IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2020] SGCA 115

Criminal Appeal No 36 of 2019

Between

Muhammad Abdul Hadi bin Haron

… *Appellant*

And

Public Prosecutor

… *Respondent*

Criminal Appeal No 37 of 2019

Between

Muhammad Salleh bin Hamid

… *Appellant*

And

Public Prosecutor

… *Respondent*

In the matter of Criminal Case No 12 of 2018

Between

Public Prosecutor

And

(1) Muhammad Abdul Hadi bin Haron
(2) Muhammad Salleh bin Hamid

JUDGMENT

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

Muhammad Abdul Hadi bin Haron
v
Public Prosecutor and another appeal

[2020] SGCA 115

Court of Appeal — Criminal Appeals Nos 36 and 37 of 2019
Andrew Phang Boon Leong JA, Judith Prakash JA and Steven Chong JA
12 October 2020

23 November 2020 Judgment reserved.

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

1 This is a set of appeals by two accused persons, Muhammad Abdul Hadi bin Haron ("Hadi") and Muhammad Salleh bin Hamid ("Salleh"). The High Court judge ("the Judge") found Hadi guilty of having in his possession not less than 325.81g of methamphetamine 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) ("the MDA"). The Judge found Salleh guilty of abetment by instigation of Hadi's offence under s 5(1)(*a*) read with s 5(2) and s 12 of the MDA. Hadi was sentenced to life imprisonment and 15 strokes of the cane, while Salleh was sentenced to the death penalty. Hadi and Salleh both appeal against their convictions and sentences.

The undisputed facts

2 The facts may be briefly stated. On 22 July 2015, Hadi entered Johor Bahru in the morning and picked up two bundles wrapped in black tape from a woman known to him only as "Kakak". It is undisputed that Salleh was the one who instructed Hadi on the collection of the bundles, and who also coordinated the transaction with "Kakak". Hadi had also performed a number of similar deliveries on Salleh's instructions prior to this occasion. Upon collecting the bundles from "Kakak", Hadi hid the two bundles within a hidden compartment under the seat of his motorcycle and returned to Singapore at about 12.41pm.

3 Later that night, Hadi and Salleh were arrested in raids conducted by the Central Narcotics Bureau ("CNB"). At about 7.10pm, CNB officers arrested Hadi at his unit at Block 53 Marine Terrace. Under questioning, Hadi informed the CNB officers that he had two bundles collected from Johor Bahru in his motorcycle. The CNB officers seized the two bundles, as well as three mobile phones that were in Hadi's possession.

4 At about 9.08pm, Salleh was arrested by CNB officers at a coffee shop at 85 Kallang Avenue, and a total of four mobile phones and one tablet were seized from Salleh's person and at his flat.

5 The two bundles recovered from Hadi were analysed by the Health Sciences Authority ("HSA"). The first bundle, A1, contained three packets of crystalline substance. The second bundle, A2, contained two packets of crystalline substance. Upon analysis by the HSA, each packet of crystalline substance was found to weigh roughly 100g. Accordingly, A1 weighed roughly

300g in total, while A2 weighed roughly 200g in total. Together, the two bundles contained not less than 325.81g of methamphetamine.

The decision below

The decision in relation to Salleh

6 At trial, Salleh challenged the voluntariness of his first contemporaneous statement and his cautioned statement. Two ancillary hearings were conducted under s 279 of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) ("the CPC") to determine the admissibility of those statements. At the end of those ancillary hearings, the Judge ruled that both statements were admissible (see *Public Prosecutor v Muhammad Abdul Hadi bin Haron and another* [2020] SGHC 8 ("the GD") at [8]–[25]). It should be noted that this ruling has not been challenged in the present appeal.

7 The Judge noted that the elements of the offence of abetment of trafficking by instigation are "active suggestion, support, stimulation or encouragement" of the primary offence, *and* "knowledge of all essential matters constituting the primary offence" (see *Public Prosecutor v Andi Ashwar bin Salihin and others* [2019] SGHC 44 at [80]). In essence, Salleh must have had knowledge as to all three elements of Hadi's offence of trafficking. Salleh's sole defence, however, was that he did not intend to traffic in more than 250g of methamphetamine, and therefore had no knowledge of the full *quantity* of drugs collected by Hadi. In this regard, Salleh contended that he had expected Hadi to pick up only *one* bundle containing 250g of methamphetamine on 22 July 2015 (see the GD at [36]).

8 There was no question that Salleh had instigated Hadi to collect the drugs from "Kakak", that he knew that the drugs were methamphetamine, and

that they were eventually to be delivered onwards to someone other than Hadi and Salleh. The only question, as the Judge put it, was as to Salleh's state of mind regarding the *quantity* of drugs that Hadi was to collect from "Kakak" (see the GD at [34]). In the Judge's view, this element would be satisfied even if Salleh had not known or had not addressed his mind to the specific number of bundles involved, "but instead knew that Hadi would collect *any* number of bundles which 'Kakak' gave him, and that this might include the two bundles that Hadi in fact received" [emphasis in original] (see the GD at [32]).

