IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2020] SGCA 90

Criminal Motion No 4 of 2017

Between

Ilechukwu Uchechukwu Chukwudi

… *Applicant*

And

Public Prosecutor

… *Respondent*

In the matter of Criminal Appeal No 10 of 2014

Between

Public Prosecutor

And

Ilechukwu Uchechukwu Chukwudi

JUDGMENT

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

[Criminal Procedure and Sentencing]— [Previous acquittals or convictions]
[Evidence] — [Adverse inferences]

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Ilechukwu Uchechukwu Chukwudi
v
Public Prosecutor

[2020] SGCA 90

Court of Appeal — Criminal Motion No 4 of 2017
Sundaresh Menon CJ, Andrew Phang Boon Leong JA, Judith Prakash JA, Tay Yong Kwang JA and Chao Hick Tin SJ
12 June 2020

17 September 2020 Judgment reserved.

Chao Hick Tin SJ (delivering the judgment of the majority comprising Sundaresh Menon CJ, Andrew Phang Boon Leong JA, Judith Prakash JA and himself):

Introduction

1 In this application, Ilechukwu Uchechukwu Chukwudi ("the Applicant") seeks to set aside his conviction by the Court of Appeal in *Public Prosecutor v Ilechukwu Uchechukwu Chukwudi* [2015] SGCA 33. The Applicant was charged with trafficking of not less than 1,963.3g of methamphetamine that was found in a black trolley bag which he had brought from Nigeria into Singapore and had handed over to one Hamidah Binte Awang ("Hamidah"). The trafficking charge under s 5(1)(*a*) of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) ("MDA") reads as follows:

That you, **ILECHUKWU UCHECHUKWU CHUKWUDI**,

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> on the 13th day of November 2011, sometime between 10.16 p.m.and 11.34 p.m., along River Valley Road, Singapore, did traffic in a 'Class A' controlled drug listed in the First Schedule to the Misuse of Drugs Act (Cap. 185, 2008 Rev. Ed), to wit, by giving to one Hamidah Binte Awang (NRIC No. [redacted]) a trolley bag which contained two packets containing 2,496 grams of crystalline substance, which was analysed and found to contain **not less than 1,963.3 grams of methamphetamine,** without any authorization under the said Act or the Regulations made thereunder, and you have thereby committed an offence under section 5(l)(a) and punishable under section 33 of the said Act, and further upon your conviction under section 5(1) of the said Act, you may alternatively be liable to be punished under section 33B of the said Act. [emphasis in bold in original]

2 At the end of a joint trial of the Applicant and Hamidah, the trial judge ("the Judge") acquitted the Applicant but convicted Hamidah on a separate charge. The Prosecution appealed against the Judge's decision acquitting the Applicant. The Court of Appeal reversed the acquittal and convicted the Applicant on the trafficking charge. Pivotal to the decision of the Court of Appeal were the numerous lies and omissions made by the Applicant in his statements to the Central Narcotics Bureau (CNB), for which there did not appear at the time to be any innocent explanation.

3 In a decidedly fortuitous turn of events, when the matter was remitted to the Judge for sentencing, material evidence came to light that the Applicant suffered from post-traumatic stress disorder ("PTSD") with dissociative symptoms. This evidence arose from the examination of the Applicant by Dr Jaydip Sarkar ("Dr Sarkar"), a psychiatrist with the Institute of Mental Health (IMH), who at that point was slated to be the Prosecution's witness for the sentencing phase. According to Dr Sarkar, the Applicant's PTSD arose as a result of a childhood trauma in his hometown in Wukari, Nigeria, when the Applicant was nearly killed and had witnessed the killing of others. In his report,

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Dr Sarkar took the position that the Applicant's PTSD symptoms were triggered after he was informed that he was facing the death penalty associated with the trafficking charge, and this condition might have resulted in an "overestimation of threat to his life which could have prompted him to utter unsophisticated and blatant falsehoods in order to save his life".[1] For this reason, the Court of Appeal granted the criminal motion filed by the Applicant to reopen the Court of Appeal's earlier conviction. No finding was made by the Court of Appeal on Dr Sarkar's assessment of the Applicant and the matter was remitted to the Judge for him to receive further expert evidence on PTSD. The Judge has since rendered his findings, which will be examined in the course of this judgment. It is in the light of those findings that we now review the Court of Appeal's earlier decision.

Facts

4 The Applicant arrived in Singapore from Lagos, Nigeria, on 13 November 2011. According to the Applicant, he ran a business selling second-hand electronic goods in Nigeria and the purpose of the visit to Singapore was to purchase used laptops for sale back home. As part of this plan, the Applicant was introduced by a childhood friend by the name of Izuchukwu to one Kingsley, who purportedly had relevant business contacts in Singapore who could assist the Applicant.

5 At the trial, the Applicant told the court that on 12 November 2012, the day of his departure from Nigeria, he only took a black laptop bag to the airport

1 Record of Proceedings ("ROP") Vol 2(B) (2018) at p 1328 - Dr Sarkar's report at para 88.

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in Lagos. There, he met Izuchukwu and Kingsley. Kingsley handed to the Applicant a black luggage trolley bag ("the Black Luggage") which he requested the Applicant to pass on to a contact in Singapore, who in turn would help the Applicant with his sourcing of second-hand electronic goods. The Applicant was informed that the Black Luggage contained clothes belonging to the said contact. On inspection, the Applicant found only clothes in the Black Luggage and nothing seemed amiss. The Applicant's evidence was that the Black Luggage underwent a physical check and X-ray scan at the airport in Lagos. It was subsequently checked in by the airline for the flight to Singapore. All of foregoing took place without any incident.

6 On his arrival in Singapore on 13 November 2011, the Applicant proceeded to the immigration checkpoint at Changi Airport, and he was detained for questioning. During this time, the Applicant received several SMS messages from a Nigerian number asking whether he had cleared immigration and about his location. The Applicant's evidence was that the messages were from Izuchukwu, who worked as a travel agent and had helped the Applicant with his travel arrangements to Singapore. One of the messages was "Have u seen him?" and "[phone number redacted] call him plz". The Applicant's evidence was that those messages referred to another Nigerian national who Izuchukwu had also arranged a visa for, and who was supposed to be at the airport with the Applicant.[2] Eventually, the Applicant did meet another Nigerian national by the name of Adili and they were placed in the same room by the authorities. Another message from Izuchukwu asked the Applicant to inform the checkpoint authorities to contact "ESP" if there were any issues. ESP refers

[2] ROP Vol 1(A) (2014) at p 23 – Transcript, 25 September 2014, p 18.

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to ESP Lines (S) Pte Ltd, a Singapore freight forwarding company which had assisted in making the arrangements for the Applicant and Adili to visit Singapore.

7 After the Applicant cleared immigration, he collected the Black Luggage from the baggage claim counter. The Black Luggage was then subjected to both an X-ray scan and physical check, which again yielded nothing. Thereafter, the Applicant left the airport with both the Black Luggage and his laptop bag.

8 The Applicant proceeded to take a taxi to Kim Tian Hotel in Geylang, where he was supposed to stay. On his arrival however, Kingsley called the Applicant and told him to go to Hotel 81 in Chinatown ("Hotel 81") instead. The Applicant complied. CCTV footage at Hotel 81 showed that the Applicant arrived there at about 8.36 pm. After speaking to the receptionist in the lobby, the Applicant realised that he did not have enough Singapore dollars to pay for his stay at the hotel. He deposited the Black Luggage at the hotel lobby and went out to look for a moneychanger. The CCTV footage showed that he returned about 12 minutes later. The Applicant then paid for one night's stay at the hotel because he was supposed to meet Kingsley's contact for the sourcing of used electronic goods the next day.

9 That same night, the Applicant received a call from Kingsley's contact informing him that a woman would collect the Black Luggage from him. This led to a meeting between the Applicant and Hamidah at Clarke Quay. The CCTV footage showed that the Applicant left Hotel 81 with the Black Luggage

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at around 10.16 pm.[3] The Applicant took a taxi from the hotel and alighted at a bus stop in Clarke Quay. As Hamidah had difficulty locating the Applicant, the Applicant approached a Caucasian male who was standing near the bus stop, to ask him to give directions to Hamidah over the phone. The Applicant's evidence is that when he walked towards the Caucasian male, he left the Black Luggage at the interior of the bus stop.

10 When Hamidah finally arrived at the bus stop, she alighted from her car and introduced herself to the Applicant. According to the Applicant, Hamidah introduced herself as "Maria". After handing over the Black Luggage to Hamidah, the latter invited the Applicant to get into the car. They chatted and upon Hamidah's inquiry, the Applicant told Hamidah that he had not eaten anything since his arrival in Singapore. Hence, Hamidah offered to take the Applicant to an African restaurant and he agreed. As it turned out, the restaurant was closed and Hamidah offered the Applicant some drinks from the boot of her car instead. Sometime during their journey in the car, the Applicant accidentally dropped his mobile phone into Hamidah's drink. Eventually, Hamidah dropped the Applicant off at a taxi stand in Clarke Quay and he returned to Hotel 81. The CCTV footage at Hotel 81 showed him going up to his room without the Black Luggage at 11.34 pm.

11 At around 11.55 pm on 13 November 2011, Hamidah was stopped at the Woodlands Checkpoint. The Black Luggage was retrieved from her car and was cut open at the sides. The controlled drugs in question, which were found to contain not less than 1963.3g of methamphetamine, were recovered from the

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[3] ROP Vol 1(A) (2014) at p 42 – Transcript, 25 September 2014, p 37.

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Black Luggage. Hamidah was arrested. The next morning, on 14 November 2011, the Applicant was arrested in his room at Hotel 81.

12 Various statements were obtained from the Applicant: the statement recorded at 1pm on 14 November 2011 shortly after his arrest ("the First Statement"); the cautioned statement recorded at 9.41pm on 14 November 2011 ("the Cautioned Statement"); and the long statements taken between 21 and 24 November 2011 ("the Long Statements"). As alluded to above at [2], the Applicant told a series of lies and omitted material facts in his statements to the CNB. The lies and omissions will be examined in greater detail later in this judgment. For present purposes, it suffices to note that in all his statements, the Applicant denied bringing the Black Luggage into Singapore, denied meeting Hamidah to pass her the same bag at Clarke Quay and did not mention Kingsley.

HC (Acquittal)

13 At the joint trial of the Applicant and Hamidah, the key issue identified by the Judge was whether the Applicant and the co-accused person Hamidah, had knowledge of the drugs concealed in the Black Luggage. The Applicant's main case was that he had come to Singapore for business and had been asked to deliver the Black Luggage on behalf of Kingsley to a business contact he was supposed to meet. Given the various checks which the Black Luggage had undergone at the Nigerian airport, he had no reason to suspect that the Black Luggage contained illicit drugs. Furthermore, the Applicant argued that it was not inexplicable for him to take a defensive stance after he was arrested and charged with an offence that carried the death penalty.

14 The Applicant was acquitted of the charge against him in *Public Prosecutor v Hamidah Binte Awang and another* [2015] SGHC 4 (hereinafter,

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"*HC (Acquittal)*"). The Judge had, at [48], accepted the Applicant's testimony that he came to Singapore to purchase electronic goods for his business. This was corroborated by the US$5,000 the Applicant brought into Singapore as well as by the evidence of one Mr Kervinn Leng ("Kervinn"), a director of ESP who had been informed by his Lagos office that the Applicant was a trader coming to Singapore and had arranged a Singapore visa for the Applicant.[4] Moreover, the Judge found that the Applicant's conduct was generally inconsistent with knowledge of the drugs. Amongst other things, the Applicant had appeared, from the CCTV footage at Changi Airport, to be composed and he had collected the Black Luggage despite the delay at immigration (at [52]); the Applicant had left the Black Luggage unattended at the lobby of Hotel 81 when he left to exchange money (*HC (Acquittal)* at [54]); and the Applicant had essentially gone for a joyride with Hamidah after handing the Black Luggage to the latter (at [60]).

15 In respect of the First Statement, the Applicant's explanation in *HC (Acquittal)* was that: (a) he did not lie when he said he only brought one piece of luggage into Singapore because he had not considered his laptop bag to be a piece of luggage; and (b) alternatively, he lied because he had been told by the CNB officers that there had been an arrest on the night of 13 November 2011 and two packets of drugs were recovered from the Black Luggage. The Judge rejected the first explanation (at [64]). However, the Judge found that he could not rule out the possibilities that the Applicant lied in his statements because he had learnt that there was an arrest the night before and drugs were found in the Black Luggage and/or that he was arrested for drug trafficking and had hence

4 ROP Vol 1 (2014) at p 116 – Transcript, 12 September 2014, p 25.

decided that the "best way forward" was to lie about the Black Luggage (at [66]).

16 In respect of the Cautioned Statement and the Long Statements, the Applicant explained at trial that he lied or omitted information because he had not been informed of the full facts surrounding his arrest and, having heard that the trafficking charge carried the death penalty, he decided that the safest course of action was a complete denial. While the Judge found that the Applicant had been overly defensive, he did not think this unequivocally showed that the Applicant knew about the drugs in the Black Luggage *before* he was arrested (at [67]). This was especially so given the Applicant's conduct before arrest, which as explained above at [14], was considered inconsistent with a knowledge of the drugs. Notably, the Judge also observed that the Applicant considered himself a victim of circumstances and viewed the investigating officer, one ASP Deng Kaile ("ASP Deng"), with absolute suspicion, which could have contributed to the Applicant's decision to deny everything relating to the Black Luggage and Hamidah. Thus, the lies could equally be explained by the Applicant's realisation *after* he was arrested that there had been drugs in the Black Luggage.

17 The Judge thus found that the Applicant's evidence at trial was generally credible and was more consistent with a person with *no* knowledge of drugs in the Black Luggage (*HC* (*Acquittal*) at [69]). The Judge noted that the drugs "were so well hidden that [the Applicant] could not have known about it unless he was told of it" (at [70]). The Applicant's explanation for his lies "was not unreasonable given the situation he found himself, including the fact that he was in a foreign land for the first time". In the circumstances, the Judge found that

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the Applicant had rebutted the presumption of knowledge under s 18(2) of the MDA on the balance of probabilities and hence he acquitted the Applicant.

CA (Conviction)

18 The Prosecution appealed against the decision in *HC (Acquittal)*. The key issue before the Court of Appeal in *Public Prosecutor v Ilechukwu Uchechukwu Chukwudi* [2015] SGCA 33 (hereinafter, "*CA (Conviction)*") was whether the Applicant had rebutted the presumption under s 18(2) of the MDA. The court considered the key dispute to be the probative effect of the various lies and omissions made by the Applicant in his statements as follows (at [33]):

> In determining whether the Judge had erred in accepting the [Applicant's] defence, the **key** dispute centres on the probative effect of the numerous lies and omissions made by the [Applicant] in his statements to the CNB, and the Judge's treatment of the [Applicant's] explanations for those lies and omissions. To narrow the point down even further, **the critical question to be answered is whether the [Applicant] had lied for innocent reasons, or whether he had intentionally lied because he *knew* that telling the truth would link him to the crime.** [emphasis added in bold]

19 In respect of the First Statement, the court agreed with the Judge's rejection of the Applicant's defence that he had not lied because he did not consider the laptop bag to be a piece of luggage (at [35]). However, the court also rejected the Applicant's alternative case that he had lied because he had been told by the CNB officers that there was an arrest the previous night and that drugs were found in the Black Luggage (at [36]). The court found that the evidential basis for this was scant notwithstanding the Judge's apparent acceptance of its possibility. In any event, the Applicant had testified at trial that the first time he had any inkling that the charge against him was related to the Black Luggage was when his counsel visited him. This took place *after* the First

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Statement had been recorded. Hence, the Applicant's alternative explanation was patently inconsistent with his own evidence (at [43]). Nonetheless, the court remarked that, taken in isolation, it is *possible* that the Applicant lied in the First Statement even though he did not know before he was arrested that the Black Luggage contained drugs (at [45] and [54]). What troubled the court was that the Applicant's lies persisted in his subsequent statements.

20 In respect of the lies and omissions in the Cautioned Statement, the Applicant rehashed his explanations in *HC (Acquittal)*. In the main, his evidence was that he was "full of confusion", ASP Deng had not been specific about the circumstances of the offence and that he could not "open [his] heart … because [he] was in high tension". In *CA (Conviction)*, the court rejected these explanations (at [51]). The charge and caution had been read to the Applicant and he must have understood the nature and consequences of the charge as well as any failure in disclosing material information relating to his defence. In fact, the Applicant had specifically admitted at trial that he understood the caution.[5]

21 Apart from the complete absence of any reference to Kingsley, the main lies and omissions identified in the Applicant's Long Statements were (*CA (Conviction)* at [55]):

(a) The Applicant said he only carried one bag into Singapore, which was the laptop bag found in his room in Hotel 81.[6] He said he only

5 ROP Vol 1(A) (2014) at p 111 - Transcript, 25 September 2014, p 106.

6 ROP Vol 2 (2014), p 231, para 6.

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checked in the laptop bag at the airport in Lagos.[7] He claimed that the bag he left in the Hotel 81 lobby was the same laptop bag.[8]

(b) He said he did not go to the Clarke Quay area.[9]

(c) He claimed he accidentally dropped his mobile phone into the toilet bowl in his room in Hotel 81.[10]

(d) He claimed he did not know and had never seen Hamidah or Adili before his arrest when shown photos of each of them.[11]

22 The court considered that the Applicant's failure to mention Kingsley was a material one which justified the drawing of an adverse inference (*CA (Conviction)* at [58]). There was no good reason for the Applicant's omission since he could have mentioned Kingsley without saying anything incriminating about the Black Luggage. The court further found that the Judge erred in finding that the Applicant's overly defensive behaviour did not show *unequivocally* that he must have known about the drugs in the Black Luggage before he was arrested. The burden of proof was on the Applicant to prove his lack of knowledge by rebutting the presumption in the MDA.

23 In the circumstances, the court considered that the Applicant's lies were more consistent with his having had knowledge of the drugs before his arrest.

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7 ROP Vol 2 (2014), p 232, para 6.

8 ROP Vol 2 (2014), p 237, para 15.

9 ROP Vol 2 (2014), p 238, para 18.

10 ROP Vol 2 (2014), p 238, para 17.

11 ROP Vol 2 (2014), p 246, paras 45 and 46.

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In accordance with the principles set out in *Regina v Lucas (Ruth)* [1981] QB 720 ("*Lucas*"), these lies could be used as corroborative evidence of guilt, even though the Prosecution did not need to rely on the lies (at [59]–[60]). It was clear that the Applicant's lies were deliberate, material and shown to be false by independent evidence. The essential question was whether the Applicant's lies stemmed from a realisation of guilt and a fear of the truth. In this regard, the court concluded at [61] that:

> … The [Applicant's] excuses for the lies were wholly unsatisfactory and unbelievable. It is clear to us that he had deliberately lied to distance himself from the drugs in the Black Luggage, the existence of which he knew. Quite simply, there is no acceptable explanation for the lies save for his realisation of his guilt. To suggest that the [Applicant] was justified to lie as a defensive move would be to turn reason and logic on its head.

24 In addition, the court highlighted that even if lies were not regarded as corroborative evidence of guilt, they could nevertheless be relevant for evaluating the Applicant's creditworthiness. On the facts, the Applicant's disclosure of material and exculpatory facts for the first time at trial rendered his testimony less credible (at [63]).

25 The court in *CA (Conviction)* considered that even putting aside the Applicant's lies and omissions, various aspects of his evidence were also difficult to believe. They can be summarised as follows:

(a) There was little objective evidence for the Applicant's narrative that he came to Singapore for business. It was, at best, weakly corroborated by the evidence of Kervinn, who had never spoken with the Applicant directly before his arrival in Singapore (at [67]). Furthermore, since Kervinn was the one who applied for the Applicant's entry visa into Singapore, one could not seriously expect a person intent

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on trafficking drugs to disclose the true purpose of his visit. The US$5,000 which the Applicant brought into Singapore was also a rather small amount for a trader in electronic goods (at [68]).

(b) There were various suspicious circumstances surrounding the entire trip (at [70]–[78]). For example, even though it was the Applicant's first overseas trip, and purportedly a business trip, the Applicant left for Singapore without obtaining any contact details from Kingsley. It was also difficult to believe that the Applicant would have meekly agreed to Kingsley's request to pass the Black Luggage to an unknown contact. In the court's view, the Applicant's behaviour was completely nonchalant and any reasonably prudent person would have enquired further. Furthermore, the court also considered the Applicant's willingness to follow Kingsley's instructions to change from the Kim Tian Hotel to Hotel 81 without any reservation and the numerous text messages received from Izuchukwu whilst the Applicant was at Changi Airport to be unusual.

26 Finally, the court also disagreed with certain points which the Judge took to indicate the Applicant's *lack* of knowledge of the drugs.

27 First, the court took issue with the Judge's assessment of the Applicant's conduct at Changi Airport and at Hotel 81. The Judge had highlighted that the Applicant claimed the Black Luggage despite the hiccup at immigration, and that the Applicant was content to leave the Black Luggage at the lobby of Hotel 81 for 12 minutes. Both of these events were taken by the Judge to indicate a lack of knowledge of the drugs in question on the Applicant's part. In the court's view however, the Judge's assessments of the two events were too narrow and

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in a sense inconsistent, and they did not necessarily indicate a lack of knowledge (at [80]–[81]). This was because abandoning the Black Luggage at the airport carried with it the threat of reprisal by those who entrusted the drugs to him, whilst insisting on taking the Black Luggage with him when he was going out of the hotel to exchange money could have aroused suspicion especially since the hotel lobby was a relatively safe place for temporary stowage.

28 Second, while the court agreed with the Judge that the Applicant's conduct in going for a ride with Hamidah was unusual, it did not consider it to be so dispositive (at [82]). It could equally be said that it was strange for Hamidah herself to have invited the Applicant for a ride. In fact, Hamidah had given evidence that the Applicant had appeared nervous. Hence, properly viewed, the Applicant's behaviour appeared to be an aberration from the totality of the evidence.

29 For the above reasons, the threshold for appellate intervention was crossed even though the appeal turned primarily on questions of fact. The court's observations in this regard bear quoting as they succinctly set out the very context in which the present application is raised before us:

> 87 In the present case, the [Applicant's] version of the facts is quite improbable. There was also no corroborating evidence for various key aspects of the [Applicant's] case. ***That said, we would still have hesitated to think that the*** [Applicant's] ***version of the facts is so incredible that it would ipso facto justify appellate interference.*** Had the case *merely* turned on the Judge's assessment on the credibility of the [Applicant's] oral testimony at trial (and nothing more), we might have declined to interfere.
>
> 88 ***What tipped the scales are the numerous lies and omissions made by the*** [Applicant] ***in his statements, for which there is no innocent explanation.*** This is an important distinguishing factor from *Farid* and the majority judgment in *Hla Win*. In those cases, the evidence of the respective

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> respondents at trial was consistent with their statements, and this lent credibility to their evidence at trial (see *eg, Farid* at [28] and *Hla Win* at [42] and [43]). Indeed, even Yong CJ in his dissenting judgment in *Hla Win* said that the respondent "had been a very consistent witness" (*Hla Win* at [61])…
>
> [emphasis in italics in original; emphasis added in bold italics]

30 Therefore, having particular regard to the Applicant's lies and omissions, the Court of Appeal concluded that the Judge's decision in *HC (Acquittal)* was against the weight of evidence and convicted the Applicant on the trafficking charge.

CA (Reopening)

31 Following the decision in *CA (Conviction)*, the matter was remitted to the Judge for sentencing. As explained at length in *Ilechukwu Uchechukwu Chukwudi v Public Prosecutor* [2017] 2 SLR 741 (hereinafter, "*CA (Reopening)*"), fresh and material evidence had arisen in the form of the psychiatric report by Dr Sarkar. As mentioned, Dr Sarkar opined that the Applicant was suffering from PTSD, that his symptoms were triggered after he was told by the CNB officers that he was facing the death penalty and that the PTSD might have caused the Applicant to lie in his statements (*CA (Reopening)* at [20]).

32 Applying in the main the principles laid out in *Kho Jabing v Public Prosecutor* [2016] 3 SLR 135 ("*Kho Jabing*"), the question before the court was whether there was sufficient material on which the court could say that there *may* have been a miscarriage of justice in *CA (Conviction)* such that the concluded appeal should be reopened. We highlight the following remarks made by the court (*Kho Jabing* at [50] affirmed in *CA (Reopening)* at [14]):

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> In our judgment, the principle of finality is no less important in cases involving the death penalty. There is no question that as a modality of punishment, capital punishment is different because of its irreversibility. **For this reason, capital cases deserve the most anxious and searching scrutiny.** This is also reflected in our laws. … **But, once the processes of appeal and/or review have run their course, the legal process must recede into the background, and attention must then shift from the legal contest to the search for repose.** We do not think it benefits anyone – not accused persons, not their families nor society at large – for there to be an endless inquiry into the same facts and the same law with the same raised hopes and dashed expectations that accompany each such fruitless endeavour. [emphasis added]

33 After examining Dr Sarkar's evidence in the context of the decision in *CA (Conviction)*, the court in *CA (Reopening)* was satisfied that Dr Sarkar's report was sufficient material that was both new and compelling (at [23]–[43]). Dr Sarkar's report also raised a "powerful probability" that the decision in *CA (Conviction)* was demonstrably wrong (at [45]). Given the exceptional circumstances of the case, the application to reopen the Applicant's conviction was allowed, though no finding was made as to whether the Applicant indeed suffered from PTSD or how he was affected by it during the statement-taking process (at [50]).

34 The matter was then remitted to the Judge to adduce further evidence and make the relevant findings based on the following terms of reference (at [50]):

(a) whether the Applicant was suffering from PTSD;

(b) the typical effects of PTSD on a sufferer; and

(c) if the Applicant was indeed suffering from PTSD:

(i) the period of time during which PTSD affected him;

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(ii) the effects of PTSD on him during that period; and

(iii) the extent to which PTSD affected him when he gave his statements to the CNB.

Following which, as we stated in *CA (Reopening)* at [51], the Court of Appeal would review its decision in *CA (Conviction)*.

HC (Remitted) – an overview

35 At the remitted hearing, a total of four experts were called (three by the Applicant and one by the Prosecution) and hot-tubbed. At the end of the remitted hearing (but before closing submissions), the Applicant applied in Criminal Motion No 22 of 2018 to revise the original terms of reference (set out in [34] above), arguing that the amendment was justified by the evidence which had been given by the four experts. The court allowed the application in part. The Judge was instead requested to make findings based on the following terms (with the amendments underlined):

(a) whether the Applicant was suffering from PTSD;

(b) the typical effects of PTSD on a sufferer;

(c) if the Applicant was indeed suffering from PTSD:

(i) the period of time during which PTSD affected him;

(ii) the effects of PTSD on him during that period; and

(iii) the extent to which PTSD affected him when he gave his statements to the CNB; and

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(d) if the Applicant was not suffering from PTSD, whether he was suffering from post-traumatic stress symptoms ("PTSS"). If he was suffering from PTSS:

(i) the precise symptoms should be identified;

(ii) the period of time during which PTSD affected him;

(iii) the effects of PTSS on him during that period; and

(iv) the extent to which PTSS affected him when he gave his statement to the CNB.

