IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2021] SGCA 27

Criminal Appeal No 35 of 2019

Between

Abdul Karim bin Mohamed
Kuppai Khan

… *Appellant*

And

Public Prosecutor

… *Respondent*

In the matter of Criminal Case No 1 of 2018

Between

Public Prosecutor

And

Abdul Karim bin Mohamed
Kuppai Khan

GROUNDS OF DECISION

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

Abdul Karim bin Mohamed Kuppai Khan
v
Public Prosecutor

[2021] SGCA 27

Court of Appeal — Criminal Appeal No 35 of 2019
Sundaresh Menon CJ, Andrew Phang Boon Leong JCA, Judith Prakash JCA, Tay Yong Kwang JCA and Steven Chong JCA
26 January 2021

30 March 2021

Sundaresh Menon CJ (delivering the grounds of decision of the court):

Introduction

1 CA/CCA 35/2019 ("CCA 35") was originally a self-contained appeal against sentence. The appellant had pleaded guilty to a charge of abetting another to possess not less than 329.99g of cannabis for the purpose of trafficking under s 5(1)(*a*) read with s 5(2), s 12 and 33(1) of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) ("MDA"). He had also consented to a similar charge pertaining to 659.99g of cannabis mixture being taken into consideration for the purposes of sentencing (the "TIC charge"). The learned High Court judge ("Judge") did not issue formal written grounds for her decision but certified the transcript dated 27 September 2019 as containing her brief oral grounds. After convicting the accused of the cannabis charge, the Judge sentenced the appellant to 15 years' imprisonment (backdated to the date of remand) and 10 strokes of

the cane. In arriving at this sentence, the Judge clarified that she placed no weight on the TIC charge concerning cannabis mixture. The appellant filed an appeal against his sentence contending that the custodial term was manifestly excessive.

2 The appeal potentially implicated our holding in *Saravanan Chandaram v Public Prosecutor and another matter* [2020] 2 SLR 95 ("*Saravanan*") at [183]–[188], [191] and [198(c)] to the effect that it was impermissible for the Prosecution to prefer, concurrently, two distinct charges, one concerning cannabis and the other, cannabis mixture, arising from a single compressed block of cannabis-related material (the "Dual Charging Practice"). Although this issue could have been avoided in this case because the Judge had expressly declined to consider the TIC charge involving cannabis mixture, the Prosecution took the opportunity to invite us, on the basis of what it claimed to be new legal arguments, to reconsider our decision in *Saravanan* effectively disallowing the Dual Charging Practice.

3 Following our decision in *Saravanan*, the Prosecution had applied to set aside a number of convictions and sentences in respect of accused persons who had been or were then facing concurrent cannabis and cannabis mixture charges arising from the Dual Charging Practice. These applications had been brought by the Prosecution in CA/CM 11/2020, CA/CM 12/2020, CA/CM 13/2020 ("CM 13") and CA/CM 14/2020.

4 In CM 13, the Prosecution had sought to persuade this court to reconsider the sentence imposed on the accused in *Suventher Shanmugam v Public Prosecutor* [2017] 2 SLR 115, and to set aside the High Court's decision to take into consideration a cannabis mixture charge in *Public Prosecutor v Suventher Shanmugam* [2016] SGHC 178. However, on 4 June 2020, the

Prosecution applied to amend CM 13 seeking instead to contend that it was, after all, appropriate to take into consideration the cannabis mixture charge, and further indicated that it intended to raise new legal arguments with a view to persuading us to depart from *Saravanan* in respect of our holding on the impermissibility of the Dual Charging Practice. The Prosecution stated that it had no objections if a five-judge bench were to be empaneled to hear CCA 35 and took the view that this appeal would afford a suitable opportunity for it to advance the ostensibly new legal arguments. Counsel for the appellant in CCA 35 did not object to the Prosecution's proposal. Accordingly, we directed that these points be canvassed in CCA 35 and the four aforementioned criminal motions be adjourned pending the resolution of the present appeal. As Professor Kumaralingam Amirthalingam ("Prof Amirthalingam") had served as *amicus curiae* in *Saravanan*, and as we had been greatly assisted by his submissions, we intimated our intentions to appoint him once again and the Prosecution did not object to this.

5 At the conclusion of the hearing on 26 January 2021, we maintained our holding in *Saravanan* as to the impermissibility of the Dual Charging Practice, and we also dismissed the appellant's appeal against his sentence. We now set out our detailed grounds. In this judgment, we: (a) explain and clarify the basis for our decision to re-affirm the holding in *Saravanan*; (b) answer a query raised by the Health Sciences Authority ("HSA") regarding its certification practice in the aftermath of our decision in *Saravanan*; and (c) explain our decision to dismiss the appellant's appeal against his sentence.

