112] is not inconsistent with his belief, however imprudent, that he would receive *one* bundle only.[113] As Rusli candidly admitted, he did not tell Andi to collect only one bundle of *obat* because he took it that it would be one bundle.[114]

102 At this juncture, it bears emphasising that it was not incumbent on Rusli to prove that he had no knowledge of the two bundles. Instead, the burden laid on the Prosecution to prove beyond reasonable doubt that, by virtue of him being wilfully blind, Rusli had knowledge of the two bundles.

103 Here, there was *no positive statement,* be it from Rusli or the Prosecution's other witnesses, to the effect that Rusli had deliberately refrained from inquiring as to the number of bundles.

104 Furthermore, the other evidence that were led during trial do not show that Rusli had deliberately turned a blind eye to the possibility of Andi receiving two bundles on his behalf. I shall now elaborate on my findings in this regard.

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110 NE Day 13 (16 August 2018) p 50 lines 5 – 8.

111 NE Day 11 (14 August 2018) p 87 lines 2 – 4.

112 NE Day 13 (16 August 2018) p 77 lines 21 – 23.

113 NE Day 13 (16 August 2018) p 46 lines 1 – 5, p 49 lines 4 – 8 and 26 – 28, p 50 lines 15 – 18.

114 NE Day 13 (16 August 2018) p 2 lines 8 – 9, p 45 lines 15 – 21.

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The Prosecution's case

Rusli's statement referencing the black bundles

105 To begin, Rusli had allegedly identified *both* black bundles containing the *obat* in his long statement recorded on 1 September 2014, which stated: "[a]bout the ***black bundles***, I know that it is *obat* and I asked Andy to pick it up."[115] [emphasis added in bold italics]

106 However, I do not think that this necessitates the conclusion that Rusli had knowledge that Andi would collect *two* bundles, rather than *one* bundle, of drugs. While Rusli indeed referred to the bundles in the plural form, and admitted that he had asked Andi to pick them up, his statement was given in response to him having been shown photographs of *both* black bundles.[116]

107 Viewed in context, it is therefore likely that he was merely describing the contents of the bundles (being *obat*) and admitting that Andi had collected them on his instructions. The statement does not amount to an admission that he knew that Andi would be collecting *two* bundles on his behalf. This is especially since he stated in the *same* long statement that he did not know nor tell Andi how many bundles to collect on his behalf, even though he had assumed based on prior collections that it would be *one* bundle only.[117]

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115 AB p 1047 at [6].

116 AB p 1047 at [6].

117 AB pp 1048 – 1049 at [7], [12] – [13], p 1051 at [21].

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Rusli acted under the instruction of Azman

108 Additionally, the Prosecution argued that Rusli had been acting under the instructions of one Azman. In this regard, Rusli had testified that Azman had called him on 21 August 2014 to help Andi with his financial problems.[118]

109 On 22 August 2014, being the morning of the transaction, Azman again called Rusli at 8.27am, and they spoke for over a minute.[119] Azman then sent the number 8286 6224 (AK-HP's number) to Rusli at 8.45am,[120] which Rusli sent to Andi at 9.03am.[121] Given the flow of events, it was submitted that Rusli had been acting under the instructions of Azman.

110 This was partially corroborated by Rusli's 1 September 2014 statement, where he stated that he was acting under the instructions of a man.[122] Relatedly, Andi also stated in his 27 August 2014 statement that he suspected that Rusli had taken instructions from Azman or one Singh.[123]

111 As Rusli was allegedly acting under the instructions of Azman, and given that Andi had admitted to collecting up to *three* bundles for Azman in previous transactions,[124] the Prosecution submitted that, by failing to place any checks on the quantity of *obat* that Andi would collect for him, Rusli had deliberately turned a blind eye to the possibility that Andi could collect more than one bundle.[125]

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118 NE Day 13 (16 August 2018) p 68 lines 3 – 6.

119 AB p 680, S/No. 17.

120 AB p 722, S/No. 48.

121 AB p 726, S/No. 1.

122 AB pp 1050 – 1051 at [15] – [19].

123 AB p 1013 at [27].

124 NE Day 11 (14 August 2018) p 56 lines 6 – 11.

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(1) Insufficient evidence to prove that Rusli acted under Azman's instructions

112 Preliminarily, I find that the evidence is plainly insufficient to prove that Rusli had acted under Azman's instructions.