(the "revised Terms of Reference").

36 After an examination of the experts' evidence, the Judge made his findings based on the revised Terms of Reference, which are set out in *Public Prosecutor v Hamidah Binte Awang and another* [2019] SGHC 161 (hereinafter, "*HC (Remitted)*"). His main findings may be summarised as follows:

(a) The Applicant suffered from PTSD as a child after witnessing the Wukari massacre when he was about five years old and continued to suffer from it until some indefinite time before he arrived in Singapore on 13 November 2011 (*HC (Remitted)* at [113]).

(b) However, the Applicant was *not* suffering from PTSD after his arrest on 14 November 2011 when the various statements were taken (*HC (Remitted)* at [129]). This was mainly because neither the arrest nor the Applicant being informed that the charge attracted the death penalty was sufficient to constitute a traumatic event.

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(c) The Applicant suffered from various PTSS during the statement-taking process that took place after he was arrested in November 2011.

37 Though the Judge was of the view that the Applicant *failed* to prove his claims *as to the extent* to which the various PTSS *affected* him when he was making those statements, the Judge, nevertheless, made the following notable observation at [193]:

> However, it was clear from the evidence that Ilechukwu was an individual deeply affected by the traumatic memories of the Wukari massacre. While a normal person might not have lied under such circumstances, ***it is not inconceivable*** **that a person with a** ***traumatic past*** **would have done so if he believed that lying would get him out of the** ***traumatic predicament that he was in***, *ie*, that lying would be a means to "protect" oneself. [emphasis added]

This is an important observation, which we will return to in due course.

38 Apart from the medical evidence adduced from the experts, the Prosecution also called Adili as a witness primarily for the purpose of showing that the Applicant's "Kingsley story" was false. This would have the consequential effect of undermining the reliability of Dr Sarkar's expert opinion in so far as it may show that the Applicant lied to him in the course of their interviews. However, for reasons which the Judge had indicated at *HC (Remitted)* at [51]–[52], he found that he could *not* take Adili's evidence on this issue into account.

39 For completeness, after the Judge's decision in *HC (Remitted)* was released, the Applicant applied in Criminal Motion No 10 of 2019 ("CM 10/2019") for an order that the Judge be permitted to answer a specific question – whether based on his findings, an innocent explanation for the Applicant's lies

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and omissions was possible. We dismissed the motion for two reasons. First, it clearly related to matters beyond the revised Terms of Reference. Second, it was, in substance, an application for the Judge to review the actual merits of the decision in *CA (Conviction)*, the very issue which the Court of Appeal had reserved for itself to decide.

The parties' cases

The Applicant's case

40 In his written submissions, counsel for the Applicant again sought leave to remit the matter to the Judge to answer the specific question of whether an innocent explanation for the Applicant's lies and omissions is possible.[12] This was on the same footing as CM 10/2019. Though this point was not pressed before us, we decline to grant such leave since this Court is the proper forum for reviewing the merits of *CA (Conviction)* as alluded to above. In any event, counsel for the Applicant submitted before us that the decision in *CA (Conviction)* was a miscarriage of justice and this Court should set aside that decision and substitute it with a discharge amounting to an acquittal.[13] Three main points have been advanced which can be outlined as follows.

41 First, the Applicant endorses the Judge's findings in *HC (Remitted)*, *ie*, that: (a) as a result of the Wukari massacre in his childhood he suffered from PTSD that lasted from the age of five until some indefinite date before he arrived in Singapore on 13 November 2011; and (b) he suffered from various PTSS during the taking of the statements. Notably, the Applicant concedes that he is

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12 Applicant's submissions dated 15 May 2020, para 36.

13 Applicant's submissions dated 2 March 2020, para 3.

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"*unable* to prove (solely on the basis of the medical evidence and without reference to the wider issue of the Applicant's guilt or innocence) that, on the balance of probabilities, the various PTSS *caused him to lie*" [emphasis added].[14]

42 Importantly however, the Applicant emphasises the Judge's observation at [193] that despite the absence of a proven causal link between the PTSS and the lies, there was a *possibility* that the Applicant lied because "he believed that lying would get him out of the traumatic predicament that he was in, *ie*, that lying would be a means to 'protect' oneself". Separately, the Applicant experienced, during the recording of the Long Statements, "persistent and negative belief[s] about others", a type of PTSS, which caused him to display persistent paranoia towards ASP Deng (*HC (Remitted)* at [199]).

43 Second, the Applicant submits that his lies and omissions were *not* so-called *Lucas* lies as had been found in *CA (Conviction)* because they did not necessarily indicate a consciousness of guilt. Rather, there were two overlapping innocent explanations for them:[15]

> (a) First, the "Overly Defensive Explanation" (*ie*, he was fearful for his life) as first alluded to by the Judge in *HC (Acquittal)*.
>
> > (i) It was possible that he lied in the First Statement because he "realised (whether he was told or otherwise) that there was an arrest on the night before and a luggage with two packets of drugs were found and/or that he was arrested for drug trafficking,

14 Applicant's submissions dated 2 March 2020 at para 13.

15 Applicant's submissions dated 2 March 2020, para 21.

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and decided that the best way forward was to lie about the Black Luggage" (*HC (Acquittal)* at [66]).

(ii) It was also possible that he continued to lie in his Cautioned and Long Statements because he viewed ASP Deng with "absolute suspicion" and was "not informed about the full facts surrounding his arrest", which made him decide, however imprudently, that the "safest course of action was to deny everything that was not in his possession" when he learnt that the offence carried the death penalty (*HC (Acquittal)* at [67]).

(b) Second, the "PTSS Explanation". It was possible that his history of childhood PTSD and the recurrent experience of PTSS during the statement-taking process caused him to lie in order to protect himself and get out of the traumatic predicament of being arrested and interrogated (*HC (Remitted)* at [193]).

44 In support of the two innocent explanations, the Applicant highlights that the Judge's findings of PTSS in *HC (Remitted)* in 2019 are strikingly consistent with the evidence previously adduced, particularly his evidence in *HC (Acquittal)* when there was no inkling whatsoever of PTSD being a live issue.[16]

45 Third, the Applicant submits that he is a credible witness despite his lies, because there are innocent explanations for his conduct as delineated above.[17]

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16 Applicant's submissions dated 2 March 2020, para 25; Annex A.

17 Applicant's submissions dated 2 March 2020, para 30.

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Moreover, Adili's evidence which was adduced to contradict the Applicant's version of events was rejected by the Judge for good reasons.

46 In the light of the new medical evidence adduced at *HC (Remitted)*, the findings of the Judge at first instance in *HC (Acquittal)* cannot be said to be wrong or against the weight of evidence.[18] It follows that the decision in *HC (Acquittal)* should be upheld instead of being overturned.

The Prosecution's case

47 The Prosecution submits that the decision in *CA (Conviction)* should be upheld. Its primary case can be summarised as follows:

(a) The Judge correctly found that the Applicant did *not* suffer from PTSD when he lied in his statements to the CNB given that Criterion A in the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition published by the American Psychiatric Association (the "DSM-5 PTSD Criteria"), *ie*, some form of exposure to actual or threatened death, serious injury or sexual violence, was not satisfied (see [58] below).[19]

(b) In any event, it was not shown how the PTSD had caused the Applicant to lie in his statements. The Judge also rightly found that the Applicant had failed to show if and how any of the PTSS would cause him to lie.[20]

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18 Applicant's submissions dated 2 March 2020, paras 36 to 49.

19 Prosecution's submissions dated 2 March 2020, para 37.

20 Prosecution's submissions dated 2 March 2020, para 47.

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(c) The "only reasonably conceivable explanation" for the Applicant's lies and omissions in his statements was his knowledge that the Black Luggage contained drugs.[21]

Thus, in the Prosecution's view, the Applicant has not rebutted the presumption of possession under s 18(1) of the MDA.

48 Furthermore, as an alternative submission, the Prosecution takes issue with two other aspects of the Judge's findings. First, it argues that there was no proper basis for the finding that the Applicant was affected by specific PTSS.[22] This is primarily because there was no Criterion A traumatic event to which the specific PTSS could be associated with, as is required under the DSM-5 PTSD Criteria. Second, there are certain defects with the Judge's finding on childhood PTSD.[23]

49 We should also mention that upon consideration of the parties' submissions, we invited further submissions on two specific points. The first relates to the distinction between PTSD and PTSS and the second concerns the incidence of the burden of proof as to whether the Applicant's lies were motivated by a realisation of guilt, *ie*, *Lucas* lies. We will return to these points a little later.

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21 Prosecution's submissions dated 2 March 2020, para 72.

22 Prosecution's submissions dated 2 March 2020, para 75.

23 Prosecution's submissions dated 2 March 2020, para 93.

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Issues to be determined

50 Having found in *CA (Reopening)* that there was sufficient material on which the court might find that there was a miscarriage of justice, the question before us now is whether the decision in *CA (Conviction)* is *in fact* demonstrably wrong. Therefore, at the heart of this application is whether, *in the light of the fresh evidence concerning the Applicant's PTSD and PTSS* and the Judge's findings in *HC (Remitted)*, the Applicant can be said to have rebutted the presumption of possession under s 18(1) of the MDA.

51 Central to that overarching question is how the Applicant's PTSD and/or PTSS could have anything to do with his lies and omissions – specifically whether either condition could provide an innocent explanation for the lies and omissions. In this regard, it bears emphasising that the court in *CA (Conviction)* explained that what "tipped the scales" were the Applicant's numerous lies and omissions, "for which there is no innocent explanation" (at [88]). Indeed, the Judge himself reiterated the same question at the conclusion of his decision without answering it because it was outside the revised Terms of Reference (*HC (Remitted)* at [208]). Accordingly, we will now evaluate the Judge's findings in *HC (Remitted)* in some detail.

52 In the light of the revised Terms of Reference, the decision in *HC (Remitted)* is comprehensive. For the present purpose, however, an examination of the following three aspects would suffice:

(a) Was the Judge correct to find that the Applicant suffered from PTSD during his childhood?

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(b) Was the Judge correct to find that the Applicant did not experience a traumatic event in 2011 for the purpose of Criterion A of the DSM-5 PTSD Criteria?

(c) Was the Judge correct to find that the Applicant suffered from PTSS in 2011 and if so, how were they connected to his lies and omissions?

While the critical aspect of the case concerns the third issue, it is necessary for us to proceed with our analysis sequentially given the cumulative nature of the evidence and discussion.

53 Given the length of the judgment in *HC (Remitted)*, we think it would be expedient and help in better understanding, if we first indicate our answers to the three questions. We agree with the Judge that the Applicant suffered from PTSD during his childhood as a result of the Wukari massacre. However, we differ from the Judge on the second question and would proceed to answer the third question, which the Judge hesitated to do because of the revised Terms of Reference. We find that having regard in particular to the "sensitisation effect" operating on the Applicant in 2011, as shall be explained in detail below, the Applicant's arrest and his being informed of the death penalty associated with the trafficking charge were sufficient to satisfy Criterion A of the DSM-5 PTSD Criteria. We agree with the Judge that the Applicant was in 2011 suffering from PTSS and find that there is a rational and credible connection between the Applicant's PTSS and the lies and omissions in his statements.

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Our analysis

Preliminary issues

54 We begin by briefly addressing two preliminary issues. The first relates to the approach which this court ought to adopt when undertaking the review of the decision in *CA (Conviction)*. Should this court look at the entire case *de novo* without regard to the decision already made in *CA (Conviction*)? This question is distinct from the question as to the test or standard which must be met before a concluded criminal appeal should be re-opened, which test was set out in *Kho Jabing* at [77] and applied in *CA (Reopening)*. We have passed that point. The present motion is to review the Court of Appeal's decision in *CA (Conviction)*, to determine whether that decision is still correct – particularly, whether in light of the evidence adduced in *HC (Remitted)*, the decision in *HC (Acquittal)* should be reversed. In other words, assuming the fresh evidence had been before the court when it was considering *CA (Conviction)*, would it have drawn the same inferences and arrived at the same conclusion?

55 We would also add that this approach is consistent with the following analysis enunciated in *CA (Reopening)* at [45]–[46]:

> 45 We earlier highlighted that the False Statements Issue was "[w]hat tipped the scales" in CCA 10/2014 and led us to overturn the Judge's acquittal of the Applicant … We have also found that the IMH Report is *prima facie* powerfully probative in relation to the False Statements Issue. **We therefore find that the IMH Report does *prima facie* raise a "powerful probability" that our decision in *CA (Conviction)* is wrong** …
>
> 46 In resisting the Present Motion, the Prosecution has pointed to other aspects of our reasoning in *CA (Conviction)* (apart from our reasoning on the False Statements Issue) to show that our decision in CCA 10/2014 is not demonstrably wrong (*eg*, our analysis in *CA (Conviction)* at [71]–[82] of the Applicant's "improbable" account of the events which took place on 13 November 2011). **As we stated in *CA (Conviction)* at**

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> **[83], CCA 10/2014 "turn[ed] primarily on questions of fact, and it is a well-established principle that an appellate court is usually slow to overturn the factual findings of a trial judge". The IMH Report raises a powerful probability that our decision on the False Statements Issue – and, in turn, on CCA 10/2014 as a whole – is wrong**, notwithstanding the other aspects of our reasoning in *CA (Conviction)* which support our decision in that appeal. Given these circumstances, we think it would be best to reconsider all the facts of this case only after the additional evidence outlined in our orders at [50] below has been adduced and dealt with.
>
> [emphasis added]

56 The second preliminary issue relates to the applicable presumption under the MDA. Before us, the parties agreed that the relevant presumption is that under s 18(1) of the MDA, notwithstanding that the case in *HC (Acquittal)* and *CA (Conviction)* had proceeded on the basis that the presumption of knowledge under s 18(2) applied. We agree with the parties that this is the correct position in the light of this court's pronouncements in *Adili Chibuike Ejike v Public Prosecutor* [2019] 2 SLR 254 ("*Adili*") and will say nothing further on this point.

DSM-5 PTSD Criteria

57 The Applicant called three experts below: Dr Sarkar, Dr Ken Ung ("Dr Ung") and Dr Mundasa Winslow ("Dr Winslow"). The Prosecution called Dr Christopher Cheok ("Dr Cheok"). The expert evidence was adduced by way of a hot-tubbing session. All four experts agreed that the DSM-5 PTSD Criteria were applicable to the present case (*HC (Remitted)* at [36]). While there was some dispute before the Judge in respect of the specific tools used by the experts to assess the DSM-5 PTSD Criteria, this was not a significant point of contention and was not pursued before us in this application.

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58 Under the DSM-5 PTSD Criteria for adults, eight criteria must be satisfied before a positive diagnosis of PTSD would be made:

<table>
<tr><td rowspan="4">A</td><td rowspan="4">Exposure to actual or threatened death, serious injury, or sexual violence in one (or more) of the following ways:</td><td>1) Directly witnessing the traumatic event(s).</td></tr>
<tr><td>2) Witnessing, in person, the event(s) as it occurred to others.</td></tr>
<tr><td>3) Learning that the traumatic event(s) occurred to a close family member or close friend. In cases of actual or threatened death of a family member or friend, the event(s) must have been violent or accidental.</td></tr>
<tr><td>4) Experiencing repeated or extreme exposure to aversive details of the traumatic event(s) (e.g., first responders collecting human remains; police officers repeatedly exposed to details of child abuse).
Note: Criterion A4 does not apply to exposure through electronic media, television, movies, or pictures, unless this exposure is work related.</td></tr>
<tr><td rowspan="3">B</td><td rowspan="3">Presence of one (or more) of the following intrusion symptoms associated with the traumatic event(s), beginning after the traumatic event(s) occurred:</td><td>1) Recurrent, involuntary, and intrusive distressing memories of the traumatic event(s).
Note: In children older than 6 years, repetitive play may occur in which themes or aspects of the traumatic event(s) are expressed.</td></tr>
<tr><td>2) Recurrent distressing dreams in which the content and/or affect of the dream are related to the traumatic event(s).
Note: In children, there may be frightening dreams without recognisable content.</td></tr>
<tr><td>3) Dissociative reactions (e.g., flashbacks) in which the individual feels or acts as if the traumatic event(s) were recurring. (Such reactions may occur on a continuum, with the</td></tr>
</table>

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		most extreme expression being a complete loss of awareness of present surroundings.) *Note:* In children, trauma-specific reenactment may occur in play.
		4) Intense or prolonged psychological distress at exposure to internal or external cues that symbolize or resemble an aspect of the traumatic event(s).
		5) Marked physiological reactions to internal or external cues that symbolize or resemble an aspect of the traumatic event(s).
C	**Persistent avoidance of stimuli associated with the traumatic event(s), beginning after the traumatic event(s) occurred, as evidenced by one or both of the following:**	1) Avoidance of or efforts to avoid distressing memories, thoughts, or feelings about or closely associated with the traumatic event(s).
		2) Avoidance of or efforts to avoid external reminders (people, places, conversations, activities, objects, situations) that arouse distressing memories, thoughts, or feelings about or closely associated with the traumatic event(s).
D	**Negative alterations in cognitions or mood associated with the traumatic event(s), beginning or worsening after the traumatic event(s) occurred, as evidence by two (or more) of the following:**	1) Inability to remember an important aspect of the traumatic event(s) (typically due to dissociative amnesia and not to other factors such as head injury, alcohol, or drugs).
		2) Persistent and exaggerated negative beliefs or expectations about oneself, others, or the world (*e.g.,* “I am bad”, “No one can be trusted”, “The world is completely dangerous”, “My whole nervous system is permanently ruined”).
		3) Persistent, distorted cognitions about the cause or consequences of the traumatic event(s) that lead the individual to blame himself/herself or others.

<table>
<tr><td rowspan="4"></td><td rowspan="4"></td><td>4) Persistent negative emotional state (e.g., fear, horror, anger, guilt, or shame).</td></tr>
<tr><td>5) Markedly diminished interest or participation in significant activities.</td></tr>
<tr><td>6) Feelings of detachment or estrangement from others.</td></tr>
<tr><td>7) Persistent inability to experience positive emotions (e.g., inability to experience happiness, satisfaction, or loving feelings).</td></tr>
<tr><td rowspan="6">E</td><td rowspan="6">Marked alterations in arousal or reactivity associated with the traumatic event(s), beginning or worsening after the traumatic event(s) occurred, as evidence by two (or more) of the following:</td><td>1) Irritable behaviour and angry outbursts (with little or no provocation) typically expressed as verbal or physical aggression towards people or objects.</td></tr>
<tr><td>2) Reckless or self-destructive behaviour.</td></tr>
<tr><td>3) Hypervigilance.</td></tr>
<tr><td>4) Exaggerated startle response.</td></tr>
<tr><td>5) Problems with concentration.</td></tr>
<tr><td>6) Sleep disturbance (e.g., difficulty falling or staying asleep or restless sleep).</td></tr>
<tr><td>F</td><td colspan="2">Duration of the disturbance (Criteria B, C, D, and E) is more than 1 month.</td></tr>
<tr><td>G</td><td colspan="2">The disturbance causes clinically significant distress or impairment in social, occupational, or other important areas of functioning.</td></tr>
<tr><td>H</td><td colspan="2">The disturbance is not attributable to the physiological effects of a substance (e.g., medication or alcohol) or another medical condition.</td></tr>
</table>

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59 The DSM-5 PTSD Criteria for children aged six years and below are very similar to the criteria above for adults, save that only seven criteria need to be satisfied (*HC (Remitted)* at [41]). Specifically, only either Criterion C *or* D needs to be met in order to qualify for a PTSD diagnosis. However, we need not be unduly concerned by this distinction because the Judge had in fact applied the more stringent DSM-5 PTSD Criteria for adults in determining whether the Applicant suffered from PTSD following the Wukari massacre.

60 All four experts also agreed that PTSD is an episodic and not a continuous psychiatric disorder (*HC (Remitted)* at [45]), although there appeared to be some ambiguity as to what exactly this meant. Dr Sarkar, Dr Ung and Dr Winslow submitted that the Applicant had a "lifetime diagnosis" of PTSD, which was taken to be synonymous with the word "episodic". More importantly, it was also agreed by all the experts that if the Applicant was found to have suffered from PTSD in his *childhood*, the threshold for assessing *Criterion A* of the DSM-5 PTSD Criteria (*ie*, an immediate threat to life) subsequently would be lowered (*HC (Remitted)* at [30]). In other words, a past diagnosis of PTSD produces a "sensitisation effect" which would place the Applicant "at a higher risk of developing subsequent PTSD" (*HC Remitted* at [46] and [118]). This is a consequential effect of some significance, which we shall return to in due course.

Whether the Applicant suffered from PTSD as a child

61 We turn then to the Judge's findings proper. The Judge found that the Applicant suffered from PTSD as a child around the age of five, after witnessing the Wukari massacre. The Judge's extensive analysis of the DSM-5 PTSD Criteria during the Applicant's childhood is set out in *HC (Remitted)* at [62]–

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[114] and we do not propose to rehash the same points here. Before us, the parties did not dispute this finding save in relation to two particular respects which can be briefly addressed.

62 First, the Prosecution argues that the Judge arrived at the diagnosis from a piecemeal agglomeration of the expert evidence, which is impermissible. If only a single expert's evidence had been relied on (as the Prosecution submits should be the case), it would have been clear that the DSM-5 PTSD Criteria would not be fulfilled.[24] This issue was raised before the Judge below[25] and he agreed that the Applicant was not entitled to construct his own "piecemeal" diagnosis of PTSD from the evidence of the various experts (*HC (Remitted)* at [55(c)] and [60]). The Prosecution argues that the Judge himself nevertheless went on to rely on a combination of Dr Sarkar's and Dr Ung's evidence.

63 We need not be detained by this argument, which we consider to be an untenable one. There is no issue with the Judge's method of relying on the body of evidence gleaned from all the experts to arrive at his conclusion that the DSM-5 PTSD Criteria was satisfied during the Applicant's childhood. As a matter of logic and common sense, we see no reason why the court should constrain itself by examining each expert's evidence in isolation. In a case where the medical evidence is contested, the eminently sensible approach is for the court to have regard to the entire corpus of evidence. The Prosecution's criticism is also at odds with the nature of the hot-tubbing exercise conducted below. To the extent that the Judge rejected the Applicant's attempts at a "piecemeal" diagnosis, the Judge obviously did not consider his holistic

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24 Prosecution's submissions dated 2 March 2020 at para 95.

25 Prosecution's reply submissions in *HC (Remitted)* at para 26.

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consideration of all the expert evidence to be piecemeal or in any way internally inconsistent. We agree with the Judge's approach.

64 Second, the Prosecution also argues that there was no evidence supporting the Judge's finding of Criterion E5, *ie*, problems with concentration being satisfied.[26] Criterion E states that the marked alteration in arousal or reactivity must be "associated with the traumatic event(s), beginning and worsening" thereafter. There is no suggestion that the problems with concentration must *only* be or *exclusively* linked to the Wukari massacre. The Judge expressly considered Dr Cheok's suggestion that the Applicant's poor concentration might be attributable to his hunger and poverty instead of the Wukari massacre (at [90]). He found that Dr Cheok's view was inconsistent with the Applicant's preference for sports (as Dr Ung himself had noted) and the prolonged period over which this symptom was observed (*HC (Remitted)* at [92]). On balance, the Judge was satisfied that Criterion E5 was made out and we agree.

65 For the above reasons, the Judge's findings in respect of the Applicant's childhood PTSD are sound and we can find no basis for interfering with them.

Whether the Applicant suffered from PTSD or PTSS during the statement-taking process

66 As we highlighted earlier (at [60]), all the experts agreed that a past diagnosis of PTSD produces a "sensitisation effect" which would place the Applicant "at a higher risk of developing *subsequent PTSD*": *HC (Remitted)* at

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26 Prosecution's submissions dated 2 March 2020 at para 96.

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[46] and [118]. Analytically, this means that since the Applicant was found to have suffered from PTSD as a child, Criterion A of the DSM-5 PTSD Criteria may be satisfied in relation to a subsequent episode of PTSD even if the new traumatic event does *not* meet the strict threshold of an immediate threat to life.

67 For ease of reference, we reproduce Criterion A here:

> **A) Exposure to actual or threatened death, serious injury, or sexual violence in one (or more) of the following ways:**
>
> 1) Directing witnessing the traumatic event(s).
>
> 2) Witnessing, in person, the event(s) as it occurred to others.
>
> 3) Learning that the traumatic event(s) occurred to a close family member or close friend. In cases of actual or threatened death of a family member or friend, the event(s) must have been violent or accidental.
>
> 4) Experiencing repeated or extreme exposure to aversive details of the traumatic event(s) (*e.g.,* first responders collecting human remains; police officers repeatedly exposed to details of child abuse).
>
> *Note:* Criterion A4 does not apply to exposure through electronic media, television, movies, or pictures, unless this exposure is work related.

68 Based on the Applicant's submissions below, there were two points in time at which he could have suffered a Criterion A traumatic event in 2011: (a) at or around the time of his arrest; and/or (b) at or around the time the Applicant was informed of the death penalty during the recording of the Cautioned Statement (*HC (Remitted)* at [121]). The Judge, however, found that the Applicant did not experience a Criterion A traumatic event at either point of time.

69 In respect of the Applicant's arrest, the Judge noted that Dr Sarkar only adopted the position that the arrest was a traumatic event at the remitted hearing

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after he learnt of the testimony given by the Applicant during the hearing for *HC (Acquittal)*. Thus, the Judge found at [124] that:

> I am **not satisfied** that Ilechukwu's version of events, *ie*, that he perceived the arrest as a "war", with "people scattering", proved that the manner of his arrest in 2011 **was an event which exposed him to "actual or threatened death, serious injury, or sexual violence" as required by Criterion A.** There was also no objective evidence to suggest that the CNB officers who arrested him exposed him to "actual or threatened death, serious injury, or sexual violence". [emphasis added]

While the Judge had acknowledged the sensitisation effect in the section preceding the quoted paragraph (at [118]–[120]), it is not entirely clear to us why he decided that Criterion A was not satisfied. A possible explanation is that while he did in the preceding paragraphs refer to the "sensitisation effect", for some unknown reason thereafter he overlooked that aspect. This can be seen from the fact that in *HC (Remitted)* at [124], the Judge talked about the Applicant not perceiving the arrest as "an event which exposed him to 'actual or threatened death, serious injury or sexual violence' as required by Criterion A. He should not have been applying the strict Criterion A test but an attenuated version of that test. He did not discuss how Criterion A should be applied to the 2011 events in the light of the "sensitisation effect". We will be returning to this question in greater detail later (at [84] below).