The Dual Charging Practice in *Saravanan*

The HSA's procedure for analysing compressed blocks of cannabis in CCA 35

6 By CA/CM 20/2020, the Prosecution applied to admit, for the purposes of CCA 35, evidence regarding the HSA's process of analysing, testing and certifying compressed blocks of cannabis-related plant material. The evidence sought to be disclosed was enclosed in an affidavit of the Deputy Laboratory Director of the Illicit Drugs Division, Merula d/o M Mangudi ("DLD Merula"), who conducted the analysis of the drug exhibits in CCA 35. We granted the order sought by the Prosecution pursuant to s 408A(1) of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) ("CPC"). Given that the Prosecution did not contend that we had erred in *Saravanan* in our narration of the relevant facts, there is no need for us to repeat at length the process by which the HSA conducts its analysis and certification, because that has all been set out at length in *Saravanan*. Nevertheless, for present purposes, we briefly summarise this process.

7 To begin, the HSA analyst uses a weighing device to determine the gross weight of the compressed block. The analyst will then prise apart the compressed block and conduct a macroscopic (meaning visual) examination of all its components. The analyst takes note of: (a) the colour; (b) the presence of different plant parts (such as cannabis stalks or stems, leaves, flowering branches, fruiting branches, flowers and fruits); (c) the uniformity of the type of plant material; and (d) the presence of non-cannabis plant material. Based on the macroscopic examination, the analyst then separates the components into three different groups: (a) individual plant branches ("Group 1"); (b) fragments of plant parts ("Group 2"); and (c) observable extraneous matter ("Group 3").

Indicia for determining whether any given vegetable matter falls within each group, under macroscopic examination, are set out in the table below:

<table>
<tr><th>Group 1
Individual plant branches</th><th>Group 2
Fragments of plant parts</th><th>Group 3
Observable extraneous matter</th></tr>
<tr><td>Must be at least 2cm in length</td><td>Includes bare branches with no leaves, flowers or fruits attached.</td><td>Includes non-cannabis vegetable matter</td></tr>
<tr><td rowspan="3">Possesses sufficient botanical features of cannabis to meet the criteria for cannabis under the macroscopic examination</td><td>Includes detached leaves, flowers or fruits</td><td rowspan="3">Includes non-vegetable matter such as strings and paper</td></tr>
<tr><td>Each fragment is typically between 2cm and 0.5mm in length</td></tr>
<tr><td>May possess some botanical features, but these are insufficient to meet the criteria for cannabis under the macroscopic examination.</td></tr>
</table>

8 Once the plant matter has been separated into the three groups, the analyst will record the weight of each group. After completing the macroscopic examination, the analyst then conducts a microscopic examination in order to establish the presence of the characteristic botanical features of cannabis. These include: (a) the bear claw-shaped unicellular trichomes (trichomes are outgrowth akin to hairs) on the upper surface of leaves; (b) long slender unicellular trichomes on the lower surface of leaves; (c) multicellular stalked glandular trichomes and long curved unicellular trichomes on the outer surface of bracts or female flowers; (d) long unicellular upwards-pointing trichomes on

stems; and (e) reticulate (meaning marked like a network) patterns on fruits. The process of the microscopic examination in respect of Group 1 material and Group 2 material can be summarised as follows:

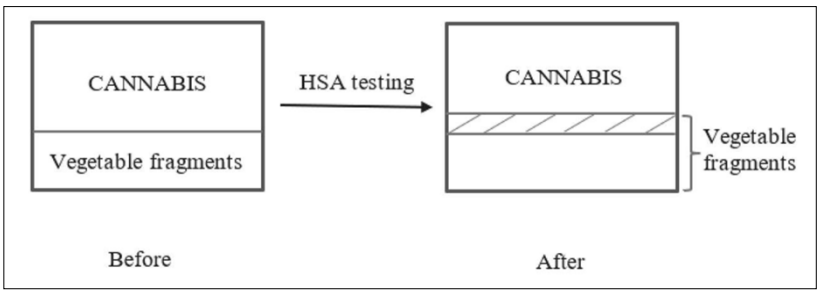
<table>
<tr><th></th><th>Group 1
Individual plant branches</th><th>Group 2
Fragments of plant parts</th></tr>
<tr><td rowspan="2">Microscopic examination procedure</td><td rowspan="2">The analyst views each branch under the microscope for the characteristic microscopic features of cannabis.</td><td>The analyst scans the plant fragments under the microscope at low magnification to observe their general appearance.</td></tr>
<tr><td>The analyst then zooms in to microscopically examine some of these fragments at a higher magnification to detect the characteristic botanical features of cannabis.</td></tr>
<tr><td>Outcome of microscopic examination</td><td>Branches that do not exhibit microscopic features of cannabis are removed from Group 1 and placed in Group 3. The analyst subtracts the weight of non-cannabis branches from Group 1.</td><td>Extraneous matter observed is removed from Group 2 and placed in Group 3. The analyst subtracts the weight of extraneous matter from Group 2.</td></tr>
</table>

