IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2020] SGCA 120

Criminal Appeal No 22 of 2019

Between

Imran Bin Mohd Arip

… *Appellant*

And

Public Prosecutor

… *Respondent*

Criminal Appeal No 23 of 2019

Between

Pragas Krissamy

… *Appellant*

And

Public Prosecutor

… *Respondent*

Criminal Appeal No 24 of 2019

Between

Tamilselvam a/l Yagasvranan

… *Appellant*

And

Public Prosecutor

… *Respondent*

In the matter of Criminal Case No 6 of 2019

Between

Public Prosecutor

And

(1) Imran Bin Mohd Arip
(2) Pragas Krissamy
(3) Tamilselvam a/l Yagasvranan

JUDGMENT

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

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v
Public Prosecutor and other appeals

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Sundaresh Menon CJ, Andrew Phang Boon Leong JA and Steven Chong JA
19 November 2020

18 December 2020 Judgment reserved.

Steven Chong JA (delivering the judgment of the court):

Introduction

1 In cases where two or more persons are charged for the *same* drug trafficking transaction, it is "common" to frame the charges against each of the co-offenders in common intention under s 34 of the Penal Code (Cap 224, 2008 Rev Ed) ("PC"). Very recently, this court in *Public Prosecutor v Aishamudin bin Jamaludin* [2020] 2 SLR 769 ("*Aishamudin*") at [110] observed that in cases "in which there is a clear distinction between principal offenders who committed the *actus reus* of the offence and secondary offenders whose involvement was more peripheral, it may be conceptually and practically more desirable to frame charges against the secondary offenders based either on abetment or on joint possession under s 18(4) of the [Misuse of Drugs Act (Cap 185, 2008 Rev Ed) ("MDA")], instead of invoking s 34 of the [PC] against all the offenders unnecessarily", given that the definition of "traffic" under the

MDA covers a broad range of activities coupled with the seemingly wide basis for accessorial liability under the MDA.

2 In respect of a drug trafficking charge against several co-offenders framed in common intention, one complication which may arise is when the *mens rea* element against one co-offender is premised on actual knowledge of the nature of the drugs while the *mens rea* element against another co-offender is based on wilful blindness. Indeed, one of the issues before this court arising from the Prosecution's case as well as the finding in the court below is whether it is factually and legally permissible to frame a charge in common intention against co-offenders and convict them under the MDA on the basis of different types of *mens rea*, *ie*, actual knowledge and wilful blindness.

Facts

3 In the morning of 8 February 2017, Pragas Krissamy ("Pragas") and Tamilselvam a/l Yagasvranan ("Tamil") passed Imran Bin Mohd Arip ("Imran") a white plastic bag ("the white plastic bag") with two packets containing 894.2g of granular/powdery substance ("the Drugs"). This was subsequently analysed and found to contain not less than 19.42g of diamorphine (hereinafter referred to by its street name "heroin"). This formed the subject matter of the charges under the MDA against Imran, Pragas and Tamil, who were subject to a joint trial ("the trial") before the High Court judge ("the Judge") below:

(a) Imran was charged under s 5(1)(*a*) read with s 12 of the MDA for abetment by conspiracy with Pragas and Tamil to traffic the Drugs.

(b) Pragas and Tamil were charged under s 5(1)(*a*) of the MDA read with s 34 of the PC for delivering the Drugs.

4 After the trial, the Judge convicted Imran, Pragas and Tamil of their respective charges under the MDA. The Judge found, *inter alia*, that Imran and Tamil had actual knowledge of the nature of the Drugs while Pragas was wilfully blind to the same. As the alternative sentencing regime under s 33B of the MDA was not applicable, the Judge imposed the mandatory sentence of death on Imran, Pragas and Tamil.

5 Imran, Pragas and Tamil, whom we refer to collectively as the appellants, appeal against their conviction and sentence in CA/CCA 22/2019, CA/CCA 23/2019 and CA/CCA 24/2019 respectively.

Factual background in the Agreed Statement of Facts

6 The background facts are not in dispute and are drawn from the Statement of Agreed Facts as well as the Judge's findings in *Public Prosecutor v Imran bin Mohd Arip and others* [2019] SGHC 155 ("the GD").

7 On 8 February 2017, at about 7.05am, officers from the Central Narcotics Bureau ("CNB") observed Tamil and Pragas entering the carpark of Block 518A Jurong West Street 52, after parking their motorcycles at the motorcycle lots behind Block 517 Jurong West Street 52. Tamil and Pragas walked towards Block 518 Jurong West Street 52 ("Block 518"), with Pragas carrying a black haversack. Before Tamil entered the lift at Block 518, Tamil passed Pragas a handphone (GD at [7]).

8 At about 7.09am, Tamil came out of the lift at the fourth floor of Block 518. He met Imran, who came out of #04-139 of Block 518 ("the Unit"). Tamil called Pragas, who answered using the handphone. Pragas then walked up the staircase to the fourth floor of Block 518.

9 Senior Staff Sergeant Wilson Chew Wei Xun ("SSSgt Chew") and Woman Staff Sergeant Cynthia Lee Shue Ching, who were at #07-08 of Parc Vista Tower 1 (a condominium facing Block 518), saw Pragas opening his black haversack and taking out a white plastic bag which he handed over to Imran. Imran then walked back to the Unit with a white plastic bag. Thereafter, Tamil and Pragas walked down the staircase of the block and towards their parked motorcycles (GD at [8]).

10 At about 7.10am, a team of officers from the CNB arrested Pragas and Tamil near their parked motorcycles. They seized, among other things, $6,700 (later marked as exhibit "E1") from Tamil's black waist pouch as well as three handphones (GD at [10]). At about 7.15am, another team of CNB officers raided the Unit and arrested Imran in the kitchen. An initial search of the Unit revealed the following exhibits (GD at [11]–[12]):

(a) ten packets of granular/powdery substance believed to be a controlled drug (marked as "A1A1") contained in a red and silver polka dot plastic bag (marked as "A1A") in a right grey "Everlast" shoe (marked as "A1");

(b) ten packets of granular/powdery substance believed to be a controlled drug (marked as "A2A1") contained in a red and silver polka dot plastic bag (marked as "A2A") in a left grey "Everlast" shoe (marked as "A2");

(c) ten packets of granular/powdery substance believed to be a controlled drug (marked as "A2B1") contained in a red and silver polka dot plastic bag (marked as "A2B") in the same left grey "Everlast" shoe (namely, A2);

(d) the white plastic bag (marked as "D1") containing one piece of cling wrap (marked as "D1A"); and

(e) eight packets of duty-unpaid Marlboro Red cigarettes ("the Marlboro Red cigarettes"). The Marlboro Red cigarettes were subsequently destroyed by the Singapore Customs after Imran was administered a stern warning for the possession of duty-unpaid cigarettes, an offence under the Customs Act (Cap 70, 2004 Rev Ed) ("Customs Act").

11 During a second search of the Unit at about 11.00am, the following items were seized (GD at [13]):

(a) A green and white "City-Link" plastic bag (marked "C1"), which contained a packet of granular/powdery substance believed to be a controlled drug (marked "C1A1A1").

(b) A black plastic bag (marked "C2"), containing two bundles marked "C2A" and "C2B":

(i) Inside C2A, within another clear plastic bag marked "C2A1", was a packet of granular/powdery substance believed to be a controlled drug (marked "C2A1A").

(ii) Inside C2B, within another clear plastic bag marked "C2B1", was a packet of granular/powdery substance believed to be a controlled drug (marked "C2B1A").

12 The heroin which formed the subject matter of the charges against Imran, Pragas and Tamil were contained in bundles C2A1A and C2B1A. The

remaining exhibits found in the Unit containing heroin were not the subject of the charges against Imran, Pragas and Tamil.

13 After an analysis by the Health Science Authority ("HSA"), C2A1A and C2B1A were found to contain not less than 5.79g and 13.63g of heroin respectively, totalling 19.42g (GD at [14]).

The parties' respective cases at the trial

The Prosecution's case

14 The Prosecution sought to prove that Imran had engaged in a conspiracy with Pragas and Tamil to have the Drugs delivered to himself, and that Pragas and Tamil had delivered the Drugs to Imran in furtherance of their common intention. The Prosecution's case against Imran was that he had actual possession of the Drugs, that he had actual knowledge that they contained heroin, and that he possessed the Drugs for the purpose of trafficking.

15 The Prosecution's case against Pragas was that he had actual possession of the Drugs before handing them over to Imran, in furtherance of the common intention between Pragas and Tamil. There is some dispute as to whether the Prosecution's case against Pragas was premised on his actual knowledge of or wilful blindness to the nature of the Drugs. This point is of critical significance to the outcome of Pragas's appeal and will be discussed in some detail below at [87]–[103].

16 The Prosecution's case against Tamil was that Tamil knew and consented to Pragas's possession of the Drugs. Relying on s 18(4) of the MDA, the Prosecution sought to prove that Tamil was deemed to be in possession of the Drugs. The Prosecution sought to prove that Tamil had actual knowledge of

the nature of the Drugs and, in the alternative, pursuant to s 18(2) of the MDA, that he was presumed to have known the nature of the Drugs.

The appellants' defences

17 Whilst accepting that Pragas and Tamil had delivered the Drugs to himself, Imran claimed that he had only intended to order one pound in gross weight of heroin, and not two pounds (the approximate gross weight of the Drugs). This defence, if proved, would reduce the *pure* weight of heroin trafficked to below the threshold for attracting capital punishment under the MDA. At the trial, Imran challenged the admissibility of his first six statements recorded on 8–11 and 14 February 2017 ("the Six Statements") on the basis that a CNB officer had told his colleague (within Imran's hearing) in English that "[i]f he [*ie*, Imran] admits, there's a good chance for him. If he does not admit, bring back his parents to the station" ("the Disputed Statement"). The Six Statements contained various admissions relating to Imran's possession and knowledge of the nature of the Drugs, as well as the knowledge that the Drugs delivered to him would contain two pounds of heroin.

18 Pragas and Tamil both claimed that their common intention was only to deliver contraband cigarettes to Imran. Both of them also claimed, as a matter of *fact*, that they had only delivered contraband cigarettes to Imran (namely, one carton of Marlboro Light cigarettes and another carton of Gudang Garam cigarettes). Even *if* the white plastic bag had contained heroin, both Pragas and Tamil alleged that they did not *know* that it did. Instead, both of them thought that it had contained only contraband cigarettes.

The decision below

19 The Judge found that there was no evidence of the Disputed Statement having been made (GD at [32]). Even if the Disputed Statement were made, the Judge found that it could not objectively amount to a threat, inducement or promise (GD at [33]). The Judge therefore admitted the Six Statements into evidence.

20 The Judge found that there was sufficient evidence of the act of delivery of the Drugs, having regard to the Six Statements and the fact that $6,700 (this representing the market price for two pounds of heroin in 2017) had been found on Tamil (GD at [39] and [41]). The Judge also noted that there was no evidence of a carton of Marlboro Light cigarettes or a carton of Gudang Garam cigarettes in the Unit despite a thorough and lengthy search by the CNB officers on 8 February 2017 (GD at [40]).

21 The Judge found that Imran possessed the Drugs for the purpose of trafficking. Imran did not raise a consumption defence and had admitted to having the Drugs for the purpose of trafficking in his cautioned statement (GD at [19] and [42]). The Judge held that a conspiracy charge requires a "common design common to each of them all" and that on the facts, there was such a "common design" because Imran had communicated with Tamil to arrange for the delivery of the Drugs and Tamil had secured Pragas to assist in the delivery (GD at [45] and [46]).