70 In respect of the charge, Dr Ung and Dr Sarkar had suggested that Criterion A might be satisfied because the Applicant was informed that he could suffer the death penalty if convicted of the trafficking charge. However, in the Judge's view, because none of the Applicant's experts explained how being verbally informed of that constituted a Criterion A event of the requisite degree of trauma, he decided that the Applicant had not satisfied the criterion (*HC (Remitted)* at [128]).

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71 In the circumstances, given that Criterion A was not satisfied, the Judge concluded that the Applicant did not suffer from a fresh episode of PTSD in relation to the events in 2011 (*HC (Remitted)* at [129]). Nevertheless, the Judge, in accordance with the revised Terms of Reference, proceeded to consider whether the Applicant did suffer from PTSS.

PTSD and PTSS

72 Before we examine the Judge's findings on PTSS proper, it is important to first clarify the distinction between PTSD and PTSS, and its effect on the Applicant.

73 Towards the end of the remitted hearing before the Judge, it became apparent from the flow of expert evidence that the original Terms of Reference, which focused only on PTSD, could be an overly parochial and pedantic approach.[27] Those terms were inclined towards a binary, all-or-nothing analysis – whereby either the Applicant had PTSD or he did not. If, on the DSM-5 PTSD Criteria, the Applicant was determined not to have PTSD, *prima facie*, that would be the end of the inquiry. The Judge, rightly in our view, thought that the focus on PTSD was overly simplistic as something short of PTSD would still be relevant in addressing the key question that had been posed by the court in *CA (Conviction)* – whether there was any innocent explanation for the Applicant's lies and omissions. On this basis, the Judge allowed the expert evidence in relation to PTSS.[28] It was in this context that the Applicant later

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27 ROP Vol 1(A) (2018) at p 627 - Transcript, 8 August 2018, p 118 to 119.

28 ROP Vol 1(A) (2018) at p 632 - Transcript, 8 August 2018, p 123.

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applied for a revision of the original Terms of Reference to allow the Judge to make the relevant findings on PTSS as well (see [35] above).

74 As alluded to earlier, we invited parties to address us in their further submissions on how the distinction between PTSD and PTSS might affect the legal analysis. The issue here is whether a diagnosis of PTSD or PTSS, as the case may be, could assist in understanding and determining whether the Applicant could have lied for innocent reasons.

75 On the one hand, counsel for the Applicant emphasised that the existence of PTSS entails a clinically significant disturbance of the mind by the relevant symptoms even if they do not rise to the level of a psychiatric disorder.[29] This means that where a person is found to have suffered from PTSS, the absence of a finding of PTSD does not necessarily suggest that the lies uttered by the person are *Lucas* lies (*ie*, lies motivated by a realisation of guilt) or that they affected his credibility.[30] What is crucial is the *effect* which each specific PTSS had on the Applicant. In this regard, the Judge had opined in *HC (Remitted)* at [193] that it was "not inconceivable" that someone with the traumatic past like the Applicant could have lied in an attempt to escape the traumatic predicament that he was in.

76 The Applicant points out that innocent people may tell lies for a variety of reasons, including a fear that the truth will not be believed.[31] As such, lies told by persons under the suspicion of having committed a crime, without more,

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[29] Applicant's submissions dated 15 May 2020 at para 13.

[30] Applicant's submissions dated 15 May 2020 at para 14.

[31] Applicant's submissions dated 15 May 2020 at para 18.

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may have limited probative value for purposes of inferring guilt. Accordingly, if ordinary reactions to stress can provide an innocent explanation for a deliberate lie, *a fortiori,* certain PTSS such as "intense psychological distress" and a "persistent negative emotional state" should surely afford a person suffering from those PTSS a similar innocent explanation.[32]

77 On the other hand, the Prosecution submitted that PTSS, unlike PTSD, is *not* a recognised psychiatric disorder. Instead, PTSS refers to the symptoms listed under Criteria B to E of the DSM-5 PTSD Criteria, which are linked to an index Criterion A traumatic event.[33] It cautioned against lowering the bar to accepting symptoms which may be nothing more than a "normal psychological reaction".[34] Nevertheless, the Prosecution accepts that if there was sound medical opinion supporting the findings that the Applicant suffered PTSS at the time he gave his statements to the CNB *and* that the PTSS caused his lies and omissions, then it could be said that the Applicant had innocent reasons for his lies and omissions.[35] However, this was not the case. As the Applicant himself accepts, the experts' evidence was not sufficient to prove on a balance of probabilities that the various PTSS did cause the Applicant to lie.[36] The Judge's observation at [193] of *HC (Remitted)* that it was "not inconceivable" that the Applicant lied because of his traumatic past and the traumatic circumstances he

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32 Applicant's submissions dated 15 May 2020 at paras 20 to 22.

33 Prosecution's submissions dated 15 May 2020 at para 4.

34 Prosecution's submissions dated 15 May 2020 at para 9.

35 Prosecution's submissions dated 15 May 2020 at para 10.

36 Applicant's submissions dated 2 March 2020 at para 13; Prosecution's submissions dated 15 May 2020 at para 13.

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found himself in also does not assist the Applicant because it was merely a general observation and not a factual finding.[37]

78 As would be apparent from the above, the parties differ on the effects of PTSD and PTSS. In our judgment, a finding of PTSD or PTSS may have the same legal effect, which is that it *may* provide an innocent explanation for the Applicant's lies in his statements to the CNB. This is a substance over form approach that accords with the fact-intensive nature of the essential question arising out of *CA (Conviction)*. This also comports with the revised Terms of Reference which allowed findings on both PTSD and PTSS. The court must, in the final analysis, scrutinise the *effects* of the PTSD and/or PTSS as the case may be, as stipulated in the revised Terms of Reference (see [35(d)] above).

79 The Prosecution has suggested that some of the PTSS found to have been experienced by the Applicant are indistinguishable from normal psychological reactions that would ordinarily be experienced by healthy persons placed in similar circumstances. In a loose sense, that could well be the case. This submission was also raised before the Judge but was rejected (*HC (Remitted)* at [184]). There is a fundamental epistemic difference between the normal psychological responses of "fear and stress" and the PTSS experienced by the Applicant as assessed by the experts, however similar they may appear outwardly to the untrained eye. For the avoidance of doubt, we wish to state categorically that we do not accept the Applicant's suggestion that if ordinary reactions to stress can supply an innocent explanation for a deliberate lie, certain PTSS such as "intense psychological distress" would *a fortiori* be capable of

[37] Prosecution's submissions dated 15 May 2020 at para 15.

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furnishing an innocent explanation.[38] In our view, that comparison is somewhat invidious. The former would rarely, if ever, be a reasoned basis for justifying or explaining away an accused person's lies in his statements. Indeed, that was a key premise for the decision in *CA (Conviction)*.

80 Contrary to the Prosecution's suggestion,[39] we also do not think our present approach in the instant case undermines the principles governing s 33B(3)(*b*) of the MDA, which affords the court a discretion to pass a sentence of life imprisonment in lieu of the death penalty when offenders suffer from a recognised and proven psychiatric condition. In *Nagaenthran a/l K Dharmalingam v Public Prosecutor and another appeal* [2019] 2 SLR 216 ("*Nagaenthran*") at [31], this court held that the abnormality of mind under s 33B(3)(*b*) of the MDA must arise from an established psychiatric condition. The reasoning employed in *Nagaenthran* was based on the specific statutory provision and Parliament's express intention to limit the exception to individuals suffering from a recognised and proven psychiatric condition. That inquiry takes place at an *ex post* stage *after* the accused person has been *convicted* of a charge under the MDA. Whether a person suffers from an abnormality of mind such that he can avail himself of the statutory exception to the death penalty is a narrow and binary inquiry. In contrast, the foundational inquiry here is a logically anterior one – simply put, it is solely to determine whether the lies and omissions in the Applicant's statements could be due to PTSD or PTSS and thus whether the Applicant's conviction in *CA (Conviction)* is unsafe.

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38 Applicant's submissions dated 15 May 2020 at paras 20 to 22.

39 Prosecution's submissions dated 15 May 2020 at para 9.

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The PTSS

81 We turn next to the Judge's analysis of the Applicant's PTSS. In summary, the Judge found that the Applicant suffered from the following PTSS during the statement-taking process:

(a) When the First Statement was recorded, the Applicant was suffering from intense psychological distress (Criterion B4): *HC (Remitted)* at [148].

(b) When the Cautioned Statement was recorded, the Applicant was suffering from dissociative reactions (Criterion B3) and intense or prolonged psychological distress (Criterion B4): *HC (Remitted)* at [154] and [158].

(c) When the Long Statements were recorded, the Applicant was suffering from intense and prolonged psychological distress (Criterion B4), a persistent and negative belief about others (Criterion D2), and a persistent negative emotional state (Criterion D4): *HC (Remitted)* at [172], [175] and [178].

(1) Criterion A

82 The threshold issue raised by the Prosecution is that the PTSS must be associated with a Criterion A traumatic event. According to the Prosecution, since the Judge had declined to find the arrest or the notification of the death penalty as satisfying Criterion A (see [71] above), the findings on PTSS are erroneous.

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83 We agree with the Prosecution that PTSS must refer to the specific symptoms listed in the DSM-5 PTSD Criteria. It is clear from the DSM-5 PTSD Criteria that they explicitly refer to a predicate Criterion A traumatic event. It is true that the Judge did *not* explicitly address what constituted the predicate Criterion A event in his analysis and findings of the various PTSS. Moreover, as indicated earlier at [69], and with respect, it is not entirely clear if the Judge gave due regard to the operation of the sensitisation effect arising from the Applicant's childhood PTSD when considering whether Criterion A was satisfied.

84 We note that when evaluating Criterion A in the context of whether the Applicant was suffering from PTSD in 2011, the Judge did preface his analysis of Criterion A by acknowledging the sensitisation effect (*HC (Remitted)* at [118]–[120]). As we already explained earlier (at [60]), it was common ground between the parties that, in the light of the diagnosis of PTSD during the Applicant's childhood, there was a sensitisation effect that would lower the threshold for Criterion A when a subsequent event should occur as in 2011. For example, Dr Ung testified that "even an innocuous trigger could retrigger his PTSD experience".[40] Consonant with this, Dr Ung noted in his explanation of the typical effects of PTSD that "the 'false alarms' triggered by various stimuli related to the original trauma (at times the relationship may be subtle) [go] on for far too long and in much greater intensity than would be expected".[41] Dr Sarkar also took the position that the trauma needed to "retrigger an episode in someone…[already having]…intense fear about something, with PTSD … does

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40 ROP Vol 1 (2018) at p 459 - Transcript, 7 August 2018, page 143, lines 6 to 11.

41 ROP Vol 2(B) (2018) at p 1428 - Dr Ung's report, para 28.

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not have to be life-threatening”.[42] Despite this, the Judge did not give a real explanation as to why the arrest of the Applicant or his being informed of the death penalty would not satisfy the attenuated Criterion A event (*HC (Remitted)* at [122]–[128]). In fairness to the Judge, we recognise that the evidence adduced before him was contested in a number of respects, and we turn to that now.

85 At the hearing of *HC (Remitted)*, Dr Sarkar appeared to be alone in suggesting that the *arrest* itself constituted the traumatic event under Criterion A as the Judge noted at [123]. Dr Sarkar testified that a person who was sensitised because of the Wukari massacre might perceive being arrested as a threat to life.[43] In doing so, he emphasised that whether an event is life-threatening should be assessed from the Applicant’s subjective perspective.[44] Dr Sarkar highlighted the fact that the Applicant had described his arrest using words such as “war”, “control” and “chaos” during the hearing of *HC (Acquittal)*, and this suggested that the arrest was sufficiently traumatic in the circumstances to satisfy Criterion A.[45] Admittedly, this was a shift from Dr Sarkar’s initial position as set out in his report, which was that the Applicant suffered a fresh episode of PTSD in 2011 after becoming aware of the death penalty. In this regard, Dr Sarkar explained that he was only made aware of the Applicant’s testimony in *HC (Acquittal)* after he had completed his report.[46]

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[42] ROP Vol 1 (2018) at p 456 - Transcript, 7 August 2018, page 140, lines 2 to 6.

[43] ROP Vol 1 (2018) at p 437 - Transcript, 7 August 2018, page 121, lines 16 to 19.

[44] ROP Vol 1 (2018) at p 438 - Transcript, 7 August 2018, page 122, lines 8 to 21; page 127, lines 16 to 21.

[45] ROP Vol 1 (2018) at p 439 - Transcript, 7 August 2018, page 123 line 22 to page 124 line 9.

[46] ROP Vol 1 (2018) at p 558 - Transcript, 8 August 2018, page 49, lines 6 to 17.

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86 Dr Ung and Dr Winslow took the view that the Applicant being informed of the charge and the prospect of the death penalty was what triggered an episode of PTSD and/or PTSS. It was conceded by the Applicant during the hearing in *HC (Remitted)*, that he was only informed of the death penalty when he was charged and not at the point of arrest (at [122]).[47] Dr Ung states in his report that "both the stress of facing a capital charge and being told that he may face the death penalty" resulted in the Applicant "re-experiencing previous traumatic memories and suffering a recurrence of PTSD".[48] Dr Winslow testified that if a person had a history of trauma or "almost dying", as was the Applicant's case, and was then told that he might be sentenced to death, this would constitute an immediate, life-threatening event.[49]

87 Dr Cheok's evidence was that none of the events of November 2011 satisfied Criterion A though his evidence appeared equivocal at times. On the one hand, he seemed to suggest that for the Applicant to have suffered from a fresh episode of PTSD in 2011, *all* the DSM-5 PTSD Criteria, including a *life-threatening* Criterion A event, would have to be met afresh.[50] Dr Cheok appeared to say that if the "trigger" is not something which is life-threatening, this would not fulfil the criteria for PTSD.[51] On the other hand, Dr Cheok also agreed that with the "sensitisation effect", it is *possible* that the reading of the

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47 ROP Vol 1 (2018) at p 222 - Transcript, 3 August 2018, p 26, lines 12 to 15.

48 ROP Vol 2(B) (2018) at p 1426 - Dr Ung's report at para 23.

49 ROP Vol 1 (2018) at p 299 - Transcript, 7 August 2018, page 103, lines 19 to 24; page 105, lines 1 to 7.

50 ROP Vol 1 (2018) at p 287 - Transcript, 7 August 2018, page 91, lines 6 to 11; p 92.

51 ROP Vol 1 (2018) at p 288 - Transcript, 7 August 2018, page 92, lines 3 to 25.

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charge was sufficient to constitute "trauma". This is seen in the following exchange:[52]

> COURT: ... But, Dr Cheok, do I understand you to say that you would agree that if there was a PTSD episode at five years old then the events could -- not saying will but could constitute trauma because of the sensitisation effect that the defence experts have talked about?
>
> DR CHEOK: **I think there is a possibility.** Yes, there is a possibility.
>
> COURT: Right. Right.
>
> DR CHEOK: But I would say that **the possibility of the trauma would come from the reading of the charges more than the arrest itself.**
>
> [emphasis added]

88 In sum, while there is unanimous agreement among the experts on the relevance of the sensitisation effect *vis-à-vis* the assessment of the Applicant's condition in 2011, what is less clear is the *extent* to which Criterion A might be attenuated.[53] It seems to us that this inherent variability of the sensitisation effect accounts for the divergence between the experts as to whether, and which of the events in 2011, might satisfy the attenuated Criterion A. Nonetheless, save for Dr Cheok, the three remaining experts considered that either the Applicant's arrest or his being informed of the death penalty if found convicted of the charge, would be a sufficiently traumatic event in the circumstances.

89 Having proper regard to the sensitisation effect, we find that both the Applicant's arrest and his being informed of the death penalty were sufficient

52 ROP Vol 1 (2018) at p 463 - Transcript, 7 August 2018, page 147, lines 12 to 22.

53 Prosecution's submissions in *HC (Remitted)*, para 167.

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separately to constitute Criterion A events. This is all the more so if they were to be viewed collectively. Let us elaborate.

(A) THE ARREST

90 We begin with the Applicant's evidence about his arrest given during his evidence-in-chief in *HC (Acquittal),* which was well before Dr Sarkar came onto the scene with his views on PTSD. The following exchange between the Applicant and his counsel, which was relied on by Dr Sarkar, is significant and bears quoting:[54]

> Q Okay. And then what happened the next day?
>
> A Before they---I was arrested. Before next day, I was still sleep---I was still inside the room when the police come. I wa---there was a knock in my room.
>
> Q Yes.
>
> A …So, suddenly, er, I was---they come up, er, and knocked my door. Okay, I opened. All s---guys---I meet a lot of guys. They come inside, erm, grabbed me. I just---I---I just come because I don't know what is happening. As they come, they just controlled me like that, the way they want. They pushed me on the bed. They handcuffed me. They put belt. **That was like---like it---there is a war. That was like everybody, one should fear---fear here, everywhere, everyone is scattering, everything is checking. I was like---I was ner---nervous what is happening.**
>
> …
>
> Q So, after the officers came in, did they tell you anything?
>
> A No, no, all these way, they didn't tell me anything. They are just doing their own work like just doing---they want, er---think satisfy their self first---I was just handcuffed. They satisfy themself [*sic*]. After all, the just

[54] ROP Vol 1(A) (2014) at p 59 - Transcript, 25 September 2014, p 54.

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> kept me there; nobody talked to me. They just sit me on the---on the bed…
>
> [emphasis added]

91 As Dr Sarkar highlighted, it is apparent from the Applicant's testimony, in particular, his use of emotive or affective language, that the Applicant found the arrest to be highly traumatic.[55] While the Applicant's evidence would not ordinarily be remarkable, we consider that his childhood diagnosis of PTSD and the concomitant sensitisation effect, coupled with the reference to the word "war", all point to the fact that at that moment he had a flashback of what he witnessed in Wukari. We agree with the Judge and Dr Sarkar that the Applicant's account displays a degree of negativity which is unusual and persistent (*HC (Remitted)* at [178]). This testimony, we must re-emphasise, was given in 2014 before the Applicant's PTSD or PTSS was put in issue. We therefore consider it to be credible and material evidence. Significantly also, the Applicant's account of how the arrest took place was not refuted or contested at trial. During cross-examination by the Prosecution in *HC (Acquittal)*, the evidence shows that Applicant essentially repeated the same account quoted above.[56]

92 Dr Sarkar opined that the Applicant's above testimony in *HC (Acquittal)* was indicative of "classic post-traumatic stress".[57] His evidence bears quoting at some length:

> DR SARKAR: … The point I am trying to make is that something as innocuous as being arrested, the

55 ROP Vol 1(A) (2018) at p 563 - Transcript, 8 August 2018, pp 54 to 55.

56 ROP Vol 1(A) (2014) at p 102 - Transcript, 25 September 2014, p 97.

57 ROP Vol 1 (2018) at p 437 - Transcript, 7 August 2018, p 121, line 16.

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manner of the arrest for someone who was sensitised to the trauma in Wukari is going to perceive that as threat to life.

And I think I disagree entirely with some of the things that have been said earlier that the stressor, the criterion A, has to be entirely objective. The whole edifice of psychiatry is built upon the subjective experience of a patient. For a psychotic person, he believes certain things that are not real at all. There is no objective evidence for what the psychotic person believes. Yet he acts on his beliefs and his perception because that is reality for him.

COURT: So are you saying you don't disagree with the requirement of there being a life-threatening traumatic event?

DR SARKAR: That is necessary and I am suggesting that --

COURT: It may not be -- what you and I would necessarily perceive as a life threatening perception is subjective.

…

DR SARKAR: … People who attack and assault him during the arrest in his mind are the enemies. **They are symbolically absolutely similar to what he experienced as a child and what he saw and read during the course of his formative years and in his life about the strife in Nigeria**, the inter-ethnic violence. And he has grown up, and if you ask him he told me, and I know this from speaking with people from that part of world, people there fear the authority much more than they fear their neighbours or a stranger because of the long-documented history of abuse of power by those in power. **So for him to be arrested in the manner that he was**, he -- the words that he uses …

[emphasis added]

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93 Dr Sarkar further explained that:[58]

> **A sensitive stimulus -- in this case people barging through the door, getting him on the floor, turning him around, tying his back and that sort of thing, he is made a captive**. This is within the first 24 hours of his arrival in a new country, for the first time in his life. **For him this is similar, emotionally similar, symbolically similar to what he has experienced**, what he has seen happen not just at five-year-old but at several points during his adult life about how his people have been massacred by the majority community … [emphasis added]

94 We accept Dr Sarkar's evidence that, having regard to the sensitisation effect, the Applicant's arrest would be sufficient to satisfy Criterion A and that there is some degree of similarity between the Applicant's arrest and the Wukari massacre.

95 As a general observation, while we do not go so far as to say that the *entire* discipline of psychiatry is premised on subjective experience as suggested by Dr Sarkar (and perhaps he did not intend to convey that), we acknowledge that one of the ineluctable features of this branch of medical science, at least in so far as the present case is concerned, is that there remains a significant subjective and discretionary element to the diagnostic process. To that extent, psychiatrists no doubt have the challenging task of *objectively* reconstructing a patient's *subjective* mental state, as they must in providing expert evidence in legal proceedings. In the final analysis, the diagnostic process is a holistic exercise of clinical judgment based on the DSM-5 PTSD Criteria applied in the context of specific facts, medical history and circumstances of each individual patient. This is not to suggest that the court will not scrutinise the cogency of

58 ROP Vol 1 (2018) at p 476 - Transcript, 7 August 2018, pp 160 to 161.

the medical evidence. The court regularly engages in the difficult task of sieving and analysing all the evidence, including the oft-contested medical evidence. In doing so, the court carefully considers, *inter alia*, the cogency and limits of the medical evidence complemented by, where appropriate, an understanding of human experience and common sense. We cannot overemphasise the fact that here we are dealing with a person who as a child developed PTSD as a result of the Wukari massacre, and bearing in mind the sensitisation effect, his subjective perspective and reaction to any particular stressful situation will necessarily be different, and might even appear irrational, to a normal person who is not so affected.

96 In the present case, though it is agreed between the four experts that the sensitisation effect is an accepted phenomenon documented in the scientific literature, we note that the DSM-5 PTSD Criteria is silent on it. Nonetheless, the general notion of sensitivity is adverted to, as follows:

> … PTSD is often characterized by a **heightened sensitivity to potential threats, including those that are related to the traumatic event** (e.g., following a motor vehicle accident, being especially sensitive to the threat potentially caused by cars or trucks) and those not related to the traumatic event (e.g., being fearful of a heart attack) (Criterion E3). Individual with PTSD may be very reactive to unexpected stimuli, displaying a heightened startle response, or jumpiness, to loud noises or unexpected movements … (Criterion E4)… [emphasis added]

97 Moreover, the following diagnostic features stipulated in the DSM-5 PTSD Criteria (which do not appear to take into account the sensitisation effect) are striking and worth noting:

> The essential feature of [PTSD] is the development of characteristic symptoms following exposure to one or more traumatic events…

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> The directly experienced traumatic events in Criterion A **include, but are not limited to, exposure to war as a combatant or civilian, threatened or actual physical assault … being kidnapped, being taken hostage,** terrorist attack, torture, incarceration as a prisoner of war, natural or human-made disasters, and severe motor vehicle accidents…
>
> [emphasis added]

98 The Applicant's account of the arrest has been outlined above. It is uncontroverted that upon opening the door to his hotel room following the knock he heard, the Applicant was swiftly and forcefully restrained by police officers before being handcuffed. All of this was taking place, as Dr Sarkar noted, on foreign soil where the Applicant had arrived for the first time (see also, *HC (Acquittal)* at [70]). While there is certainly no suggestion that the CNB officers involved in the arrest physically assaulted the Applicant, we do not consider the arrest to be categorically different from the examples cited in the DSM-5 PTSD Criteria above. In the case of the Wukari massacre, there was an immediate threat to the Applicant's life as he witnessed others being murdered before him. While the two events obviously differ in terms of gravity, both the arrest and the Wukari massacre presented a real and proximate threat to the Applicant's life or liberty. To that extent, we agree with Dr Sarkar that there are similarities between the two events. In the circumstances, we consider it more probable than not that the arrest would have constituted a traumatic event, having due regard to the sensitisation effect operating on the Applicant.

99 As against this, the Prosecution highlighted in its submissions below, other evidence which in its view, militated against the suggestion that the arrest was a traumatic event for the Applicant.[59]

[59] Prosecution's submissions in *HC (Remitted)* at para 173.

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100 First, at the hearing for *HC (Remitted)*, the Applicant had agreed that there was no reason for him to fear for his life at the time of the First Statement. The relevant exchange in cross-examination of the Applicant during *HC (Remitted)* is as follows:[60]

> Q. And at the time that this [First Statement] was recorded … no police officer had told you about the death penalty; correct?
>
> A. Yes, your Honour. Yes.
>
> Q. And no police officer had read you any charge; correct?
>
> A. Yes, your Honour.
>
> **Q. So there was no reason to fear for your life; correct?**
>
> **A. Yes, your Honour, like I say.**
>
> [emphasis added]

101 To our minds, the Applicant's apparent concession is of little consequence. It is evident that the specific context of the cross-examination quoted above concerned the question of whether there was a rational basis for the Applicant's distress since he had not been informed of the charge (or death penalty) at that point. There is an appreciable difference, particularly when the sensitisation effect is borne in mind, between agreeing that one does not fear and one has no *rational basis* for fear. We do not consider the Applicant's concession inconsistent with a finding that the arrest was a distressing event that satisfied the attenuated Criterion A. More importantly perhaps, it appears that the Applicant was not asked in cross-examination whether the *arrest* itself caused him to fear for his life. The above exchange highlighted by the Prosecution understandably focused on what an ordinary rational person would

60 ROP Vol 1 (2018) at p 222 - Transcript, 3 August 2018, p 26.

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feel in similar circumstances. In our assessment however, that disregards the Applicant's unusually negative account of the arrest as quoted earlier. We consider that evidence to be credible and thus, we do not think much weight can or should be given to Applicant's ostensible concession here.

102 Second, the evidence of the arresting officers from the CNB was that they did not notice anything unusual about the Applicant's behaviour after the arrest. This is corroborated by how the Applicant testified in *HC (Acquittal)* that he had "no problem" and was "walking peacefully" with the CNB officers after his arrest. Again, in the particular circumstances of this case, we do not think this necessarily negates our finding that Criterion A is satisfied on the Applicant's arrest.