9 Following both the macroscopic and the microscopic examinations, the analyst then conducts two chromatography tests: (a) Thin Layer Chromatography; and (b) Gas Chromatography-Mass Spectrometry. These tests are used to determine the presence of cannabinol ("CBN") and tetrahydrocannabinol (a cannabinol derivative) ("THC"), which are the chemical markers for cannabis. In each test sample, CBN and THC are extracted

with a solvent. The analyst will then use Gas Chromatography-Flame Ionisation Detection to estimate the amount of CBN and THC in Group 1.

Created Fragmented Vegetable Matter

10 We turn now to *Saravanan* at [174], where we referred to a step in the HSA's testing and analysis process that generated what we termed "Created Fragmented Vegetable Matter":

> 174 As we have explained above at [56]–[64], the HSA has a comprehensive testing mechanism for the certification of cannabis and cannabis mixture. To recap, the testing procedure results in three groups of material emanating from a single compressed block of cannabis-related plant material: (a) material that can be identified and certified as cannabis; (b) fragmented vegetable matter that cannot be certified as cannabis, but with THC and CBN detected therein; and (c) observable extraneous matter that is discarded and disregarded (see [64] above). According to Dr Yap, the HSA in effect creates some part of the fragmented vegetable matter in the second group of plant material through its testing procedure when the HSA analyst inevitably, although often intentionally, breaks some of the cannabis plant parts. As a result, the contents of the block at the time it is analysed and handled by the HSA during and after testing will be different from the contents of the block at the time of trafficking, importation or exportation. This can be illustrated by the following diagram:
>
> 
>
>
> The shaded portion in the 'After' diagram represents vegetable fragments that were created as a result of the HSA's testing procedure ('Created Fragmented Vegetable Matter'). A consequence of generating such Created Fragmented Vegetable Matter is that it gives rise to difficulties in bringing a charge pertaining to cannabis mixture in respect of such matter

> because it did not exist as cannabis mixture at the time of trafficking, importation or exportation.

11 There are three characteristics of Created Fragmented Vegetable Matter that have a bearing on the legal permissibility of the Dual Charging Practice. First, some Created Fragmented Vegetable Matter includes what may have been Group 1 material that becomes Group 2 material by reason of the HSA's act of prising apart the compressed block of cannabis-related plant material. Any such material would not have existed as Group 2 material at the time of the offence. Second, Created Fragmented Vegetable Matter cannot be precisely quantified by the HSA because it is impossible for the HSA to tell how much of the Group 2 material was already in that form and how much of it came into being as a result of the HSA's actions. Third, and perhaps most significantly, Created Fragmented Vegetable Matter does not possess the characteristics necessary to be certified as "cannabis" by the HSA because "the HSA currently certifies as cannabis only plant branches that are at least 2cm in length and that have sufficient leaves, flowers or fruits attached to them" (*Saravanan* at [80]), and therefore such matter cannot be certified as "cannabis" under s 2 of the MDA.

Our decision in Saravanan

12 We turn now to the aspects of our reasoning in *Saravanan* relevant to the present appeal. These were set out at [183]–[195], and we summarise the relevant paragraphs here.

13 For any drug-related offence, in relation to the requisite *mens rea*, at least as a general rule, it is incumbent on the Prosecution to prove that the accused person knows the specific nature of the drug he is charged with trafficking, importing or exporting and not merely that the substance in question is in generic terms a controlled drug of some sort (at [185]). In the context of

Saravanan, the Prosecution therefore had to prove that the accused person knew the nature of the Created Fragmented Vegetable Matter (as defined at [174]). This could not possibly have been proved because the Created Fragmented Vegetable Matter did not exist in that form at the time the offender brought the relevant bundle into Singapore (at [186]).

14 As to the *actus reus*, the Prosecution is required to prove the quantity of such material that was in fact trafficked, exported or imported by the accused at the time of the offence (at [187]). This again was impossible for the Prosecution to prove because the HSA could not certify how much of such material was in existence at the time of the offence and how much of it came into being as a result of the acts of the HSA analyst (at [187]). It was not disputed in *Saravanan* that the HSA's act of breaking apart the compressed block of cannabis material would result in the creation of Created Fragmented Vegetable Matter and that it was not possible to ascertain how much of this material was created as a result of the HSA's actions (at [189]).