22 The Judge rejected Imran's defence that Tamil had passed him two pounds of heroin without his knowledge. The Judge was of the view that this defence was raised as an afterthought and was also inconsistent with Imran's statements to the CNB (GD at [47] and [49]). The Judge also noted that Imran

had paid Tamil the sum of $6,700 for the Drugs, this being the market price for two pounds of heroin at the time (GD at [49]).

23 Turning to the charges against Pragas and Tamil, the Judge, referring to the decisions of this court in *Muhammad Ridzuan bin Md Ali v Public Prosecutor and other matters* [2014] 3 SLR 721 at [27] and *Daniel Vijay s/o Katherasan and others v Public Prosecutor* [2010] 4 SLR 1119 ("*Daniel Vijay*") at [76], proceeded to analyse the three elements of a charge under s 34 of the PC: (a) the criminal act element; (b) the common intention element; and (c) the participation element (GD at [22]). In other words, the Prosecution must prove that: (a) a criminal act amounting to the offence of trafficking has occurred; (b) that Pragas and Tamil each had a common intention to do the criminal act; and (c) that Pragas and Tamil each participated in the criminal act.

24 In relation to the common intention element, the Judge held that knowledge that the Drugs contained heroin was a necessary pre-requisite to finding that Pragas had the "common intention" to traffic the same (GD at [70]). In this respect, the Judge applied a modified form of the test for wilful blindness that this court set out in *Adili Chibuike Ejike v Public Prosecutor* [2019] 2 SLR 254 ("*Adili*") in respect of wilful blindness in the context of possession, in order to determine whether Pragas was *wilfully blind* to the nature of the Drugs. We note here that the Judge had issued her decision *before* the decision by this court in *Gobi a/l Avedian v Public Prosecutor* [2020] SGCA 102 ("*Gobi*") was released on 19 October 2020, and that our decision in *Gobi* sets out the essential elements to prove wilful blindness in the context of the knowledge of the specific nature of a drug. Applying the modified *Adili* test, the Judge found that Pragas was wilfully blind to the nature of the Drugs (GD at [79]).

25 The Judge found that, based on Imran's evidence, Tamil had actual knowledge of the nature of the Drugs. The Judge also held that the common intention shared between Pragas and Tamil could be proved even though it was premised on Pragas's wilful blindness and Tamil's actual knowledge of the specific nature of the Drugs.

26 In the alternative, the Judge found that charges under s 5(1)(*a*) of the MDA for trafficking would have been made out against both Pragas and Tamil even *if* the charges under s 34 of the PC could not be proved by the Prosecution (GD at [85] and [107]).

The parties' respective cases on appeal

The appellants' cases

27 Imran submits that the Six Statements to the CNB ought not to have been admitted. Imran claims that the Disputed Statement was made by a male Chinese CNB officer to another CNB officer, and that Imran had heard the Disputed Statement being made. Imran points to the reaction of some of the CNB officers at the trial when they were questioned on the Disputed Statement, in particular, their assertion that the Disputed Statement was "definitely not made" even though one of them admitted that he could not be "100%" sure. Imran therefore urges this court to believe his account. Imran also contends that the Judge had erred in finding that the Disputed Statement, even if it were made, could not operate as an inducement under s 258(3) of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) ("CPC"). Assuming that the Six Statements are not admitted, Imran submits that the remaining evidence does not prove the charge against him beyond a reasonable doubt. At most, the evidence establishes that Imran was guilty of a conspiracy to traffic in only *one* pound of heroin.

28 At the hearing of these appeals, counsel for Tamil, Mr Dhanaraj James Selvaraj ("Mr Selvaraj"), raised a number of points in relation to whether the Prosecution had discharged its burden that Tamil was in possession of the Drugs and whether the Prosecution had established that the Drugs were in fact delivered to Imran. These included the following: (a) whether D1 was in fact the white plastic bag that Pragas passed to Imran; (b) whether D1 contained the Drugs or contraband cigarettes when it was passed to Imran; and (c) whether the Judge ought to have relied on Imran's statements in convicting Tamil.

29 In response to these submissions, we questioned Mr Selvaraj on whether it had ever been *put* to Imran that he had lied about Tamil's involvement in the delivery of the Drugs or that he had a specific motive in implicating Tamil. Mr Selvaraj assured us that this point had, in fact, been put to Imran, but he was unable to refer us to the relevant part of the record of the proceedings. In addition, Mr Selvaraj asserted without any proper basis that Imran had, in his contemporaneous statement, when asked to identify various drug exhibits by the CNB officer, failed to specifically link the Drugs which formed the subject matter of the charges to the white plastic bag (namely, D1) and the two bundles (namely, C2A and C2B). The substance of his submission was that Imran had *falsely* identified certain drugs as having been received from Pragas when that was not in fact the case. We asked Mr Selvaraj several times to confirm whether this was in fact his position, to which Mr Selvaraj responded affirmatively that it was. This was a point of some significance as, if true, it would mean that Imran had implicated Tamil in his contemporaneous statement by falsely claiming that the Drugs were delivered by Tamil through Pragas. Again, we queried Mr Selvaraj as to whether this point was explored at the trial, to which Mr Selvaraj replied that he was unable to recall if it had.

30 On 23 November 2020, Mr Selvaraj sent a letter to court apologising for his conduct at the hearing and highlighting what he deemed to be relevant parts of the record of the proceedings which he claimed he had been unable to provide at the hearing. We pause here to note that the letter was an attempt to raise additional (and irrelevant) arguments without the leave of court. We shall discuss the contents of the letter as well as Mr Selvaraj's conduct at the hearing in greater detail below (at [80]–[83]).

31 Finally, Pragas submits as follows:

(a) The Prosecution has failed to prove beyond a reasonable doubt that Pragas had delivered the Drugs to Imran. There were a number of deficiencies in the Prosecution's case, especially in the evidence of SSSgt Chew and Sergeant Yogaraj s/o Ragunathan Pillay ("SGT Yogaraj"). The Judge was also wrong to find that the CNB officers had performed a "thorough and lengthy search" of the Unit. Further, there had been destruction of potentially vital evidence, namely, the Marlboro Red cigarettes which were found in the Unit. Apart from Imran's statements, there was no objective evidence to establish that the heroin had been delivered by Pragas. Imran's statements should therefore be excluded or should be accorded little weight.

(b) The Judge erred in finding that Pragas was wilfully blind to the nature of the Drugs.

(c) It is not possible to make a finding of common intention premised on the actual knowledge of one accomplice (namely, Tamil) and the wilful blindness of another (namely, Pragas). Given that the Judge had found that Pragas did not have actual knowledge of the nature

of the Drugs, it was impossible for him to have agreed with Tamil to jointly deliver the Drugs to Imran.

The Prosecution's case

32 The Prosecution's case on appeal seeks to uphold all of the Judge's findings, save in relation to the Judge's decision in declining to make a finding of actual knowledge of the nature of the Drugs as against Pragas. The Prosecution argues that its case against Pragas was premised on actual knowledge of the nature of the Drugs and that the Judge erred in declining to make that finding.

The issues to be determined

33 The issues that arise in these appeals are as follows.

34 First, whether the Prosecution has proved the charge against Imran. In this regard, the following sub-issues arise:

(a) whether Imran's Six Statements are involuntary under s 258(3) of the CPC and should therefore not be admitted; and

(b) if the Six Statements are admitted into evidence, whether Imran only intended to order one, and not two, pounds of heroin.

35 Second, whether the Prosecution has proved that Pragas and Tamil delivered the Drugs to Imran. This requires us to consider:

(a) whether there was any reason that Imran's statements ought not to be used as a basis for finding that the Drugs had been passed to him by Pragas;

(b) whether Imran's contemporaneous statement referred to the Drugs or to some other drugs that were not the subject of the charges against the appellants;

(c) whether D1 was in fact the white plastic bag passed by Pragas to Imran; and

(d) whether D1 contained the Drugs or contraband cigarettes.

36 Third, more specifically in relation to Pragas, the following sub-issues arise:

(a) whether the Prosecution's case against Pragas at the trial was premised on actual knowledge of or wilful blindness to the nature of the Drugs;

(b) in the event the Prosecution's case against Pragas at the trial was premised on wilful blindness, whether the Prosecution has proved beyond a reasonable doubt that Pragas was wilfully blind to the nature of the Drugs; and

(c) whether it is permissible for the Prosecution to prove a common intention between Pragas and Tamil on the basis of Pragas's wilful blindness to and Tamil's actual knowledge of the nature of the Drugs.

Issue 1: The admissibility of the Six Statements

Admissibility of an accused person's statements under s 258 of the CPC

37 We begin our analysis of this issue by setting out the relevant law on s 258 of the CPC, which provides:

Admissibility of accused's statements

258.—(1) Subject to subsections (2) and (3), where any person is charged with an offence, any statement made by the person, whether it is oral or in writing, made at any time, whether before or after the person is charged and whether or not in the course of any investigation carried out by any law enforcement agency, is admissible in evidence at his trial; and if that person tenders himself as a witness, any such statement may be used in cross-examination and for the purpose of impeaching his credit.

(2) Where a statement referred to in subsection (1) is made by any person to a police officer, no such statement shall be used in evidence if it is made to a police officer below the rank of sergeant.

(3) The court shall refuse to admit the statement of an accused or allow it to be used in the manner referred to in subsection (1) if the making of the statement appears to the court to have been caused by any inducement, threat or promise having reference to the charge against the accused, proceeding from a person in authority and sufficient, in the opinion of the court, to give the accused grounds which would appear to him reasonable for supposing that by making the statement he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him.

Explanation 1 — If a statement is obtained from an accused by a person in authority who had acted in such a manner that his acts tend to sap and have in fact sapped the free will of the maker of the statement, and the court is of the opinion that such acts gave the accused grounds which would appear to the accused reasonable for supposing that by making the statement, he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him, such acts will amount to a threat, an inducement or a promise, as the case may be, which will render the statement inadmissible.

Explanation 2 — If a statement is otherwise admissible, it will not be rendered inadmissible merely because it was made in any of the following circumstances:

(*a*) under a promise of secrecy, or in consequence of a deception practised on the accused for the purpose of obtaining it;

(*aa*) where the accused is informed in writing by a person in authority of the circumstances in section 33B of the Misuse of Drugs Act (Cap. 185) under which life imprisonment may be imposed in lieu of death;

> (*b*) when the accused was intoxicated;
>
> (*c*) in answer to questions which the accused need not have answered whatever may have been the form of those questions;
>
> (*d*) where the accused was not warned that he was not bound to make the statement and that evidence of it might be given against him;
>
> (*e*) where the recording officer or the interpreter of an accused's statement recorded under section 22 or 23 did not fully comply with that section; or
>
> (*f*) where an accused's statement under section 22 or 23 is in writing, when section 22(5) or 23(3B) (as the case may be) requires the statement to be recorded in the form of an audiovisual recording.

38 In our recent decision in *Sulaiman bin Jumari v Public Prosecutor* [2020] SGCA 116 ("*Sulaiman*"), this court considered the issue of whether the contemporaneous statement recorded from the appellant was admissible as evidence. The appellant sought to exclude the contemporaneous statement from admission on the basis that the recording officer had offered him an inducement by telling him to "make it fast then you go and rest" (*Sulaiman* at [2] and [14]). In considering this issue, the court set down the following principles in relation to admissibility under s 258(3) of the CPC (*Sulaiman* at [39] and [40]):

> (a) The primary requirement for admissibility under s 258(3) is that the statement must be a voluntary one. This turns on whether any of the elements mentioned in s 258(3) of the CPC was present in the statement-taking process.
>
> (b) The court must embark on a two-stage process. First, the court must consider whether there was any inducement, threat or promise having reference to the charge against the accused person. If any of these was present, the court next considers whether the said inducement, threat or promise was such that it would be reasonable for the accused person

> to think that he would gain some advantage or avoid any "evil" (meaning adverse consequences) in relation to the proceedings against him.