103 We accept the evidence of the CNB officers that they had observed no visible signs of the Applicant's PTSS. However, the presentation of PTSD can vary greatly and may not necessarily manifest overtly. This much is expressly stated in the DSM-5 PTSD Criteria:

> **Diagnostic Features**
>
> … Emotional reactions to the traumatic event (e.g., fear, helplessness, horror) are no longer a part of Criterion A. The clinical presentation of PTSD varies. In some individuals, fear-based experiencing, emotional, and behavioural symptoms may predominate. In others, anhedonic or dysphoric mood states and negative cognitions may be most distressing. In some individuals, arousal and reactive-externalizing symptoms are prominent, while in others, dissociative symptoms predominate. Finally some, individuals exhibit combination of these symptom patterns.
>
> [emphasis added]

104 Therefore, the fact that the CNB officers did not detect anything unusual in the Applicant's behaviour following his arrest is not entirely surprising and

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is certainly not determinative. In this connection, it should also be highlighted that Dr Sarkar had diagnosed the Applicant with PTSD with dissociative symptoms, which is a specific subtype of PTSD. The DSM-5 PTSD Criteria states:

> Specify whether:
>
> **With dissociative symptoms:** The individual's symptoms meet the criteria for post-traumatic stress disorder, and the individual experiences persistent or recurrent of either of the following:
>
> 1. **Depersonalization**: Persistent or recurrent experiences of feeling detached from, and as if one were an outside observer of, one's mental processes or body (e.g., feeling as though one were in a dream; feeling a sense of unreality of self or body or of time moving slowly).
>
> …

105 While this issue of the subtype of PTSD was not explored in depth in *HC (Remitted)*, Dr Sarkar did explain what it means. He said:[61]

> Disassociation or dissociative symptoms imply short time-limited lapses in memories. That could be one manifestation. Another is experiencing symptoms such as being outside of one's body and looking in on oneself as though there are two parts to oneself, one that is observing the other part. And it also implies forgetting some critical parts of the traumatic experience.
>
> So those are … **three, broadly speaking, manifestations of disassociation** that you forget certain things over a short period of time about circumscribed incident about the trauma, you experience yourself from outside and you have, as I said, memory impairment about a critical part of the trauma.
>
> [emphasis added]

61 ROP Vol 1 (2018) at p 348 - Transcript, 7 August 2018, p 32.

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106 Dr Ung's report also notes that the Applicant reported dissociative symptoms in the form of depersonalization albeit after being informed of the charge (see [111]–[112] below). This took the form of "out of body" experiences, which the Applicant described as "seeing himself standing when he is lying down" and "seeing himself lying down when standing".[62] Dr Winslow made the same observations and reached the same conclusion as Dr Ung.[63]

107 The Applicant's testimony in *HC (Acquittal)* that he was walking peacefully with the CNB officers is likewise equivocal. The salient portions of the transcript read:[64]

> Q. … So from the time you left Hotel 81 to the time you were asked to give [the cautioned statement], did anybody question you?
>
> A. We are --- we are --- asking, we just --- "Are you okay? You want to eat anything?" These guys ---
>
> Q Yes.
>
> A --- are just walking peacefully. We have no problem.
>
> **Q Okay, no problem with them?**
>
> **A We have no problem. We are walking peacefully.**
>
> [emphasis added]

108 It may be thought that the Applicant's testimony is inconsistent with him labouring under the distress associated with his arrest. However, in our view, the contradiction is more apparent than real. The fact that the Applicant was

62 ROP Vol 2(B) (2018) at p 1428 - Dr Ung's report, para 25.

63 Prosecution's submissions in *HC (Remitted)*, para 173(b).

64 ROP Vol 1(A) (2014) at p 109 - Transcript, 25 September 2014, p 104; ROP Vol 1 (2018) at p 444 - Transcript, 7 August 2018, pp 128 to 129.

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"walking peacefully", though somewhat relevant, is ultimately inconclusive as to his mental state. At no point in the Applicant's testimony did he concede that he was not in a state of fear after the arrest. In fact, his evidence in both *HC (Acquittal)* and *HC (Remitted)* suggests the opposite. On a closer reading of the transcript, for the Applicant to say that he was walking peacefully with the CNB officers seems to say more about the relatively calm nature of his interactions with the officers rather than his state of mind.

109 Third, the Applicant's account of the arrest given to Dr Sarkar, as recorded in his report, was relatively brief compared to the events surrounding his being informed of the charge. We acknowledge that in his interviews with Dr Sarkar, the Applicant did not seem to volunteer details about the arrest and had focused instead on his being informed of the death penalty.[65] Similarly, little mention is made of the arrest in the reports of Dr Ung, Dr Winslow and Dr Cheok. However, we do not consider this to be fatal to the finding that the arrest constituted a Criterion A event. Nonetheless, if there is any doubt as to the sufficiency of the arrest as a traumatic event, we find that the evidence relating to the charge lays that to rest.

(B) THE CHARGE

110 When the Applicant was informed of his charge, he was also told that he might face the death penalty, as was recorded in the Cautioned Statement. This took place at around 9.41 pm on 14 November 2011 after his arrest earlier that day at 11.00 am. As will be recalled, it was Dr Ung's and Dr Winslow's opinion that the Applicant being informed that he could face the death penalty

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[65] ROP Vol 1(A) (2018) at p 564 - Transcript, 8 August 2018, p 55, lines 15 to 23.

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would constitute a Criterion A event (*HC (Remitted)* at [86]). It was also the original position which Dr Sarkar had taken in his report and maintained. Dr Cheok himself also acknowledged the possibility of this being a Criterion A event (see [87] above).

111 The key parts of the Applicant's evidence concerning the reading of the charge given in *HC (Acquittal)* are as follows:[66]

> Q … [C]an you explain why you say that when they --- when they asked you where's your luggage, you told them that "This is all I have".
>
> A From the beginning of this---when I come there, the---ma---**the IO reads something scary to me. He---he read that---he gi---the charge he read to me is---is---is too terrible.** So I---I can't---I---I---I was **full of confusion**. But, er, only thing I---I---I need to---I just---only thing I'm trying to do is that to describe for him what happened, how I get arrested and what they asked me when I was get arrested. That's---it's only thing I wa---the question they asked me there and how me---we---er, er, we got in touch with each other before I come before his presence.
>
> …
>
> Q So he told you that there – that you had given two packets of crystallised substance believed to contain methamphetamine to one Hamidah Binte Awang?
>
> A Yeah.
>
> Q At that point, do you know who Hamidah was?
>
> A No. By that time, er, the name, I haven't heard it before. So---and the---the two packets of he's saying, I don't have no [explanation] of that. So when he say that I give two packet of drugs to Hamidah Binte Awang, **I was like---I was like flying away** because I don't know this---I haven't see---I haven't had something like it before---er, no, something like this haven't crossed my way. I have no explanation of what he's saying. So I---I say I

[66] ROP Vol 1(A) (2014) at p 61 - Transcript, 25 September 2014, pp 57 to 58.

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> didn't do anything. I didn't give anything to anybody. That's why I s---I was looking---I was---yah, I was---just---he say, "What you have again to say?" I say that's why I---I refer to him, yah. "Before I come your present, this is what I come to your present. This is what---the people that brought me here, this is the question they asked me". So this thing actually, I don't know anything about it.
>
> …
>
> Q Did they tell you what the punishment of the charge that you were facing –
>
> A Yeah, that is the **most** ---
>
> …
>
> A -- **scariest something that come to my way**. After he read the charge, he tell me that---that this can lead to my life---it's---my life---to die---to death---it's a death. I was still, er, scared, erm, mm, because of my life, because I---I---what---I never informed ha---I never---don't---I don't know anything about it, already have been threatened my life towards it. I was too scared about it. So that's why I---I tell him I don't know anything about it.
>
> [emphasis added]

112 It is quite evident that the Applicant's description of the events surrounding the charge is superlative and unusually vivid, especially when viewed in the light of the Applicant's childhood PTSD and the sensitisation effect. We do not think this evidence was exaggerated or embellished by the Applicant. Again, this evidence was provided in 2014 and is supported by Dr Sarkar's report in 2017, which goes into some detail concerning the Applicant's mental state from the time after the charge was read out to him. The material portions of Dr Sarkar's report bear quoting at length:

> 42. … The second statement was given later that evening when the said charges were read out to him. He said "the interpreter told me in Igbo that the outcome of the charge was death. **My mind went blank. My heart gave way. I was lost. I thought God had spared my life once (referring to the**

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narrow escape he had during the riot in Nigeria as a child), but now my life was again at risk. I would die".

43. When asked what he meant by the term "lost" he said "I was **very frightened. I was in shock.** Even the CNB officers who saw me outside *after* this asked what is wrong and said I should trust the legal system as Singapore has a very fair system of justice." He said he felt really weak, and was very hungry, his last meal being over a day and half earlier. He said he just "lie down on floor".

44. He said over the following few days he could not think "like a human", which he clarified meant he could not think logically. He said "For seven days they kept me. It was so cold. I have never shivered so much in my life. I lie on the floor and saw my life leaving me. I was dying". When asked what he meant by it, **he said he felt he was out of his body looking at himself lying on the floor and feeling that his "life was leaving me".**

45. He said during the next few days the only contact he had with the outside world was "when they came to do spot-checks and to ask me to sign if I did not want to eat. I did not eat much at all", he said…They say the temperature is fixed. They could not give me blankets when I asked.

46. He said food, drinks and toilet breaks were provided and denied any coercion on part of interrogators. He claimed that he was in shock, had no appetite, and could not sleep because of the cold and "Awu" (an Igbo word that the interpreter said means intense fear). **He described himself to be "not feeling like a human".**

…

48. He said for a week before he made the long statements he ruminated about death and dying. He claimed that the "main officer" who was interrogating him had said 'You are lying. You will hang' and was convinced his life was in immediate· danger. He said that he therefore "lied a lot" as he did not wish to die. He said he "denied everything" including things that were blatantly ludicrous. He said to officers that he did not call anybody or text anyone from his phone "knowing that they have my phone and can check all the records". He said "I just say 'NO, NO, NO' to everything they asked me".

…

51. Whilst describing this period in custody, he often had a dazed staring look, eyes fixed to a point on the wall, with no blinking, and occasional tears streaming down, shallow breath

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> which rapid and audible. He sat transfixed and gently kept shaking his head. Then he sobbed loudly.
>
> [emphasis added in bold and underline]

113 The Prosecution took issue with several aspects of Dr Sarkar's report, in particular, the paragraphs cited above. Its chief complaint was that the Applicant had lied or at the very least, greatly embellished the evidence given to the experts such that their opinions are unreliable.[67] The Prosecution highlighted that the objective and contemporaneous evidence contradicted the Applicant's account recorded in Dr Sarkar's report. In short, the testimony of the interpreter who was present when the charge was read by ASP Deng (who also recorded the Cautioned Statement), as well as those of ASP Deng and the CNB officers who escorted the Applicant that day, all showed that there was nothing remarkable about the Applicant's conduct on 14 November 2011. The routine medical examination of the Applicant after the Cautioned Statement was recorded also revealed no abnormalities.

114 Specifically, the Prosecution took issue with two sentences each in paragraphs 43 and 48 of Dr Sarkar's report (quoted in [112] above and underlined). In respect of paragraph 43, there was no evidence that any of the CNB officers had asked the Applicant what was wrong or had assured him to trust in Singapore's legal system. There was also no evidence that the Applicant had laid down on the floor at any point during the taking of the Cautioned Statement. In respect of paragraph 48, ASP Deng did not say to the Applicant that he was lying and "will hang".

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67 Applicant's submissions in *HC (Remitted)*, paras 92 to 106, 186.

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115 We find Dr Sarkar's report, including the paragraphs highlighted by the Prosecution, to be reliable. We address each of the points in turn.

116 In respect of paragraph 43, it is not clear to us whether the Applicant meant that he lay down during the recording of any statement or that he was referring to some other instance when he was in custody. In fact, on a closer reading of Dr Sarkar's report, particularly paragraph 43, it seems that the Applicant was describing events *after* the Cautioned Statement was recorded. When asked in cross-examination in *HC (Remitted)* whether he laid down on the floor during the taking of the Cautioned Statement, we note that the Applicant vehemently denied doing so and became rather agitated.[68] In the circumstances, we do not think this was a material embellishment by the Applicant.

117 However, the Applicant insisted during the hearing of *HC (Remitted)* that the CNB officers did tell him not to worry but instead to trust in the fairness of the Singapore legal system, as recorded in paragraph 43 of Dr Sarkar's report.[69] We recognise that the evidence of the CNB officers is that they did not make such remarks to the Applicant at any point in time. In our view, even if it were shown that these remarks were contrived by the Applicant, we find it to be an immaterial embellishment that has little effect on the reliability of Dr Sarkar's report. Thus, it is not necessary to make a factual finding on this very point.

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68 ROP Vol 1 (2018) at p 225 - Transcript, 3 August 2018, p 29.

69 ROP Vol 1 (2018) at p 230 - Transcript, 3 August 2018, p 34.

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118 Finally, the Applicant also insisted that ASP Deng said to him "[y]ou are lying. You will hang" during the statement-taking process, as set out in paragraph 48 of Dr Sarkar's report. To be clear, the Applicant does not challenge the voluntariness of any of his statements under s 258(3) of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) ("CPC").

119 We think this apparent embellishment on the part of the Applicant must be viewed in context. What is pertinent is that the Applicant was found to have developed a persistent paranoia towards ASP Deng. This flowed from his persistent and negative belief about others (*ie*, Criterion D2) (*HC (Remitted)* at [198]). Notably, at the hearing of *HC (Acquittal)*, the Judge had already observed that the Applicant held an extremely negative and suspicious view of ASP Deng, though at that point, there was no suggestion of the Applicant's history of PTSD (*HC (Remitted)* at [198]; *HC (Acquittal)* at [67]).

120 For example, when his attention was drawn to an inconsistency in one of his Long Statements recorded by ASP Deng, the Applicant's evidence in *HC (Acquittal)* was as follows:[70]

> Sir, if you are in my position, have been abandoned in a courtroom, you have nobody who care about you, what you can only – only thing you can hear is, "Your life is in danger, your life is going to be take away from you. Er, er, indeed you see that this is now playing. They are desperate to take away your life because someone who is – is not who is – didn't care about your life – just is one shot, put you inside a courtroom, abandon you for 1 week." Make you like if – like ice-fish, you know. You think you 100% grab him, love him and tell him your heart, because he never come to know the truth. **If he come to know the truth, definitely he have to tell you the truth and he will never give you a torture for what you know; he didn't know anything about it. He already tortured you for 1 week;**

70 ROP Vol 1(A) (2014) at p 97 - Transcript, 25 September 2014, p 92.

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> **he tortured my life, he tortured my brain, he tortured me in hunger, he tortured me every angle of my way, then he never even want me to know what – what – what – what again you wanted me to tell him.** [emphasis added]

121 Dr Sarkar proffered the following explanation concerning the Applicant's view of ASP Deng (*HC (Remitted)* at [194]):[71]

> So his entire paranoia focuses on Investigating Officer Deng rather than the whole group of CNB officers who arrested him, because he also had said to me, and I see that in his testimony as well, that there are other officers who approached him during his arrest and questioned why did he look so fearful after the charge was read out to him…

122 Dr Sarkar went further to postulate as follows:[72]

> … I have a different hypothesis. The first day, the first couple of hours in the evening when the cautioned statement was taken, it was a different motivation to lie, **and the long statement seven days later there was a very different motivation which was very specific to the investigating officer** and [the Applicant's] perception of the investigating officer actually playing him and setting him up in a kind of conspiratorial game where the conclusion had been waged right from the outset that he would be killed and the IO was just amassing evidence to justify the killing, and he believed that he was not told the truth at the beginning, because he said "The IO did not explain to me how the baggage and the drugs were linked" and so on and so forth, so because he believed that the IO had not been honest and upfront with him, he said he would not be honest and upfront with him. This is in his 2014 testimony.
>
> And some of the reasons that he gives almost borders, as I said earlier, not so much psychosis but certainly paranoid…
>
> The suspicion that he had towards the IO in particular borders on sort of paranoia a bit more than normal suspicion that he would have.
>
> [emphasis added]

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71 ROP Vol 1 (2018) at p 446 - Transcript, 7 August 2018, p 130.

72 ROP Vol 1(A) (2018) at p 640 - Transcript, 8 August 2018, p 131.

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123 We are inclined to agree with Dr Sarkar's explanation and the Judge's finding that the Applicant's persistent and negative belief about others caused him to develop a persistent paranoia towards ASP Deng. In all the circumstances, what might have appeared at first blush to be an exaggeration on the part of the Applicant to Dr Sarkar, is actually consistent with the Applicant's paranoia towards ASP Deng. Thus, we are satisfied that Dr Sarkar's report is probably reliable.

124 Returning to the main inquiry as to whether the charge constitutes a Criterion A event, we find that there is ample basis to make such a finding. Under ordinary circumstances, we accept that a mere verbal caution and notification of the death penalty would not be construed as a Criterion A event. However, bearing in mind again the sensitisation effect and the circumstances of the Applicant's arrest earlier that day, we are satisfied that the reading of the charge to the Applicant would be an event which met the attenuated Criterion A. We do not consider it improbable that the Applicant could have considered the charge to be a proximate threat to his life that triggered or aggravated his PTSS. This is supported by both the Applicant's testimony in *HC (Acquittal)* and Dr Sarkar's evidence in *HC (Remitted)* as explained above. Dr Ung and Dr Winslow also took the position that the charge constituted a Criterion A event. In addition, it should be noted that on the day of his arrest and during the taking of the First Statement and Cautioned Statement, the Applicant had on three occasions refused food and drink when offered. This, to us, constitutes some evidence that the Applicant was distressed by the arrest and the charge.

125 Therefore, taking into account the sensitisation effect operating on the Applicant, we find that both the arrest and the reading of the charge were events which satisfied Criterion A for the purposes of the various PTSS. We pause to

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note that on a close reading of the Judge's analysis of the PTSS, it is apparent that he adverted to both events notwithstanding that he did not analyse them under the rubric of Criterion A (see, for example, *HC (Remitted)* at [145]–[146] and [150]–[152]).

(2) The remaining PTSS

126 Apart from the threshold issue with Criterion A, the Prosecution in its alternative submissions, also took issue with the Judge's reasoning for finding specific PTSS. We shall briefly address this criticism.

(A) FIRST STATEMENT

127 The Judge found that the Applicant was suffering from "intense or prolonged psychological distress at exposure to internal or external cues that symbolize or resemble an aspect of the traumatic event(s)" (Criterion B4) when the First Statement was taken. The Judge considered that Dr Sarkar was in fact talking about Criterion B4 when he stated that "people who attack and assault him during the arrest in his mind are the enemies. They are symbolically similar to what he experienced as a child" despite the absence of an express reference to the said criterion (see [92] above; *HC Remitted* at [138]). The Prosecution argues that those statements of Dr Sarkar were actually made in reference to the issue of whether Criterion A was satisfied in 2011 as we have analysed in the preceding section.[73]

128 While it is correct that Dr Sarkar's remarks appear to have been made in the context of a discussion of the arrest as satisfying Criterion A, it is quite clear

[73] Prosecution's submissions dated 2 March 2020 at para 82.

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to us that he was also adverting to Criterion B4 at the same time, albeit somewhat implicitly. We agree with the Judge that this is apparent from a comparison of Dr Sarkar's comments and the wording of Criterion B4, which reads:

> **B Presence of one (or more) of the following intrusion symptoms associated with the traumatic event(s), beginning after the traumatic event(s) occurred:**
>
> **...**
>
> 4 Intense or prolonged psychological distress at exposure to internal or external cues that *symbolize or resemble an aspect of the traumatic event(s).*
>
> [emphasis added in italics]

As we have already explained, the Applicant's testimony in *HC (Acquittal)* also attested to his intense psychological distress, which Dr Sarkar himself also alluded to (see [90] above).

(B) CAUTIONED STATEMENT

129 The Judge found that the Applicant experienced dissociative reactions (Criterion B3) and intense psychological distress (Criterion B4) during the taking of the Cautioned Statement.

130 In respect of the Judge's finding of Criterion B3, the Prosecution contends that the Judge misapprehended the DSM-5 PTSD Criteria when he said that Dr Sarkar's comments on "dissociative symptoms" that were made in the context of Criterion D1 also related to Criterion B3 (*HC (Remitted)* at [154]).[74] In our view, while Criterion D1 and Criterion B3 are distinct, they do

[74] Prosecution's submissions dated 2 March 2020 at para 85.

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overlap in so far as both are concerned with dissociative phenomenon. For ease of reference, they refer to:

> **B Presence of one (or more) of the following intrusion symptoms associated with the traumatic event(s), beginning after the traumatic event(s) occurred:**
>
> **…**
>
> 3 Dissociative reactions (*e.g.,* flashbacks) in which the individual feels or acts as if the traumatic event(s) were recurring. (Such reactions may occur on a continuum, with the most extreme expression being a complete loss of awareness of present surroundings.)
>
> …
>
> **D Negative alterations in cognitions or mood associated with the traumatic event(s), beginning or worsening after the traumatic event(s) occurred, as evidence by two (or more) of the following:**
>
> 1 Inability to remember an important aspect of the traumatic event(s) (typically due to dissociative amnesia and not to other factors such as head injury, alcohol, or drugs).

131 The important point is that Dr Sarkar relied on *dissociative phenomenon* and *dissociation* in his comments on Criterion D1, which would reasonably refer to Criterion B3 as well. As highlighted earlier at [104], when asked what "PTSD with dissociative symptoms" meant, Dr Sarkar explained that dissociation can manifest in memory lapses and "out of body" experiences. As such, we think the Judge was entitled to find that Criterion B3 was met on Dr Sarkar's evidence and had properly done so (*HC (Remitted)* at [151]–[153]). Dr Sarkar's omission to draw a specific link to Criterion B3 is not fatal. Likewise, the fact that the Judge did not make a positive finding on Criterion D1 itself is of no consequence to the present inquiry.

132 In respect of Criterion B4, the Judge noted that Dr Ung's report states that after being informed of the charge, the Applicant suffered from intense or

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prolonged psychological distress as there were "cues related to case triggering daily distress for a few months". The Prosecution essentially argues that it is unclear what Dr Ung meant by this. We accept that there is some ambiguity in this part of Dr Ung's evidence. Nonetheless, as seen from the above at [112], Dr Sarkar's report, particularly paragraphs 42 to 43, is clear and compelling evidence that the Applicant was suffering from intense distress around the time of the Cautioned Statement.

(C) LONG STATEMENTS

133 Finally, the Judge found that Applicant suffered from intense psychological distress (Criterion B4), persistent and negative beliefs about others (Criterion D2) and persistent negative emotional state (Criterion D4) during the recording of the Long Statements (*HC (Remitted)* at [172]–[178]). Again, the Prosecution argues that there was no clear basis on the expert evidence for reaching those conclusions.[75]

134 It is clear to us that the Judge had referred to and explained at length, how he derived his findings on the three criteria. Again, Dr Sarkar's report at paragraphs 42 to 51 provides a clear basis for the Judge's reasoning and conclusions (see [112] above). For present purposes, we do not propose to repeat the Judge's analysis and endorse it entirely (*HC (Remitted)* at [164]–[178]).

[75] Prosecution's submissions dated 2 March 2020 at paras 88 to 91.

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Effect of the PTSS

135 It is undisputed among the experts that neither PTSD nor PTSS directly results in lying (*HC (Remitted)* at [179]). The experts also agreed that the Applicant retained the requisite faculties to decide whether or not to lie or tell the truth. However, the central concern here is the *reasons* for the lies, and how the Applicant's mental reasoning or capacity was affected by PTSD/PTSS.

136 The Applicant's case in *HC (Remitted)* was that the PTSS that the Applicant was found to be experiencing in 2011 were likely to have led to an overestimation of the threat to his life, which could have prompted him to utter the unsophisticated and blatant falsehoods in his statements in an attempt to save his life (at [180]–[184]). This was the position taken by Dr Sarkar from the outset in his report, which Dr Ung and Dr Winslow endorsed and adopted as well (at [207]).

137 The Applicant particularised the effects of PTSS as follows (*HC (Remitted)* at [181]):

(a) during the recording of the First Statement, the Applicant's intense psychological distress caused him to adopt an overly defensive posture and lie to deny everything that was not in his possession;

(b) during the recording of the Cautioned Statement, the Applicant's dissociative reactions and intense or prolonged psychological distress also caused him to adopt an overly defensive posture and lie to deny everything that was not in his possession; and

(c) during the recording of the Long Statements, the Applicant's persistent and negative belief about ASP Deng caused him to

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> consciously choose to maintain his previous lies in a misguided attempt to "outwit" the system and save himself.

Consistent with a fact-sensitive approach, the Applicant acknowledges that the PTSS do vary and not all of them can supply an innocent explanation (see also, [78] above).[76] For example, it is difficult to imagine how a finding of markedly diminished interest or participation in significant activities (Criterion D5) would relate to the Applicant's lies and omissions. Nonetheless, the specific PTSS engaged in the present case as summarised above do not pose such difficulties.

138 However, the Judge found that the Applicant was not able to show the connection between the PTSS and his lies and omissions (see, for example, *HC (Remitted)* at [188] and [197]). As mentioned earlier, the Judge considered that the Applicant's persistent and negative belief about others caused him to develop a persistent paranoia of ASP Deng during the recording of the Long Statements. However, since no submission was made connecting the persistent paranoia to the Applicant's continued lies, the Judge declined to make a finding to that effect (at [199]). We note parenthetically that of the various PTSS which the Judge found the Applicant to be experiencing, the Judge omitted to consider the effect of the Applicant's intense psychological distress (Criterion B4) during the Cautioned Statement. However, nothing turns on that omission.

139 The Judge's conclusion on the effect of the PTSS on the Applicant is important and bears quoting in full (at [207]):

> 207 As for the issue of the extent to which PTSS affected Ilechukwu when he gave the three categories of statements, I note that the three Defence experts set out slightly different

76 Applicant's submissions, para 22.

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> explanations as to why Ilechukwu might have lied in his statements. Dr Sarkar stated in his report that the presence of PTSD was "likely to have led to an overestimation of [the] threat to his life" which could have prompted him to utter unsophisticated and blatant falsehoods in order to save his life. Although Dr Sarkar did not say in his report that the presence of PTSS (as opposed to PTSD) would result in a similar effect, it was clear that Dr Sarkar held this view in light of his testimony at [*HC (Remitted)*]. As for Dr Ung, he stated that the two relevant effects that PTSD had on Ilechukwu were in relation to (a) effects on his thinking and decision making and (b) hyper-arousal and avoidance behaviour. At the same time, Dr Ung also concurred with Dr Sarkar's view that the PTSD was "likely to have led to an overestimation of [the] threat to his life". Dr Winslow too expressed agreement with this aspect of Dr Sarkar's opinion, and also that "the defendant was suffering from acute symptoms of PTSD with dissociation around the time that he made the inconsistent and unreliable statements (between 24 November and 21 November 2011). This could be a factor relevant in providing an unreliable account." Dr Cheok, like the Defence experts, simply stated that there was no direct link between PTSD and lying. As the Defence relied primarily on Dr Sarkar's view that Ilechukwu overestimated the threat to his life as a result of the symptoms, I confine my analysis solely to this aspect of his opinion. As I have already stated above at [188], **I find that the Defence failed to spell out with sufficient clarity how the symptom of "intense psychological distress" caused Ilechukwu to overestimate the threat to his life during the recording of the Pocketbook Statement. For purposes of clarity, I also state that I find that the Defence had not shown how any of the *other* PTSS caused Ilechukwu to overestimate the threat to his life on a balance of probabilities in relation to the Cautioned Statement and Long Statements.** [emphasis added]

140 We are somewhat puzzled by the Judge's conclusions. As we highlighted to the Prosecution in the hearing before us, it is unclear to us why on the weight of the expert evidence, which the Judge had found to be credible and reliable, the Judge reached the conclusion that there was no connection between the Applicant's condition and his lies and omissions. Consistent with the Judge's position, the Prosecution repeatedly urged upon us that there is no

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explicable connection between the Applicant's PTSS and the lies and omissions as well. With respect, we are unable to agree.