15 Notwithstanding these points, the Prosecution in *Saravanan* contended that: (a) the Created Fragmented Vegetable Matter would already have been present in a compressed block of cannabis material at the time of the offence albeit in a different form (at [189]); and (b) to account for the fact that the change in the form of the material was a result of the HSA analyst's actions, an offender by his conduct must be taken to have assumed the risk of having some portions of cannabis convert into cannabis mixture as a result of the HSA analyst having to break apart the compressed block (at [190]). Leaving aside the correctness or relevance of the latter proposition, that the offender should be taken to have accepted the risk of the HSA analyst's actions, these submissions did not address the two points regarding *mens rea* and *actus reus*. First, the relevant *mens rea* had to be assessed at the time of the offence and it was not at all evident

how it could be said that the offender intended at that time to traffic in a substance that did not as yet exist *as that substance*. Second, the Prosecution had to accurately establish the quantity of the relevant drug at the time of the offence. Given that the HSA was not able to state the quantity of the Created Fragmented Vegetable Matter, again, it was not possible to establish what the quantity of the relevant drug was at the material time. In short, there was simply no way that an accused person could be charged with the intention to traffic in, export or import something that did not exist in that form at the time of the offence but only came into being as a result of the HSA's subsequent acts.

The Prosecution's submissions

16 Before us, the Prosecution sought to challenge the two reasons set out in *Saravanan* at [186]–[187] and summarised at [13]–[14] above.

17 First, as regards the *actus reus*, the Prosecution argued that, given that an entire compressed block of cannabis-related material may be certified as cannabis mixture (which is not controversial), it followed that the Created Fragmented Vegetable Matter which originated from the same compressed block must have existed at the time of trafficking, importation or exportation as cannabis mixture. In this regard, the task of ascertaining the quantity of Created Fragmented Vegetable Matter (which the HSA admittedly cannot do) is not a necessary step for determining the relevant quantity of cannabis mixture present at the time of the offence. This is because: (a) the Prosecution is entitled to prefer a cannabis mixture charge on the weight of the entire compressed block (*Saravanan* at [194]–[195]), a valid practice even if an HSA analyst subsequently prises it open and separates the block into Group 1 and Group 2 material; and (b) the Prosecution can as an arithmetic matter subtract the HSA-certified weight of Group 1 material (as subsequently determined by prising

open the block) from the weight of the pre-analysis compressed block to derive the weight of remainder cannabis mixture that comprises Group 2 material alone. On this basis, the problem of indeterminacy in the weight of Created Fragmented Vegetable Matter is said to vanish. According to the Prosecution, this approach coheres with the following principles: (a) Group 2 material by itself qualifies as "cannabis mixture" under s 2 of the MDA based on *Saravanan* at [178] (this is a crucial but mistaken assumption as we explain at [27] below); (b) a cannabis mixture charge does not need to specify the proportion of pure cannabis before a mixture can fall within the definition; (c) the Court of Appeal in *Public Prosecutor v Manogaran s/o R Ramu* [1996] 3 SLR(R) 390 ("*Manogaran*") treated as cannabis mixture a part of a block of cannabis-related material that could not be certified as "cannabis" (see *Saravanan* at [109]); and (d) a compressed block's total weight and chemical composition does not change with the HSA's testing or certification process.

18 Second, as regards the *mens rea*, the Prosecution contended for "a broader view regarding the *mens rea* requirement for a cannabis mixture offence". On this view, an accused person's knowledge attaches to the compressed block as a whole (which on the basis of *Saravanan* at [195] qualifies as cannabis mixture) and this knowledge necessarily and inevitably entails knowledge of the compressed block without the pure cannabis material (which, it is said, nonetheless remains *cannabis mixture*). So long as the Prosecution can show that the accused person possesses the necessary *mens rea* in respect of the entire compressed block at the time of the offence, the accused person would necessarily possess the *mens rea* pertaining to the cannabis mixture for the residual portion of the same block when the pure cannabis material has been excluded. Under this approach, the accused person's knowledge of the form of the drugs, after the HSA analysis has been carried out and the Created

Fragmented Vegetable Matter has come into being, is simply irrelevant. This, the Prosecution argued, is consonant with the idea that the process of analysis only serves to determine the nature and quantity of the drugs. The Prosecution also submitted that this approach would be consistent with the fact that generating the Created Fragmented Vegetable Matter does not: (a) affect the accused person's knowledge at the time of the offence; (b) alter the nature of the compressed block of vegetable matter because it qualifies as "cannabis mixture" in its entirety regardless of whether an HSA analyst subsequently generates the Created Fragmented Vegetable Matter; or (c) affect the status of the Created Fragmented Vegetable Matter, which qualifies as "cannabis mixture" because it was formerly part of the entire compressed block.