39 Apart from the above, we would add that it is also established law that *self-perceived* inducements are not operative inducements under s 258(3) of the CPC. In this court's decision in *Lu Lai Heng v Public Prosecutor* [1994] 1 SLR(R) 1037 ("*Lu Lai Heng*"), the appellant formed the impression that his mother, Mdm Teng, could be in trouble because the drugs in question were found in her room. At the time the appellant's statement was recorded, the appellant was still worried that his mother could get into trouble. It was his own understanding that the recording officer, ASP Lim, would let his mother go free in a day or two if he admitted that he owned the drugs (*Lu Lai Heng* at [8]). It was held that the trial judge had misdirected himself in excluding the written statement as the appellant had suffered from a self-perceived inducement (*Lu Lai Heng* at [19]):

> … The evidence was quite clear that ASP Lim or any other person in authority did not hold out *to* the appellant that his mother, Mdm Teng, would not be arrested or would be set free in a day or two if the appellant admitted that the drugs found in the cupboard in Mdm Teng's room were in fact his. This was the appellant's own perceived impression. That was what he said in evidence. Such a self-perceived inducement, in our judgment, could not in law amount to an inducement or promise within the meaning of s 24 of the Evidence Act (Cap 97, 1990 Ed) (which incidentally is the same within the proviso to s 122(5) of the Criminal Procedure Code (Cap 68)). On the evidence, no such inducement or promise proceeded from ASP Lim or any other person in authority. In the words of Lord Salmon in *DPP v Ping Lin* [1976] AC 574; [1975] 3 All ER 175 at 189 this hope was self-generated; it certainly was not excited by anything said or done by ASP Lim or anyone else. Accordingly, the learned trial judge should not have excluded the written statement. [emphasis added]

40 Although the above observations were made in the context of s 122(5) of the former Criminal Procedure Code (Cap 68, 1985 Rev Ed), it is clear that

self-perceived inducements are similarly not operative inducements under s 258(3) of the CPC (see *Public Prosecutor v Mohamed Ansari bin Mohamed Abdul Aziz and another* [2019] SGHC 268 at [31] and *Public Prosecutor v Ong Seow Ping and another* [2018] SGHC 82 at [43]).

41 We should also make one final point clear, which is that under the first stage of the inquiry in *Sulaiman*, the inducement, threat or promise having reference to the charge must be made "*against* the *accused person*" [emphasis added] (*Sulaiman* at [39]). In other words, an inducement, threat or promise must be directed *at* the accused person. It does not suffice if the statement was made from one individual to another (who was not the accused person). This would not constitute an operative inducement under s 258(3) of the CPC. There is no known decision of any court rendering a statement inadmissible on account of an inducement, threat or promise being made to an individual other than the accused person. We do, however, acknowledge that there may be cases where the *reliability* of an accused person's statement might be compromised as a result of something spoken between two other individuals, but this would, in our view, bear only on the *weight* of the statement and not its *admissibility*.

Our decision on admissibility

42 Having set out the relevant principles, we turn to examine the issue before us. At the ancillary hearing, Imran claimed as follows:

> … That morning [on 8 February 2017], the CNB officers found the drugs and they told me to sit in the living room. They showed me the things and they ask me questions. They ask me who does – to whom are those things belong to [*sic*]. At that time, I heard the voice of a CNB officer talking behind me, having a conversation with his colleague in a low tone. This CNB officer was talking to his colleague in English, 'If he admits, that's [*sic*] a good chance for him. If he doesn't admit, we bring back his parents to the station.'

43 Imran was unable to specifically identify *which* CNB officer had made the Disputed Statement, and to whom. During the cross-examination of Imran by deputy public prosecutor ("DPP") Chin Jincheng ("DPP Chin"), Imran stated that the Disputed Statement was made in the context of a conversation between two CNB officers, but that he believed that since the conversation was talking about him, the Disputed Statement was also directed at him.

44 At the hearing of these appeals, counsel for Imran, Mr Daniel Chia Hsiung Wen, submitted that it was his client's position that a Chinese CNB officer had made the Disputed Statement, but that that particular CNB officer had not been called as a witness for the Prosecution at the trial. This was not, however, seriously explored at the trial. This was perhaps understandable given that such vague references could hardly be helpful to identify the two CNB officers who were allegedly involved in the Disputed Statement.

45 We note that all 12 of the Prosecution's witnesses in the ancillary hearing either denied making or hearing the Disputed Statement. We also agree with the Judge's observation that the Disputed Statement was raised as an afterthought, given Imran's failure to follow up with any of the CNB officers to verify that he had heard the statement correctly or to seek clarification from anyone regarding the Disputed Statement (GD at [33]). The Judge had the benefit of hearing all of the Prosecution's witnesses as well as Imran and was in a position to assess their respective credibility. There is no reason for us to disturb this factual finding by the Judge and we decline to do so.

46 In any event, the alleged Disputed Statement was clearly *not* directed *at* Imran, the accused person in question, but was purportedly made in the context of a conversation between two CNB officers. The alleged Disputed Statement cannot therefore constitute an inducement under s 258(3) of the CPC. Further,

any inducement suffered as a result of the Disputed Statement being made was, at best, a self-perceived inducement. Nobody told Imran that he would be offered a "good chance" with reference to the charge. It is also unclear to us what "a good chance" meant. The Six Statements were made over the course of seven days from 8 February to 14 February 2017. Any inducement suffered as a result of the alleged Disputed Statement was very likely self-induced.

47 From an *operational* perspective, we also see nothing wrong with the Disputed Statement itself as between two CNB officers (even if it was made). Where an accused person is found with drugs in a house occupied by his parents and the accused person refuses to co-operate or denies ownership of the drugs, it is only reasonable that the CNB officers would want to question the parents, being the other occupants of the premises.

48 For completeness, we also consider the issue of admissibility under the second stage (*Sulaiman* at [39]), which is whether Imran was seeking to avoid any "evil" or gain any advantage in connection with the charge by making the Six Statements. In this regard, we find that far from seeking to avoid any evil or to gain any advantage with reference to the charge, Imran was simply attempting to avoid causing any inconvenience to his aged persons, who were present in the Unit at the time of the arrest. The following exchange in the ancillary hearing between counsel for Imran at the time, Mr Masih James Bahadur, and Imran is highly relevant:

> A I was afraid for my parents. My parents are old and sickly. I was worried about them. I was worried that they might be arrested and brought back to the station.
>
> …
>
> A I was afraid. My mother is old and sickly, and I do not want anything to happen to her.
>
> …

> Q Okay. You remember the learned DPP asked you, 'But the CNB officers didn't tell you this what'? Neither did you ask the CNB officers, 'Eh, why are you bring [*sic*] in my parents to the---why do you want to bring my parents to the station'?
>
> A *I did not ask. At that time, I cannot think clearly. I was just thinking of how* to *protect my parents so I made the admission.*
>
> [emphasis added]

49 In the circumstances, we find that the Six Statements were voluntarily made and admit them. We should add that the Six Statements were also highly textured confessions which possessed a ring of truth. We find it unbelievable that Imran would have made such detailed confessions merely on account of hearing the Disputed Statement being made by one CNB officer to another in a conversation which did not involve him. We would therefore explore the contents of the Six Statements below in our assessment of Imran's defence that he had only intended to order one pound of heroin from Tamil.

Our decision on whether Imran intended to order one or two pounds of heroin

50 We now consider Imran's only defence, which is that he had only intended to order one pound and not two pounds of heroin.

51 In our judgment, Imran's statements clearly establish that he had intended to order two pounds of heroin from Tamil in exchange for a sum of $6,700:

(a) In Imran's contemporaneous statement recorded on 8 February 2017, Imran admitted that Tamil had delivered two bundles of heroin to him, and that he paid Tamil $6,700 for the heroin.

(b) In his cautioned statement recorded on the following day, Imran admitted, without qualification, to an initial charge of trafficking three bundles and 30 packets of granular/powdery substance believed to contain heroin.

(c) In his investigative statements recorded on 10 February 2017, Imran explained in some level of detail that he was to meet Tamil and Pragas as they were supposed to pass him "*2* pounds" [emphasis added] of heroin in exchange for a sum of $6,700. Significantly, Imran admitted to *knowing* that the white plastic bag would contain two bundles of heroin when Pragas passed it to him. More specifically, Imran's account was that Tamil had called him the day before, on 7 February 2017. While Imran had *initially* informed Tamil that he did not want to buy any more heroin, he eventually agreed to do so as Tamil claimed that he had no place to store the heroin. The investigative statements also reveal that although Imran had initially agreed to take only "*1* carton" [emphasis added] (a term used to disguise the delivery of "bundles" of heroin), he eventually *agreed* to buy "*2* cartons" [emphasis added] for $6,700.

(d) In the investigative statement recorded on 11 February 2017, Imran identified the $6,700 seized and marked as "E1" as the sum of money which he had passed to Tamil before his own arrest. According to Imran, this was the money that was meant to pay Tamil for two pounds of heroin.

52 Apart from the above statements, there is also clear objective evidence in the form of the sum of $6,700 which was passed from Imran to Tamil and found on Tamil following his arrest.

53 As the Judge rightly found, this was a "clear nexus to the sale of two pounds of heroin because it reflected the market price for the same" (GD at [49]). At the trial, Imran did not challenge that this represented the applicable market price for two pounds of heroin at the material time. Instead, Imran's explanation for the $6,700 was that it was partly a loan to Tamil and partly a payment for an earlier delivery of one pound of heroin on 3 or 4 February 2017 on behalf of an individual known as "55". Apparently, "55" was a 30-year-old Singaporean Indian man with no tattoos and short hair (GD at [47]). It is telling that Imran provided this explanation belatedly in his fifth (and final) investigative statement recorded on 18 December 2017. Moreover, this account blatantly contradicts Imran's consistent and coherent account in the above-mentioned statements (see above at [51]) that he had placed an order for *two* pounds of heroin, and that he *knew* that he was ordering *two* pounds of heroin in exchange for the sum of $6,700. In the circumstances, we agree with the Judge's finding in the GD at [49] that this explanation was an afterthought and therefore reject it.

Issue 2: The charge against Tamil

54 We propose to deal with the issues concerning Tamil in the following order:

(a) First, given the significance of Imran's statements in a number of issues that follow, whether there is any reason that the court ought not to rely on Imran's statements to the CNB in convicting Tamil.

(b) Second, whether Imran's contemporaneous statement referred to the Drugs or to some other drugs that were not the subject of the charges against the appellants.

(c) Third, whether D1 was the same white plastic bag which Pragas handed over to Imran (namely, the white plastic bag).

(d) Fourth, what were the contents of the white plastic bag: the Drugs or contraband cigarettes.

55 Finally, we deal with Mr Selvaraj's conduct at the hearing as well as his letter of 23 November 2020 below at [80]–[83].