9 On the evidence, the Judge ruled that Salleh had no qualms about dealing in more than 250g of methamphetamine, and that a transaction involving two bundles with a total gross weight of 500g was well within Salleh's contemplation when he instructed Hadi to collect an unspecified quantity of methamphetamine from "Kakak" (see the GD at [50]). The Judge arrived at this conclusion by considering the following matters:

(a) First, despite the alleged agreement not to deal in more than 250g of methamphetamine, the messages sent between Salleh, Hadi and "Kakak" after the collection on 22 July 2015 did not evince any alarm or concern on Salleh's part when he was told that Hadi had collected two bundles of drugs weighing about a total of 500g (see the GD at [36]–[41]).

(b) Salleh's allegation that he had confronted "Kakak" in a phone call and asked her to take back the larger bundle weighing 300g was a bare assertion and was, moreover, not borne out by the messages he sent after the call (see the GD at [42]–[44]).

(c) Salleh's defence at trial, that there was an agreement not to deal in more than 250g of methamphetamine, was inconsistent with his

cautioned statement (where he stated that he was not aware of the number of packages collected by Hadi, or "Bear") and his contemporaneous statement (see the GD at [46]–[47]).

10 There was also some evidence in Salleh's phone records that he had previous dealings involving more than 250g of methamphetamine (see the GD at [49]). In the circumstances, the Judge concluded that the charge against Salleh was proven beyond a reasonable doubt.

11 On sentence, although a certificate of substantive assistance had been tendered for Salleh, the Judge found that his role clearly exceeded that of a courier, since Salleh was the one who recruited and paid Hadi for collecting drugs and performed an independent coordinating role between Hadi and "Kakak" (see the GD at [77]–[78]). As the requirements for the discretionary sentencing regime under s 33B(2)(*a*) of the MDA were not satisfied, the Judge sentenced Salleh to the death penalty.

The decision in relation to Hadi

12 The elements of the offence against Hadi were: (a) possession of a controlled drug; (b) knowledge of the nature of the drug; and (c) possession of the drug for the purpose of trafficking (see the GD at [52]). Hadi did not dispute being in possession of the two bundles containing the drugs, nor that these were meant for onward delivery. Instead, Hadi's defence was that he thought the bundles contained gold and cash, which he collected as a courier for Salleh who he believed was a gold and currency investor (see the GD at [53]).

13 The Judge first noted that, since Hadi was in possession of the drugs, the presumption of knowledge of the nature of the drugs under s 18(2) of the MDA applied (see the GD at [54]). To rebut the presumption, Hadi had to prove, on a

balance of probabilities, that he did not have knowledge of the nature of the drugs. Various factors suggested this was not the case.

(a) First, although Hadi's defence was raised in his long statement recorded on 27 July 2015, he had failed to raise this defence in all the statements recorded prior to this statement. Indeed, his defence was *inconsistent* with his earlier statement ("s 33B statement"), where he stated that he *did not know* what was in the bundles (see the GD at [56]). The Judge did not accept Hadi's claim that he had mentioned his defence to the officer recording his s 33B statement, and that that officer had refused to write it down.

(b) There were also internal inconsistencies in Hadi's account as to why he did not check the contents of the bundles, as he had during his first delivery for Salleh. Hadi's long statement and his testimony gave differing accounts of how Salleh came to know that the bundle in the first delivery had been opened, and this affected the credibility of Hadi's account (see the GD at [60]).

(c) Importantly, Hadi's lies about his acquaintance with Salleh, and his attempts to avoid any association with Salleh by referring to him by various different names, were deliberate lies on a material issue. That Hadi saw the need to lie about his acquaintance with Salleh showed that Hadi knew of Salleh's drug trafficking activities, and wanted to distance himself from them (see the GD at [63]).

14 The Judge did not, however, consider that much weight could be placed on Salleh's testimony against Hadi, given that Salleh had an incentive to lie about Hadi's involvement in order to support Salleh's defence of there having been an *agreement* to traffic in not more than 250g of methamphetamine (see

the GD at [71]). Nonetheless, based on the remainder of the evidence, Hadi had failed to rebut the s 18(2) presumption on a balance of probabilities, and the Judge also found Hadi guilty of the charge against him.

15 On the issue of sentence, however, there was no dispute between the parties that Hadi was a courier within meaning of s 33B(2)(*a*) of the MDA, and the Judge agreed that his role was limited to transporting and delivering the drugs. The Prosecution also tendered a certificate of substantive assistance in favour of Hadi. The Judge therefore exercised her discretion under s 33B(1)(*a*) of the MDA and sentenced Hadi to life imprisonment with effect from 24 July 2015, and 15 strokes of the cane (see the GD at [75]).

16 Despite the order in which the Judge addressed the cases against the two accused persons, we will begin our analysis first with Hadi's appeal before turning to Salleh's appeal.