The appellant's submissions

19 As against the foregoing, the appellant essentially re-affirmed the two reasons set out in *Saravanan* at [186]–[187] that operate against the permissibility of the Dual Charging Practice. First, given that Created Fragmented Vegetable Matter, which comprises a proportion of Group 2 material, only comes into existence after the HSA handles the block of compressed cannabis-related material, an accused person cannot be said to have *known the nature* of all the Group 2 material that is certified to be cannabis mixture. Second, given that the HSA cannot determine the quantity of Created Fragmented Vegetable Matter generated during its analysis procedure, which should logically be excluded from a cannabis mixture charge, it is impossible to accurately ascertain the relevant quantity of cannabis mixture present at the time of the offence. In addition to these two reasons, the appellant contended that the Dual Charging Practice is unfair because an accused person who traffics cannabis-related plant material, in reality, transacts with only one drug but ends up facing two charges. Two charges, the appellant argued, may attract

significantly different and more serious sentencing consequences as compared to a single charge.

The amicus curiae's submissions

20 Prof Amirthalingam agreed with that part of our decision in *Saravanan* holding the Dual Charing Practice impermissible, for the following reasons.

21 First, since Created Fragmented Vegetable Matter does not exist in that form at the time of the offence, the Prosecution cannot show: (a) that an accused person trafficked, imported, or exported the Group 2 material; or (b) that he knew the nature of the Group 2 material. In reality, accused persons only intend to traffic, import or export cannabis rather than cannabis mixture. Furthermore, as regards the requisite *mens rea*, Prof Amirthalingam argued that: (a) no legal authority supports a "broader view regarding the *mens rea* requirement"; (b) permitting knowledge in this context to mean knowledge of generic "vegetable matter containing cannabis" would obfuscate the law and ignore the statutory definition of "cannabis mixture"; and (c) knowledge must attach to a specific drug and not a different drug or drugs in general (*Mohammad Azli bin Mohammad Salleh v Public Prosecutor and another appeal and other matters* [2020] 1 SLR 1374 at [107]).

22 Second, Prof Amirthalingam argued that, given that it is impossible for the Prosecution to determine the precise quantity of Group 2 material at the time of the offence, the weight of Group 2 material ascertained by the HSA at the time of analysis would always exceed the quantity that existed at the time of the offence. Such a charge can therefore never be proven. Moreover, as regards the *actus reus*, Prof Amirthalingam submitted that the Dual Charging Practice was impermissible because there is in fact no separate component of cannabis

mixture. In this regard, he submitted that: (a) the Prosecution was impermissibly "double dipping" by relying on multiple HSA certifications and ignoring the fact that the constituent elements of the compressed block "are in a state of flux"; (b) an entire compressed block of cannabis material is, as a whole, *easily separable* and therefore should not even qualify as "cannabis mixture" under s 2 of the MDA, which we defined in *Saravanan* as "cannabis plant matter commingled with vegetable matter of indeterminate origin or known to be of non-cannabis origin, where the components cannot be easily distinguished or separated from each other"; and (c) at the time of the offence, some Created Fragmented Vegetable Matter (which is a subset of Group 2 material) did not exist in that form and instead existed as Group 1 material (which is pure cannabis).

23 Third, Prof Amirthalingam highlighted *Public Prosecutor v Arun Raj s/o Chandran* [2020] SGDC 213 ("*Arun Raj*"), a case decided after *Saravanan*, as an instance of the Dual Charging Practice interacting with the consecutive sentencing regime under s 307 of the CPC to produce what he contended was an arbitrary result. In that case, the accused person not only delivered a bag of cannabis but also consumed some of the drug (*Arun Raj* at [1]). He pleaded guilty to: (a) one count of trafficking cannabis; (b) one count of having in his possession cannabis mixture (which originated from the same block as the drug in the trafficking charge); and (c) one count of consuming a specified drug. As a result, the accused person in that case was necessarily subject to the consecutive sentencing regime provided for in s 307 of the CPC (*Arun Raj* at [22]), which Prof Amirthalingam argued would not have been invoked had the Prosecution followed the spirit of our decision in *Saravanan*. While it is not appropriate for us to review or comment on the case of *Arun Raj* as it was not before us, we considered the argument made by Prof Amirthalingam.

24 Fourth, Prof Amirthalingam observed that the Misuse of Drugs (Amendment) Act 1993 (Act 40 of 1993) ("the 1993 amendments") which first introduced a new sentencing regime for cannabis mixture, aimed to tackle the perceived problem of traffickers disguising cannabis in tobacco by empowering the Prosecution to treat entire compressed blocks of cannabis material as "cannabis mixture". However, the 1993 amendments were not intended to permit the Dual Charging Practice. Since the decision that legitimised the Dual Charging Practice – *Manogaran* – had been overruled in *Saravanan*, the Dual Charging Practice now has no legal basis.