Use of Imran's statements against Tamil

56 As regards the first issue, Mr Selvaraj submitted that it was put to Imran that he had lied about Tamil's involvement and that Imran had a specific motive for implicating Tamil. More generally, he argued that it was unsafe for the court to rely on Imran's statements in convicting Tamil. This was because Imran had changed various aspects of his testimony at the trial and was therefore an unreliable witness. Mr Selvaraj also contended that Imran's statements were uncorroborated by any objective evidence. Although Mr Selvaraj, at the hearing, did not identify any specific motive that Imran might have had in implicating Tamil, he suggested in his letter of 23 November 2020 that Imran lied in his statements in order to "escape the death penalty".

57 Section 258(5) of the CPC governs the use of a co-accused person's confession against an accused person if they are being tried jointly for the same offence.

58 The Judge referred to s 258(5) of the CPC as amended by s 74 of the Criminal Justice Reform Act 2018 (No 19 of 2018) as well as ss 258(5A) and (5B) of the Criminal Procedure Code (GD at [56]–[58]). However, it appears that the Judge was strictly incorrect in referring to the amended s 258(5), as

reg 4(2) of the Criminal Justice Reform (Saving and Transitional Provisions) (No. 2) Regulations 2018 (GN No S 728/2018) provides that "section 258(5), (5A) and (5B) of the [CPC] does not apply to a determination of whether the court may take into consideration a confession, made during an investigation of an offence, as against a person (other than the maker of the confession), if that investigation began before 31 October 2018". In this case, given that the investigations against the appellants began on 8 February 2017, it is the predecessor version of s 258(5) of the CPC that applies:

> (5) When more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the court may take into consideration the confession as against the other person as well as against the person who makes the confession.
>
> *Explanation*— —'Offence' as used in this section includes the abetment of or attempt to commit the offence.

59 Nonetheless, nothing in this case turns on the difference between the new and the predecessor version of s 258(5) of the CPC.

60 In *Norasharee bin Gous v Public Prosecutor and another appeal and another matter* [2017] 1 SLR 820 ("*Norasharee*"), this court held that an accused person may be convicted solely on the basis of a co-accused person's testimony, but the co-accused person's confession has to be very compelling such that it can on its own satisfy the court of the accused's guilt beyond a reasonable doubt. It would also be relevant to consider the state of mind and the incentive of the co-accused person in giving evidence against another. If the accused person alleges that the co-accused has a motive to frame him, this must be proved as a fact (*Norasharee* at [59]).

61 In this case, it should be emphasised that the case against Tamil does not rest solely on Imran's statements, as the sum of $6,700 was found on Tamil when he was arrested also comprises objective evidence against him. Nonetheless, given the Prosecution's heavy reliance on Imran's statements in its case against Tamil, we examine whether there is any reason why we ought not to rely on Imran's statements in the case against Tamil.

62 In our judgment, it is highly material that Imran's Six Statements were all statements in which Imran essentially incriminated *himself* and incidentally incriminated *Tamil*. Such statements are generally more reliable because they are made against the interest of the maker. We should also state that such statements are, generally speaking, even more reliable where the maker incriminates himself in a *capital offence*. This category of statements must be distinguished from statements where the maker seeks to exculpate himself but at the same time incriminate the co-accused person. In such cases, the court will exercise special scrutiny to determine the reliability and weight of the said statements.

63 Save for the final statement from Imran recorded on 18 December 2017, there was no attempt by Imran to downplay his role in the commission of the offence or to exculpate himself in any way. This is a strong factor that we would take into account in deciding to give the Six Statements significant weight. The fact that Imran had incriminated himself, in a capital offence no less, supports the view that he was speaking the truth when he gave the Six Statements.

64 Further, as we explained during the hearing, notwithstanding the fact that Imran had changed some aspects of his evidence at the trial, Imran's evidence in his statements was consistent as to the specific fact-in-issue, which is whether the Drugs had been delivered to Imran on the morning of 8 February

2017. His shifting testimony pertained primarily to the following three matters: (a) the amount of heroin which Imran had ordered from Tamil; (b) the explanation for the sum of $6,700 being a part-loan; (c) the story about "55"; and (d) his claim that he worked for Tamil as his "courier". If anything, the fact that these matters were only raised at the trial strongly suggests that these were merely afterthoughts. Imran's consistent evidence at the trial concerning the delivery of the Drugs also shows that he was speaking the truth on this crucial matter.

65 Turning to the question of motive, we do not accept that Imran had implicated Tamil in order to "escape the death penalty". We think it somewhat bizarre that Imran would have incriminated himself in a capital offence whilst also implicating Tamil in order to escape the death penalty. There is no suggestion that Imran was unaware at the material time he gave his statements that he might face the death penalty. Indeed, in his cautioned statement, Imran admitted to the offence without qualification, despite being told that he potentially faced the death penalty for the charge. We therefore find that there was no motive for Imran to have incriminated Tamil in relation to the Drugs. In the circumstances, we see no reason not to use Imran's Six Statements against Tamil and give them significant weight.

Imran's contemporaneous statement

66 We turn now to the second issue concerning Imran's contemporaneous statement. Mr Selvaraj submitted that Imran's reference to drugs in the contemporaneous statement, made in response to the questions posed by CNB officer Staff Sergeant Bukhari bin Ahmad ("SSgt Bukhari") as to whom he had received certain bundles of drugs from (in particular, Question 10), was *not* referring to the Drugs which formed the subject matter of the charges, but

instead referred to some yet unidentified drugs which were not the subject of these criminal proceedings. Such a submission expectedly attracted questions from the court as to its source and accuracy. Mr Selvaraj drew a blank when probed to provide his evidential basis. As it turned out with the assistance of counsel for the Prosecution, DPP Wong Woon Kwong, this submission was plainly wrong.

67 We first set out the English translation of the relevant questions and answers in Imran's contemporaneous statement:

> Q7 What is this? (while pointing to a plastic bag containing 2 plastic bag [*sic*] with sandy brown content)
>
> A7 Heroin.
>
> Q8 Whose heroin are all these?
>
> A8 Mine.
>
> Q9 What are all these Heroin for?
>
> A9 To sell
>
> Q10 *Where did you get all these Heroin from?*
>
> A10 *The two packet* [*sic*] *from my friend 'Tamil'. The one roll and the three packets of red plastic bag are all old things. From a Malaysian kid. I lost contact.*
>
> [emphasis added]

68 In our judgment, this was a seriously misconceived submission on the part of Mr Selvaraj. As we mentioned above, we asked Mr Selvaraj on multiple occasions whether he had explored this issue at the trial (namely, that Imran had *lied* in his response to Question 10 by stating that the two packets were from Tamil, and that Imran was not in fact referring to the Drugs that formed the subject matter of the charge in his responses in the contemporaneous statement), to which Mr Selvaraj responded in the affirmative. He was, however, unable to

provide us with the necessary references in the record of the proceedings. Nor were these references provided to us in his letter of 23 November 2019.

69 In any event, having examined the record of the proceedings, we are satisfied that Imran's response to Question 10 was indeed referable to the Drugs that formed the subject matter of the charges. SSgt Bukhari, who recorded the contemporaneous statement from Imran, was a witness for the Prosecution at the trial. During his examination-in-chief, SSgt Bukhari was asked to refer to Question 7 of the contemporaneous statement and to identify the photograph showing the "two plastic bags with sandy brown content":

> Q Now question 7, you were pointed to a plastic bag containing two plastic bags with sandy brown content. *Which photograph shows this?*
>
> A *P51, Your Honour.*
>
> Q *And the two plastic bags are C2A and C2B, correct?*
>
> A *Yes, Your Honour.*
>
> Q When you showed [Imran] the two plastic bags, did they look as they do in the photo?
>
> A Yes, Your Honour.
>
> [emphasis added]

70 In other words, SSgt Bukhari's evidence was clear that Question 7 of the contemporaneous statement was referable to the bundles marked as C2A and C2B, which contained the Drugs that formed the subject matter of the charges. Both C2A and C2B were photographed in P51. Read in context with Questions 7, 8 and 9, it is apparent that Imran was indeed referring, in his response to Question 10, to the *Drugs*. In this response, Imran unequivocally stated that the Drugs were received from *Tamil*. Having reviewed the record of the proceedings, we also note that Mr Selvaraj, contrary to his oral submissions at

the appeal hearing, had failed to seriously explore the accuracy of the contemporaneous statement at the trial. Indeed, Mr Selvaraj declined to cross-examine SSgt Bukhari at the trial below, stating that he had "no questions for this witness".

71 In the circumstances, there can be no doubt that Imran was referring to the Drugs which formed the subject matter of the charges in his responses to Questions 7 to 10 in the contemporaneous statement.

Whether D1 was the white plastic bag that Pragas handed to Imran

72 Next, we consider whether D1 was the same white plastic bag that Pragas had handed over to Imran (namely, the white plastic bag). We first set out Imran's account of how the Drugs were handled after the white plastic bag had been passed to him.

73 In his first investigative statement, Imran stated as follows:

> … [Pragas] then took out a white plastic bag from the haversack he was carrying and pass me [*sic*] the plastic bag. I already knew that the plastic bag contains 2 pounds of heroin. I walked back to my house and 'Tamil' and [Pragas] also left the 4th floor lift lobby. Once I came back to my house, I open up [*sic*] the white plastic bag and confirmed that there were 2 big bundles of heroin. I took out the 2 bundles of heroin from the white plastic bag and put it in a black plastic bag. *I then placed the 2 bundles of heroin which was already in my black plastic bag, on the top shelf of my storeroom. I left the white plastic bag on the bed in my bedroom.* … [emphasis added]

74 During the recording of the second investigative statement, Imran was asked to identify various photographs of drug exhibits that were found in the Unit. Here, Imran stated as follows:

> I am now shown the photographs of the drugs that were found in my house. The drugs marked 'C2A' and 'C2B' are the 2 pounds of heroin that I collected from [Pragas] on the morning

> of my arrest. *The black plastic bag marked 'C2' is my own plastic bag. The plastic bag marked 'D1' is the plastic bag that contains the 2 pounds of heroin that I collected from [Pragas].* The cling wrap marked 'D1A' is already in the white plastic bag when I took from [Pragas] [*sic*]. It does not belong to me. [emphasis added]

75 At the trial, Imran's evidence remained consistent. He again identified photograph P51, which showed the bundles marked C2A and C2B, as the photograph of the bundles which he had taken out from the white plastic bag (namely, D1) and placed into a black plastic bag (namely, C2). As in his first investigative statement, Imran explained that he had left the white plastic bag (namely, D1) on his bed after transferring the Drugs into the black plastic bag (namely, C2). It does not appear from the record of the proceedings that it was ever put to Imran that D1 was not in fact *the white plastic bag* which Pragas had passed to Imran. Neither did Mr Selvaraj or Mr Singa Retnam, counsel for Pragas, refer us to any such exchange at the trial.

76 Given Imran's consistent and detailed evidence in his statements and at the trial, as well as his clear identification of D1 as the white plastic bag which Pragas had passed to him, we are satisfied that D1 was in fact the bag that Pragas had passed to Imran. This was plainly contrary to Mr Selvaraj's submission that D1 might not be the white plastic bag that Pragas had passed to Imran.

Whether the white plastic bag contained the Drugs or contraband cigarettes

77 Finally, we consider whether the white plastic bag contained the Drugs or contraband cigarettes. Both Pragas and Tamil claimed that they had delivered two cartons of contraband cigarettes (namely, one carton of Marlboro Light cigarettes and another carton of Gudang Garam cigarettes). Mr Selvaraj pointed to the fact that the Marlboro Red cigarettes had been destroyed by the Singapore Customs and that SGT Yogaraj had testified at the trial that there were *other*

white plastic bags which he did not open. The "other white plastic bags" might have, according to Mr Selvaraj, contained the two cartons of contraband cigarettes.