Hadi's appeal

17 On appeal, Hadi – who is unrepresented – maintains his defence that he did not know the nature of the drugs in his possession and that the Judge erred in finding otherwise. Hadi argues, first, that the Judge erred in failing to give sufficient weight to Hadi's consistent evidence, in "all of [his] statements and testimony", that he did not know that the bundles contained a controlled drug. In particular, Hadi contends that he had consistently testified that he had informed Staff Sergeant Muhammad Fardlie bin Ramlie ("SSgt Fardlie"), at the time of his arrest and even *prior* to the recording of his s 33B statement and his first contemporaneous statement, about his belief that the bundles contained gold and cash. In any event, Hadi argues, the Judge should not have taken his failure to mention his defence in his prior contemporaneous and cautioned

statements against him. Hadi also argues that the Judge erred in finding that he had lied about his association with Salleh. Finally, Hadi also appeals against his sentence on the basis that it is "manifestly excessive".

18 As we reiterated recently in *Saravanan Chandaram v Public Prosecutor and another matter* [2020] 2 SLR 95 at [34], when the accused person seeks to rebut the presumption of knowledge under s 18(2) of the MDA, the court will assess the veracity of the accused person's account of what he thought the items were against the objective facts, and this is a highly fact-specific inquiry. In the present case, the Judge made several key findings of fact that led her, in the round, to disbelieve Hadi's defence.

19 The first factor is the timing of Hadi's defence. In his long statement recorded five days after his arrest, Hadi stated for the first time that he was told that the bundles contained gold, and that he was involved in smuggling gold and cash for Salleh. We do not accept Hadi's claim that he had mentioned his defence orally to SSgt Fardlie around the time of his arrest and that the officer had failed to write it down. If that in fact did happen, it is implausible that Hadi would fail to mention his defence again in his s 33B statement or in his first contemporaneous statement, which were recorded just *one to two hours after* his arrest. Instead, it is telling that in Hadi's three earliest statements, including his cautioned statement, Hadi always maintained that he *did not know* what was in the black bundles (see the GD at [56]). Hadi's *positive defence* that he thought the bundles contained gold and cash was therefore *plainly inconsistent* with his initial claim to be ignorant of the contents of the bundles.

20 We also do not accept Hadi's argument that less weight ought to be placed on the contents of his earlier statements, given the shock and stress he was under at the relevant time. No argument was raised at trial about the

admissibility or voluntariness of Hadi's statements and, in any case, it appears to us that Hadi's complaints about his mental state at the time of recording of the statements do not meet the legal threshold required for the voluntariness of those statements to be impugned. It bears repeating that it is not Hadi's case that the statements are *inaccurate* because of SSgt Fardlie's omission to record his assertion that the bundles contained gold and cash. Instead, Hadi seeks to downplay the fact that he had stated, on record, that he did not know the contents of the bundles at all. For the reasons stated, we do not think that this argument has merit.

21 The second important factor was the Judge's finding that Hadi had told deliberate lies about his acquaintance with Salleh. At the time of his arrest and in his first recorded statements, Hadi referred to the person giving him instructions as "Whye", "White" and "Rasta", and insisted that he had "*never met*" [emphasis added] this person face-to-face before. It is undisputed that all these names refer to Salleh. However, Hadi began to take a different position from the time he first raised his defence about transporting gold and cash. In his later statements and at trial, Hadi claimed that he had indeed met Salleh several times previously but found nothing suspicious about his character. Hadi also sought to explain away his earlier statements on the basis that what he meant to say was that he had not met Salleh *on the day of the arrest*. This explanation is plainly incredible and it is clear that Hadi's defence cannot be reconciled with his statements that he had never met Salleh before. The use of different names for Salleh aside, there was no reason for Hadi to lie about his acquaintance with Salleh if he had truly believed Salleh to be a businessman only. We see no reason to disturb the Judge's finding that Hadi had told deliberate lies in order to distance himself from Salleh, and that this was probative of his guilt.

22 We would point out that the Judge was eminently fair to Hadi in declining to draw any inference from his frequent use of code words, and in not placing much weight on Salleh's testimony against Hadi. Nonetheless, in all the circumstances, we think the Judge was correct to reject Hadi's defence as an afterthought. The presumption of knowledge is unrebutted and on this basis we dismiss Hadi's appeal on conviction.

23 As there is no scope to reduce the sentence any further, we also dismiss Hadi's appeal on sentence.

Salleh's appeal

24 We turn now to Salleh's appeal. Salleh primarily appeals against the Judge's finding that he was prepared to deal in the quantity of drugs that was in fact found to have been in the bundles, and her consequent rejection of his defence. Salleh's submission is that that finding was wrong in law and in fact. We deal first with the issues relating to Salleh's conviction, before addressing his appeal on sentence.