A clarification of Saravanan

25 Having heard the parties, we were not persuaded by the Prosecution's arguments and we were certainly not minded to depart from our decision in *Saravanan*. Apart from the fact that most of the Prosecution's arguments were not in truth new and had already been adequately addressed in *Saravanan* at [183]–[195], those aspects of the Prosecution's arguments that *were* new rested on a complete misinterpretation of *Saravanan* and took certain aspects of our reasoning wholly out of context. In particular, the Prosecution relied on *Saravanan* at [178], where we said:

> 178 For the reasons set out at [105]–[109] above, we are satisfied that there is nothing objectionable with treating the fragmented vegetable matter in a block of cannabis-related plant material as cannabis mixture because cannabis mixture as we have defined it includes vegetable matter that is ultimately of indeterminate origin.

26 Before us, the Prosecution acknowledged that the foregoing passage was the source of its inspiration for contending that, given a block of compressed cannabis material, it was entitled to bring a cannabis charge for the portion of that block that was determined to be Group 1 material and also bring a separate

cannabis mixture charge for the residue as Group 2 material (see [17] above). While we accepted that *Saravanan* at [178] could have been better articulated, the conclusion that the Prosecution arrived at was simply and plainly incorrect when that paragraph is read in its specific context and in the context of the judgment as a whole.

27 First, the foregoing passage should be understood in the light of the diagram set out in *Saravanan* at [174] (see [10] above). That diagram represents, in effect, that: (a) a given compressed block of cannabis material starts off being a mixture of cannabis and other plant material; and (b) due to the testing process applied by the HSA, a part of the Group 1 material and a part of the Group 2 material becomes Created Fragmented Vegetable Matter (which is Group 2 material) that the HSA cannot certify as being of any particular origin and ends up treating as plant material of "indeterminate origin". At [178] of *Saravanan*, we were speaking of the Created Fragmented Vegetable Matter being regarded as cannabis mixture in so far as it is deemed or is treated as being *a part of the whole* compressed block. That is precisely what we meant in *Saravanan* at [178] when we said, quite literally, that "there is nothing objectionable with treating the fragmented vegetable matter *in* a block of cannabis-related plant material as cannabis mixture" (emphasis added). The Prosecution wrongly took *Saravanan* at [178] out of context to mean that it is permissible to treat the *separated* Group 2 material *in and of itself* as cannabis mixture.

28 Second, the Prosecution's reading of *Saravanan* at [178] is manifestly wrong because it wholly ignored the cross-reference in that very paragraph to [105]–[109] as well as the earlier parts of the judgment at [84], [90]–[93] and [119]. For convenience, we set out below the relevant portions in *Saravanan*, with particular emphasis on portions discussing the proper interpretation of "cannabis mixture":

84 In our judgment, the term 'cannabis mixture' can bear the following possible interpretations:

> (a) a mixture where *cannabis plant matter is commingled with vegetable matter of indeterminate origin or known to be of non-cannabis origin* (the latter is the meaning that was held to be the true meaning in *Abdul Raman* ([48] *supra*) and described as the extended meaning in *Manogaran*);
>
> (b) a mixture of different grades or purity levels of cannabis, or the commingling of various different parts of the cannabis plant (this is the primary meaning adopted in *Manogaran*); and
>
> (c) a mixture where non-cannabis vegetable matter is infused or spiked with THC and CBN and commingled.

…

90 As we stated at [54(b)] above, s 2 of the MDA defines 'cannabis mixture' as 'any mixture of vegetable matter containing [THC] and [CBN] in any quantity'. We have set out the three possible interpretations of this at [84] above.

91 In assessing which of these possible interpretations is the correct one, we begin by determining the ordinary meaning of the words in the statutory definition of 'cannabis mixture' (see *Tan Cheng Bock* at [38]). The *Oxford English Dictionary* (Oxford University Press, 2nd Ed, 1989) defines 'mixture' as a '[m]ixed state of condition; coexistence of different ingredients or of different groups of classes of things mutually diffused through each other' and '[a] product of mixing; a complex unity or aggregate (material or immaterial) composed of various ingredients or constituent parts mixed together'. At the core of the meaning of 'mixture' lies the commingling of *two or more different* components.

92 In our judgment, the ***ordinary meaning of 'mixture' militates against the second of the three interpretations of 'cannabis mixture' set out at [84] above***. It seems to us counterintuitive to speak of a 'mixture' in the context of a 'mixture of vegetable matter' that does not entail the combination of more than one type of such matter. Vegetable matter that comes from different parts of the cannabis plant would seem, at first blush, to be the same sort of vegetable matter and, thus, not to be a 'mixture'.

93 In our judgment, ***the plain meaning of the term 'cannabis mixture' likewise does not support the third interpretation***. Parliament shuns tautology and courts

generally proceed on the premise that Parliament uses words purposefully (see *Tan Cheng Bock* at [38]). The ***inclusion of the word 'cannabis' in the term 'cannabis mixture' indicates that the mixture must necessarily be composed of some cannabis plant matter***.