78 In our view, the fact that the Marlboro Red cigarettes were destroyed by the Singapore Customs does not corroborate the allegation that Pragas and Tamil had delivered only contraband cigarettes to Imran. This is because the Marlboro Red cigarettes were in *packet* form, whereas Pragas and Tamil's claim was that they had delivered *cartons* of contraband cigarettes. Notwithstanding the presence of other white plastic bags in the Unit, we are satisfied from Imran's evidence that the white plastic bag marked D1 contained the Drugs. The fact that $6,700 (this representing the market price for two pounds of heroin in 2017) was found on Tamil shortly after the delivery of the white plastic bag marked "D1" to Imran is also strong objective evidence that the Drugs were delivered to Imran.

79 Given the above, we find that the Prosecution has proved the delivery of the Drugs to Imran beyond a reasonable doubt. In the same vein, we reject *Pragas's* attempts to impugn the Judge's finding given that his contentions overlap substantially with Mr Selvaraj's submissions on Tamil's behalf at the hearing.

80 Finally, we make some observations about Mr Selvaraj's conduct during the hearing and the contents of his letter of 23 November 2020.

81 While it is undoubtedly the duty of every counsel to put forward all available arguments in the best interest of his client, it is equally important for counsel to recognise his overarching duty as an officer of the court (see *Public Trustee and another v By Products Traders Pte Ltd and others* [2005] 3 SLR(R)

449 at [26] and [35]; *Mia Mukles v Public Prosecutor* [2017] SGHC 252 ("*Mia Mukles*") at [6]). The balancing of these twin duties requires counsel to make submissions in a responsible manner (*Mia Mukles* at [6]). We find it deeply unsatisfactory that Mr Selvaraj had on several occasions made various serious submissions but was unable to provide the necessary references to the record of the proceedings when questioned. We highlight Mr Selvaraj's allegations in relation to Imran's contemporaneous statement as one example. These allegations, if proved, might have seriously impacted the charge against Tamil. Having independently surveyed the record of the proceedings *as well as* the references provided to us in the letter of 23 November 2020, which was sent *without* the leave of court, we are satisfied that Mr Selvaraj's submissions in relation to Imran's contemporaneous statement had not been put to Imran at the trial and were hence in breach of the rule in *Browne v Dunn* (1893) 6 R 67 ("*Browne v Dunn*").

82 It is *equally* the duty of counsel appearing for an appellant to adequately prepare for the appeal and to assist in the proper conduct of the hearing by providing the court with the necessary references to the record of the proceedings, particularly where counsel had charge of the matter at the trial below. Counsel must come prepared and should generally be familiar with the matters that transpired below at the trial. This duty applies with greater force in a capital matter where the accused person's life is at stake.

83 Mr Selvaraj attempted to remedy his failure to respond to our questions at the hearing by way of his letter of 23 November 2020. Here, his excuse was that he was unable to answer the court's questions as he had concentrated on "other issues" which he thought were more relevant. It should be made clear, however, that the questions from the court during the appeal *arose directly* from Mr Selvaraj's oral submissions. In the circumstances, it is no excuse for

Mr Selvaraj to say that he had been concentrating on "other issues", as these were the *very same* issues which Mr Selvaraj had *himself* decided to raise to this court. In any event, as has been shown to be the case at [66] to [76] above, the references provided in the letter do not address our queries posed at the hearing, particularly in relation to Imran's contemporaneous statement.

Issue 3: The charge against Pragas

84 Given our finding that the Drugs had, in fact, been delivered to Imran, the "criminal act" element is also satisfied in respect of the charge against Pragas.

85 The only remaining issue to be considered is whether the "common intention" element is satisfied. On this issue, the Judge held that Pragas's knowledge that the plastic bag contained heroin was a necessary pre-requisite to any finding that he had a common intention to traffic the same (GD at [70]). However, the Judge deemed that it was sufficient for the Prosecution to prove that Pragas was wilfully blind to the nature of the Drugs, wilful blindness being the *legal* equivalent of actual knowledge. The Judge, however, declined to make a finding of actual knowledge as she was of the view that the Prosecution did not contend that actual knowledge should be inferred from the circumstances (GD at [72]):

> In this case, which was heard prior to the release of the judgment in *Adili*, the Prosecution took the view, reflected in their closing submissions, that wilful blindness was used in the first sense, relying on *Nagaenthran a/l K Dharmalingam v Public Prosecutor* [2011] 4 SLR 1156 ('*Nagaenthran*'). The deputy public prosecutor elaborated during oral response time that what was meant was 'lawyers' speak for actual knowledge'. At the same time, the Prosecution did not contend that actual knowledge should be inferred from the circumstances, their submissions distinguished such a scenario, drawing a distinction with *Public Prosecutor v Koo Pui Fong* at [14]. On the

> facts of this case, and in view of the Prosecution's stance, I did not make an inferential finding that Pragas in fact knew that the parcel contained heroin. I was of the view, beyond reasonable doubt, that Pragas was wilfully blind, in the second sense adopted by the Court of Appeal in *Adili*, to the fact that the white plastic bag he delivered contained two bundles of heroin. My reasons for this finding follow.

86 Although the Judge's decision itself predates *Adili*, the Judge issued the GD *after* the release of the judgment in *Adili*. The Judge therefore proceeded to consider whether the Prosecution had proved that Pragas was wilfully blind to the nature of the Drugs by *modifying* the three elements set out in *Adili* at [51] and [83] (see the GD at [74]–[79]). It should be noted that *Adili* concerned the presumption of *possession* under s 18(1) of the MDA and the relevance of the doctrine of wilful blindness in that context. In contrast, the present case relates to the *knowledge of the nature of the drugs* and the presumption of knowledge under s 18(2) of the MDA. In *Gobi*, we explained the doctrine of wilful blindness in the context of the element of knowledge of the nature of the drugs. The Judge was thus without the benefit of our pronouncements in *Gobi* at the time she made her decision. For these reasons, we directed the Supreme Court Registry to invite the parties to tender further written submissions addressing us on the impact, if any, of our decision in *Gobi* on these appeals.

Whether the Prosecution's case against Pragas was premised on actual knowledge or wilful blindness

87 In brief, the Prosecution submits in its further submissions that *Gobi* is not relevant to the outcome of these appeals, with its submissions focussing particularly on Pragas's appeal. The Prosecution argues that its case against Pragas at the trial was premised on his actual knowledge of the nature of the Drugs and not his wilful blindness to the same. The Judge ought therefore to have made a finding of actual knowledge or, alternatively, to have found that Pragas had failed to rebut the presumption of knowledge under s 18(2) of the

MDA. At the hearing of these appeals, the Prosecution accepted that, in line with our decision in *Gobi*, recourse to the s 18(2) presumption would be foreclosed if its case against Pragas was not premised on actual knowledge. As a result, the Prosecution would be obliged to make out its case against Pragas beyond a reasonable doubt. Specifically, the Prosecution submits as follows:

(a) The put questions to Pragas towards the middle and at the end of his cross-examination show that its case against Pragas was one of actual knowledge that the Drugs were heroin.

(b) Unlike in *Gobi*, there was no put question by the Prosecution that implicitly accepted that Pragas had believed that he was carrying contraband cigarettes.

(c) Unlike in *Gobi*, the Prosecution was not made to clarify its case immediately following its put question that Pragas had no reason to trust the person who told him what the bundles contained. In *Gobi*, the trial judge had specifically asked if the Prosecution was submitting that the applicant should not have believed or did not believe what he had been told about the nature of the drugs in question, to which the Prosecution replied that its position was the former.

(d) Although the decision in *Gobi* emphasised that less significance ought to attach to the Prosecution's closing submissions at the trial, as opposed to how the Prosecution crystallised its case at the end of the cross-examination, in the present case, the Prosecution had made assertions, in its closing submissions to the effect that Pragas had actual knowledge of the nature of the Drugs.

(e) The Judge erred in finding that the Prosecution had not contended that actual knowledge should be inferred from the circumstances, as this point was made clear both in its put questions and in its closing submissions. The relevant parts of the Prosecution's closing submissions reveal that it had contended that Pragas had actual knowledge of the nature of the Drugs.

88 We first consider the Prosecution's reliance on the put questions towards the middle and final part of the cross-examination of Pragas:

1	… I put it to you that your version that you did not check your haversack because you didn't find it suspicious is unbelievable. …
2	And I also put it to you that your version that you did not check the plastic bag when you took out from the haversack and passed to Mr Imran, your account is also unbelievable. …
3	And I put it to you that you deliberately did not check the items in the plastic bag.
4	And I put it to you that you were wilfully blind as to what the item was.
5	And I put it to you the reason why you did not check was because you knew the items were drugs.
6	… I put it to you that your testimony that you delivered to Imran two cartons of cigarettes on that day is not true.
7	And I put it to you the reason is that you wanted to distance yourself from your actual delivery of heroin to Mr Imran that day.
8	And I put it to you that on that morning, you delivered two bundles of heroin to Mr Imran.
9	And I put it to you that you knew that these two bundles were heroin, you knew.
10	And lastly, I put it to you that you committed the offence of delivering the heroin in furtherance of your common intention with Tamilselvam.

89 Whilst we accept that there were some references in the put questions to Pragas's actual knowledge of the nature of the Drugs, we find that the overall context surrounding the put questions reveal that the Prosecution's case against Pragas was in substance premised on his wilful blindness to the nature of the Drugs. Even the put questions referred to by the Prosecution show that the general thrust and tenor of its case against Pragas was premised on wilful blindness and not actual knowledge. These include the following:

(a) "I put it to you that your version that *you did not check your haversack* because you didn't find it suspicious is unbelievable" [emphasis added];

(b) "And I put it to you that you deliberately *did not check* the items in the plastic bag" [emphasis added]; and

(c) "And I put it to you that you were *wilfully blind* as to what the item was" [emphasis added].

90 It is also useful to appreciate the put questions in their proper context, particularly in the earlier part of Pragas's cross-examination. Here, the Prosecution attempted to draw a distinction between Pragas's receipt of contraband cigarettes from a Chinese man on three previous occasions, and the transaction on 8 February 2017, where he met a Malay man in Tuas, who took his haversack and went to a toilet to place the white plastic bag within it, as part of a similar delivery involving contraband cigarettes:

Q Yes. Alright. The prosecution's case is that what was inside the haversack was the drugs.

A Okay.

Q ***Yes. The point is when you received the haversack back from the Malay man, did you not notice the***

difference in weight of your haversack compared to the previous cigarettes?

A No, I did not know because I was wearing my jacket and I was carrying my bag. I did not see anything difference [*sic*] in it.

…

Q ***Since you saw what was put inside your bag for the three previous deliveries, did you not think that it's more – it's careful for you to open your haversack to see what was placed inside?***

A No, because I know that I had only---I know that I had collected cigarettes during the three previous deliveries. And I know that I'm collecting cigarettes this time as well.

Q Alright. Let me ask you again. You may know because you saw. You saw the cigarettes in your three previous deliveries. ***But this time, you did not see what was in the bag. And this time, it was a different person instead of the usual Chinese man. Weren't you put on alert and put on notice that at least you should just open up the haversack and check?***

A Because there was nothing for me to suspect that there could be something else inside.

Q Alright. What if, let's say, the Malay man had put guns inside? Would you know?

A No, I know that I was there to collect cigarettes.

Q No, my question: Would you know if the Malay man had put guns inside your haversack?

…

A He would not have done that. But if he had done so, I wouldn't know that.