The knowledge requirement

25 Salleh's first argument relates to the Judge's observations on the requirement of knowledge of the quantity of drugs. In rejecting Salleh's defence, the Judge noted that the knowledge requirement was satisfied even if Salleh did not know or had not addressed his mind to the specific number of bundles involved, "but instead knew that Hadi would collect *any* number of bundles which 'Kakak' gave him" [emphasis added], referring to this court's decision in *Muhammad Ridzuan bin Md Ali v Public Prosecutor and other matters* [2014] 3 SLR 721 ("*Ridzuan*") (see the GD at [32]). On appeal, counsel for Salleh, Mr Tito Isaac ("Mr Isaac"), argued that the Judge had erred in her

assessment of what the knowledge requirement entailed. In particular, Mr Isaac contended that reliance on the proposition from *Ridzuan* impliedly shifted the burden of proof to the accused person, since it no longer required the Prosecution to prove actual knowledge on the part of the accused. Mr Isaac also submitted that *Ridzuan* was distinguishable on the basis that it involved a charge of common intention rather than abetment by instigation.

26 We respectfully disagree with the submission that the Judge had erred in her analysis of what the knowledge element requires. At the outset, it is apparent to us that in referring to *Ridzuan*, the Judge was dealing with a *factual* rather than a legal point – namely, the manner in which the requirement of knowledge of the quantity of drugs may be satisfied. In particular, *Ridzuan* demonstrates that if it can be proven that the accused person intended for ***any*** *amount* of drugs to be collected, as opposed to some defined smaller amount, then he or she cannot evade liability by claiming that he or she did not know of the *specific* quantity of drugs that were in fact collected (see *Ridzuan* at [57]).

27 Although *Ridzuan* was a case involving a common intention charge, and not an abetment by instigation charge as in the present case, we are of the view that the principle in *Ridzuan* would apply equally in this case. Nothing turns on the difference between abetment and common intention: the requirement of *knowledge* is present in both scenarios. In our view, the approach in *Ridzuan* is sound in logic as it recognises the culpability of an accused person who actively instructs his co-accused to collect an unspecified amount of drugs, thereby necessarily accepting the possibility that this amount may exceed the threshold for capital punishment. In these circumstances, we do not think the accused person's indifference to the precise amount of drugs involved should be allowed to operate to his or her benefit.

28 Moreover, and contrary to Salleh's submission, the approach in *Ridzuan* does *not* result in a shifting or lowering of the burden of proof to be met by the Prosecution. It remains for the Prosecution to establish, beyond a reasonable doubt, that the accused person (here, Salleh) knew that his co-accused (here, Hadi) would collect any quantity of drugs given to him. It would not suffice for the Prosecution to rely on the *lack* of evidence about Salleh's state of mind on this matter. We pause to clarify, however, that while the legal burden of proof remains on the Prosecution throughout, this should not be confused with the *evidential* burden to produce sufficient evidence in support of one's contentions, which may shift between the Prosecution and the Defence depending on the nature of the defence and the fact in issue (see our recent observations in *Public Prosecutor v GCK and another matter* [2020] 1 SLR 486 at [132]–[133]; see also *Public Prosecutor v BPK* [2018] SGHC 34 at [144]–[146]). As the accused person's knowledge of the quantity of the transacted drugs is an issue that goes to the element of possession, the evidential burden on the Prosecution at the outset is to show on the evidence that Salleh had instigated Hadi to pick up the bundles that he had in fact collected on the relevant day. If Salleh's defence is that he had never intended or known that the drugs amounted to more than 250g at the relevant time, it is for *Salleh* to put that fact in issue by producing sufficient evidence of that defence such that it calls for a response or rebuttal by the Prosecution. In our view, Salleh's submissions conflated the distinction between the legal and evidential burdens of proof when he submitted that the appeal should be allowed since the Prosecution had failed to adduce sufficient positive evidence at the outset that Salleh had intended for Hadi to collect any quantity of drugs on the relevant day, even an amount which exceeded the capital threshold.

29 In any event, it is clear to us that in referring to *Ridzuan*, the Judge was not expounding any normative proposition on the burden of proof. As we have earlier noted, the analogy drawn between *Ridzuan* and the present case was from a *factual* perspective only, *ie*, that both cases involved an accused person who intended for ***any*** *amount* of drugs to be collected. The Judge concluded that Salleh possessed the requisite knowledge *only after considering the evidence* and being satisfied that *the Prosecution had discharged its burden of proof* (see the GD at [32]–[50]). We turn now to consider whether the Judge's conclusions were correct on the facts.

Application to the facts

30 It is apparent to us from the outset that the main obstacle in the way of Salleh's defence, and an important piece of evidence on which the Prosecution relies, are messages sent between Salleh, Hadi and "Kakak" in the afternoon of 22 July 2015, in which Salleh learnt that the quantity of drugs collected exceeded 250g. At the hearing before us, Mr Isaac emphasised that given the nature of the charge against Salleh, the inquiry into Salleh's state of mind must be confined to the time of Salleh's *instigation* of Hadi's offence. Mr Isaac submitted that as the offence of instigation was completed once Hadi had collected the drugs from "Kakak" on the morning of 22 July 2015, the fact that Salleh later found out about the actual quantity of the drugs collected was less significant. Mr Isaac relied, instead, on messages sent between Salleh and "Kakak" the day before the collection, and sought to portray these as indicative of an agreement for "Kakak" to prepare only 250g of methamphetamine for Hadi's collection.