141 Certainly, we are not surprised that the experts unanimously take the position that PTSD/PTSS does not *ipso facto* ***cause*** a sufferer to lie. However, the Applicant's case does not hinge on proof of causation between his psychiatric ailments and his conduct, which at any rate, appears to be an impossible task as a matter of empirical science. The Applicant's case is based on the opinion of Dr Sarkar, which Dr Ung and Dr Winslow agreed with, that the Applicant's condition led to an ***overestimation of the threat to his life*** which could have prompted him to utter unsophisticated and blatant falsehoods in an attempt to save his own life. In our view, this is clearly cogent expert evidence of a sufficient connection between the Applicant's PTSD/PTSS and his lies and omissions. Let us elaborate.

142 We understand Dr Sarkar's evidence on this point to be that the Applicant's PTSS in 2011 *affected* the Applicant's capacity to appreciate the circumstances he was in and the material events. As we have explained above, this is attributable to his arrest and/or his being informed of the death penalty that came with the trafficking charge. This is not to say that he was deprived of his cognitive capacity or that he was *non compos mentis* at any point, but rather that the PTSS caused the Applicant to harbour irrational or illogical notions of his circumstances *including* that he was in danger even though he might have been innocent. These misconceived conceptions in turn supplied a plausible explanation for his lies because, conceivably, the Applicant was eager to save his own life and foolishly thought that by telling lies this objective could be achieved. Of course, we accept and recognise that an ordinary person without similar psychiatric ailments like the Applicant may also experience fear or

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perceive a threat to his life when arrested. The present case is fundamentally different, however, because the Applicant's fear was rooted in or at least could be attributed to a relevant psychiatric condition or symptoms. The Applicant's response was not simply a case of difference in the degree of fear experienced but rested on an epistemically distinct basis – that is, a gross misapprehension of the situation brought about by his history of PTSD and his PTSS.

143 Dr Ung explained it slightly differently while also endorsing Dr Sarkar's explanation. His evidence was that:

> 35. Those suffering PTSD go to great lengths to avoid being 're-traumatized' **(secondary to hyper-arousal and avoidance behaviour)**. Ilechukwu spoke of deciding to lie to avoid the death penalty. Irrespective of a diagnosis of PTSD, the fear of the death penalty may induce many to lie to save themselves. In his context, **having PTSD adds significantly to such a drive to 'save oneself'.**
>
> "*Those who have been traumatized never want to be traumatized again; in some situations, the degree of hypervigilance can be so extreme that it resembles (and may be mistaken) for a paranoid state*"
>
> [emphasis in italics in original; emphasis added in bold]

144 We acknowledge that the Applicant's behaviour and decision to lie was irrational and indeed, Dr Sarkar himself alluded to this in the course of the *HC (Remitted)* hearing.[77] Even factoring for the stress that would ordinarily accompany the fact of being arrested, one would expect a reasonable accused person, if he were innocent, to be forthcoming with the truth as soon as possible. However, given the Applicant's history of PTSD and his PTSS operating at the material time in 2011, we agree with Dr Sarkar that it may have resulted in the

[77] ROP Vol 1 (2018) at p 239 - Transcript, 7 August 2018, p 43; ROP Vol 1(A) (2018) at p 641 – Transcript, 8 August 2018, p 132.

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Applicant conjuring contrivances in a misguided attempt to distance himself from the entire event. However imprudent this overly defensive stance may appear to a reasonable bystander, in the particular circumstances of the Applicant here, we consider the explanation of Dr Sarkar and Dr Ung to be plausible.

145 We note that Dr Cheok seems to take an absolute position that there is no link between the Applicant's PTSS and his lies.[78] Dr Cheok repeatedly states that in the scientific literature, there is no suggestion of a causal link between PTSD and lying. We have difficulty accepting Dr Cheok's position both on the evidence and as a matter of common sense. As we have already explained, none of the experts or the parties take the position that PTSD/PTSS invariably or inexorably results in lies. That much is corroborated by the scientific literature referenced by Dr Cheok. However, Dr Cheok has not explained specifically why the Applicant's PTSD/PTSS might not result in an overestimation of the threat to his life, which in turn might have caused him to lie.

146 We do not think there is any real gap or deficiency in the expert evidence as to the connection between the Applicant's condition and his lies. As the Prosecution acknowledged before us, the multifarious and complex domains of the human mind are not always susceptible to the prescription of neat rules or definitive causal relationships. In the present circumstances, it is difficult to imagine what else could reasonably be expected of the experts providing an explanation for the connection between the Applicant's condition and his lies and omissions in the statements. Indeed, when pressed on this point during the

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[78] ROP Vol 1 (2018) at p 402 - Transcript in in *HC (Remitted)*, 7 August 2018, pp 86, 93, 154, 157.

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hearing, the Prosecution was unable to offer a clear answer to us. When the court analyses medical evidence in particular, regard must be had to its limits. Although there may be a limit to the answers that medical science can offer at present, that does not mean that there is an absence of medically supported opinion supporting the Applicant's case. In our judgment, there is ample credible evidence from the majority of the experts that there exists a plausible link between the Applicant's history of PTSD, his PTSS during 2011 and his lies and omissions.

147 In fairness to the Judge, we recognise his observations at [191]–[193] which formed a key part of the Applicant's case before us. His observations which were made in the context of the Applicant's dissociative reactions during the recording of the Cautioned Statement bear quoting:

> 191 Thus, the primary effect of "dissociation", as stated by Dr Sarkar, is an "inability to remember" and a "focus on protecting" oneself and "[avoiding] getting re-traumatised about" past traumatic memories.
>
> 192 The Defence submitted that these effects experienced during the recording of the Cautioned Statement caused Ilechukwu to adopt an "overly defensive posture". Dr Sarkar said that Ilechukwu focused on protecting himself to avoid getting re-traumatised about past memories. Dr Sarkar also said that this was why Ilechukwu avoided talking about the Black Luggage.
>
> 193 Dr Cheok did not agree with this view. I note that Dr Sarkar did not say that this was a recognised psychiatric condition and the evidence he gave at [190] above was an opinion based on his clinical experience dealing with trauma patients. In view of this, I am unable to make a finding that this was what had happened in Ilechukwu's case. **However, it was clear from the evidence that Ilechukwu was an individual deeply affected by the traumatic memories of the Wukari massacre. While a normal person might not have lied under such circumstances, it is *not inconceivable* that a person with a *traumatic past* would have done so if he believed that lying would get him out of the *traumatic predicament***

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> ***that he was in***, *ie*, that lying would be a means to "protect" oneself.
>
> [emphasis added]

148 We accept that the Judge's remarks at [193] are somewhat oblique and inconsistent with his conclusion at [207], which we have rejected for the reasons above. It seems that whilst the Judge could not accept unreservedly Dr Sarkar's specific postulations as to how the Applicant's dissociative reactions were linked to his lies, he nonetheless thought that there was some rational connection between the Applicant's childhood PTSD, his PTSS in 2011 and the lies and omissions in his statements. We agree that there was such a connection. The Applicant suffered from PTSD as a child and the combination of his arrest and being informed of the death penalty he faced in 2011 if convicted of the trafficking charge was traumatic. Having regard to Dr Sarkar's evidence (which was endorsed by Dr Ung and Dr Winslow) as discussed above, the plausible explanation, put simply, is that because of the Applicant's PTSS, he overestimated the threat to his life, and that could have been a cause which compelled him to lie.

149 Apart from PTSD and PTSS, we should add for completeness that it was also undisputed by the experts in *HC (Remitted)* that the Applicant was below average in intelligence though not intellectually disabled.[79] Dr Sarkar had also suggested in his report that there was some evidence that the Applicant suffered from mild neurocognitive disorder (MND) which might have caused him to persevere with non-profitable strategies when it came to problem-solving. Since

[79] ROP Vol 1 (2018) at p 372 - Transcript in in *HC (Remitted)*, 8 August 2018, p 56, lines 16 to 20.

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these two points were not seriously pursued before the Judge and on appeal, we do not propose to dwell on them.

The correctness of *CA (Conviction)*

150 Having evaluated the Judge's findings in *HC (Remitted)*, we return to the broader question in the present application as to whether the decision in *CA (Conviction)* should still stand. In particular, would it still be proper for this court to draw an adverse inference against the Applicant for his lies and omissions, as was done in *CA (Conviction)* (see [22] above)? Finally, in the totality of the circumstances, has the Applicant rebutted the presumption of possession under s 18(1) of the MDA on a balance of probabilities?

Adverse inference

151 We first turn to examine the principles for drawing adverse inferences, which were applied in *CA (Conviction)*. The starting point is s 261 of the CPC, which applies to cautioned statements. It reads:

> **Inferences from accused's silence**
>
> 261. —(1) Where in any criminal proceeding evidence is given that the accused **on being charged with an offence, or informed by a police officer or any other person charged** with the duty of investigating offences that he may be prosecuted for an offence, failed to mention any fact which ***he*** **subsequently relies** on in his defence, being a fact which ***in the circumstances*** existing at the time he could ***reasonably have been expected*** to mention when so questioned, charged or informed, as the case may be, the court may in determining —
>
> …
>
> (*c*) whether the accused is guilty of the offence charged,
>
> ***draw such inferences from the failure as appear proper***; and the failure may, on the basis of those inferences, ***be treated as, or as capable of amounting to, corroboration***

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> **of any evidence** given against the accused in relation to which the failure is material.
>
> [emphasis added]

Simply put, the effect of s 261 of the CPC is that the accused person's omission in stating a material fact for his defence in the cautioned statement allows the court to draw an adverse inference, which in turn can be used to corroborate other evidence. As the court noted in *CA (Conviction)* at [52], deliberate untruths or lies may equally invite the drawing of adverse inferences.

152 A court may also, where appropriate, draw an adverse inference against an accused person for failing to state his defence in his long statements. If the fact or circumstance that is withheld will exculpate the accused from an offence, a court may justifiably "infer that it is an afterthought and untrue, unless the court is persuaded that there are good reasons for the omission to mention that exculpatory fact or circumstance" (*Kwek Seow Hock v Public Prosecutor* [2011] 3 SLR 157 at [19]; see also, *Lim Lye Huat Benny v Public Prosecutor* [1995] 3 SLR(R) 689 at [25]).

153 It is well-established that the court's power to draw adverse inferences is a discretionary one based on the specific facts at hand, as is plain from the wording of s 261 of the CPC. In this exercise of determining whether lies and/or omissions of an accused person might be used to corroborate evidence of guilt the following requirements set out in *Lucas* at 724 must be satisfied:

(a) The lie told out of court is deliberate;

(b) It relates to a material issue;

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(c) The motive for the lie is a realisation of guilt and a fear of the truth; and

(d) The statement must clearly be shown to be a lie by independent evidence.

154 Conceptually, the *Lucas* principles can be viewed as a set of guidelines for aiding the court's determination of whether to draw a species of adverse inference predicated on the lies and omissions of an accused person. Whilst there may be a distinction between lies and omissions in some cases, whether something is a lie is a question of fact to be determined by the court. In the present case, it is clear to us that there is no meaningful distinction between the Applicant's lies and omissions in his statements.

155 The principles in *Lucas* have been regularly endorsed by the Singapore courts. It is pertinent to note that in England, the principles are applied in the context of directions to be given to juries where lies are being relied on as corroboration (see *Phipson on Evidence* (Hodge M Malek gen ed) (Sweet & Maxwell, 19th ed, 2019) at para 16-09). The purpose of a *Lucas* direction is to avoid the risk that the jury might adopt "an inadmissible chain of reasoning" that equates the accused person's lying with guilt (*R v Middleton* [2001] Crim LR 251).

156 An adverse inference based on lies should be drawn only under carefully prescribed circumstances. In the present case, the key element in dispute is the third limb, *ie*, whether the lies are motivated by a realisation of guilt. In this regard, we highlight that lies can amount to corroboration of evidence of guilt if they are shown to be told out of a motive that can *only* be linked to his guilt: *Public Prosecutor v GCK and another matter* [2020] 1 SLR 486 at [141]. This

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stringency is underpinned by an evidential concern as to the reliability of lies as was highlighted by V K Rajah J (as he then was) in *Public Prosecutor v Chee Cheong Hin Constance* [2006] 2 SLR 24 at [92]. Furthermore, strictly speaking, lies may be used to corroborate other evidence of guilt but are not in themselves, evidence of guilt, as emphasised by Chan Sek Keong CJ in *Kamrul Hasan Abdul Quddus v Public Prosecutor* [2011] SGCA 52 at [18]–[19].

157 In assessing an accused person's lies, it must be borne in mind that there exists two possible counterfactuals. First, an accused person may lie because he is guilty and there is, as a matter of common sense, a real chance that he would do so in an attempt to evade punishment. Second, an accused person who might in fact be innocent, may also lie for some reason not linked to guilt such as a misconception of circumstances attributable to a clinical condition as is the Applicant's case. As we highlighted to the Prosecution during the hearing before us, careful consideration must be had to both scenarios before determining which one is applicable on the facts. This approach was adopted by the court in *CA (Conviction)* when it asked whether there was an innocent explanation for the lies and omissions.

Application

158 To recapitulate, in the First Statement, the Applicant's main lie or omission was that he brought only one piece of luggage (the laptop bag found in his hotel room) to Singapore when he in fact brought in two pieces.[80] His explanations were that: (a) he did not lie because he had not considered his laptop bag to be a piece of luggage; and (b) alternatively, he lied because he was

80 ROP Vol 2 (2014), p 197.

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told by the CNB officers that there had been an arrest on the night of 13 November 2011 and two packets of drugs were recovered from the Black Luggage (*HC (Acquittal)* at [62]–[66]). As noted earlier, the court in *CA (Conviction)* rejected both explanations (at [44]).

159 One issue that arises in relation to the Applicant's explanations for the First Statement is that the Applicant was arguably still lying in *HC (Acquittal)* at [62]–[64]. As noted above, one of the Applicant's explanations was essentially that his evidence on the First Statement that he only brought one piece of luggage into Singapore was *not* a lie because he had not considered his laptop bag to be a piece of luggage. On one view, the Applicant appears to resort to another lie (that he had not considered his laptop bag to be a piece of luggage) to explain the lie in his First Statement (that he only brought one piece of luggage into Singapore). This was even though by this point in 2014, there was no suggestion that the PTSD and/or PTSS were in issue.

160 The relevant parts of the Applicant's evidence at trial in 2014 are as follows (*HC (Acquittal)* at [61]–[63]):

> 61 After his arrest, Ilechukwu had insisted in all of his statements that he did not have anything to do with the Black Luggage or Hamidah. This was subsequently proven to be untrue. The prosecution submitted that these lies showed that he knew that the Black Luggage contained illicit drugs, otherwise he would have come clean upon questioning.
>
> 62 **In his first statement recorded** shortly after he was arrested, Ilechukwu said he brought only one luggage into Singapore:
>
> > Q: When you arrive at airport in Singapore, how many luggage did you bring?
> >
> > A: One
> >
> > Q: Is that the luggage? (Recorder's note: accused was pointed to a black bag on the floor in the room)

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> A: Yes.
>
> 63 **Ilechukwu explained that he did not lie in this statement because he considered that the laptop bag (or in his words, "handbag") was not a luggage.** Since he had one laptop bag and one luggage (*ie*, Black Luggage), it was not wrong for him to say that he had only brought one luggage into Singapore. The prosecution submitted that Ilechukwu's explanation cannot be true in light of the next question ([62] above). **In response, Ilechukwu claimed that everything, including his laptop bag, had been taken out of the hotel room and the officer did not point to any bag when the statement was taken.**
>
> [emphasis added]

161 The Applicant's evidence in *HC (Acquittal)* should be construed carefully. The Applicant's clear position from the beginning of *HC (Acquittal)* until now is that he brought two pieces of luggage into Singapore. What the Applicant was seeking to do at trial, as quoted above, was to explain why he had said in his First Statement that he only brought one piece of luggage into Singapore. We note that the Judge in *HC (Acquittal)* had considered it unlikely that the Applicant would have been mistaken as to the number of pieces of luggage and rejected his explanation (at [64]). This was affirmed by the court in *CA (Conviction)* at [35].

162 As we have already explained at length, each of the two events, the arrest and the Applicant being informed of the death penalty, would separately constitute a Criterion A traumatic event in the present case primarily because of the sensitisation effect. This furnishes a possible innocent explanation for the Applicant's lies in his statements, including the question of the number of pieces of luggage he brought into Singapore. That the Applicant in the first-instance trial in 2014 tried to explain away the lie on some other basis other than his PTSD and/or PTSS is unsurprising. The reality is that at the time of the trial leading to *HC (Acquittal)*, there was no suggestion whatsoever that there might

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be a medical basis which could provide an innocent explanation for the Applicant's lies and omissions in his statements. To this extent, we agree with counsel for the Applicant that in so far as his defence in 2014 appears to be untruthful, little weight should be accorded to that and it should not be counted against him when viewed in the entire context.

163 In the Cautioned Statement, the Applicant said he "did not give anything to anybody" and maintained that he had only left his hotel room to "change money and look around" when in fact he had gone out to pass the Black Luggage to Hamidah.[81]

164 In the Long Statements, the Applicant again stated that he came to Singapore to purchase second-hand computers for his business and that Izuchukwu had assisted him with the travel arrangements. He insisted that he only brought one bag to Singapore – the laptop bag.[82] He again maintained that he only left his hotel room to exchange money and denied having gone to Clarke Quay.[83] He claimed he dropped his mobile phone into a toilet bowl.[84] Furthermore, when shown photographs of Hamidah and Adili, the Applicant claimed never to have seen them before his arrest.[85] He also denied recognising Hamidah's car when shown a picture of it.[86] Also, Kingsley was not mentioned in any of his statements.

81 ROP Vol 2 (2014), p 211.

82 ROP Vol 2 (2014), pp 231 to 232; p 239.

83 ROP Vol 2 (2014), p 237.

84 ROP Vol 2 (2014), p 238.

85 ROP Vol 2 (2014), p 246.

86 ROP Vol 2 (2014), p 247.

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165 It is not necessary to rehash at this juncture the Applicant's explanations for his continued lies and omissions in the Cautioned Statement and Long Statements. These have been traversed earlier (see [20] above). It suffices to recall that the Court of Appeal had disbelieved all of them (at [51]–[58] of *CA (Conviction)*) and found that there was "no acceptable explanation for the lies save for his realisation of his guilt" (at [61] thereof).

166 In our judgment, there is now a plausible innocent explanation that accounts for the Applicant's lies and omissions in his statements. The critical new finding that emerges from *HC (Remitted)* as we have analysed it, is that there is a plausible connection between the Applicant's PTSS and the lies and omissions.

167 In the light of the medical evidence connecting the Applicant's history of PTSD and experiencing of PTSS in 2011 to his lies and omissions, it can no longer be said with a reasonable degree of confidence that the Applicant's motive for the lies and omissions can *only* be attributed to a realisation of guilt. To reiterate, we accept the evidence of Dr Sarkar, Dr Ung and Dr Winslow that the Applicant's history of PTSD and in particular his PTSS arising out of the events in 2011 may have led him to grossly overestimate the threat on his life. This may in turn have prompted the Applicant to utter the unsophisticated and blatant falsehoods in his statements in an attempt to escape from the death penalty and to save his life. This ostensibly imprudent and irrational response must also be considered with the persistent paranoia which the Applicant harboured towards ASP Deng, which in our view may explain the Applicant's continued lies even during the making of the Long Statements.

168 Therefore, it is plausible that the Applicant's lies and omissions in his statements were the result of his PTSS rather than a realisation of guilt. In the circumstances, it is unsafe to draw any adverse inference against the Applicant from his lies and omissions. Consequently, it is also inappropriate to rely on the Applicant's lies and omissions to impugn his creditworthiness as had been done in *CA (Conviction)* at [62].

169 That however is not the end of the matter. In *CA (Conviction)*, it was the numerous lies and omissions – which had no innocent explanation save for the Applicant's guilty mind – that tipped the scales and led the court to find that the presumption under MDA was not rebutted by the Applicant. It is to that issue which we finally turn.

Rebuttal of s 18(1) presumption

170 Section 18(1) of the MDA reads:

> **Presumption of possession and knowledge of controlled drugs**
>
> 18.—(1) Any person who is proved to have had in his possession or custody or under his control —
>
> (*a*) anything containing a controlled drug;
>
> (*b*) the keys of anything containing a controlled drug;
>
> (*c*) the keys of any place or premises or any part thereof in which a controlled drug is found; or
>
> (*d*) a document of title relating to a controlled drug or any other document intended for the delivery of a controlled drug,
>
> shall, until the contrary is proved, be presumed to have had that drug in his possession.
>
> [emphasis added]

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171 Under s 18(1), the legal burden is on the Applicant to adduce sufficient evidence to demonstrate that, on the balance of probabilities, he did not actually know about the presence of the item in the Black Luggage that turned out to be drugs. At the same time, the "inherent difficulties of proving a negative" must be borne in mind so that the burden of rebutting the relevant presumption "should not be made so onerous that it becomes virtually impossible to discharge" (*Harven a/l Segar v Public Prosecutor* [2017] 1 SLR 771 at [2]).

172 We also highlight the following observations made by the majority of the court in *Gopu Jaya Raman v Public Prosecutor* [2018] 1 SLR 499 at [25]:

> In this setting, *there is only one fact that is controversial: the Appellant's knowledge that the drugs were hidden in the Motorcycle*. If he knew of the drugs, then the Judge's decision will stand; if he did not, it cannot. To determine this fact, a delicate and fact-sensitive inquiry is required, in the context of which we must unpack and examine each relevant fact or piece of evidence to assess whether it supports one or both possibilities. ***A fact that is consistent with both possibilities is likely to be probatively neutral unlike a fact that is consistent with only one of the two possibilities.*** However, although the Prosecution has a statutory presumption operating in its favour, when it comes to assessing the evidence in order to determine whether the presumption has been rebutted, the starting point should be neutral with no predilection for either conclusion. The real significance of the statutory presumption is that it reverses the burden of proof. ***But once the evidence has been led, it must be evaluated neutrally to determine whether the presumption has been rebutted. In that light, we turn to consider the evidence.***
>
> [emphasis in italics in original; emphasis added in bold italics]

173 In our judgment, the s 18(1) presumption has been rebutted by the Applicant on the balance of probabilities. Given our above finding on the Applicant's lies and omissions, they can no longer be relied on to corroborate the other evidence of guilt. As mentioned, it is also inappropriate to discredit his overall credibility and evidence on the same basis. In other words, no weight

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can be given to the lies and omissions. What remains then is to evaluate the other evidence.

174 The Applicant's evidence from the outset was that he was in the business of selling electronics in Nigeria and had come to Singapore to purchase second-hand electronics for resale back home.[87] In *HC (Acquittal)*, the Applicant testified that his childhood friend, Izuchukwu, had introduced him to Kingsley, who supposedly had relevant business contacts in Singapore.

175 His evidence was that at the airport in Nigeria, Kingsley passed him the Black Luggage with a request that he pass it to a contact in Singapore who was going to help the Applicant source for second-hand electronics.[88] He was told that it contained clothes that belonged to Kingsley's contact in Singapore. Notably, the Applicant testified that he had opened the Black Luggage to confirm it contained clothes and upon examination, this appeared to be the case. According to him, the Black Luggage also underwent a physical check and X-ray scan at the Lagos airport before check-in for the flight to Singapore.[89]

176 The Applicant tried to ask for the details of Kingsley's contact in Singapore, but Kingsley did not give them to him.[90] Nonetheless, he thought that once he met up with the contact, he would be able to conduct future transactions for electronics through that contact. He also trusted Kingsley since he was

[87] ROP Vol 1(A) (2014) at p 14 - Transcript, 25 September 2014, page 9, lines 4 and 5.

[88] ROP Vol 1(A) (2014) at p 87 - Transcript, 25 September 2014, page 82, lines 8 to 32.

[89] ROP Vol 1(A) (2014) at p 17 - Transcript, 25 September 2014, page 12, lines 12 to 16 and 29 to 30.

[90] ROP Vol 1(A) (2014) at p 89 - Transcript, 25 September 2014, page 84, lines 2 to 7.

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Izuchukwu's friend and the request to bring the Black Luggage seemed like a small favour in exchange for the prospective business contacts.[91] We agree with the Judge's observations in *HC (Acquittal)* at [47] that while the Applicant's actions appear foolhardy, it is not implausible or incredible from the point of view of an ambitious young man presented with the prospect of a business opportunity.

177 The Applicant's account is also corroborated by the US$5,000 which he had brought to Singapore as well as the evidence of Kervinn, the director of ESP, the freight forwarding company which had made the necessary arrangements to sponsor both the Applicant's and Adili's visits to Singapore. Notably, Kervinn had given evidence that it was common for Nigerians to come to Singapore to buy electronic goods and ship them back to Nigeria (*HC (Acquittal)* at [48]).

178 When the Applicant arrived in Singapore, he received suspicious messages from Izuchukwu asking several questions. We have little doubt that Izuchukwu and Kingsley orchestrated the transportation of the drugs in the Black Luggage. However, that does not necessarily mean that the Applicant was part of the plan (*HC (Acquittal)* at [51]). Despite the delay at immigration, the Judge also observed that the Applicant remained composed and went ahead to collect the Black Luggage instead of walking away. From the CCTV footage, he did not appear to be flustered. He was also unflustered when the Black Luggage was put through the X-ray machine and physically checked by an officer. If he were not an innocent participant, it would be rather remarkable

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[91] ROP Vol 1(A) (2014) at p 88 - Transcript, 25 September 2014, page 84, lines 12 to page 85 line 12.

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that he proceeded to collect the Black Luggage and had remained calm at all material times at Changi Airport as noted by the Judge.