…

105 That said, we return to a point that we alluded to at [81] above. The correct interpretation of cannabis mixture that we have arrived at may not always make a difference in practice. It is important to distinguish physical realities from what can be proved in court. It is evident from Dr Yap's evidence that the HSA's insistence upon rigour in testing leads its analysts at times to decline to certify particular plant material as cannabis even if, as a matter of observation, they might subjectively believe it to be cannabis. We think this is an entirely correct stance for the HSA to take. ***But as a result of this, even if the HSA analyst might subjectively believe that a given batch of plant material is entirely derived from the cannabis plant, he would be unable to certify it as cannabis because of the testing criteria that are in place. As a court seeking the best evidence, and having regard to (a) the gravity of the consequences of improper certification on the liberty, and perhaps even the life, of an offender; as well as (b) the fact that the HSA's testing criteria are in line with international standards (for instance, those reflected in the guidance provided by the United Nations Office on Drugs and Crime), we think that absent the HSA's certification of a block of cannabis-related plant material as cannabis, the correct factual conclusion to be drawn in such circumstances is this: it may or may not be possible to rule out, in such circumstances, that the plant fragments from the block are of a non-cannabis origin***. If, as a scientific matter, that possibility *can* be ruled out, then logically, the entire block should be treated as cannabis. But ***where that possibility remains, then the block would be a combination of cannabis and other plant material of indeterminate origin; and provided that other plant material contains THC and CBN, there would be no difficulty with treating the block as cannabis mixture***.

106 Significantly, ***in response to our query as to whether the HSA would be able to certify fragmented vegetable matter from a block of cannabis-related plant material as unadulterated cannabis, Dr Yap testified that even where the HSA analyst subjectively believed that the entire block was unadulterated cannabis, the HSA would not be able to certify it as such*** and would only be able to certify it as follows:

> not less than [] grams of fragmented vegetable matter which was analysed and found to contain [CBN] and [THC]. Within this vegetable matter: (i) there is evidence of plant parts/fragments bearing features of the cannabis plant; and (ii) there is no evidence of another plant type being present, *although the possibility of another type of plant material being present cannot be completely excluded*. [emphasis in original omitted; emphasis added in italics]

In short, as a matter of scientific evidence, the fragmented vegetable material, as far as the court is concerned, is ultimately of indeterminate origin.

107 It should be noted that the effect of our holding in the previous two paragraphs would not in any case prejudice the offender. Its effect is to treat as cannabis mixture even vegetable matter which the HSA analyst subjectively believes to consist solely of cannabis. It is uncontroversial that the penalties for offences involving cannabis mixture are less severe than those for offences involving pure cannabis of the same weight because Parliament took into account the circumstance that cannabis mixture would commonly include a proportion of non-cannabis plant material (see above at [70]).

…

119 We therefore hold that 'cannabis mixture' as defined in s 2 of the MDA means ***cannabis plant matter commingled with vegetable matter of indeterminate origin or known to be of non-cannabis origin***, *where the components cannot be easily distinguished or separated from each other*.

[emphasis added in bold italics; emphasis in original in italics]

29 What stands out unmistakeably from these paragraphs of our judgment in *Saravanan* is that for a compressed block of cannabis-related material to qualify as cannabis mixture there must exist a *mixture* comprising two distinct types of material – cannabis *and* other plant material. Such other material may, as noted in *Saravanan* at [119], be material that is definitively identified as being non-cannabis material or it may be plant material that is of indeterminate origin whether with or without evidence of THC or CBN. If the Prosecution seeks to proceed with a charge of cannabis mixture based on Group 2 material alone, there is no admissible evidence at all that the Group 2 material by itself

consists of cannabis and some other type of material. Granted, the compressed block as a whole consists of cannabis and other vegetable material of indeterminate origin and so qualifies as cannabis mixture. But once the cannabis is removed, all that is left in the Group 2 material is vegetable matter of indeterminate origin and this will no longer satisfy the definition of "cannabis plant matter commingled with vegetable matter of indeterminate origin or known to be of non-cannabis origin". It therefore cannot qualify as "cannabis mixture" under s 2 of the MDA. The Prosecution wholly ignored this. When we put this to the learned Deputy Public Prosecutor, no response was forthcoming. The short point is that nothing in *Saravanan* at [178] was meant to detract from what we had earlier set out in the judgment regarding the definition of "cannabis mixture".