31 Given the highly inferential nature of the inquiry, we turn to consider in closer detail the evidence relating to Salleh's state of knowledge about the

quantity of drugs involved in the instant transaction. In this regard, we begin with the correspondence sent between Salleh, Hadi and "Kakak" on 22 July 2015.

The correspondence between Salleh, Hadi and "Kakak" on 22 July 2015

32 In oral submissions, the Prosecution highlighted four aspects of the correspondence between Salleh, Hadi and "Kakak" on 22 July 2015 which detailed the events that occurred that day in chronological order, and disclosed Hadi and Salleh's reaction to the collection of the drugs.

33 The first portion of interest in the correspondence concerns the time immediately after Hadi had collected the drugs from "Kakak". As the Prosecution pointed out, Hadi informed Salleh at 11.57am that the collection was "[d]one". Salleh did not ascertain with Hadi the quantity of drugs contained in the two bundles collected from "Kakak". Only at around 1.44pm did Hadi send two text messages to Salleh: "Total I have 2 pack only", and "250 each".

34 Salleh claims he did not understand what Hadi meant by "250", but that assertion is incredible in the light of Salleh's own defence that he knew this to be a drug transaction. On Salleh's own case, both he and Hadi must have fully understood "250 each" to refer to the gross weight of each bundle from Hadi's message (see also the GD at [38]). It is noteworthy then that Hadi, *acting on Salleh's instructions*, was not surprised about the quantity of drugs collected, both in terms of the number and the weight of the bundles. Salleh, too, did not express his surprise to Hadi about the fact that two bundles were collected instead of one.

35 The second portion of the correspondence comprised WhatsApp messages between Salleh and "Kakak" between 1.45pm and 3.58pm. In fairness to Salleh, upon learning from Hadi of the number (and weight) of the bundles collected, he immediately sent a message to "Kakak" at 1.45pm, asking: "[y]ou do 2, is it?", a reference to the number of bundles that "Kakak" had handed to Hadi. Yet at the same time, Salleh was content to then wait for over two hours for a reply from "Kakak", who only replied in the affirmative at 3.58pm. The Prosecution submitted that this was at odds with the urgency and anxiety that Salleh ought to have felt if he had wanted to stay within the threshold of a non-capital amount of drugs.

36 Flowing from Salleh's message at 1.45pm clarifying the number of bundles given to Hadi, a crucial series of messages was exchanged between Salleh and "Kakak" (referred to as "Apple" in the messages) from 3.58pm:

Time	From	Message (or official translation)
1.45pm	Salleh	Apple
1.45pm	Salleh	You do 2, is it?
3.58pm	Apple	Yup
3.58pm	Apple	3pkt 2pkt
4.01pm	Salleh	Huh
4.01pm	Salleh	3 or 2?
4.02pm	Salleh	How many packets you gave him?
8.00pm	Apple	5pkt 100x5
8.00pm	Salleh	Huh??
8.01pm	Salleh	He told me only 2 pkt

No further messages were exchanged between Salleh and "Kakak". Rather, from the call logs, at around 8.02pm Salleh received a call from a contact known as "Wahida" that lasted for 19 minutes. It is accepted that "Wahida" was another name for "Kakak".

37 Salleh's response to "Kakak" in the messages at [36] above is telling. We accept that Salleh did express some surprise upon learning of the number of smaller packets in the bundles. However, we do not accept that this was due to there being any prior agreement for the transaction to involve no more than 250g of methamphetamine. Salleh himself admitted that the message from "Kakak" about there being "5pkt" of "100x5" suggested to him that the bundles weighed 500g in total (see the GD at [41]). Yet, he did not express any alarm at the *total* weight or quantity of the drugs collected, but only informed "Kakak" that Hadi "told [him] only 2pkt". The inference we draw from this is that Salleh was simply clarifying the number of "packets" that Hadi had collected. He did not express alarm or worry despite the clear indications that Hadi had collected 500g of drugs; the large quantity of drugs did not bother Salleh at all.

38 We note Salleh's assertion that during the 19-minute call, he had confronted "Kakak" about the excess drugs and asked her to take back the larger bundle. We will address this in more detail below (see [40] below), but it bears mention at this juncture that despite Salleh's claim to have been shocked at the total quantity of drugs involved in this transaction, it was not Salleh who called "Kakak" but the other way round. If Salleh was truly disturbed by the amount of drugs collected, one would have expected him to have taken urgent affirmative action to rectify the situation.

39 Finally, at 8.30pm, Salleh sent the following text message to Hadi:

> Bro, 2 pkts

> Smaller one hv 2pkt inside
> Bigger one hv 3pkt inside

What is noteworthy is that in this message, Salleh did not express *any* alarm or worry about the weight of the drugs. Consistent with our earlier observations (see [37] above), he was simply *clarifying* with Hadi the contents of the two bundles.