179 Furthermore, the fact that the Black Luggage had been checked several times both in Nigeria (according to the Applicant's evidence which we are inclined to believe) and in Singapore (which is undisputed) and yet yielded nothing, is an objective factor relevant to our assessment as well. The reality is that the drugs in question were only found after the Black Luggage was cut open at the Woodlands Checkpoint after Hamidah was arrested.

180 When the Applicant arrived at Hotel 81, he realised he did not have enough Singapore dollars on him and thus went out to a moneychanger located across the street from the hotel. Notably, the Applicant left the Black Luggage at the hotel lobby for about 12 minutes before returning. Whilst it may be true that the safer and least suspicious option available to the Applicant at that point might have been to stow the Black Luggage at the lobby rather than carting it along, we have some doubts as to whether the Applicant had made such a calculated decision then. As a first-time visitor to Singapore, this was not a place he was familiar with. It is entirely possible for someone with the knowledge of the drugs in his possession to hold onto the Black Luggage without necessarily arousing suspicion. Indeed, this may be the more prudent option as compared to leaving it at an unfamiliar hotel lobby. On balance, we think this fact lends further weight to the perception that the Applicant probably did not know that there were drugs in the Black Luggage.

181 Finally, the circumstances surrounding the Applicant's meeting with Hamidah are also notable. The Applicant's evidence was that he had been waiting for Hamidah at a bus stop in Clarke Quay but Hamidah was unable to

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find him. Thus, the Applicant approached a Caucasian male who was also at the bus stop so that he could give directions to Hamidah. It seems somewhat unusual to us that anyone who is knowingly involved in a criminal enterprise would voluntarily approach and interact with a third party, since that would carry with it the real risk of being identified subsequently. More unusual was that the Applicant agreed to join Hamidah on what was to all accounts a joyride after he had passed the Black Luggage to her. This clearly prolonged the risk of the Applicant getting caught with the Black Luggage. As noted in *CA (Conviction)* at [82], this was one of the strongest points in the Applicant's favour. Moreover, this was a country he was totally unfamiliar with and if he were up to no good, the natural instinct would have been to leave at the soonest possible moment. We find it difficult to disagree with the Judge's observations that the Applicant's behaviour is more consistent with someone who did not have any knowledge of the drugs in the Black Luggage (*HC (Acquittal)* at [54]).

182 It is a trite principle that an appellate court is usually slow to overturn the factual findings of a trial judge especially where the finding is based on the oral testimony of witnesses (see *CA (Conviction)* at [83]–[84] citing *ADF v Public Prosecutor and another appeal* [2010] 1 SLR 874 at [16] and *Public Prosecutor v Muhammad Farid bin Mohd Yusop* [2015] 3 SLR 16 at [53]). The present is such a case. Having analysed the totality of the evidence apart from the lies and omissions, we find that it is more probable than not that the Applicant did *not know* that there were drugs in the Black Luggage. The Applicant has consistently maintained that he came to Singapore for a business purpose and was asked by Kingsley to help pass the Black Luggage – which was checked multiple times – and it seems to us that both these assertions are plausible and credible, viewed in the light of all the circumstances alluded to at [180]–[181]. The picture that emerges from the evidence is that the Applicant

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had grossly misjudged Izuchukwu and Kingsley, and naively believed that he was doing a simple favour in return for promised business contacts. Unwittingly, he had been deceived into transporting drugs on their behalf to Kingsley's contact in Singapore.

183 In the premises, without the adverse inferences based on the Applicant's lies, the remaining evidence is consistent with him not having knowledge that there were drugs in the Black Luggage. The Judge had believed his claim of ignorance. For both Andrew Phang Boon Leong JA and myself, who were in the *coram* which delivered the decision in *CA (Conviction),* if the evidence adduced in *HC (Remitted)* had been before us then, we would not have held that the lies and omissions in the statements of the Applicant tipped the balance and caused us to overturn the acquittal of the Judge. There would have been nothing that tipped the balance and the acquittal of the Judge would have been allowed to stand. The Chief Justice and Judith Prakash JA who join this enlarged *coram* to hear this case are also of that view. The third member of the *coram* which decided *CA (Conviction)*, Tay Yong Kwang JA, is of a different view.

Conclusion

184 While we stated at the outset (at [3]), that the medical evidence – which we have considered to be determinative for the reasons explained – arose out of fortuitous circumstances, those circumstances were very much part of the normal process which would apply following the overturning of the acquittal decision of the High Court. What is exceptional is the fact that the evidence that the Applicant could possibly be affected by PTSD came from the Prosecution's psychiatrist, Dr Sarkar, when he interviewed the Applicant to determine his mental health for the purpose of determining the appropriate sentence. As

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mentioned, if that evidence adduced in *HC (Remitted)* concerning the Applicant's PTSD/PTSS had been before the Court of Appeal in *CA (Conviction)*, the outcome would have been different. In all the circumstances, we find that the decision in *CA (Conviction)* is demonstrably wrong and the Court of Appeal's conviction is hereby set aside.

185 Accordingly, we allow the application and affirm the order of the High Court acquitting the Applicant of the trafficking charge.

Sundaresh Menon Chief Justice	Andrew Phang Boon Leong Judge of Appeal	Judith Prakash Judge of Appeal

Chao Hick Tin
Senior Judge

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Tay Yong Kwang JA (dissenting):

Introduction

186 The Applicant was charged under s 5(1)(*a*) of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) ("MDA") for trafficking in not less than 1,963.3g of methamphetamine ("the drugs") contained in a black luggage ("the Black Luggage") which he had brought into Singapore and handed over to Hamidah Binte Awang ("Hamidah") subsequently. The present criminal motion was an application for his conviction by this court (which comprised three Judges then) in *Public Prosecutor v Ilechukwu Uchechukwu Chukwudi* [2015] SGCA 33 ("*CA (Conviction)*") to be reviewed on the basis of the principles in *Kho Jabing v Public Prosecutor* [2016] 3 SLR 135 ("*Kho Jabing*"). In our subsequent decision in *Ilechukwu Uchechukwu Chukwudi v Public Prosecutor* [2017] 2 SLR 741 ("*CA (Reopening)*") and the criminal motions that followed, we ordered that the matter be remitted to the trial Judge ("the Judge") in the High Court for him to determine the effects of any post-traumatic stress disorder ("PTSD") or post-traumatic stress symptoms ("PTSS") on the Applicant's lies and omissions from the time the investigations began.

187 In this judgment, I explain why I hold the view that the findings from the remitted hearing, taken together with all the existing evidence, do not warrant a change in the conclusion that this court reached in *CA (Conviction)* when it allowed the Prosecution's appeal and convicted the Applicant. My view therefore is that the Applicant should remain convicted as charged.

Facts

188 The facts have been set out in detail in the majority judgment and I shall therefore mention only the more salient facts which are necessary for this

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judgment. I highlight at the outset that the factual account that the Applicant gave in his statements during the course of investigations differed significantly from the account that he gave during his oral testimony at the trial ("the 2014 trial") and his further oral testimony at the remitted hearing before the Judge.

189 The Applicant's oral evidence at the 2014 trial was that he had been introduced by "Izuchukwu" to "Kingsley", an individual who had contacts in Singapore who would help him with his plans to purchase second-hand laptops for sale in Nigeria.[92] On the day of his departure from Nigeria, he met Kingsley and Izuchukwu at the airport there. Kingsley passed him the Black Luggage, told him it contained clothes and asked him to pass it to a contact in Singapore. The Applicant asserted that he did not know of this in advance and that he did not have any details of Kingsley's contact but agreed to do this nevertheless as a favour to Kingsley. The Applicant claimed that the request that he convey the Black Luggage assured him that there would be somebody waiting for him in Singapore. The fact that Kingsley had called this person from the Lagos airport further reassured him.[93] The Applicant claimed that he had opened the Black Luggage and saw clothes and a pair of shoes inside.[94]

190 When the Applicant arrived in Singapore on 13 November 2011, he experienced some delay in the immigration section of the airport. The Judge in *Public Prosecutor v Hamidah Binte Awang and another* [2015] SGHC 4 ("*HC*

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92 ROP Vol 1(A) (2014) at pp 10 and 13 – Transcript, 25 September 2014, page 5, lines 8 to 26; page 8 lines 10 to 17.

93 ROP Vol 1(A) (2014) at pp 87, 88 and 90 – Transcript, 25 September 2014, page 82 line 25 to page 83 line 8; page 85 lines 2 to 12.

94 ROP Vol 1(A) (2014) at p 17 – Transcript, 25 September 2014, page 12, lines 9 to 15.

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(Acquittal)") at [52] observed that notwithstanding this delay, the Applicant remained composed and collected the Black Luggage before leaving the airport. The Applicant then took a taxi to Kim Tian Hotel in Geylang. This was because Kingsley had given him a "hotel card" from Kim Tian Hotel.[95] However, after he reached the hotel, Kingsley called and told him that there was a change of plans and that he should stay at Hotel 81 in Chinatown instead as that hotel would be nearer to Kingsley's contact.[96]

191 Upon reaching the said Hotel 81, the Applicant realised that he did not have enough Singaporean currency to pay for the room. He therefore walked out of the hotel to go to a moneychanger located across the road.[97] During this time, he left the Black Luggage in the hotel lobby for about 12 minutes because the hotel staff recommended that he do that.[98]

192 Subsequently, he took the Black Luggage and went to Clarke Quay to meet Hamidah at a bus stop. After meeting Hamidah, who was driving a car and who introduced herself as "Maria",[99] he handed her the Black Luggage which was then placed in the car. He then got into her car and she suggested that they

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95 ROP Vol 1(A) (2014) at pp 32 and 33 – Transcript, 25 September 2014, page 27, lines 12 to page 28, line 12.

96 ROP Vol 1(A) at p 33 – Transcript, 25 September 2014, page 28, lines 23 to 27.

97 ROP Vol 1(A) at pp 37 and 38 – Transcript, 25 September 2014, page 32, line 22 to page 33 line 4.

98 See also ROP Vol 2 (2014) at p 236 - Statement dated 22 November 2011 at para 15; ROP Vol 1 at p 269 (2014) – Transcript, 17 September 2014, page 70, line 2.

99 ROP Vol 1 (2014) at p 381 – Transcript, 24 September 2014, page 15, line 24.

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eat at an African restaurant.[100] As the restaurant was closed,[101] Hamidah offered him drinks kept in the trunk of her car.[102] The Applicant dropped his mobile phone accidentally into Hamidah's drink.[103] Later, he made his way back to Hotel 81.

193 That night, Hamidah was arrested at the Woodlands Checkpoint when she tried to leave for Malaysia in her car with the Black Luggage inside. The drugs that were the subject of the Applicant's charge were found in the Black Luggage. The next morning, 14 November 2011, a team of CNB officers went to Hotel 81 to arrest the Applicant who was inside his room. A total of six statements were recorded from the Applicant after his arrest. These were the statements which contained the Applicant's various lies and omissions which became the centre of contention in these proceedings. I will elaborate on this subsequently.

Procedural History

The trial in the High Court

194 The Applicant's defence was that he did not know anything about the drugs concealed in the Black Luggage. At the trial in the High Court, the Judge acquitted the Applicant. Briefly, these were the findings made by the Judge in *HC (Acquittal)*:

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[100] ROP Vol 1 (2014) at p 384 – Transcript, 24 September 2014, page 18, lines 5 to 22.

[101] ROP Vol 1 (2014) at p 387 – Transcript, 24 September 2014, page 21, lines 19 to 21.

[102] ROP Vol 1 (2014) at p 388 – Transcript, 24 September 2014, page 22, lines 15 and 16.

[103] ROP Vol 1 (2014) at p 390 – Transcript, 24 September 2014, page 24, lines 14 to 17; ROP Vol 1(A) (2014) at p 57 – Transcript, 25 September 2014, page 52, lines 19 to 23.

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(a) The Applicant's evidence at trial was generally credible and supported by objective evidence. The Judge found that the evidence was more consistent with a lack of knowledge of the drugs in the Black Luggage (at [69]). In particular, at the airport in Singapore, despite the delay that the Applicant experienced in the immigration section, he collected the Black Luggage and appeared to be composed when doing so. At Hotel 81, he left the Black Luggage at the hotel lobby for about 12 minutes. He got into Hamidah's car even after handing her the Black Luggage. The Judge found all these actions to be inconsistent with the Applicant having knowledge that there were illegal drugs in the Black Luggage (at [52], [54] and [60]). Further, the director of ESP Lines (S) Pte Ltd gave evidence that the Applicant was a trader coming to Singapore (see [48]).

(b) Although the Applicant lied in the statement recorded on 14 November 2011 at 1pm ("the First Statement") about the number of bags that he had brought into Singapore (that he brought with him only his laptop bag), the Judge was not convinced that he lied because he knew, prior to his arrest, that the Black Luggage contained the drugs. It was equally possible that the Applicant had decided that the best way forward for him in the circumstances was to lie about the Black Luggage and deny any association with it because he realised that there had been an arrest the night before and that a luggage with two packets of drugs was found and/or that he had been arrested for drug trafficking (the Applicant's "alternative case") (at [66]).

(c) In respect of the Applicant's cautioned statement recorded on 14 November 2011 at 9.41 pm (the "Cautioned Statement") and the four

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statements recorded under s 22 of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) ("CPC") between 21 and 24 November 2011 ("the Long Statements"), the Applicant explained at the trial that he lied or omitted information because he had not been informed of the full facts surrounding his arrest and having heard that the trafficking charge carried the death penalty, he decided that the safest course of action was to deny everything that was not then in his possession. The Judge found that while the Applicant had been defensive and "perhaps excessively so", this did not show unequivocally that he knew about the drugs in the Black Luggage before he was arrested. The Judge held that it could instead be explained by a realisation after his arrest that there were drugs in the Black Luggage. This was especially since the Judge found that the Applicant's conduct before his arrest was not consistent with a person who had knowledge of the drugs. As he was suspicious about the investigating officer, ASP Deng Kaile ("ASP Deng"), that could have contributed to his decision to deny everything concerning the Black Luggage and Hamidah (at [67]).

195 The Judge found that the Applicant had rebutted the presumption of knowledge of the drugs under s 18(2) of the MDA on a balance of probabilities. He therefore acquitted the Applicant (at [70] and [71]).

The conviction

196 On appeal by the Prosecution against the acquittal, *CA (Conviction)* set aside the acquittal and convicted the Applicant on the charge. The issue before the court in *CA (Conviction)* was whether the Applicant had rebutted the presumption under s 18(2) of the MDA (see *CA (Conviction)* at [27]). Following

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this court's decision in *Adili Chibuike Ejike v Public Prosecutor* [2019] 2 SLR 254, it is now agreed between the parties that the correct question should be whether the Applicant had rebutted the presumption under s 18(1) of the MDA.[104]

197 In finding that the Applicant had knowledge of the drugs in the Black Luggage, *CA (Conviction)* found that his defence was, in the final analysis, an unlikely account from an unreliable source (at [89]). This was since the Applicant's version of the facts was quite improbable, although perhaps not to the degree that it would by itself justify appellate interference (at [87]). In particular, there was little evidence to corroborate the Applicant's claim that he had come to Singapore for business and the US$5,000 he had brought was a rather small amount if he had intended to trade in electronic goods (at [66]-[68]). The Applicant's account was suspicious for a number of reasons. First, the Applicant had travelled out of Nigeria for the first time, allegedly for a serious business trip, without the contact's name, details or a clear itinerary. He also had a hotel booking for only one night. Second, the account of how compliant the Applicant had been to Kingsley's instructions, *eg*, to carry the Black Luggage or to stay in Hotel 81 was suspicious. Third, the numerous text messages the Applicant received upon arrival in Changi Airport suggested it was not a legitimate business trip (at [71] to [78]). The sole objective fact in the Applicant's favour was the fact that he got into the car with Hamidah after handing over the Black Luggage to her but this fact was of limited value. The fact that the Applicant claimed the Black Luggage despite having been delayed at the immigration section in the airport here and that he was willing to leave

104 Applicant's submissions dated 2 March 2020 at para 7; Prosecution's submissions dated 2 March 2020 at para 9(d).

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the Black Luggage in the lobby in the care of the staff of Hotel 81 for 12 minutes while he went to exchange money did not indicate he did not know there were drugs therein (at [79]-[82] and [88]).

198 If the case had turned solely on the Judge's assessment of the Applicant's credibility, appellate intervention might not have been warranted (at [87]). What tipped the scales were the numerous lies and omissions made by the Applicant in his statements, for which there was no innocent explanation (at [88]). In respect of the First Statement, *CA (Conviction)* rejected the Applicant's assertion that he did not lie. However, unlike the Judge, *CA (Conviction)* also rejected the Applicant's alternative case (see [194(b)] above), finding that it was speculative and the evidential basis for it threadbare. This was since none of the Central Narcotics Bureau ("CNB") officers testified that they had said anything regarding Hamidah's arrest, that two packets of drugs were found in a bag or that the Applicant was being arrested for drug trafficking. The Applicant also did not assert in his evidence that he had been told this (at [35]-[42]). Rather, the Applicant testified that the first time he had any inkling that the charge against him was related to the Black Luggage was when his counsel visited him (at [43]). *CA (Conviction)* therefore found that he had not only lied in the First Statement but was also untruthful about why he had lied. The lie might not have been held against the Applicant if he had come clean afterwards but he did not (at [45]).

199 In respect of the lies and omissions in the Cautioned Statement, *CA (Conviction)* held that the Applicant's explanations that he was confused and the investigating officer had not been "open" or specific about the circumstances of the case were convenient excuses (at [48], [50] and [51]). By this time, as was his position in the alternative case, the Applicant must have known about

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the nature and consequences of the charge and that it related to the Black Luggage and its transfer to Hamidah. He had also said he understood the caution perfectly.[105] The explanations given for the lies in the Long Statements were broadly similar, *ie*, that the Applicant had decided to lie out of fear as his life was at stake and that he had decided that denying anything that was not in his possession would be the safer course to take as he did not know the full facts of what had happened. We similarly rejected these explanations in relation to the Long Statements (at [56] and [58]).

200 The Applicant did not provide any good reasons for his omission to mention key exculpatory facts or circumstances, in particular, Kingsley, who was essential to his defence. This could have been done without having to say anything about the Black Luggage. The Judge should have drawn an adverse inference in this regard (at [58]). The Judge's observation that the Applicant's defensive behaviour did not show "unequivocally" that he had the requisite knowledge prior to his arrest suggested that he might have overlooked that the burden of proof was on the Applicant and not the Prosecution to show that he did not have such knowledge. While the Prosecution did not need to rely on the lies in the statements as corroborative proof of guilt, they were more consistent with the Applicant having had knowledge of the drugs in the Black Luggage before the arrest (at [59]).

201 The lies were deliberate, related to material issues and have been proven independently to be untrue. Further, the Applicant's excuses for the lies were wholly unsatisfactory and unbelievable and there was no acceptable explanation

105 ROP Vol 1(A) (2014) at p 111 – Transcript, 25 September 2014, page 106, lines 14 to 31.

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for the lies save for his realisation of guilt (at [61]). These lies met the criteria in *Regina v Lucas (Ruth)* [1981] QB 720 ("*Lucas*") and could be used as corroborative evidence of guilt ("*Lucas* lies"). Finally, a lie not corroborative of guilt could still be relied upon to find that an accused person was not creditworthy. The Judge did not have sufficient regard to the lies and omissions in concluding that the Applicant's evidence at trial was generally credible (at [62] and [63]).

The remittal

202 Psychiatric reports were obtained with a view to considering whether the Applicant had grounds to argue that he should be sentenced to life imprisonment under s 33B(3)(*b*) MDA on the basis of diminished responsibility. A medical report was produced by Dr Jaydip Sarkar ("Dr Sarkar") when the Applicant was assessed by the Institute of Mental Health ("IMH"). In this report, Dr Sarkar opined that the Applicant was suffering from, among other things, PTSD with dissociative symptoms at the time the various statements were taken by the Central Narcotics Bureau ("CNB") officers. He opined that the acute symptoms of PTSD may have been a factor relevant to the unreliable account provided by the Applicant and that the presence of PTSD "is likely to have led to an overestimation of threat to his life which could have prompted him to utter unsophisticated and blatant falsehoods in order to save his life".[106]

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[106] ROP Vol 2(B) (2018) at p 1328 – Dr Sarkar's report at paras 84 and 88.

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203 The present criminal motion was filed in 2017 seeking a review of the decision in *CA (Conviction)* on the basis of the above IMH report.[107] The IMH report was "new" evidence since it could not have been obtained earlier even with reasonable diligence. In *CA (Reopening)*, this court applied a slightly modified form of the principles laid down in *Kho Jabing* due to the unique turn of events which led to the production of the IMH Report. As such, it sufficed that the IMH report was *prima facie* reliable, substantial and raised a "powerful probability" that the decision in *CA (Conviction)* was wrong (at [34], [36] and [45]).

204 The matter was therefore remitted to the Judge with directions for him to receive evidence from Dr Sarkar. Following several criminal motions, the final terms of reference for the Judge's determination were as follows:

(a) whether the Applicant was suffering from PTSD;

(b) the typical effects of PTSD on a sufferer;

(c) if the Applicant was indeed suffering from PTSD:

(i) the period of time during which PTSD affected him;

(ii) the effects of PTSD on him during that period; and

(iii) the extent to which PTSD affected him when he gave his statements to the CNB;

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107 Notice of Motion filed on 5 April 2017.

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(d) if the Applicant was not suffering from PTSD, whether the Applicant was suffering from PTSS. If he was suffering from PTSS:

(i) the precise symptoms should be identified;

(ii) the period of time during which PTSS affected him;

(iii) the effects of PTSS on him during that period; and

(iv) the extent to which PTSS affected him when he gave his statements to the CNB.

205 The Judge's decision following the remitted hearing is in *Public Prosecutor v Hamidah Binte Awang and another* [2019] SGHC 161 ("*HC (Remitted)*"). The Judge's conclusions were:

(a) The Applicant was *not* suffering from PTSD during the time the various statements were taken, although he had suffered from PTSD as a child ("childhood PTSD") up to an indefinite time before the arrest (at [204]).

(b) The Applicant had been suffering from various PTSS when the statements were recorded from him (at [205]-[206]).

206 Nevertheless, the Judge held that the Applicant had not shown on a balance of probabilities how any of the PTSS had caused him to overestimate the threat to his life during the recording of the various statements (at [207]).

207 Adili (the appellant in *Adili Chibuike Ejike v Public Prosecutor* mentioned at [196] above) was called by the Prosecution to testify at the

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remitted hearing. Adili had flown into Singapore on the same flight as the Applicant and was arrested for drug trafficking in a separate operation. The Prosecution called Adili to give evidence on the events in Nigeria prior to his arrest on 14 November 2011. Adili's account contradicted the Applicant's evidence as to how the Applicant had obtained the Black Luggage from Kingsley. Adili stated that the Applicant had the Black Luggage with him in Izuchukwu's house (see *HC (Remitted)* at [50] and [51]). According to the Prosecution, this showed that the Applicant lied to Dr Sarkar. Since it was not contended that the Applicant was suffering from PTSD or PTSS during the 2014 trial (or as the Prosecution argued before us, in 2016, when he was seen by Dr Sarkar), this would mean that the Kingsley story was fabricated intentionally by the Applicant during the trial. The Prosecution reasoned from this that the omission of the Kingsley story from the Applicant's statements was not due to any PTSD or PTSS and that the lies in the same statements were similarly not caused by any such conditions.[108]

208 However, the Judge declined to consider Adili's evidence, holding that it was improper for the Prosecution to adduce evidence from Adili on an important aspect of the Prosecution's case in the 2014 trial during the remitted hearing without the Applicant being given a full opportunity to challenge Adili's evidence. If Adili had been called in the committal hearing, the Applicant would have had the opportunity to prepare for his cross-examination of Adili, to cross-examine the Prosecution's other witnesses and to call his own witnesses on this issue. Since this was not done, the Judge declined to make any finding on whether Adili's evidence affected the veracity of the Applicant's account to Dr

108 Prosecution's submissions dated 20 March 2019 at paras 88 to 90; Prosecution's submissions dated 2 March 2020 at para 103.

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Sarkar (at [51] and [52]). Before this court, the Prosecution argued that the Kingsley story was raised by the Applicant for the first time on the sixth day of the 2014 trial and that they had no notice of this at the committal hearing stage. The Prosecution observed that, in any event, the court in *CA (Conviction)* found that the Prosecution had adduced sufficient evidence to make out its case without Adili's testimony.[109]

Parties' cases

The Applicant's case

209 The Applicant's position here is that the matter should be remitted to the Judge for a finding on whether it is possible that there was an innocent explanation for the lies and omissions. In the alternative, he submits that the Prosecution has not shown that there is no possible innocent explanation for the lies and omissions and that accordingly he must be acquitted.[110] The Applicant does not challenge the correctness of the Judge's findings of childhood PTSD and of the various PTSS at the time the statements were taken.[111] The Applicant further contends that he suffered from "sleep disturbance" during the recording of the Long Statements, which the Judge had overlooked.[112]

210 Significantly, the Applicant accepts that, on a balance of probabilities, the various PTSS did not cause him to lie, whether directly or indirectly:[113]

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109 Prosecution's submissions dated 2 March 2020 at para 105.

110 Applicant's submissions dated 15 May 2020 at para 36.

111 Applicant's submissions dated 2 March 2020 at paras 9 and 10.

112 Applicant's submissions dated 15 May 2020 at paras 9 and 11.

113 Applicant's submissions dated 2 March 2020 at para 13.

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> In short, the Judge declined to find that the various PTSS, whether directly or indirectly, caused the Applicant to lie. We accept that this is correct. Firstly, as all the experts agreed, there is no direct link between PTSD and lying. Secondly, even if there were a direct link between PTSD and lying, there remains the irreducible possibility that the Applicant lied because he was guilty. The proof of this is immediately apparent when we contemplate, for argument's sake, the hypothetical scenario of someone who suffers from PTSD *and* traffics drugs. PTSD and criminal activity are not mutually exclusive. Therefore, we concede that we are unable to prove (solely on the basis of the medical evidence and without reference to the wider issue of the Applicant's guilt or innocence) that, on the balance of probabilities, the various PTSS caused him to lie.
>
> [emphasis in original]

211 Instead, the Applicant confines his submissions to asserting a possibility that the lies were caused by his PTSS. In this regard, he suggests that two innocent explanations are possible:[114]

(a) He lied in the First Statement because of his alternative case (see [194(b)] above) and thereafter continued to lie in his Cautioned and Long Statements because he viewed ASP Deng with "absolute suspicion" and was not informed of the full facts surrounding his arrest, which made him decide that the "safest course of action was to deny everything that was not in his possession" when he learnt the offence carried the death penalty ("the Overly Defensive Explanation").

(b) His childhood PTSD and PTSS during the statement recording process caused him to lie to protect himself and get out of the "traumatic predicament" he had been in ("the PTSS Explanation"). In this regard, he emphasised the Judge's oblique remarks at [193] of *HC (Remitted*)

[114] Applicant's submissions dated 2 March 2020 at para 21.