Q You wouldn't know. Alright. And what if he had placed drugs inside, would you know?

A No, there is no chance for that.

Q When you say no chance for that, you are saying that the Malay man had no chance to put heroin inside your bag. Is that what you mean?

> A There is no chance for something like that to happen because what we were giving [*sic*] in Singapore was cigarettes.
>
> Q Alright. Just ask you one more on this before I move on. So when the Malay man was away and inside for some time, and you say three of you were talking, wasn't there plenty of time for the Malay man to put the heroin or drugs inside your haversack?
>
> A That I do not know.
>
> Q ***Alright. So what about the shape? Can you see any difference in the shape in the haver---things in the haversack?***
>
> A I did not even open my bag.
>
> Q So, according to you, there is no difference in the shape of your haversack.
>
> A The bag was normal, as usual.
>
> [emphasis added]

91 Ultimately, the questions in bold in our view detract from the Prosecution's submission that its case against Pragas was premised on actual knowledge. We accept, of course, that there is no "magic formula" when it comes to put questions. In the end, the substance of the Prosecution's case must always be examined in the overall factual context of its case run at the trial.

92 More significant is the Prosecution's opening address in respect of Pragas and how it had framed the case against him *in contrast* to its case against Tamil. In its opening address, the Prosecution stated that it was seeking to prove that Pragas was "*wilfully blind* as to the nature of the Drugs" [emphasis added], and in the alternative, presumed to have known the nature of the Drugs, pursuant to s 18(2) of the MDA:

> The Prosecution will prove that Pragas had actual possession of the Drugs before handing them over to Imran, in furtherance of a common intention between Pragas and Tamil. ***The Prosecution will also prove that Pragas was wilfully blind as to the nature of the Drugs.*** *In the alternative, pursuant to*

> *s 18(2) of the MDA, Pragas is presumed to have known the nature of the Drugs. The Prosecution will show that Pragas is unable to rebut the s 18(2) presumption.* [emphasis added in italics and bold italics]

93 This was markedly different from the manner in which it had framed its case against Tamil:

> *The Prosecution will prove that Tamil knew and consented to Pragas' possession of the Drugs.* By virtue of s 18(4) of the MDA, Tamil is thereby deemed to be in possession of the Drugs. Pragas then handed the Drugs over to Imran, in furtherance of a common intention between Tamil and Pragas. *The Prosecution will prove that Tamil had actual knowledge that the Drugs contained diamorphine.* In the alternative, pursuant to s 18(2) of the MDA, Tamil is presumed to have known the nature of the Drugs. The Prosecution will show that Tamil is unable to rebut the s 18(2) presumption. [emphasis added]

94 The same stark difference can be observed in the Prosecution's closing submissions before the Judge. As against Pragas, the Prosecution structured its submissions in the following manner:

> 1. Pragas was *wilfully blind*.
>
> (a) *Pragas'* [*sic*] *deliberately failed to check the contents of 'D1'*
>
> (b) Pragas' claim is internally inconsistent.
>
> (c) Pragas' claim is externally inconsistent.
>
> (d) Pragas' claim is incredible.
>
> 2. Alternatively, Pragas is unable to rebut the presumption of knowledge under s 18(2) of the MDA.
>
> [emphasis added]

95 In contrast, the Prosecution structured its closing submissions against Tamil in the following manner:

> 1. Tamil had *actual knowledge*.
>
> (a) Imran's implication of Tamil is credible.

> (b) Tamil's claim is internally inconsistent.
>
> (c) Tamil's claim is incredible.
>
> 2. Alternatively, Tamil cannot rebut the presumption of knowledge.
>
> [emphasis added]

96 The substance of the Prosecution's closing submissions is also revealed by examining the various contentions that it had put forward in its closing submissions. This is self-evident from the following relevant submissions:

> (a) Pragas had deliberately *failed to check* the contents of exhibit D1, and his previous *modus operandi* of delivering cigarettes departed from the *modus operandi* used on 8 February 2017, when an unknown Malay man met him at a canteen and placed items in his haversack. This departure from the usual *modus operandi* as well as the clandestine circumstances which surrounded the delivery on 8 February 2017 should have put Pragas on *notice* to check the contents of the haversack.
>
> (b) Pragas was well-aware of the criminal nature of the transaction, having never met the Malay man before.
>
> (c) Pragas would have taken very little time to *check* the contents of the haversack, and there was sufficient time for him to do so on the morning of 8 February 2017. Furthermore, the *suspicious circumstances* were such that any reasonable person would have checked its contents. In this respect, it is material that Pragas was aware that his deliveries for Tamil were for "something illegal".

97 We note at this point that the Prosecution's opening address, cross-examination and closing submissions were made *before* our decision in *Adili*,

which clarified the distinction between the concepts of actual knowledge and wilful blindness.

98 Nonetheless, as we explained to the Prosecution at the hearing, the Prosecution must have been aware of at least the *basic* differences between the doctrines of actual knowledge and wilful blindness, as was set out in our earlier decision in *Tan Kiam Peng v Public Prosecutor* [2008] 1 SLR(R) 1 ("*Tan Kiam Peng*"). In *Tan Kiam Peng*, this court stated that wilful blindness was the *legal equivalent* of actual knowledge (at [97]). It was also stated that in order to establish wilful blindness, there had to be the appropriate level of *suspicion* (*Tan Kiam Peng* at [125]). Having examined the Prosecution's opening address, its cross-examination of Pragas, and its closing submissions, with their repeated references to the concepts of "suspicion", being put on "notice", as well as a failure to "check" (concepts closely linked to the doctrine of wilful blindness), it is clear to us that the Prosecution had in its mind the *legal equivalent* of actual knowledge (namely, wilful blindness).

99 Finally, consistent with its case against Pragas being premised on wilful blindness, the Prosecution made an affirmative factual concession during its closing oral submissions before the Judge that Pragas did not, in fact, *know* that he was carrying heroin. DPP Lau Wing Yum ("DPP Lau") stated as follows:

> [DPP Lau] … In spite of the suspicious circumstances which we submit, Your Honour, amount to wilful blindness in that he refused to check in the face of such overwhelming suspicion.
>
> …
>
> [DPP Lau] … *As we have put in our closing submissions, if I look at the facts, if I look at the facts, Your Honour, the basis of all these assertions, Your Honour, it just comes from what he heard from Mr Tamil***.** Because he himself agreed that when the plastic bag was put in the haversack, so-called by the

> Malay man in a toilet, in a canteen, off Tuas, he did not see it. He did not check. All the way up to the time he passed the plastic bag to Mr Imran, he did not check. *So our assertion is that he was not there to know---he did not even check.* ***So, as a matter of fact, he did not know what was in the white plastic bag.*** …
>
> [emphasis added in italics and bold italics]

100 Unlike in *Gobi*, DPP Lau's statement that Pragas did not "… as a matter of fact … *know* what was in the white plastic bag" [emphasis added] was an *unsolicited* statement by the Prosecution. We disagree with the Prosecution's submission on appeal that DPP Lau had made an "incorrect assertion" to the Judge during the Prosecution's closing oral submissions. DPP Lau was the lead counsel for the Prosecution at the trial. He was in the best position to inform the Judge as to what the Prosecution's case against Pragas was. After all, as we have explained in some detail above, this factual concession was entirely in line with the Prosecution's case against Pragas that he was wilfully blind to the nature of the Drugs, as demonstrated in its opening address, its cross-examination of Pragas and in its closing submissions.

101 Given the manner in which the Prosecution had framed its case against Pragas as premised on wilful blindness, it was hardly surprising that the Judge *consciously* and *deliberately* declined to make any finding of actual knowledge (see GD at [72]).

102 In *Adili*, this court found that, given that the Prosecution's case had been mounted on the basis that the appellant did not actually know the contents of the suitcase and the existence of the two packages of drugs therein, it was not open to the Prosecution to invoke the s 18(1) presumption of knowing possession against him (*Adili* at [74], [79] and [81]). In *Gobi*, the Prosecution maintained that its cases at the trial and on appeal were both premised on the

Applicant's actual knowledge of the nature of the drugs and, given that there was no change in the case it ran on appeal, it was entitled to invoke the s 18(2) presumption of knowledge (*Gobi* at [48]). This court in *Gobi*, however, found that the structure of the Prosecution's closing submissions showed that its case at the trial was one of wilful blindness in substance, and that it had sought to establish this through the s 18(2) presumption (*Gobi* at [115]). As the s 18(2) presumption is an evidential presumption which operates to presume specific facts, and wilful blindness is a question of mixed law and fact, it cannot ordinarily be the subject of an evidential presumption (*Gobi* at [54]). This court therefore held that recourse to the s 18(2) presumption was foreclosed to the Prosecution (*Gobi* at [56] and [121]).

103 Consistent with our decision in *Gobi*, we hold that recourse to the s 18(2) presumption against Pragas is similarly foreclosed to the Prosecution. The Prosecution must therefore prove beyond a reasonable doubt that Pragas was wilfully blind to the nature of the Drugs.

Whether the Prosecution has proved that Pragas was wilfully blind to the nature of the Drugs

104 In line with the framework set out in *Gobi* at [79], in order to establish that Pragas was wilfully blind to the nature of the Drugs, the Prosecution must prove beyond a reasonable doubt that:

(a) Pragas had a clear, grounded and targeted suspicion that what he was told or led to believe about the nature of the items in the white plastic bag was untrue;

(b) there were reasonable means of inquiry available to Pragas which, if taken, would have led him to discover the truth, namely, that

his suspicion that he was carrying something other than what he was told the items in the white plastic bag were or believed them to be was well founded; and

(c) Pragas deliberately refused to pursue the reasonable means of inquiry available to him because he wanted to avoid any adverse consequences of being affixed with knowledge of the truth.

105 The Judge rejected Pragas's claim that he had believed that he was carrying contraband cigarettes and instead found that Pragas had harboured a clear, grounded and targeted suspicion that he was carrying heroin (GD at [74]). We note that this mirrors the "Narrow Conception" of suspicion referred to in *Gobi*, which requires the Prosecution to prove that the accused person suspected that he was carrying the *specific* controlled drug that forms the subject matter of the charge (*Gobi* at [82]). The court in *Gobi*, however, ultimately rejected the Narrow Conception as its adoption would frustrate the purpose and the underlying objectives of the MDA by making it unduly difficult for the Prosecution to prove that the accused person had the requisite level of suspicion (*Gobi* at [85]).

106 We begin our analysis by setting out the Judge's three reasons for finding that Pragas had harboured the requisite degree of suspicion. These were also relied on by the Prosecution in resisting Pragas's appeal:

(a) Pragas confirmed at the trial that he had been paid RM500 for three previous deliveries of contraband cigarettes. When this sum is examined in the light of Tamil's evidence at the trial that the contraband cigarettes were purchased for $50 per carton and had been sold to Imran at $70 per carton, the sum of RM500 would be a "gross overpayment"

for assisting in the delivery of the contraband cigarettes. Tamil's profit margin was about $20 or RM60 per carton. Payment of RM500 to Pragas for the three deliveries of two cartons of contraband cigarettes each would outstrip the profit for these same deliveries, which amounted to RM360 (GD at [74]).

(b) The weight of the Drugs in Pragas's haversack was not that of two cartons of cigarettes (GD at [74]).

(c) The surreptitious and elaborate system of delivery employed by Pragas and Tamil was wholly out of keeping with the delivery of contraband cigarettes (GD at [74]).