40 This final message must be seen in light of Salleh's claim that, during the 19-minute call with "Kakak" just minutes before this message to Hadi, Salleh had asked "Kakak" to take back the additional bundle upon learning of the true weight of the drugs. That claim is a bare assertion, but more importantly, if there had in fact been such a further arrangement made, it is all the more incredible that Salleh would have failed or forgotten to inform Hadi of the pending arrangements to return one of the bundles in his possession. This leads us to disbelieve Salleh's assertion that he had confronted "Kakak" about the supposedly excess quantity of drugs prepared.

41 Taken collectively, a clear picture emerges from the correspondence. Salleh was not troubled at all by the quantity of drugs that Hadi had collected. This buttresses the notion that Salleh had in fact instructed Hadi to collect whatever quantity of drugs that "Kakak" gave him on 22 July 2015.

Salleh's emphasis on the message sent on 21 July 2015

42 A main plank of Salleh's arguments on appeal is that the text messages we have examined above, which were sent *after* the pick-up had taken place on 22 July 2015, should be given less weight as they were not directly probative of Salleh's state of mind at the time that he had instigated Hadi to collect the drugs. Instead, Salleh submits that significant weight should be placed on the text

message sent by Salleh the day before the transaction, *ie*, 21 July 2015, in which he had asked "Kakak" to prepare "half" for collection the next day. There are two facets to this argument.

(a) First, in oral submissions, Mr Isaac submitted that in line with the principle of concurrence, *ie*, that the *actus reus* and *mens rea* of an offence must coincide in time, only the messages exchanged on 21 July 2015 are relevant. The messages sent on 22 July 2015 represented a *subsequent* state of mind that did not temporally coincide with Salleh's act of instigation and should hence be disregarded ("the concurrence argument").

(b) Second, Salleh submits that the reference to "half" shows that he had asked for half *of 500g*, and not the full amount that Hadi collected.

43 We do not accept either submission. The concurrence argument is wrong in so far as it attempts to myopically scrutinise *only* the messages exchanged on 21 July 2015 without any regard to the events that followed. Put simply, these messages should not be viewed in isolation from each other. The concurrence principle, as a principle of law, does not prescribe the range of factual evidence that can be considered for the purposes of assessing the *actus reus* or *mens rea* of an accused person. While it is undoubtedly true that, in line with the concurrence principle, the *mens rea* inquiry is as to Salleh's state of mind *at the time of instigation*, the messages sent on 22 July 2015 shed critical light on what he must have thought at the time of instructing Hadi on the collection of drugs. The messages sent on 22 July 2015 form *the holistic (and continuous as well as integrated) context* within which we may test whether there was, as Salleh alleged, a subsisting oral agreement between Salleh and Hadi to *not* deal in a capital quantity of drugs (see [46]–[57] below). They also allow us to ascertain

the proper interpretation of the messages exchanged on 21 July 2015 – if these messages are to be read in the manner Salleh claims, Salleh and Hadi must have behaved, on 22 July 2015 and subsequent to the collection of the drugs, in a manner that comported with their understanding from the day before.

44 This leads us to Salleh's (second) argument that "half" meant half of 500g. The meaning of "half", in this context, must depend on the reference point which the term "half" is aimed at. There are two points of note. First, as the Judge found, the message to "Kakak" to prepare "half" for collection depended entirely on Salleh's evidence as to what it meant, and given her finding on his lack of credibility as a witness, there was no reason to accept his assertion alone on what "half" meant (see the GD at [48]). Second, as explained, the messages sent on 22 July 2015 shed light on what Salleh must have thought at the time of instructing Hadi on the collection, and in particular whether he only intended to transact in not more than 250g of drugs. For the reasons we have stated above, and, in particular, Salleh's lack of concern upon learning that the bundles weighed 500g in total, we do not accept Salleh's interpretation. If "half" truly meant half of 500g, Salleh would not have exchanged the messages that he did with Hadi and "Kakak". He would have expressed alarm at Hadi collecting and retaining two bundles of drugs collectively weighing 500g as this would have been entirely contrary to the arrangement with "Kakak".

45 There is, therefore, no basis on which to set aside the Judge's finding that the Prosecution had proved that Salleh was willing for Hadi to accept the amount of drugs that was in fact given to him that day.

The alleged subsisting oral agreement and past conduct

46 We also address Salleh's contention that the oral agreement with "Kakak" and Hadi to deal in non-capital quantities of methamphetamine was one that had subsisted from their past interactions with each other. In response, the Prosecution pointed to old messages, retrieved from Salleh's phone, suggesting that Salleh and Hadi were involved in prior transactions involving large quantities of drugs. There is an attendant issue concerning similar fact evidence that arises by virtue of the Prosecution's reliance on these old messages – we address this subsequently after setting out the content of these messages (see [52] below *ff*).