113 In *Mohamed Affandi bin Rosli v Public Prosecutor and another appeal* [2018] SGCA 87 ("*Affandi*"), there were 4 calls exchanged between the accused persons, Affandi and Fadzli, on the morning of 12 July 2013, being the day that Affandi was arrested with eight bundles of drugs. The trial judge found that the "high level of communication" between the pair prior to their arrest "showed that something was going on between them which required them to stay up in the early hours of the morning and communicate with one another" (*Affandi* at [94]). On appeal, the majority (consisting of Sundaresh Menon CJ and Chao Hick Tin SJ) disagreed, and held that given the lack of objective evidence of what was said during the calls, it was unsafe to conclude that they had any relation with the eight bundles of drugs that were subsequently found in Affandi's car (*Affandi* at [96] – [97]).

114 Similarly, even if Rusli had agreed to help Andi, and thereafter obtained AK-HP's number from Azman,[126] this only confirms that Azman had communicated AK-HP's number to Rusli. Without objective evidence of what transpired during the phone calls, the phone records are plainly insufficient to show that Rusli was acting under Azman's instructions. This was especially as both Rusli and Andi gave evidence that Andi had been acting under Rusli's instructions only[127] and that Rusli had his own set of customers to sell the *obat* to.[128]

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125 Prosecution's Closing Submissions at [114].

126 NE Day 13 (16 August 2018) p 3 lines 12 – 17.

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115 As regards the statements, I did not give much weight to Andi's statement that he suspected that Rusli was acting under Azman or one Singh's instructions for two reasons. First, it was a mere suspicion which was unsupported by evidence as Andi specified in the same statement that all the instructions he got from the day of the drug transaction were from Rusli.[129] Secondly, and more pertinently, Andi had stated in an earlier statement that he had concealed Rusli's involvement in the transaction as he was a close friend whom he wanted to protect.[130] It was therefore likely that he had concocted his suspicion to downplay Rusli's role in the transaction.

116 As for Rusli's statement, he admitted during trial that he had been untruthful in stating that he had acted under a man's instructions.[131] Instead, he admitted that Andi had acted on his instructions *only*,[132] even though this necessarily amounts to an admission as regards the *actus reus* element of the abetment charge against him.

117 Importantly, Andi admitted to having collected up to three bundles on the *direct* instructions of Azman on multiple occasions.[133] This admission was in fact relied on by the Prosecution in suggesting that Rusli ought to have suspected that Andi could collect more than one bundle on his behalf. Given that Andi had a direct working relationship with Azman, it begs the question as to why Azman had to engage Rusli to act as a proxy between himself and Andi

127 NE Day 13 (16 August 2018) p 69 line 21 – p 70 line 5; AB p 1012 at [27].

128 AB p 1011 at [21], NE Day 11 (14 August 2018) p 58 line 23 – p 59 line 6.

129 AB p 1012 at [27].

130 AB p 1008 at [13].

131 NE Day 13 (16 August 2018) p 25 lines 25 – 26, p 27 line 17 - p 28 line 5, p 32 line 28 – p 33 line 1.

132 NE Day 13 (16 August 2018) p 33 lines 2 – 7.

133 AB p 1011 at [19].

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in this particular transaction. It was thus unlikely that Rusli was acting under Azman's instructions, as Azman could have dealt directly with Andi.

(2) Rusli not wilfully blind even if he was acting under Azman's instructions

118 For completeness, even if I accept that Rusli had been acting on the instructions of Azman, I do not think that he was therefore wilfully blind to the number of bundles that Andi would collect for him.

119 In this regard, Andi had stated that Rusli would help him re-pack *obat* which Andi collected on Azman's behalf into smaller packets.[134] However, it did not necessarily follow that transactions whereby Rusli had acted as Azman's and Andi's proxy involved more than one bundle. In fact, Andi also stated that he had never seen Rusli pack so much as three bundles of *obat*, as Rusli usually packed one bundle, and Andi would simply deliver the unpacked bundles by the bundle.[135]

120 Additionally, while Andi admitted that he had collected up to *three* bundles on Azman's behalf, he testified that his assignments involving Rusli always involved one bundle:[136]

> Q: So you---depending on the amount that was received by you from a courier, you could either bring one pound of "*obat*" to Rusli. You could be bringing two pounds of "*obat*" to Rusli, you could be bringing three pounds of "*obat*" to Rusli, correct?
>
> A: **For Rusli, it's only one pound**.
>
> Q: These are---and you are referring to cases where Pai Kia instructs you, correct---

134 NE Day 11 (14 August 2018) p 57 lines 18 – 29; AB p 1011 at [19].

135 NE Day 11 (14 August 2018) p 62 lines 1 – 5, p 92 line 18 – p 93 line 5.

136 NE Day 11 (14 August 2018) p 56 lines 2 – 11.

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A: Yes.