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that it was not "inconceivable" that a person with a traumatic past would have lied if he believed that "lying would get him out of the traumatic predicament that he was in, *ie*, that lying would be a means to 'protect' oneself".[115]

212 The Applicant also emphasises that his evidence in the 2014 trial was consistent with these explanations, before any issue of PTSD or PTSS arose.[116]

213 The Applicant submits that he was a credible witness despite his lies, because there were innocent explanations for them as set out above.[117] The Applicant contends that a lie not corroborative of guilt can only be relied upon to make a finding that an accused person is not creditworthy where he has been demonstrably economical with the truth without any good reason, citing the decision in *CA (Conviction)* at [62]. I note at this juncture that this appears to be a misreading of the said [62] which in fact went on to make the point that lies can be taken into account when assessing the creditworthiness of an accused person even if he has a valid reason for lying.

The Prosecution's case

214 The Prosecution submits that the decision in *CA (Conviction)* should be upheld. This is because the Applicant has not rebutted the presumption under s 18(1) of the MDA.[118]

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115 Applicant's submissions dated 2 March 2020 at para 23.

116 Applicant's submissions dated 2 March 2020 at para 25; Annex A.

117 Applicant's submissions dated 2 March 2020 at para 29.

118 Prosecution's submissions dated 2 March 2020 at para 107.

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215 The Judge was correct to find that the Applicant did not suffer from PTSD in 2011. Referring to the criteria for PTSD in the Diagnostic and Statistical Manual of Mental Disorders (American Psychiatric Publishing, 5th Ed, 2013) ("DSM-5"), the Prosecution submits that the Judge was correct to find that Criterion A, *ie*, "[e]xposure to actual or threatened death, serious injury, or sexual violence …" was not satisfied in 2011. The Prosecution argues that it follows from this that the Applicant also did not suffer from any PTSS, since the symptoms listed in the DSM-5 must be attributable to a Criterion A traumatic event, as the Judge recognised.[119] The Prosecution also takes issue with the Judge's finding of childhood PTSD.[120]

216 In any event, neither PTSD nor PTSS could account for the lies and omissions, as the Judge rightly found.[121] The experts agreed that PTSD does not directly cause a sufferer to lie and that a sufferer would be able to distinguish right from wrong and could still choose to tell the truth.[122] The Judge had analysed the Applicant's case and the evidence meticulously and comprehensively before concluding that the Applicant had not established any of the links that he contended were present between the PTSS and the lies.[123] Further, it was unclear why the Applicant would have thought that there was a threat to his life and over-estimated such a threat if he had never associated the Black Luggage with any thought of drugs. Even then, it is unclear why he would react by lying to distance himself from the Black Luggage. The irresistible

119 Prosecution's submissions dated 2 March 2020 at para 76.

120 Prosecution's submissions dated 2 March 2020 at para 93.

121 Prosecution's submissions dated 2 March 2020 at para 47.

122 Prosecution's submissions dated 2 March 2020 at paras 48 and 62.

123 Prosecution's submissions dated 2 March 2020 at para 57.

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inference is that the Applicant had prior knowledge that the Black Luggage contained drugs.[124]

217 The Prosecution also argues that it does not need to prove that the Applicant's lies are "*Lucas* lies" since it does not have any legal burden to prove knowing possession of the drugs, either by way of "corroborative" or other evidence.[125] Rather, the burden of proof lies with the Applicant to rebut the presumption under s 18(1) of the MDA.

Issues to be determined

218 In *CA (Reopening)*, we found that there was cause to review our decision in *CA (Conviction)* on the basis that there was, at least *prima facie*, a powerful probability that our earlier decision was wrong. Accordingly, we indicated in *CA (Reopening)* at [51] that we would examine the correctness of the Judge's findings from the remitted hearing as well as their implications on our decision. In other words, the central question in this application is whether, in the light of the fresh evidence concerning the Applicant's PTSD and PTSS, the Applicant should now be said to have rebutted the presumption of possession under s 18(1) of the MDA. This requires that the following issues be determined:

(a) whether the Judge's findings on childhood PTSD and the various PTSS in 2011 were correct; and

(b) how the PTSD or PTSS affected the Applicant when he gave his statements to the CNB and whether the lies and omissions were *Lucas*

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124 Prosecution's submissions dated 2 March 2020 at paras 55 and 56.

125 Prosecution's submissions dated 15 May 2020 at para 53.

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lies. Embedded within this issue is the question of who should bear the burden of proving the Applicant's motives for the lies and omissions and the requisite standard of proof.

219 I consider these issues and the entire case in the light of the evidence adduced not only at the 2014 trial but also at the remitted hearing. It would be artificial to segregate the evidence at the two hearings into distinct blocks since they form part of the whole series of events and should therefore be studied together in order to come to an informed decision on what the truth is in this case.

The Judge's findings on childhood PTSD and PTSS in 2011

Childhood PTSD

220 The evidence shows that the Applicant had suffered from PTSD as a child. I do not accept the Prosecution's contention that the Judge erred in finding childhood PTSD by relying on a combination of the evidence of Dr Sarkar and Dr Ken Ung ("Dr Ung").[126] On the evidence as a whole, the various symptoms were established. The experts were not in complete agreement on which symptoms had been exhibited by the Applicant. However, the experts called by the Applicant appeared to be in broad agreement, even if they had not identified the same symptoms in their reports. The Judge sifted through the evidence and gave detailed reasons for each PTSS that he found was exhibited by the Applicant at the relevant time. He also explained why the contentions of the Prosecution and of Dr Christopher Cheok ("Dr Cheok") did not persuade him.

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[126] Prosecution's submissions dated 2 March 2020 at para 95.

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On the totality of the evidence, I see no reason to disagree with the Judge's findings on this point.

PTSS in 2011

221 Mr Eugene Thuraisingam ("Mr Thuraisingam") accepted that the Judge was correct to find that only certain PTSS but not PTSD existed in 2011. I therefore do not consider whether or not the Judge should have found that the Applicant suffered from PTSD.

222 It was not disputed that a past diagnosis of PTSD would produce a "sensitisation effect", thereby placing the Applicant at a higher risk of developing PTSD subsequently. This meant that the threshold for assessing Criterion A of the DSM-5 Criteria would be lowered (*HC (Remitted)* at [30], [46] and [118]). As the Prosecution rightly notes, Criteria B to E of the DSM-5 criteria must be attributable to a predicate Criterion A event. This was accepted by the Judge (see *HC (Remitted)* at [56]) and is evident from a plain reading of the DSM-5 criteria. This meant that if the Prosecution is correct in suggesting that there had been no Criterion A event in 2011, the clinical manifestations of the Applicant would not have been, strictly speaking, "PTSS" as defined in the DSM-5. In any case, Dr Cheok did not deny that the Applicant exhibited "stress-related symptoms".[127]

223 In my view, however, whether the symptoms observed amounted to "PTSS" or not is not critical to the inquiry of the Applicant's knowledge of the drugs at the material time. Even if the Judge was correct to find that the various

[127] ROP Vol 1(A) (2018) at p 582 – Transcript, 8 August 2018, page 73, lines 15 to 20.

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PTSS existed, that does not mean that the Applicant's lies and omissions could not be due to his knowledge that there were drugs in the Black Luggage.

The arrest

224 On an attenuated standard, I agree that there is some basis to find that the arrest could have satisfied Criterion A in 2011, although this is not without difficulty. While the experts did not appear to entirely agree on the extent to which Criterion A would be attenuated, as is perhaps indicated by the fact that only Dr Sarkar took the position that the arrest itself constituted a Criterion A event (see *HC (Remitted)* at [123]),[128] the Applicants' experts' evidence also suggested that the sensitisation effect would have been significant. For instance, Dr Ung testified that "even an innocuous trigger could retrigger his PTSD experience"[129] and Dr Sarkar testified that a person who has an "intense fear about something, with PTSD" may be triggered even by an event which is not life-threatening.[130] If the standard was attenuated to the extent that an innocuous, non-life threatening event would have sufficed, then it would seem that the arrest would have met this standard.

225 However, I do not think that this is without difficulty. Dr Sarkar, in opining that the Applicant's PTSD was triggered by the arrest, relied on the fact that the Applicant described his arrest using terms such as "war" and "chaos".[131] I question the extent to which the words used by the Applicant should be given

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128 In contrast, see ROP Vol 1 (2018) at p 391 – Transcript, 7 August 2018, page 75, lines 16 to 25.

129 ROP Vol 1 (2018) at p 459 – Transcript, 7 August 2018, page 143, lines 6 to 11.

130 ROP Vol 1 (2018) at p 456 – Transcript, 7 August 2018, page 140, lines 2 to 6.

131 ROP Vol 1(A) at p 558 – Transcript, 8 August 2018, page 49, lines 6 to 17.

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such weight, particularly since, as the Prosecution noted, the Applicant had described the arrest elsewhere in much less dramatic terms. It is also hard to see how being arrested by the CNB officers would have been anything like the Wukari massacre he had experienced. The Applicant might have meant simply that the situation was chaotic and caused him to be fearful, which would be understandable even for someone without PTSD/PTSS. This was also alluded to in the Judge's observation that while it was possible that the fear he felt during the arrest was related to the Wukari massacre, it was equally possible that he was fearful because he was under arrest in a foreign country (*HC (Remitted)* at [146]). This is significant since any "intense psychological distress" he experienced as a result of the latter would not, strictly speaking, be PTSS.

226 Notwithstanding these difficulties, I am prepared to proceed on the basis that the arrest constituted a Criterion A event. I also proceed on the basis that the PTSS of "intense psychological distress" was exhibited by the Applicant at the material time.

The reading of the charge

227 In any event, there was sufficient evidence to support a finding that the reading of a charge constituted a Criterion A event. Dr Munidasa Winslow ("Dr Winslow") testified that an individual with a history of trauma would consider being told of the death-penalty as a life-threatening event.[132] Significantly, Dr Cheok appeared to agree, at least at one point, that the "sensitisation effect"

132 ROP Vol 1 (2018) at p 419 – Transcript, 7 August 2018, page 103, lines 19 to 24.

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might be such that it is possible that the reading of the charges was sufficient to constitute "trauma" (which I understand to mean a Criterion A event):[133]

> COURT: … But, Dr Cheok, do I understand you to say that you would agree that if there was a PTSD episode at five years old then the events could -- not saying will but could constitute trauma because of the sensitisation effect that the defence experts have talked about?
>
> DR CHEOK: I think there is a possibility. Yes, there is a possibility.
>
> COURT: Right. Right.
>
> DR CHEOK: But I would say that the possibility of the trauma would come from the reading of the charges more than the arrest itself.

228 For the above reasons, I agree that there is evidence to support a finding that the reading of the charge may have constituted a Criterion A event, taking into account the sensitisation effect which resulted from his childhood PTSD. I am therefore prepared to accept the Judge's findings of PTSS at the various points in time, namely, that:

(a) When the Cautioned Statement was recorded, the Applicant was suffering from dissociative reactions (Criterion B3) and intense and prolonged psychological distress (Criterion B4) (*HC (Remitted)* at [154] and [158]).

(b) When the Long Statements were recorded, the Applicant was suffering from intense psychological distress (Criterion B4), a persistent and negative belief about others (Criterion D2) and a persistent negative

133 ROP Vol 1 (2018) at p 463– Transcript, 7 August 2018, page 147, lines 12 to 17.

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emotional state (Criterion D4) (*HC (Remitted)* at [172], [175] and [178]).

229 The Applicant submits that he also suffered from "sleep disturbance" (Criterion E6) when the Long Statements were recorded and that the Judge had omitted to address this submission.[134] This was on the basis that Dr Cheok, Dr Sarkar and Dr Ung all recorded that the Applicant slept poorly. Dr Cheok recorded that the Applicant said he had dreamt of a man chasing him with a knife.[135] Dr Sarkar recorded that the Applicant was unable to sleep because of the cold and his intense fear.[136] Dr Ung recorded that the Applicant had insomnia nightly for the first few months after the charge was read to him. Dr Ung assessed the severity of the difficulty the Applicant had in falling or staying asleep as 3 out of 4, with 0 being the best score and 4 being the worst.[137] Whether or not the Applicant suffered from sleep disturbance, regard must be had to the specific nature of the PTSS in considering whether or not it might provide an innocent explanation for the lies and omissions. The Applicant did not explain, and it is difficult to see how, sleep disturbance might have led or contributed to the lies since his case was that he lied deliberately and not because he was so exhausted that he was not really conscious of what he was saying in his statements to the CNB.

230 On the basis of the Judge's findings, I now consider whether his findings of PTSS at the time the Applicant's various statements were recorded have any

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[134] Applicant's submissions dated 2 May 2020 at para 9.

[135] ROP Vol 2 (2018) at p 70 – Dr Cheok's report at para 15.

[136] ROP Vol 2(B) (2018) at p 1455 – Dr Sarkar's report at para 46.

[137] ROP Vol 2(B) (2018) at p 1427 – Dr Ung's report at para 24.

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effect on the lies and omissions in those statements. I also consider the inferences that should be drawn from all the evidence.

The applicable principles

231 Under s 261 of the CPC, the court may draw such inference as appears proper from an accused person's failure to mention in a cautioned statement a fact which he could have been reasonably expected to mention and which he subsequently relies on in his defence. Such inferences may also be drawn from long statements, where appropriate.

232 In the present case, the Applicant not only failed to refer to key facts in his defence, such as his claim that he got the Black Luggage from Kingsley, but also told further lies in order to try to explain the omissions. In *CA (Conviction)* at [60], we accepted that for lies to amount to corroboration of evidence of guilt, they must fulfil the four conditions set out in the English Court of Appeal decision in *Lucas* at 724. The lies must be deliberate, relate to a material issue, the motive for the lies must be a realisation of guilt and fear of the truth and must clearly be shown to be a lie by independent evidence. Here, only the motive requirement is in contention as it is common ground that all the other requirements for *Lucas* lies were met. The central question is therefore whether the motive for the Applicant's lies was his realisation of guilt and fear of the truth.

233 We invited submissions from the parties on two questions:[138]

> (a) What is the legal relationship between [PTSD] and [PTSS]? In particular, would a finding of PTSS have the same

[138] Correspondence from court dated 23 March 2020.

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> legal effect with regard to the accused person as a finding of PTSD for the purposes of the application?
>
> (b) Who bears the burden of proof as to the accused person's motives for the lies and omissions in his statements to the [CNB] and what the applicable standard of proof is. The further written submissions are to have regard to how they interface with the relevant evidential burdens placed on the Prosecution and the Defence under s 18(1) of the [MDA].

Legal effect of PTSS

234 On the first question, the Prosecution submitted that there should be "caution in lowering the bar to accept *symptoms* not amounting to an established/recognised psychiatric condition as a legal basis for exculpating accused persons from their actions" [emphasis in original]. It appeared to accept that the same considerations apply when considering the legal effect of PTSD or PTSS, namely whether there is sound medical opinion supporting: (a) the findings of PTSD and/or PTSS at the time the Applicant gave his statements to the CNB; and (b) a finding that the PTSD or those particular PTSS caused the Applicant's lies and omissions.[139]

235 Similarly, the Applicant contended that there is no strict rule that a finding of PTSD has a different effect from that of PTSS on the question of whether his lies were *Lucas* lies or on the issue of his creditworthiness.[140] He argued that ordinary reactions to stress could supply an innocent explanation for a deliberate lie without further elaboration; it follows therefore that PTSS could similarly provide an innocent explanation. He emphasised that what is key is

139 Prosecution's submissions dated 15 May 2020 at paras 6, 9 and 10.

140 Applicant's submissions dated 15 May 2020 at para 14.

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the effect the specific PTSS had on him.[141] The Applicant further submitted that an individual without any psychiatric condition may also have innocent reasons for lying.

236 I agree that there is no real difference between finding that the Applicant suffered from PTSD or from PTSS in the context of the present case. The essential question, as identified in *CA (Conviction)*, is whether the Applicant lied for innocent reasons or because he knew that telling the truth would link him to the offence. The pertinent issue, therefore, is what effect, if any, the PTSD or PTSS had on the Applicant's mental state when he was answering questions and on any inclination or decision to lie. The ultimate question relating to guilt or innocence is whether, considered against the totality of the evidence, the only reasonable inference is that the Applicant lied because of his realisation of guilt.

237 It follows from this that the particular PTSS experienced by the Applicant should also be considered in determining whether or not, in the light of all the evidence, the Applicant's lies were motivated by a realisation of guilt or some other innocent reason. This is consistent with the fact-specific nature of the inquiry. As the Applicant also pointed out, PTSS such as "markedly diminished interest or participation in significant activities" are unlikely to contribute, however indirectly, to an accused person's decision to lie.[142] The Judge also considered the specific nature of the PTSS that he found to be present during the taking of each statement in assessing their effects on the lies and omissions.

[141] Applicant's submissions dated 15 May 2020 at paras 20 to 22.

[142] Applicant's submissions dated 15 May 2020 at paras 20 to 22.

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238 The Prosecution submitted that a causal link between the PTSD/PTSS and the lies is necessary.[143] I agree. The presence of PTSD and/or PTSS must be capable of supplying a reason for the lies or material omissions that would be consistent with innocence. As will be discussed later, the expert evidence is unanimous in the view that having PTSD/PTSS is not equivalent to being a liar or someone incapacitated from telling the truth or incapable of differentiating truth from falsehood.

Burden of proof

239 The Applicant argued that the Prosecution bears the burden of showing that the lies and omissions were motivated by a realisation of and/or desire to conceal guilt. This was because, other than knowing possession, s 18(1) of the MDA does not presume any other fact. The Applicant submitted that where a primary fact is equally capable of bearing a favourable and an unfavourable inference, the court should treat the primary fact as probatively neutral (relying on *Gopu Jaya Raman v Public Prosecutor* [2018] 1 SLR 499). As it is the Prosecution who alleges that the Applicant lied because of guilt, it is the Prosecution which must prove this fact pursuant to s 105 of the Evidence Act (Cap 97, 1997 Rev Ed) ("EA"), regardless of whether this fact is relied upon to prove knowing possession beyond a reasonable doubt or to argue that the Applicant has not rebutted the s 18(1) MDA presumption on a balance of probabilities.[144] The Applicant contended also that placing the burden of proof on the Prosecution would not be unduly lenient to accused persons. If it is established that there were lies or omissions in an investigative statement, this

[143] Prosecution's submissions dated 15 May 2020 at paras 6 and 10.

[144] Applicant's submissions dated 15 May 2020 at para 29.

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would normally call for an explanation from the accused person, failing which, the court may be justified in holding that the accused person has failed to discharge his or her evidential burden of "keeping alive" the issue of motive. Further, even if the Prosecution fails to show that the lies and omissions were actuated by a guilty motive, the court will still have to evaluate all the evidence in determining whether the accused person has successfully rebutted the presumption.[145]

240 On the other hand, the Prosecution's position was essentially that the burden to prove, one way or another, whether the Applicant had an innocent reason(s) for lying is an evidential one. It submitted that under s 18(1) of the MDA, the Applicant had at the outset the legal and evidential burden of showing on a burden of probabilities that he did not know that the Black Luggage contained anything that was later found to be controlled drugs.[146] In his statements, the Applicant denied having physical possession of the Black Luggage and therefore the drugs.[147] At trial, however, the Applicant sought to discharge this burden by advancing the story about Kingsley. This was "barely" sufficient to shift the evidential burden to the Prosecution. The Prosecution discharged its evidential burden by (a) proving that the Applicant had told lies and made material omissions in his various statements and showing that he had no good reason for them save to conceal his knowledge that the drugs were in the Black Luggage; and (b) by cross-examining him to expose the incredibility of the account he gave at trial.[148] It contended that the evidential burden shifted

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145 Applicant's submissions dated 15 May 2020 at para 30.

146 Prosecution's submissions dated 15 May 2020 at paras 38 and 39.

147 Prosecution's submissions dated 15 May 2020 at para 35.

148 Prosecution's submissions dated 15 May 2020 at paras 39 to 42.

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back to the Applicant, who then had to adduce sufficient evidence of an innocent reason for his lies and omissions in order to discharge his legal burden under s 18(1).[149]

241 Under s 18(1) MDA, the Applicant is presumed to have had knowing possession of the thing later discovered to be a controlled drug. As the Prosecution sought to rely on this presumption, it did not, at least at the outset, need to adduce evidence of the presumed fact. However, in seeking to bolster its case and to challenge the Applicant's account, it sought to assert that the lies and omissions were *Lucas* lies. As such, the starting point for the analysis is s 105 of the Evidence Act, which provides that the burden of proof as to any particular fact falls on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person. As it was the Prosecution who sought to rely on the alleged *Lucas* lies as part of its case, the burden falls upon it to prove beyond reasonable doubt that the *Lucas* requirements were met.

242 This would first require the Prosecution to show that the Applicant lied about a material issue. The mere fact of a material lie would ordinarily call for an explanation from the accused person. This would be consistent with the case law on drawing adverse inferences from an accused person's failure to mention key facts in his defence in his cautioned statement. Where the Prosecution can show that it was a deliberate lie which relates to an ingredient of the charge, a logical nexus between the lies and guilt would be shown. In the present case, there was no dispute that the Black Luggage was very material to the charge

[149] Prosecution's submissions dated 15 May 2020 at para 44.

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because the Applicant brought it into Singapore and it was found to have drugs concealed in it. The Applicant acknowledged that he lied deliberately not once but several times in respect of the Black Luggage. Once such lies and omissions were proved by the Prosecution and indeed they were admitted by the Applicant, the obvious and entirely logical question that arises is why the Applicant should seek assiduously and consistently to deny any knowledge of or to disavow any connection with the Black Luggage if he really thought that the Black Luggage contained merely clothes which a friend of his friend had requested him to deliver to someone in Singapore.

243 In practically all such cases, who else but the person who lied or omitted material facts could explain why he lied or made the omissions? The Prosecution certainly would not be able to. Apparently, none of the experts in this case could either as they had acknowledged that they could not read the mind of the Applicant when he decided to lie or to withhold material information. The evidential burden therefore naturally and logically shifted to the Applicant to show that there was some other motive(s) for his lies.

244 This is completely consonant with s 108 of the EA which provides that when any fact is especially with the knowledge of any person, the burden of proving that fact is upon him. Illustration (a) in that section also states that when a person does an act with some intention other than that which the character and circumstances of the act suggest, the burden of proving that intention is upon him. If the Applicant succeeds in showing some other motive(s) for his many lies, the Prosecution's case on *Lucas* lies would contain a reasonable doubt. The Prosecution has to eliminate other possible innocent motives only if these appear from its own evidence or are raised by the Applicant. This the Prosecution can do by cross-examination of the Applicant and his witnesses or

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by adducing contrary evidence. If the law were that the Prosecution must prove that the Applicant could have no other possible innocent motives for his lies and omissions, it would be imposing on the Prosecution the impossible task of proving multiple negatives in having to show that none of the innumerable reasons why an accused person might lie applied to the particular case. It is therefore only if the Prosecution is unable to rebut the innocent motives or reasons raised by the accused person or which arise from the Prosecution's own evidence that the accused person's lies would not satisfy the *Lucas* requirements and therefore would not be corroborative evidence of guilt. However, such lies could still be relevant in assessing the accused person's credibility (see *CA (Conviction)* at [62] and [63]).

Application to the present case

245 It is not disputed, in the present case, that there was no direct link between lying and PTSD/PTSS.[150] Further, it is not disputed that even if the Applicant suffered from PTSD/PTSS at the material time, he would still have been able to make a conscious choice whether to lie or to tell the truth.[151] Dr Ung testified that even with PTSD, "people still know the difference between right and wrong" and that PTSD was not a psychotic condition and people with PTSD were not of unsound mind. He also accepted that the majority of people who suffer such conditions would not lie.[152] It was not in dispute here that the

150 ROP Vol 1(A) (2018) at p 567 – Transcript, 8 August 2018, page 58, lines 2 to 4; ROP Vol 1(A) (2018) at p 635 – Transcript, 8 August 2018, page 126, lines 6 to 19; ROP Vol 1(A) (2018) at p 684 – Transcript, 8 August 2018, page 175, lines 18 to 24.

151 ROP Vol 2(B) (2018) at p 1432 – Dr Ung's 2nd report at para 37; ROP Vol 1 (2018) at p 471 – Transcript, 7 August 2018, page 155 lines 15 to 18.

152 ROP Vol 1(A) at pp 633 and 635 – Transcripts, 8 August 2018, page 124, lines 19 to 21; page 126, lines 6 to 21.

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Applicant lied consciously and deliberately when he denied and disavowed all knowledge and any connection with anyone or anything that had any connection to the Black Luggage.

246 The explanations put forward by the Applicant are the Overly Defensive Explanation and the PTSS Explanation. The issue is whether either of them could be supported by the evidence such that the inference for the Applicant's lies and omissions is not that they were motivated by a realisation of guilt and fear of the truth. There are two main matters to consider. First, the lies and omissions were direct and specific and the Applicant chose to make them deliberately. Second, the evidence of the Applicant's experts indicated that there were various PTSS operating on him such that he might not have responded in the same manner as an individual without PTSS. Even the Applicant acknowledged that the evidence did not show a definitive or probable "causal link" between the PTSS and the lies. Instead, the Applicant only put his arguments at the level of a possibility,[153] perhaps since Dr Sarkar himself acknowledged that the experts were all not "100 [percent] certain what went on in [the Applicant's] mind" and they were "trying to propose hypotheses and present evidence … to help the court try to work out what went through this person's mind which led to him lying about things".[154]

247 In assessing the evidence, I bear in mind the High Court's observations in *Sakthivel Punithavathi v Public Prosecutor* [2007] 2 SLR(R) 983 at [75] that where there is conflicting evidence between experts, it is not the sheer number of experts articulating a particular opinion or view that matters but rather the

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153 Applicant's submissions dated 2 March 2020 at paras 13 to 16.

154 ROP Vol 1(A) (2018) at p 523 – Transcript, 8 August 2018, page 14, lines 12 to 19.

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consistency and logic of the preferred evidence that is paramount. Mr Thuraisingam accepted fairly and accurately that the Applicant's lies centred around distancing himself from the Black Luggage. Having considered the totality of the evidence, I am not satisfied that any possibility that the Applicant's experts and the Judge pointed to gives rise to any reasonable doubt when considered against the specific lies and omissions. This view is reinforced by the fact that the Applicant told further lies during the 2014 trial and the remitted hearing in an attempt to explain away his lies and omissions in his statements.

The First Statement

248 In the First Statement recorded in the hotel room, the Applicant claimed that he brought only one luggage bag (the laptop bag) into Singapore. He was also recorded as indicating that this was the bag present in the hotel room during the recording of the statement:[155]

> Q: When you arrive at airport in Singapore, how many luggage did you bring?
>
> A: One.
>
> Q: Is that the luggage? (Recorder's note: Accused was pointed to a black bag on the floor in the room)
>
> A: Yes.