47 On 19 June 2015, roughly one month before the transaction giving rise to the charges in the present case, the following exchange took place between Salleh and Hadi over WhatsApp:

Time	From	Message (or official translation)
1.56pm	Salleh	Bro afternoon can?
2.06pm	Hadi	What tyme bro?
2.12pm	Salleh	About 4pm. Before jam
2.13pm	Hadi	Go back in around what time bro?
2.14pm	Salleh	Before break fast can bro
2.14pm	Hadi	Bring in 1 stick ok?
2.18pm	Salleh	Ok but 4 packets
2.19pm	Salleh	250 ea
2.19pm	Hadi	250 big afraid cannot stuff in.. if 8 x 125 still can

Time	From	Message (or official translation)
2.23pm	Salleh	Cannot compress bro because 8 packets. With tape even thicker
3.50pm	Salleh	Bro
3.50pm	Hadi	Yes bro..
3.51pm	Salleh	What time arrive? Later jam you Know
3.51pm	Hadi	I'm getting ready now bro
3.52pm	Hadi	About 4.30-4.45
3.53pm	Salleh	Ok
4.12pm	Hadi	Otw
4.49pm	Hadi	Checkpoint jam

48 Hadi's immigration records from the Immigration & Checkpoints Authority (the "ICA records") show that on the same day, *ie*, 19 June 2015, Hadi entered Malaysia at 5.19pm and returned to Singapore at 7.28pm. This accordingly suggests that Hadi did in fact transport drugs that day, as instructed by Salleh.

49 At trial, based on the above, it was put to Salleh that these series of messages to Hadi meant that they were prepared to transport "1,000 grams of meth". However, Salleh disagreed and stated that this "ha[d] nothing to do with drugs" but had to do with "some money" instead. When further confronted as to how the word "stick" could possibly refer to money, Salleh tried to explain this away by saying that this might have been a typo on Hadi's part, as the word was meant to be "stack". We consider Salleh's explanation to be entirely unsatisfactory. Coupled with the ICA records, the reference to "packets",

"stick", "250 ea", "8 x 125" and "[c]annot compress bro because 8 packets. With tape even thicker", all point towards these being an arrangement to transport drugs. It is revealing that while Hadi sought separately to explain the messages as referring to "gold", nowhere in his evidence did he consider the messages as a reference to "money", as Salleh had claimed.

50 The above analysis reinforces the Judge's finding at [50] of the GD – Salleh evidently had "no qualms" for Hadi to be, on his instructions, in possession of *any* quantity of drugs, *including capital amounts*. Indeed, the arrangement on 19 June 2015 involved *1kg of drugs* (four bundles of 250g each), which exceeds even the quantity of drugs that form the subject matter of the present charges.

51 Viewed in this light, we do not accept that the alleged oral agreement existed. It is inconceivable that, after having dealt with significant quantities of drugs that far exceeded the capital threshold, Salleh and Hadi would have had any reservations over the quantity of drugs that the latter was to collect from "Kakak" on 22 July 2015.

52 We turn to consider, however, whether the messages exchanged between Salleh and Hadi on 19 June 2015 constitute inadmissible similar fact evidence. In oral submissions, Mr Isaac raised concerns about the Judge's reliance on the messages exchanged between Salleh and Hadi as evidence of past transactions. That, he argued, may have clouded the lower court's consideration of the evidence for the transaction that forms the basis of the present charges.

53 As we stated in *Rosman bin Abdullah v Public Prosecutor* [2017] 1 SLR 10 at [32], "it is well-established that there is no *blanket* rule against the admission of 'similar fact evidence'; such evidence may be utilitsed in the

limited manner envisaged within a *strict application* of, for example, ss 14 and 15 of the Evidence Act (Cap 97, 1997 Rev Ed)" ("Evidence Act") [emphasis in original]. It bears reiterating that the mischief that the similar fact evidence rule seeks to prevent is *reasoning by propensity*. In other words, the rule exists to prevent the inference that the accused person's past misconduct increases his disposition or tendency to have committed the offence for which he is now charged (see the decision of this court in *Tan Meng Jee v Public Prosecutor* [1996] 2 SLR(R) 178 ("*Tan Meng Jee*") at [41]).

54 The contention that the Judge placed undue emphasis or reliance on the past messages exchanged between Hadi and Salleh is misconceived. It is clear that the Judge only considered the past messages as "*some* evidence … to suggest that [Salleh] had previous dealings involving more than 250g of methamphetamine" [emphasis added] (see the GD at [49]). Preceding this was her thorough analysis that focused solely on the exchanges on 22 July 2015.

55 *In any event*, we find that the past messages exchanged are admissible and do not constitute inadmissible similar fact evidence. Section 14 of the Evidence Act is relevant and provides that "[f]acts showing the existence of any state of mind, such as intention [or] knowledge, … are relevant when the existence of any such state of mind … is in issue or relevant". This entails a balancing exercise between the probative weight and prejudicial effect of the evidence, with such similar fact evidence being admitted only if the former outweighs the latter; the three factors being that of cogency, strength of inference, and relevance (see *Tan Meng Jee* at [48]).

56 In our view, Salleh's previous messages and past dealings with "Kakak" and Hadi on 19 June 2015 are not only relevant but also highly significant to his state of mind when considering the transaction for which he was charged –

namely, whether he was content with transporting any quantity of drugs, even a large amount, or whether he had (as he claimed) an agreement not to deal in more than 250g of methamphetamine. It was thus appropriate for the court to take into account the messages for the *limited purpose* of demonstrating a specific state of mind on the part of Salleh, in that he was content for Hadi to transport any quantity of drugs. The strength of the inference is also heightened especially when regard is had to the fact that these messages came merely a month prior to the transaction that forms the basis for the present charge.