Q: ---where Azman gives you the instructions.

A: Yes.

Q: So **when Azman gives you the instructions**, you can go up to **three pounds**.

A: Yes, correct.

121 Here, while Azman had been investigated by the authorities,[137] he was not called to testify. Accordingly, the court was left with Andi's testimony which was not disproved by other evidence. In the circumstances, even if Rusli had acted under Azman's instructions, there remains insufficient evidence to show that he deliberately refrained from making inquiries as to the number of bundles.

Andi's agreement that Rusli was not concerned with dealing in only one bundle

122 At trial, Andi also agreed that Rusli was not concerned with dealing in only one bundle:[138]

Q: Now you said that Rusli was very conscious about only dealing in a non-capital amount, which is one bundle. Yet **Rusli never told you at any point in time to make sure that the drugs you were collecting was only one bundle**. Correct?

A: Yes, correct.

Q: I put it to you that **Rusli was therefore not concerned about dealing in only one bundle**. Agree?

A: Agree.

123 Viewing the line of questioning, Andi's agreement that Rusli was not concerned about dealing in only one bundle came after he agreed that Rusli never told him to make sure that he was collecting only one bundle. It is

137 NE Day 4 p 4 lines 17 – 18 and lines 21 – 23.

138 NE Day 11 (14 August 2018) p 89 lines 1 – 7.

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therefore evident that Andi's agreement only amounted to Andi's evaluation as to Rusli's state of mind.

124 However, "as a matter of principle, each accused person must be treated individually and independently for the purpose of the charge which has been brought against him." (*Ali bin Mohamad* at [98]) Hence, Andi's determination as regards Rusli's state of mind cannot be imputed to mean that Rusli was not concerned about dealing in more than one bundle, or that Rusli had knowledge of the two bundles of *obat*.

Commercially insensible to deliver two bundles

125 Finally, an argument raised during the course of hearings was that Rusli could not have been given two bundles of *obat* unless he had indeed ordered both, given that the supplier would be making a loss otherwise.[139] In essence, it would have been commercially insensible for Akebal to have given Andi two bundles of *obat* unless Rusli had ordered them.

126 However, I do not find that Rusli therefore had knowledge of both bundles of *obat*. This is because an alternate explanation for Andi having received two bundles on Rusli's behalf could be because Akebal was attempting to offload more *obat* to Rusli. This is consistent with the deferred payment arrangement that the parties had, whereby Rusli did not have to pay for the drugs until he had finished selling them.[140] As a result, there was no exchange of moneys observed when Akebal delivered the orange plastic bag to Andi.[141]

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139 NE Day 13 (16 August 2018) p 51 line 24 - p 52 line 11; Prosecution's Closing Submissions at [128].

140 NE Day 13 (16 August 2018) p 65 lines 5 – 30.

141 NE Day 1 (30 March 2017) p 65 lines 17 – 20, p 66 lines 8 – 30.

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Hence, there was a commercial incentive for Akebal to deliver more drugs to Rusli since he would receive more payment *if* the drugs were repacked and completely sold, as was often the case until their arrest.[142]

127 It is beyond the remit of this court to decide which of the two explanations ought to be preferred. As V K Rajah JA (as he then was) observed in *Sakthivel Punithavathi v Public Prosecutor* [2007] 2 SLR(R) 983 at [81]:

> … [I]t is a matter of considerable significance, in a case such as this, to emphasise and ensure that the criterion of proof of guilt beyond reasonable doubt *prohibits the trial judge from filling in the gaps in the Prosecution's case* on her own initiative and through conjecture or supposition … [emphasis added]

128 Hence, that it *could* have been commercially insensible for Akebal to deliver two bundles to Andi had Rusli not specified for both bundles is insufficient to prove that Rusli had knowledge of both bundles.