249 This was clearly untrue as he had also brought the Black Luggage to Singapore and had handed it over to Hamidah already. At the 2014 trial, the Applicant attempted to explain that he did not lie in the First Statement as he was actually referring to the Black Luggage when he replied that he brought

155 ROP Vol 2 (2014) at pp 197 to 200.

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only one luggage into Singapore.[156] The laptop bag was not a "luggage" to him. He asserted that Sgt Mohamed Affendi Bin Ideris ("Sgt Affendi"), who recorded the First Statement, did not point to any bag in the hotel room because his personal belongings, except for a pair of trousers, had already been removed from the room at that time.[157]

250 This was contradicted not only by Sgt Affendi but also by what was recorded in that statement. Sgt Affendi testified that the laptop bag was still in the room when the First Statement was taken.[158] That was why he asked the second question, "Is that the luggage?" and noted that he pointed to the black bag on the floor. Neither the Judge in *HC (Acquittal)* nor this court in *CA (Conviction)* accepted this blatant lie by the Applicant in the face of the court (see *HC (Acquittal)* at [64] and *CA (Conviction)* at [35]). Mr Thuraisingam did not dispute before us that the Applicant lied in the First Statement. In my view, here was a clear example of the Applicant lying consciously and deliberately about a very material fact and then proffering in court what he must have thought was a clever answer to explain away the lie in the First Statement.

251 The First Statement was recorded from the Applicant approximately two hours after the arrest. The Judge found that the Applicant was suffering from "intense psychological distress" (Criterion B4 of the DSM-5 criteria for PTSD)[159] at the time of the arrest and when the First Statement was recorded

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156 ROP Vol 1(A) (2014) at p 60 – Transcript, 25 September 2014, page 55, lines 24 to 29.

157 ROP Vol 1(A) (2014) at p 61 – Transcript, 25 September 2014, page 56, lines 8 to 24; page 100, lines 4 to 14.

158 ROP Vol 1 (2014) at p 86 – Transcript, 10 September 2014, page 76, lines 14 to 23.

159 ROP Vol 2 (2018) at p 162.

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(see *HC (Remitted)* at [148] and [182]). This was a finding he reached primarily on the basis of Dr Sarkar's remarks that the experience of being made a captive and of having the officers barge through the door was "symbolically similar" not just to what he had experienced or seen during the Wukari massacre but also "at several points during his adult life" (see *HC (Remitted)* at [136] and [138]). The Judge also noted the Applicant's testimony that he was fearful at the time of the arrest and that he had described it as being like "war", with "everyone scattering" (*HC (Remitted)* at [146]). However, the Judge found that the Applicant failed to spell out with sufficient clarity how the "intense psychological distress" experienced by him at the time the statement was recorded caused him to overestimate the threat to his life, which in turn caused him to lie. He was therefore not prepared to accept the Applicant's submissions on this point and made no finding on whether the "intense psychological distress" suffered by the Applicant indirectly caused him to lie (*HC (Remitted)* at [188]).

252 I agree with the Judge's assessment on this point. I can accept that an accused person whose hotel room was raided suddenly by a group of officers could be quite frightened and shocked at least for the first few minutes. Even so, this issue also raises the question why the Applicant could not have simply explained during the 2014 trial that he lied in the First Statement because he was so overwhelmed by the CNB officers' actions that they evoked in his mind the Wukari incident and whatever other incidents that shocked him during his adult life. I do not think anyone needs to have a diagnosis of PTSD or PTSS or has to be told that he has some psychiatric problem before he is able to make such a simple explanation, especially if he is truly innocent of any wrongdoing. As we have seen above, the Applicant chose to lie again in court instead of stating this purported truth.

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253 Further, while the Applicant might have been frightened and shocked and going on the basis that he was still in that state when the First Statement was recorded about two hours after the raid on his hotel room, it is extremely hard to accept that he thought the best thing to do in a foreign land when arrested and questioned by law enforcement officers was to lie about the Black Luggage instead of telling the simple truth that all he did was to bring the Black Luggage containing clothes into Singapore to hand over to a contact here. On his own evidence, he came to Singapore hoping to do business by buying second hand electronic goods. He was obviously quite comfortable and confident about this country as he came here without any concrete idea as to who or where he was supposed to do business with except for some nebulous and seemingly fluid information allegedly given to him while he was in Nigeria. His own evidence about moving hotel on arrival here also showed that he had no firm plans on where he was going to stay even for the first night. Certainly, he did not say that he thought that Singapore was a dangerous place with crooked law enforcement officers who could not be trusted. The Applicant told Dr Sarkar that he trusted Kingsley because Kingsley was Izuchukwu's friend and the Applicant trusted Izuchukwu completely.[160] Given the allegedly naïve trust that he had placed in Izuchukwu and Kingsley, it was plainly implausible that his first thoughts after arrest were that there was something illegal about the Black Luggage that Kingsley had handed to him in the presence of Izuchukwu and that the only safe course for him was to lie and deny any knowledge or connection with the Black Luggage.

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160 ROP Vol 2(B) (2018) at p 1319 – Dr Sarkar's report at paras 29 to 32.

254 Before us, the Applicant sought to revisit the alternative case that he ran in the 2014 trial, namely, that he lied in the First Statement because he realised that there had been an arrest the night before in which a luggage with two packets of drugs were found and/or that he had been arrested for drug trafficking and therefore decided that the best way forward was to lie about the Black Luggage.[161] It appeared that this was a key premise on which the Overly Defensive Explanation relied. While the Judge accepted this in *HC (Acquittal)*, we explained in *CA (Conviction)* at [38] to [43] why this assertion was unsupported by the evidence and was contradicted by the Applicant's own account that he only realised subsequently that the charge against him was related to the Black Luggage when his lawyers visited him in remand, which was subsequent to the statements.

255 The Applicant also claimed, in relation to his other statements, that his lies and omissions resulted from the fact he was not told that the charge was related to the Black Luggage.[162] If this were true, it would show that there was also no reason for him to seek to distance himself completely from the Black Luggage by telling the lies in the First Statement. Yet, the Applicant's only reason for distancing himself from the Black Luggage was to "protect" himself because he somehow knew after the arrest that the Black Luggage must have contained drugs. I therefore similarly reject the Applicant's PTSS Explanation. I think the only reason that there was a need for him to lie in order to "save himself" was if he knew about the drugs concealed in the Black Luggage.

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161 Applicant's submissions dated 2 March 2020 at para 21.1.

162 ROP Vol 1 (2018) at pp 170, 171 276 and 277 – Transcript, 2 August 2018, pages 58 to 59; Transcript, 3 August 2018, page 80, line 17 to page 81, line 13.

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256 In my view, the Prosecution's description of the Applicant's testimony as an "edifice" of lies upon lies was apt and the experts' evidence, to the limited extent that they addressed the link between intense psychological distress and lying on the specific facts of the present case, should therefore be viewed with circumspection. For the foregoing reasons, I am not persuaded that the intense psychological distress experienced by the Applicant during the recording of the First Statement provided an innocent explanation for his lie.

The Cautioned Statement

257 In the Cautioned Statement, the Applicant stated that:[163]

> I did not give anything to anybody. I was in my hotel room and there was a knock and they said Police and I opened the door. They came in asked me where my luggage. I told them this is all I have. They asked me if I go out. I told them I only go to change money and look around. They searched the place and they found nothing.

A number of untruths can be discerned from the Cautioned Statement. First, it is common ground that the Applicant had handed over the Black Luggage to Hamidah and the statement that he did not "give anything to anybody" was therefore patently untrue. Secondly, assuming that he did not think that his laptop bag could be considered a piece of "luggage" (as he had initially claimed in relation to the First Statement), it should have been apparent to him that the question "where my luggage" also referred to the Black Luggage, which was not in the room at that time. Finally, his claim to have left the hotel only to change money and to look around was also untrue, since he also left later to hand over the Black Luggage to Hamidah.

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163 ROP Vol 2 (2014) at p 211.

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258 The Judge found that at the time the Cautioned Statement was recorded (which was about 9.41pm, more than ten hours after the arrest), the Applicant was suffering from dissociative reactions (Criterion B3) and intense and prolonged psychological distress (Criterion B4) (*HC (Remitted)* at [154] and [158]). While the Judge did not make express findings on the effects of Criterion B4 on the Cautioned Statement, his view was presumably the same as that on the First Statement, *ie*, that he was not prepared to find that this PTSS caused the Applicant to overestimate the threat to his life or caused him to lie. The Judge said:

> 190 The effects that "dissociation" had on [the Applicant] were stated by Dr Sarkar in the following manner:
>
> > …I would submit to the court that his inability to associate the bag, the black luggage bag with two packets of drugs that were concealed within and his inability to associate Hamidah the co-accused with Maria, the person as she represented herself to him, represents this inability to remember. And immediately after arrest and the caution statement thereafter, I would submit is a manifestation of a dissociative phenomenon where he is so focused on protecting himself and getting retraumatised about his memory of the past …
>
> …
>
> 192 The Defence submitted that these effects experienced during the recording of the Cautioned Statement caused [the Applicant] to adopt an "overly defensive posture". Dr Sarkar said that [the Applicant] focused on protecting himself to avoid getting re-traumatised about past memories. Dr Sarkar also said that this was why [the Applicant] avoided talking about the Black Luggage.
>
> 193 Dr Cheok did not agree with this view. I note that Dr Sarkar did not say that this was a recognised psychiatric condition and the evidence he gave at [190] above was an opinion based on his clinical experience dealing with trauma patients. In view of this, I am unable to make a finding that this was what had happened in [the Applicant's] case. However, it was clear from the evidence that [the Applicant] was an

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> individual deeply affected by the traumatic memories of the Wukari massacre. While a normal person might not have lied under such circumstances, it is not inconceivable that a person with a traumatic past would have done so if he believed that lying would get him out of the traumatic predicament that he was in, *ie*, that lying would be a means to "protect" oneself.

259 Part of the account that the Applicant gave to Dr Cheok contradicted Dr Sarkar's assertion that the Applicant was focused on "protecting himself". Among other things, the Applicant told Dr Cheok that:[164]

> … He said when the charges were read on 14 [November], he thought the death penalty had been decided as he was unfamiliar with the Singapore legal system. He said he made up his mind to answer questions pertaining to him accurately. However, when questions were asked about other people associated with his case, he made up his mind to say no to everything as he was stressed. He gave no explanation for this decision other than stress.

260 The Applicant had also testified, at least at one point during the remitted hearing, that he thought that it had already been decided that he would face the death penalty.[165] From his account to Dr Cheok, the Applicant's first response to his belief that he would be sentenced to death was to decide to tell the truth and that he only changed his mind when "questions were asked about other people associated with his case". If this is construed as referring to the Long Statements, in which the Applicant was asked about various individuals such as Hamidah and Adili, then his "stress" would similarly not explain why the Applicant lied in the Cautioned Statement.

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164 ROP Vol 2 (2018) at p 70 – Dr Cheok's report at para 15.

165 ROP Vol 1 at pp 249 and 250 – Transcript, 3 August 2018, pages 53 to 54.

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261 If the Applicant had thought that the death penalty was a certainty, it was unclear what purpose would have been served by his lies or how lying could provide any protection. Further, the Applicant was warned, in the caution read to him before the statement was recorded, that the omission to mention any facts in his defence could lead to the court being less likely to accept his defence subsequently and might have a negative effect on his case in court. He was told specifically that it might be better for him to mention any facts in his defence in the Cautioned Statement.

262 The Applicant testified that he did not know, when the charge was read to him for the purpose of recording the Cautioned Statement, that there were drugs in the Black Luggage.[166] He claimed that:

> Q. But when it came to this charge they said two packets of drugs -- they didn't say you give black luggage, they say you give two packets of drugs.
>
> A. Yes.
>
> Q. So that is why it is not clear to you?
>
> A. Yes, your Honour.
>
> Q. And because you didn't know the full picture, therefore you didn't tell the police about the black luggage; correct?
>
> A. They didn't ask me do you give any baggage, he already charged me that: You give two packets of drugs. I said I didn't give it.
>
> Q. And if the police officer had actually said "The problem is you gave this black luggage to this lady", then you would open your heart out -- I think you used the words "open your heart" to the police officer, correct, about the black luggage?

166 ROP Vol 1 (2018) at pp 276 and 277 – Transcript, 2 August 2018, page 80 line 17 to page 81 line 13.

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A. If he could have if he told me and if I understand that really it's that I give the black luggage, but the black luggage was they found this drug in it, in this black luggage, then I know what is -- I would tell him: Yes, I gave the black luggage.

The charge that was read to him specified the date, the time, the location (the bus stop along 3 River Valley Road, Clarke Quay) and the recipient's name. Even if he did not know the name of the road and Hamidah's real name at that time and did not know that the two packets of drugs alleged in the charge were found in the Black Luggage, the date, the time and the bus stop would have indicated to him clearly that the CNB was referring to the incident that happened the night before. All that the Applicant had done around that time was to take a taxi to the bus stop where he handed over the Black Luggage to a lady. He could have stated this easily and truthfully. Yet, he said that he did not give anything to anybody. Further, he sought to give the impression that he had left the hotel only to change money and to look around. The persistent efforts to say nothing about the Black Luggage or that he had met someone in Singapore were very telling. In my opinion, they pointed clearly to a guilty mind which was acutely aware of what was concealed in the Black Luggage.

263 The Applicant also claimed that he was confused, did not understand what was going on when the charge was interpreted to him and was not "thinking any more like a human being".[167] However, far from being unable to think clearly, I find that he was in fact being selective in what he said in the Cautioned Statement. For example, he chose not to lie about having gone to the moneychanger or to look around. The only significant thing that he had done the previous day was to meet a lady in the evening to hand over something quite

[167] ROP Vol 1 (2018) at pp 170 and 171 – Transcript, 2 August 2018, pages 58 to 59.

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large to her. He spent some time with her, even going for a ride in her car. He could not have forgotten all those events already the next day. It was clear to me that he was able to distinguish between facts that would have linked him to the Black Luggage and facts which were quite innocuous.

The Long Statements

264 The Applicant also told several untruths in the Long Statements recorded between 21 and 24 November 2011, some seven to ten days after his arrest on 14 November 2011. Again, these lies and omissions were calculated to avoid any reference to the Black Luggage or any individuals that would have connected him to the Black Luggage. Indeed, the Applicant denied any knowledge about the persons when he was shown photographs of them and when asked directly about them.

(1) The lies and omissions

265 The Applicant did not mention Kingsley or the Black Luggage in any of the statements. First, he explained that he had come to Singapore to purchase second-hand computers and said that he had asked Izuchukwu for help in making the necessary arrangements. He claimed that his plan was to "come to Singapore and call [his] Nigerian friends who had been to Singapore, to ask for contacts to buy second hand computers from" and asserted that he did not have any specific person or shop in Singapore that he was supposed to go to.[168] However, his oral testimony was that Kingsley had a contact for him to meet in Singapore, although he did not have the details of this contact. There would

168 ROP Vol 2 (2014) at p 231 – Statement dated 21 November 2011 at para 4.

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therefore have been no need for him to call his friends to ask for these contacts. Second, he claimed that he brought only the laptop bag into Singapore in which he put all his personal belongings and did not carry "any other bags or luggages".[169] When he was shown a photograph of the Black Luggage, he claimed that he did not recognise it, did not check it in at the Lagos airport in Nigeria, did not take it out from the Singapore airport and did not carry it in Singapore.[170] When he was shown the First Statement, in which he claimed that he brought only the laptop bag into Singapore, he confirmed that it was true and correct and did not wish to make any changes to it.[171]

266 Turning to the events at the Singapore airport, the Applicant claimed that he did not recognise anybody while waiting to clear immigration[172] and that he was very certain he had not spoken to anyone at the airport apart from the airport staff.[173] This contradicted his oral testimony in court where he said that he had approached a male person at the airport to ask if he was "Diley", presumably, a reference to Adili, since he had been told to look out for him as he was on the same flight to Singapore.[174] In his statement, when he was shown a photograph of Adili, he claimed that he recognised Adili as the person who

169 ROP Vol 2 (2014) at pp 231 and 232 – Statement dated 21 November 2011 at paras 5 and 6; ROP Vol 2 (2014) at p 41 (CH-PH36)

170 ROP Vol 2 (2014) at p 247 – Statement dated 24 November 2011 at para 48.

171 ROP Vol 2 (2014) at p 241 – Statement dated 24 November 2011 at para 30.

172 ROP Vol 2 (2014) at p 233 – Statement dated 21 November 2011 at para 10.

173 ROP Vol 2 (2014) at p 236 – Statement dated 22 November 2011 at para 13.

174 ROP Vol 1(A) (2014) at p 24 - Transcript, 25 September 2014, page 19, lines 20 to 32.

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went to court with him after his arrest but he had never seen or spoken to Adili and did not recognise him prior to his arrest.[175]

267 In the Long Statements, the Applicant also stated that after leaving the airport, he went to Hotel 81 in Chinatown although this was not the hotel that the agent had booked for him because Izuchukwu sent him a text message asking him to head to Hotel 81 instead.[176] His oral testimony in court was that he had initially gone to Kim Tian Hotel because Kingsley (not an "agent") had given him a card with that hotel's name on it and that subsequently, Kingsley (not Izuchukwu) called and sent a text message to tell him to go to Hotel 81 instead.[177] In the Long Statements, he claimed that the bag that he left at the Hotel 81 counter while he went to the moneychanger to change his US dollars to local currency was the laptop bag (not the Black Luggage).[178]

268 He also claimed in the Long Statements that he had accidentally dropped his mobile phone into the toilet bowl but in his oral testimony in court, he claimed that he had dropped it into Hamidah's drink.[179] Consistent with his failure to mention Hamidah throughout his statements, despite the investigating officer showing him a photograph of Hamidah, he claimed that he did not know

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175 ROP Vol 2 (2014) at p 246 – Statement dated 24 November 2011 at para 46.

176 ROP Vol 2 (2014) at p 236 – Statement dated 22 November 2011 at para 14.

177 ROP Vol 1(A) (2014) at pp 32-34 – Transcript, 25 September 2014, page 27, lines 12 to page 29, line 7.

178 ROP Vol 2 (2014) at p 237 – Statement dated 22 November 2011 at para 15.

179 ROP Vol 1 (2014) at p 390 – Transcript, 24 September 2014, page 24, lines 14 to 17; ROP Vol 1(A) (2014) at p 57 – Transcript, 25 September 2014, page 52, lines 19 to 23; ROP Vol 2 (2014) at p 240 – Statement dated 24 November 2011 at para 25.

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her and had never seen her before.[180] This was clearly an outright lie because even if he knew her only as "Maria", he would have recognised a photograph of her as his meeting with her was not a brief one and he was in her car for a ride. Despite that, the Applicant claimed that he did not recognise her car when shown a photograph of the vehicle and asserted that he had not taken that car or a "similar looking car" while in Singapore.[181]

(2) Effects of PTSS on the lies and omissions

269 The Judge found that the Applicant suffered from intense psychological distress (Criterion B4), persistent and negative beliefs about others (Criterion D2) and persistent negative emotional state (Criterion D4) during the recording of the Long Statements (*HC (Remitted)* at [172] to [178]). The Judge observed that the Applicant did not detail how the symptoms of "intense psychological distress" and a "persistent negative emotional state" during the recording of the Long Statements would have led him to develop "persistent paranoia" of ASP Deng (the recording officer of all the statements except the First Statement), in turn causing him to consciously maintain his previous lies (at [197]). While the Judge found that the Applicant's "persistent and negative belief about others" caused him to display a "persistent paranoia" towards ASP Deng, the Applicant did not make any submissions on how this "persistent paranoia" caused him to maintain his previous lies consciously. The Judge therefore declined to make a finding on this point (at [199]).

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[180] ROP Vol 2 (2014) at p 246 – Statement dated 24 November 2011 at para 45.

[181] ROP Vol 2 (2014) at p 247 – Statement dated 24 November 2011 at para 50.

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270 I agree with the Judge's assessment. Even if the Applicant did not trust ASP Deng, it was illogical that this would have resulted in his persistent efforts to dissociate himself from the Black Luggage, particularly if he did not know at that time that the charge was linked to the Black Luggage. Why should a person tell lies to someone in authority just because he has a deep distrust towards him or feels paranoid about him, particularly when that person has been charged formally with an offence carrying the death penalty and cautioned that he should not be holding back anything in stating his defence?

271 Dr Sarkar's report recorded the Applicant as saying that:[182]

> 47. He said 'then on eighth day [ASP Deng] brought a charge and said 'You gave two packets of drugs to one Hamida'. I said 'No. I said all the stuff in the hotel room is mine. Anything that is not in hotel room is not mine. I don't know whose stuff it is. I also said I didn't know Kingsley as my mind was not thinking it was Kingsley. He was [Izuchukwu's] friend, he had called the contact, he was helping my business. I didn't think he was involved.'
>
> …
>
> 49. He continued, 'I did not give any packets to a Hamida. I only gave a black luggage to Maria. If [ASP Deng] had asked 'Did you give a black luggage bag to Maria, I would have said 'Yes'. I could not link black luggage and Maria with 2 packets of drugs and Hamida. My mind could not think'. He said that when his lawyer told him in the year 2013/14 that the CNB had found drugs concealed within the black luggage and it was then that he made the connection that 'baggage' and 'two packets' and 'Maria and Hamida' referred to the same thing and person, respectively. He said he offered to write to judge that his initial account was false.
>
> [emphasis in original omitted]

182 ROP Vol 2(B) (2018) at p 1322 - Dr Sarkar's report at paras 47 and 49.

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Again, it is difficult to see why the Applicant would lie deliberately in the Long Statements about the Black Luggage and anything that could have linked him to the Black Luggage, if he did not know that the charge arose from the drugs concealed in the Black Luggage, as he claimed. While he asserted also that by the time he was shown a photograph of the Black Luggage in the last statement taken from him, he had already "[made] up [his] mind" that he would deny everything which was not in his possession,[183] it is clear that his lies throughout the statements were targeted specifically at denying the Black Luggage and anything related to it. If he had thought that the Black Luggage contained only clothing and nothing illegal, he would not have needed to deny recognising Adili's photograph or having met him at the Singapore airport. How would Adili have linked him to any drugs? This applies similarly to his denial about knowing or meeting Hamidah or Maria. Adili was arrested subsequently for importing 1,961g of methamphetamine into Singapore and was convicted, although he was acquitted subsequently by the Court of Appeal. Hamidah was also arrested and convicted for attempting to export (to Malaysia) not less than 1,963.3g of methamphetamine in the Black Luggage handed over to her by the Applicant. Was it sheer coincidence that the persons that the Applicant falsely denied knowing were subsequently arrested also for drug offences involving methamphetamine? Plainly, it was not.

272 Finally, if the Applicant's claim is that he did not tell the truth in the Long Statements because he was still fearful and shocked by the circumstances of his arrest, it must have been evident to him, by the time of the Long

[183] ROP Vol 1(A) (2014) at pp 63 to 65 – Transcript, 25 September 2014, page 59, line 18 to page 61, line 3; ROP Vol 1 (2018) at p 278 – Transcript, 3 August 2018, page 82, lines 1 to 18.

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Statements, that he was in the hands of law enforcement officers in Singapore and not in any situation or place that resembled even remotely the circumstances of the Wukari massacre. It was quite obvious by then that the CNB officers were nothing like the marauding, murderous mobs that he said he experienced as a young boy. Further, he made no allegations about threats of harm from the law enforcement officers while in remand. Any fear or anxiety that he felt then would be reasonably expected of anyone in remand for a capital charge or other serious offence anyway.

Whether the conviction in *CA (Conviction)* should be set aside

273 In my opinion, the many lies told by the Applicant in his statements were *Lucas* lies which pointed clearly and cogently to his guilty mind concerning the drugs concealed in the Black Luggage. Nevertheless, even if the lies and omissions were not corroborative evidence of the Applicant's guilt, he would not have rebutted the presumption in s 18(1) MDA in any case. As stated in *CA (Conviction)* at [62], a lie which is not corroborative of guilt can still be relied upon to make a finding that an accused person is not creditworthy. In particular, we affirmed the observation in *Heng Aik Peng v Public Prosecutor* [2002] 2 SLR(R) 535 at [27] that an accused person's lies could be taken into account when assessing his creditworthiness even if he has a valid reason for lying, so long as the court gives careful consideration to the accused person's explanations for the lies and omissions. The fact remains that the Applicant here was a person who told many deliberate lies on highly material issues on separate occasions and then continued to lie in both the 2014 trial and at the remitted hearing. Further, this was despite the fact that there was no evidence that he was suffering from PTSD/PTSS during the period of these two hearings. As such,

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any PTSD/PTSS would not have provided even a remotely satisfactory answer to the edifice of lies constructed by the Applicant.

274 I sympathise with the Applicant for his past suffering in respect of whatever horrors he had witnessed in his homeland, especially as a young boy. However, in the final analysis of all the evidence here, the Applicant's defence was truly a highly unlikely account from a totally unreliable and untruthful source. In my view, the hypothesis by the defence psychiatrists about why the Applicant chose to lie in the First Statement is unsupportable. However, even if that hypothesis could explain the lies and omissions in the First Statement, I really do not see how it could continue to operate for the Cautioned Statement after a formal charge and warning were administered to the Applicant some ten hours after his arrest. It is even more bewildering to me how that hypothesis could continue to excuse the Applicant's deliberate untruths in the Long Statements recorded seven to ten days after his arrest.

275 In my opinion, the defence is a case of hypothesis built upon hypothesis built upon hypothesis, in order to try to explain away a continuous and consistent stream of very focused lies. With respect, it appears to me that the defence started out by postulating a highly doubtful hypothesis, sought to convince the court to accept it as truth or at least as injecting doubt into the Prosecution's case and then strove to construct on that questionable foundation an illusory tower of credence to cover the multitude of untruths lying underneath. The Applicant's case harped on his feeling the dire need to tell lies because of his past traumatic experience in order to protect and to liberate himself from the death trap that he alleged that he had walked into unknowingly. According to him, the simple truth was that a friend of a good friend had asked him in Nigeria to bring along a luggage of clothes to hand over to someone in

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Singapore. After a week or more of telling persistent lies to the CNB and finding that he was still in custody, why did it not occur to him that the truth would set him free? Why did he wait for more than two years to reveal the "truth" in court? Even then, it will be remembered that he still tried to create a clever lie for his First Statement at the 2014 trial.

Conclusion

276 For all the reasons discussed above, I do not think that the new evidence, considered with all the other evidence, reveals any error at all in the previous decision to convict the Applicant. I still hold that the Prosecution's case against him was proved beyond reasonable doubt. I would therefore dismiss the application to set aside *CA (Conviction)*.

Tay Yong Kwang
Judge of Appeal

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