57 For clarity, the past messages relating to the alleged previous drug transactions between Salleh, Hadi and "Kakak" are not pivotal in our analysis and ultimate conclusion. We consider that there was sufficient evidence before the Judge, *even leaving aside the past messages*, to show that Salleh was prepared for Hadi to collect the quantity of drugs that he had in fact collected at the material time. The previous drug transaction simply *fortifies* our conclusion that Salleh and Hadi had no qualms with dealing in a quantity of drugs that exceeds the capital threshold. The Prosecution, to their credit, recognised this and made an argument to this effect in oral submissions: they specifically placed most reliance on the exchange of messages on 22 July 2015 (which we have analysed earlier and found in favour of the Prosecution's case), and on Salleh's contemporaneous statement. We now turn to that statement.

Salleh's contemporaneous statement

58 Salleh's contemporaneous statement was recorded on 22 July 2015 at 10.10pm by Station Inspector Mohamed Faizal bin Baharin ("SI Faizal"). The relevant parts of the question-and-answer exchange between SI Faizal and Salleh are as follows:

Q3	Are there any drug related activities between you and 'Bear'? …
A3	Yes after I knew there are drugs involved.
Q4	What are the drug related activities?
A4	I am a messenger between 'Macha' and 'Bear' I will relay 'Macha' message to 'Bear' on when to collect and deliver the package.
Q5	What do you mean by 'the package'?
A5	Drugs. Initially I do not know it is drug. After doing it for few occasions then only I knew it is drugs from 'Macha'.
Q6	What did 'Bear' told you today?
A6	He said he have arrived Singapore [*sic*] and he have 2 packets with him.
Q7	The 2 packets is for who?
A7	I have no idea because I am waiting for 'Macha' instruction.

59 The Judge at [47] of the GD found that the exchange reproduced above was in substance an admission by Salleh. We agree. The contemporaneous statement makes it apparent that Salleh: (a) was content to deal with the two bundles; and (b) instructed Hadi to collect the two bundles. Salleh could have, but did not, express alarm or any objection at the fact that Hadi had collected two bundles. He made no suggestion that he did not anticipate the number of bundles that Hadi had collected. Salleh simply conveyed the information on the number of bundles and his role in the transaction to SI Faizal as a matter of fact. This serves only to strengthen our earlier conclusions with regard to Salleh's state of mind.

Conclusion on conviction

60 In our judgment, as the Judge found, the evidence leads to the sole conclusion that Salleh was never truly concerned about the quantity or weight

of the drugs. Salleh had known, from Hadi's first message about there being two bundles of "250 each", that this was a transaction involving about 500g of methamphetamine. Subsequent messages with "Kakak" confirmed that fact. Nonetheless, Salleh was fully prepared for Hadi to go through with the transaction with the amount of drugs that were in fact collected.

61 For completeness, we have considered and we agree with the other reasons given by the Judge for rejecting Salleh's defence, namely, that Salleh's defence was raised for the first time at trial – three years after his arrest – and was inconsistent with his cautioned statement where he claimed ignorance of the "number of packages" collected (see the GD at [46]). His defence was clearly an afterthought bereft of any credible evidence.

62 In all the circumstances, we are satisfied that the Prosecution had succeeded in proving its case on Salleh's knowledge beyond a reasonable doubt. The conviction must therefore be upheld.

Sentence

63 Turning to Salleh's appeal on sentence, it is clear from the text messages that Salleh was the coordinator of the transactions with Hadi and "Kakak". Although Salleh submits that his role was limited to relaying messages as part of a "relay team", this is not borne out on the evidence. The burden is on the accused person to show that he is a "courier" pursuant to s 33B(2)(*a*) of the MDA and although Salleh claims that he was acting on the instructions of another person, no evidence was adduced to prove this at trial. In line with our observations in *Zainudin bin Mohamed v Public Prosecutor* [2018] 1 SLR 449 at [65], Salleh's acts of recruiting and paying Hadi for his work in delivering

the drugs also go beyond the ambit of a mere courier. In the circumstances, we are unable to conclude that the courier exception applies to Salleh.

Conclusion

64 For the above reasons, we dismiss Hadi and Salleh's respective appeals against their conviction and sentence.

Andrew Phang Boon Leong Judge of Appeal	Judith Prakash Judge of Appeal	Steven Chong Judge of Appeal

The appellant in Criminal Appeal No 36 of 2019 in person;
Tito Shane Isaac, Chong Yi Mei and Lucella Lucias Jeraled (Tito Isaac & Co LLP) for the appellant in Criminal Appeal No 37 of 2019;
Marcus Foo and Rimplejit Kaur (Attorney-General's Chambers) for the respondent in Criminal Appeals Nos 36 and 37 of 2019.