Conclusion for Rusli

129 Having considered the arguments, I am not satisfied that the Prosecution has proven beyond reasonable doubt that Rusli was wilfully blind as to *both* bundles of drugs.

130 For completeness, I decline to draw an adverse inference against Rusli for simply stating that he had "nothing to say" in his cautioned statement.[143] This is for three reasons:

(a) First, Rusli sufficiently detailed his one bundle defence in the first and second long statements that were recorded on 1 September 2014, just two days after his cautioned statement.

142 AB p 1009, at [16] – [17].

143 AB p 1025.

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When Rusli was given the opportunity to explain in detail in his long statements as to what in fact happened, Rusli did not fail to bring up the relevant facts in support of his one bundle defence. Materially, the one bundle defence was *not* contradicted by him having had "nothing to say" in his cautioned statement.

(b) Secondly, Rusli was possibly suffering from withdrawal from his methamphetamine usage prior to his arrest. In this regard, Rusli tested positive for methamphetamine on 25 August 2018, a day after his arrest.[144] 3 days later, and without having been communicated to CMC for observation of his drug withdrawal symptoms as Andi had,[145] Rusli's cautioned statement was taken.

While the examining doctor[146] and recording officer[147] observed that he displayed no physical signs of withdrawal, the Prosecution's expert witness, Dr. Michelle Alcantara, gave evidence that withdrawal symptoms could last from *"1 week to months*".[148] Withdrawal symptoms of methamphetamine use include anxiety, confusion, and insomnia.[149] Consistent with this, Rusli testified that he simply said that he had "nothing to say" in his cautioned statement as he was "really lethargic" at the time of recording.[150] I have no reason to disbelieve him that he was

144 AB p 124.

145 NE Day 3 (3 April 2018) p 39 lines 7 – 11.

146 Exhibit P337.

147 NE Day 3 p 44 lines 15 – 20.

148 NE Day 4 p 81 line 3.

149 Exhibit 3D4.

150 NE Day 13 (16 August 2018) p 80 lines 7 – 10.

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"really lethargic" at the time of giving his cautioned statement and hence, was in no mood to make any effort to say anything at all.

(c) Thirdly, it is not unreasonable for Rusli to have simply said that he had "nothing (else) to say" in his cautioned statement. At the time, Rusli had already ordered *obat*, which he never disputed. He assumed that the quantity of *obat* would remain as one bundle, similar to his previous orders. Given his condition at the time the cautioned statement was taken, it would be unrealistic for one to insist that Rusli should have raised the defence of "having assumed and honestly believed that one bundle would be delivered similar to previous orders", and then providing a plausible explanation as to why the wrong amount was delivered, for instance due to his failure to clearly specify the quantity of his drug order.

This would be a much more refined or sophisticated defence compared to other defences relating to ordering a different type of drug, like "only cannabis was ordered by me but heroin was wrongly delivered", or blanket denials like "the drugs were not mine" or "I never made the order for the drugs". The latter examples are defences which would have been far more straightforward and obvious for an accused person to give in their cautioned statements upon being warned of the adverse consequences of not stating facts or matters in the person's defence to the charge."

131 In conclusion, as Rusli admits that he had knowledge that Andi would be collecting one bundle on his behalf,[151] I amend his capital charge to one of

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abetting Andi to traffic in one (1) packet of granular/powdery substance which was analysed and found to contain not less than 14.46g of diamorphine, and convict him accordingly.

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151 Rusli's Closing Submissions at [11]; NE Day 13 (16 August 2018) p 2 lines 8 – 9, p 45 lines 15 – 21.

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Conclusion

132 I convict Andi and Akebal of the charges against them, while I convict Rusli on the amended charge. I will now hear the parties on the sentences.

Chan Seng Onn
Judge

Wong Woon Kwong, Michelle Lu, and Desmond Chong (Attorney-General's Chambers) for the Public Prosecutor;
Ramesh Chandr Tiwary (Ramesh Tiwary) and Satwant Singh s/o Sarban Singh (Satwant & Associates) for the first accused;
Lee Yoon Tet Luke (Luke Lee & Co) and Prasad s/o Karunakarn (K Prasad & Co) for the second accused;
Suresh s/o Damodara (Damodara Hazra LLP), Rajan Sanjiv Kumar (Allen & Gledhill LLP) and Josephine Iezu Costan (David Nayar and Vadan) for the third accused.

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