107 It appears to us that the Judge grounded her conviction of Pragas on reasons which had not been expressly put forward by the Prosecution. In the Prosecution's closing submissions before the Judge, its primary basis for claiming that Pragas was wilfully blind was that the transaction on 8 February 2017 departed significantly from the usual *modus operandi* in respect of the earlier three deliveries. In this regard, the Prosecution highlighted the following factors in relation to the delivery on 8 February 2017:

(a) Unlike the previous deliveries which involved a Chinese man, the delivery on 8 February 2017 involved a Malay man.

(b) The Malay man had placed the items into Pragas's haversack inside a toilet, out of his sight.

(c) Pragas had no prior relationship with the Malay man.

(d) Pragas was aware that the nature of his deliveries for Tamil involved something illegal.

108 In its closing oral submissions before the Judge, the Prosecution made a similar submission that the delivery on 8 February 2017 departed from the *modus operandi* of the earlier deliveries:

> … Your Honour, our submission is that if one, Your Honour, looks at the circumstances under which Mr Pragas received the so-called white plastic bag, which was highlighted to Your Honour in submissions, the very time he received, the final time, was a total departure, Your Honour … He had given before, three times before, it was the so-called cigarettes were placed [*sic*] in his bag in his presence, he saw it, not this time, Your Honour. In fact, supposedly in the toilet of a canteen off Tuas, Your Honour. …

109 It is plain that the Judge's reasons in finding that the suspicion element was satisfied differed *entirely* from the reasons advanced by the Prosecution both in its written and oral closing submissions.

110 In our judgment, it is generally unsafe for a trial judge to reconstruct the Prosecution's case on wilful blindness and employ reasons not articulated by the Prosecution in convicting an accused person. As a matter of principle, an accused person should be given the opportunity to refute or address the points used by the Judge to convict him. Where the Prosecution has itself not proffered these reasons in its case against the accused person, the accused person would not be able to refute these reasons at the trial. In *Muhammad Nabill bin Mohd Fuad v Public Prosecutor* [2020] 1 SLR 984 at [134], we referred to the rule in *Browne v Dunn*, and held that one of the key points relied on in convicting the appellant was "of such a nature and of such importance" that it ought to have been put to the appellant before it was made as a submission by the Prosecution. As our analysis below will demonstrate, some of the reasons adopted by the Judge were not put to Pragas during cross-examination. Given the centrality of these reasons in Pragas's conviction, it should be self-evident that the relevant points ought to have been put to Pragas during cross-examination, in accordance

with the rule in *Browne v Dunn*. That having been said, these points were not put to Pragas because they were not part of the Prosecution's case. If the Judge had considered these points material, she should have raised them with Pragas at the end of his cross-examination in order to provide him with an opportunity to respond.

111 We first address the Judge's three reasons, before turning to the Prosecution's primary basis for contending that Pragas was wilfully blind to the nature of the Drugs.

112 First, as regards the profit which Tamil made from the purported sale of contraband cigarettes in Singapore, we find that Pragas was not specifically cross-examined on whether his payment for the previous three deliveries was disproportionate to the usual sale price of contraband cigarettes in Singapore. Pragas had also testified during his cross-examination by the Prosecution that he did not know how much profit Tamil would make from one carton of cigarettes:

> Q And do you know how much profit he made from one carton of cigarettes for example?
>
> A I do not know.
>
> Q So there's not much that you knew about his cigarette dealings apart from the fact that you're helping him to deliver?
>
> A Yes.
>
> [emphasis added]

113 Whilst Pragas may well have been paid in excess of what Tamil would have made as profit from a sale of two cartons of contraband cigarettes in Singapore, it must be emphasised that the suspicion requirement in *Gobi* is ultimately a *subjective* inquiry targeted at the accused person's state of mind. It

is therefore incumbent on the Prosecution to show that Pragas had the subjective knowledge of the resale price of contraband cigarettes in Singapore. It is this knowledge that might have put Pragas on notice that he was being over-paid for his role in the delivery on 8 February 2017 of contraband cigarettes.

114 Furthermore, the Prosecution did not lead any evidence on how much Pragas would be paid for his role in the delivery on 8 February 2017. The sum of RM500 that Pragas was paid was referable only to the earlier three deliveries, although we note that Tamil testified at the trial that the RM500 was for the "four jobs" (namely, including the delivery on 8 February 2017). Pragas's own evidence in his first investigative statement was that he was not told of the specific amount that he would receive for the delivery on 8 February 2017. Apart from this, there is no other evidence as to what Pragas would have been paid for his role in the delivery on 8 February 2017. Neither did the Prosecution refer us to any such evidence. If we were to accept Tamil's assertion at the trial that the RM500 was for the "four jobs", this would translate to a sum of about RM125 or $41 for each delivery of two *cartons* of contraband cigarettes. Without further evidence, we do not see how this was a "gross overpayment" for assistance in delivering contraband cigarettes.

115 Turning to the difference in the weight, Inspector Tan Zhi Yong Gabriel from the CNB testified that the weight of one carton of cigarettes with the plastic wrap around the carton was 271.80g. Two cartons would therefore weigh 543.60g. In contrast, the Drugs weighed at least 923.93g. At the trial, Pragas provided a reasonable explanation for not being able to tell the difference in weight:

> Q Yes. The point is when you received the haversack back from the Malay man, did you not notice the difference in weight of your haversack compared to the previous cigarettes?

> A *No, I did not know because I was wearing my jacket and I was carrying my bag. I did not see anything difference in it.*
>
> [emphasis added]

116 In any event, it is unsafe to rely on the differences in the weight of the Drugs in contrast to the two cartons of contraband cigarettes as they were delivered on separate occasions. It is simply not realistic to expect someone like Pragas to be aware of any difference in weight under such circumstances. In our view, a finding of suspicion cannot be justified on such a marginal difference in weight of about 380g, especially when Pragas had provided a reasonable explanation for his failure to detect that difference.

117 Finally, we turn to the Judge's final reason, which is that the "surreptitious and elaborate system of delivery" (GD at [74]) was wholly out of keeping with the delivery of contraband cigarettes. With respect, we disagree with the Judge on this finding. There is simply no evidence of the usual *modus operandi* of the delivery of contraband cigarettes in Singapore. It was not open to the Judge to take judicial notice of the same. It cannot be denied that contraband cigarettes are also illegal items and that their sale or delivery would also attract criminal punishment under the Customs Act. In that sense, we do not think the manner of the delivery on 8 February 2017 was such as to necessarily cause Pragas to suspect that it did not involve contraband cigarettes.

118 Having reviewed the record of the proceedings, we also observe that Pragas was not specifically cross-examined on this line of the Judge's reasoning. Again, as with the Judge's first reason, this was a point which Pragas ought to have been asked for his response. Unfortunately, Pragas was not asked why it was necessary to employ a "surreptitious and elaborate system of delivery" if he had truly believed that what he was carrying were merely

contraband cigarettes. In the circumstances, it cannot be assumed that Pragas would not have provided a satisfactory explanation *if* he had been asked this question. It follows that it would be unsafe to find that the first element of wilful blindness has been made out against Pragas on this basis.

119 This leaves us with the Prosecution's primary argument, which is that the departure from the usual *modus operandi* should have made Pragas suspicious that what he was told or led to believe that he was only delivering contraband cigarettes was untrue. It would appear from the Prosecution's submission that it has, in fact, impliedly accepted that Pragas was involved in the delivery of contraband cigarettes on the three previous occasions. In our view, it is noteworthy that the Prosecution did not specifically challenge Pragas on his claim that he had, on the three previous occasions, delivered contraband cigarettes to Imran together with Tamil. Under such circumstances, it is certainly possible that Pragas, instead of displaying more attention to the differences between the *modus operandi* employed on 8 February 2017 and the previous deliveries, might reasonably have been lulled into a false sense of security, whilst operating under the mistaken belief that he was, as in the three previous occasions, only delivering contraband cigarettes.

120 Furthermore, we do not think that the differences between the modes of delivery were as significant as the Prosecution claimed. Notwithstanding the fact that it was a Malay man that had passed Pragas the white plastic bag on 8 February 2017, as opposed to a Chinese man, in both instances it was an unidentified person not previously known to Pragas who had passed him the items in question. It was also not the Prosecution's case that Pragas had a prior relationship with the Chinese man who handed him the items on the three previous occasions and that he should have therefore been less trusting of the Malay man. As for the fact that Pragas had, on the morning of 8 February 2017,

collected the white plastic bag from the Malay man in a manner that was different from the earlier three deliveries (the Malay man had placed the white plastic bag into Pragas's haversack out of sight in a toilet at a canteen in Tuas whereas the Chinese man had passed Pragas the contraband cigarettes in his plain sight), Pragas did provide a reasonable explanation as to why this was done:

> Q Yes. And this time, which was very different, you see, Mr Pragas, previously---for the previous three deliveries, the Chinese man will place the plastic bag containing the cigarettes in front of you, alright? You can see that.
>
> A Yes.
>
> Q Yes. But this time, you testified that the Malay man just brought your haversack into a toilet and came out.
>
> A *The previous times, the transaction took place at the roadside, there was no one around us. But this time the transaction took place in a canteen, there were many people there.*
>
> [emphasis added]

121 For completeness, we also address some other points which we think have a material bearing on whether the Prosecution is able to prove beyond a reasonable doubt that Pragas harboured the requisite degree of suspicion.

122 We first consider the issue of whether the Drugs would have been visible from the outside of the white plastic bag. The Judge had, in the context of her analysis of the third element of the modified *Adili* test, stated that the bundles C2A and C2B, which contained the Drugs, would have been "obvious from an exterior view of the package" (GD at [78]).

123 With respect, we disagree that it can be established beyond a reasonable doubt that Pragas would have been able to see the contents of the white plastic

bag from the outside of the bag at the relevant time. From our survey of the photographs in the record of the proceedings, it is not entirely clear whether a person would have been able to see the Drugs from the outside of the white plastic bag. The Drugs themselves (namely, C2A1A and C2B1A) were surrounded by a layer of plastic. Both exhibits C2A1A and C2B1A were covered by intermediate layers of plastic: C2A1A was contained within C2A1 and C2A, and C2B1A within C2B1 and C2B (see above at [11(b)]). Both C2A and C2B were then surrounded by more cling wrap (namely, D1A), before being kept in the white plastic bag (namely, D1). In any event, there is no evidence that Pragas had inspected the outside of the white plastic bag. Pragas's account was that the Malay man had placed the Drugs in the white plastic bag out of his sight and in the toilet at the Tuas canteen. Based on the evidence before us, the only time when Pragas might have seen the outside of the white plastic bag was when he actually handed it over to Imran. It is, however, crucial to appreciate the extremely short duration of the entire transaction, which as SSSgt Chew testified, was only about five seconds. This was also consistent with Pragas's testimony at the trial:

> Q You see, Mr Pragas, you yourself said that for the previous deliveries when the---it was cigarettes, you can see the rectangular shape, yes? Did it strike you that the items were not rectangular in shape?
>
> A I did not even see the shape; how can I see the difference?
>
> Q My point is that when you look from the outside of the plastic bag, can you see the rectangular outline?
>
> A I did not see anything like that. Once I took it out, he took it out from me immediately.
>
> Q And when you took out the plastic bag, was the plastic bag tied or untied?
>
> A I did not see that.

> Q And what about the weight of the cigarette---weight of the items? Did you not feel that the weight was heavier than usual?
>
> …
>
> [A] *I did not feel any difference because once I took it out, he* [*ie*, Imran] *took it from me immediately.*
>
> [emphasis added]

124 The short duration of the transaction might also offer a reasonable explanation as to why Pragas might not have noticed the difference in the shape between a plastic bag that contained cartons of contraband cigarettes and the white plastic bag which contained the Drugs. We should state that it was also unclear whether the white plastic bag was tied or open at the time it was passed to Imran.

125 There are also several other aspects of the evidence on the record which militate against a finding of wilful blindness on Pragas's part:

(a) In all his statements, Imran never stated that he had dealt directly with Pragas or that he had paid Pragas. Of particular significance was the fact that Imran had never suggested in any of his statements that Pragas knew he was delivering heroin, despite having met Pragas several times. In his contemporaneous statement, Imran also stated that Tamil had only delivered heroin to him "just once" and that he "usually sen[t] cigarettes".

(b) Pragas was never implicated by Tamil in any of his statements or in his evidence at the trial.

(c) Pragas consistently maintained, from the time he gave his cautioned statement up to the time he gave his evidence at the trial, that he believed that the white plastic bag contained contraband cigarettes.

126 In the circumstances, we find that the Prosecution has failed to prove beyond a reasonable doubt that the first element relating to suspicion is made out. As we stated in *Gobi*, the three requirements of wilful blindness must be cumulatively established in order for a finding of wilful blindness to be made (*Gobi* at [124]). Given that the first requirement is not made out, it is not necessary to consider whether the second and third requirements are made out. Since Pragas's conviction is premised on his wilful blindness to the nature of the Drugs, we set aside his conviction of the charge against him and acquit him of it.

Whether the Prosecution can prove that there was a common intention between Pragas and Tamil to traffic heroin on the basis of two different mental states

127 Whilst Pragas's conviction would be set aside in any event, we deal with this last issue, given its broader ramifications on common intention charges against accused persons. Pragas submits that the Judge was wrong in making a finding of common intention that was premised on different mental states (namely, wilful blindness in the case of Pragas and actual knowledge in the case of Tamil). The Judge held that it was possible that common intention may encompass actual knowledge on the part of Tamil and wilful blindness on the part of Pragas (GD at [82]):

> *In this context, so long as the pre-arranged plan is clear, I am of the view that common intention may encompass actual knowledge on the part of Tamil and wilful blindness on the part of Pragas.* In *Adili*, at [47]–[49] and [93], the Court of Appeal explained that wilful blindness is treated as the legal equivalent of actual knowledge because it is a highly culpable state of ignorance, where an accused person's careful skirting of actual knowledge undermines the administration of justice. At [49], Chief Justice Sundaresh Menon quoted Prof Glanville Williams, *Criminal Law: The General Part* (London: Sweet & Maxwell, 1961) at p. 159: 'He suspected the fact; he realised its probability; but he refrained from obtaining the final

> confirmation because he wanted in the event to be able to deny knowledge. This, and this alone, is wilful blindness. It requires in effect a finding that the defendant intended to cheat the administration of justice.' The same rationale compels the conclusion that common intention may be premised on the actual knowledge of one accomplice and the wilful blindness of another. An analogy of sorts may be drawn with the scenario explained in *Daniel Vijay* at [168](d). In this scenario, A, B and C have a common intention to rob D and if necessary, to kill him to facilitate the robbery. If D is then killed by A in the course of the robbery, B and C would be constructively liable. This scenario echoes *Barendra Kumar Ghosh v Emperor* AIR 1925 PC 1, cited in the same judgment at [103], where the Privy Council stated: 'even if [BKG] did nothing as he stood outside the door, it is to be remembered that in crimes as in other things "they also serve who only stand and wait".' The reason, as elucidated by Khundkar J in *Ibra Akandar v Emperor* AIR 1944 Cal 339, is that despite what was described by the learned judge as a 'fractional act' on the part of [BKG], the common intention of [BKG] and his accomplices was a wide one, embracing both robbery and murder (see *Daniel Vijay*, at [104]). *Where an accomplice is wilfully blind, he is affixed with the very knowledge which he has refused to investigate. It follows, then, that his shared intention must be sufficiently wide to include the actual knowledge that the law imputes to him.* [emphasis added]

128 In our recent decision in *Aishamudin*, we considered the issue of differing common intention charges as well as whether the Prosecution had impermissibly run inconsistent charges against the two accused persons who were the subject of separate common intention charges. Given that identical common intention charges were brought against both Pragas and Tamil, the issue in *Aishamudin* does not squarely arise in this case.

129 Instead, the issue here is whether it is permissible for the Prosecution to sustain a common intention charge for drug trafficking against two accused persons where they possess different *mens rea* (namely, wilful blindness in the case of Pragas and actual knowledge in the case of Tamil). Regardless, there is some useful guidance in *Aishamudin* on the concept of common intention. The first is that s 34 of the PC is a "deeming provision" because where it is invoked,

an accused person is, by its virtue, treated in the eyes of the law *as if* he had himself performed the entire "criminal act", even though he might in fact only have performed some aspects of the act in question (*Aishamudin* at [42]).

130 In the context of a murder involving a joint planned attack by multiple persons, for example, it may not have been clear which person inflicted the fatal blow. In this regard, if the Prosecution was required to prove which individual committed the physical act of killing, it would be very difficult to secure a conviction (Stanley Yeo, Neil Morgan & Chan Wing Cheong, *Criminal Law in Malaysia and Singapore* (LexisNexis, Revised 3rd Ed, 2018) ("*YMC*") at para 35.2. In our judgment, it is in such a situation where s 34 of the PC is particularly useful.

131 With respect, we disagree with the Judge's reasoning in the above passage (GD at [82]), particularly her reference to the analogy in *Daniel Vijay*. In that analogy, A, B and C have a common intention to rob D and, if necessary, to kill him to facilitate the robbery. Despite the fact that it is A who ultimately killed D, B and C would be held constructively liable for the murder. In this analogy, there is no dispute concerning the *mens rea* of the common intention charge: all three accused persons, A, B and C, possessed the *common* intention to rob D and, if necessary, to kill him. What was different is that it was only one of the three who committed the actual killing. It is uncontroversial that B and C would be constructively liable for killing D so long as they shared the common intention to rob and kill him, and the act of killing was performed in furtherance of their common intention.

132 The present case is somewhat different in that Pragas and Tamil were alleged to have possessed *different* mental states in relation to the nature of the Drugs. The essential element of a common intention charge is that both accused

persons must have a similar intention with respect to the primary criminal act, as is implied by the term "common". In *Aishamudin* at [49(b)], we explained that:

> A *common intention* refers to a 'common design' or plan, which might either have been pre-arranged or formed spontaneously at the scene of the criminal act ([*Lee Chez Kee v Public Prosecutor* [2008] 3 SLR(R) 447 ('*Lee Chez Kee*')]) at [158] and [161]). This must be the intention to do 'the very criminal act done by the actual doer' [emphasis in original omitted]; foresight of the possibility of the criminal act is not enough (*Daniel Vijay* at [107]; see also *Daniel Vijay* at [87] and [166]). This is the critical aspect on which this court in *Daniel Vijay* departed from the earlier analysis in *Lee Chez Kee*. As this formulation shows, the common intention, strictly speaking, refers not to the intention to commit the offence which is the subject of the charge, but to the intention to do the criminal act, although in many cases, the two will overlap (*Daniel Vijay* at [99]). [emphasis in original]

133 As we have stated above, the term wilful blindness is the *legal* equivalent of actual knowledge, but is, as a matter of fact, a mental state which *falls* short of actual knowledge (*Adili* at [50]). It follows that the underlying factual basis which supports a finding of wilful blindness is *different* from the factual basis which supports a finding of actual knowledge. As such, the legal *fiction* of treating wilful blindness as the *legal* equivalent of actual knowledge is only relevant in so far as it permits the court to make a finding of criminal liability in relation to an offence where the essential ingredient is actual knowledge. That legal *fiction*, however, cannot permit the Prosecution to be relieved from its duty to prove that both accused persons *shared a common intention* to do the criminal act in question. In our judgment, this "common" intention must be premised on the accused persons harbouring a similar *mens rea*.

134 In *Daniel Vijay*, this court stated as follows at [87]:

> In our view, the requirement of *common intention* is, in principle, *a more exacting requirement* than the [*Lee Chez Kee*] requirement of subjective knowledge for the purposes of imposing constructive liability. If A and B have a common intention only to rob C but not to physically harm C, and A joins B in robbing C even though he has subjective knowledge that B has a history of using violence, it does not follow – assuming B does indeed use violence against C in the course of carrying out the robbery – that A had a common intention with B to use violence against C; A might simply have been callous about or indifferent to the fate of C. Even if A was aware that B was carrying a knife with him when they set out together to rob C, a court would be more likely to infer merely that A had subjective knowledge that B might likely use the knife to hurt or kill C in the course of carrying out the robbery, as opposed to inferring that A, by going along with B to rob C in those circumstances, spontaneously formed a common intention with B to rob and, if necessary, to use the knife to hurt or kill C so as to carry out the robbery.

135 In *YMC*, it is explained that there are two categories of common intention cases: (a) the "single-crime" situation, in which all the participants shared the intention to commit the offence but only one or more of them physically perpetrated the offence itself; and (b) the "twin-crime" situation", which concerns participants who agreed to the main goal of the criminal design but did not share the intention of one or more members of the group to also commit offences which were incidental or collateral to the main goal of the group (*YMC* at paras 35.10 to 35.11). Notwithstanding that the present case falls within the "single-crime" situation and the example in *Daniel Vijay* at [87] refers to a "twin-crime" situation, it is clear that in *both* instances the accused persons must share the same or a similar *mens rea* with respect to the primary criminal act. In the illustration in *Daniel Vijay*, *both* A and B must have formed the common intention to "rob and, if necessary, to use the knife to hurt or kill C so as to carry out the robbery". It was, however, specifically noted that it is insufficient that "A might simply have been callous about or indifferent to the fate of C". *In other words, it would not suffice if A's mental state falls short of the mental state of B*.

136 Given the above, it follows that the common intention charge against Pragas and Tamil cannot be sustained as it is premised on different mental states. The element of common intention is therefore not proved. In any event, the charge against Pragas is not made out as the Prosecution has failed to prove that he was wilfully blind to the nature of the Drugs.

137 We take this opportunity to again emphasise our observation in *Aishamudin* at [110] that it may be conceptually and practically more desirable to frame charges against secondary offenders based either on abetment or on joint possession under s 18(4) of the MDA, instead of invoking s 34 of the PC against all the offenders unnecessarily. Framing charges against secondary offenders based either on abetment or joint possession under s 18(4) of the MDA would also avoid the legal difficulty inherent in a common intention drug trafficking charge, namely, that co-accused persons must share the same underlying *mens rea* in relation to the nature of the drugs in question.

Conclusion

138 We return to the final issue, which is the impact of our above findings on the specific charges against Imran, Tamil and Pragas.

139 We allow the appeal on the charge against Pragas and acquit him of this charge.

140 Given the acquittal of Pragas, the findings of this court against Imran and Tamil, as well as bearing in mind that the charge against Imran refers to a conspiracy with Tamil and Pragas and the charge against Tamil refers to a shared common intention with Pragas, we invite the Prosecution to submit on the appropriate amendments that should be made to the charges in respect of Imran and Tamil, with such submissions to be filed within 28 days from the date

of this judgment. Counsel for Imran and Tamil are to respond to the Prosecution's submissions within 21 days. A hearing date for the parties to address any proposed amendments to the charges shall be fixed thereafter.

Sundaresh Menon Chief Justice	Andrew Phang Boon Leong Judge of Appeal	Steven Chong Judge of Appeal

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