30 To summarise, "cannabis mixture" is purely a creature of statute and the existence of this drug must be determined in that light. Its legal components are: (a) something that is scientifically determined to be "cannabis"; (b) such "cannabis" must then be mixed with something that is scientifically determined to be a plant matter other than cannabis, which could include something that is of indeterminate nature; and (c) the foregoing two components cannot be easily separated (though this does not mean impossible to separate). Where the entire mass of the compressed block has not been separated, the block will be assessed *as a mass* for compliance with the statutory definition above. But where the mass of the entire block is broken down or separated, each part would have to be re-assessed:

> (a) If it is possible to separate the pure cannabis (meaning Group 1 material) out of the entire block, and the portion said to be cannabis is scientifically determined to be such, it would be treated as "cannabis" at

law even if it was once a part of a mass determined as a whole to be "cannabis mixture".

(b) The Group 2 material that remains after the cannabis has been taken out can at that point no longer be treated as cannabis mixture because as a matter of science there is no evidence that this portion contains "cannabis" and, absent such evidence, as a matter of law it cannot be cannabis mixture even though that mass was once part of a mass that as a whole was "cannabis mixture".

(c) The foregoing does not, however, preclude the Prosecution from pursuing other charges in respect of the Group 2 material as long as it is clear as a matter of science what that portion contains *and* that, as a matter of law, such substance that is contained in it is prohibited. This would include controlled substances such as CBN. However, we must reiterate that the fact that THC and CBN might be detected within the Group 2 material does not mean that it is cannabis mixture because by definition, as explained at [29] above, cannabis mixture must contain material which is scientifically determined to be "cannabis".

31 To crystallise the issue further, suppose that all an accused person has on his person is the Group 2 material (and not a compressed block of cannabis-related material that includes pure cannabis that is Group 1 material), and suppose that the HSA's certificate only states that the Group 2 material is of an indeterminate plant source and contains THC and CBN but the HSA is not able to determine the origin of such material – can an accused person in these circumstances be charged with an offence of dealing with cannabis or cannabis mixture? The answer is plainly no. This is because in such a situation: (a) the HSA cannot provide any certification in respect of cannabis; and (b) by

definition, there can be no certification of a *mixture* that includes "cannabis". While the Prosecution could conceivably proceed on a charge for another controlled drug if there is evidence to that end, it may not proceed on a charge of "cannabis mixture". This, incidentally, is why we set out in *Saravanan* at [192]–[195] the Prosecution's two charging options: (a) the Prosecution may charge as cannabis mixture the entire block of cannabis-related material excluding plainly extraneous material; or (b) the Prosecution may charge as cannabis only that portion of the block of cannabis-related material that can be identified and certified as pure cannabis. The analysis outlined above coheres precisely with this approach.

Additional observations

32 We make some final observations regarding the Prosecution's critique of *Saravanan* at [186]–[187] (see [17]–[18] above).

33 First, we re-affirm the reasoning in *Saravanan* at [186]. Created Fragmented Vegetable Matter, which includes Group 1 material that transforms into Group 2 material as a result of the HSA's analysis, does not exist as cannabis mixture at the time of the offence and, therefore, an accused person could not have known or be said to have known the nature of the Created Fragmented Vegetable Matter at the time of the offence, much less know that it is cannabis mixture. Equally, persons who deal with compressed blocks of cannabis material cannot be said to intend the consequential creation of Created Fragmented Vegetable Matter where such matter is inadvertently and only later generated as a result of the HSA's testing. There is no authority at all for the proposition that an accused person can be made liable for these consequences, which can in some cases extend to the mandatory death penalty, on the basis

that such a person assumes the risk for the form of the material and, as a result, its legal nature changing due to the HSA's testing processes.

34 Next, the Prosecution's proposed solutions – to overcome the problems associated with proving the *mens rea* and the *actus reus* in respect of Created Fragmented Vegetable Matter – are untenable. As regards the *actus reus*, the Prosecution contended that it could avoid the indeterminacy problem by: (a) starting with the weight of the entire compressed block less Group 3 material (which qualifies as "cannabis mixture"); (b) subtracting from the foregoing the weight of Group 1 material (which qualifies as "cannabis"); and (c) arriving at the net weight of Group 2 material alone. Similarly, as regards the *mens rea*, the Prosecution contended that the requisite *mens rea* or knowledge relates to the compressed block as a whole and, if such knowledge is proved, the accused person necessarily and inevitably possesses the same *mens rea* with respect to the compressed block minus Group 1 material under a cannabis mixture charge. Both approaches for ascertaining the *mens rea* and *actus reus* in respect of Created Fragmented Vegetable Matter suffer from the same inherent deficiencies – they make a false equivalence between: (a) two different types of drug; and (b) the weights of the compressed block's various components as they exist at different moments in time. We explain:

> (a) First, the Prosecution's approach conflates what in law are two different types of drug and assumes that the weight of one type of drug (namely, cannabis) can be subtracted from the weight of another type (namely, cannabis mixture) when the latter only qualifies as a drug because and so long as it includes the former. In its submissions, the Prosecution hypothesised that if a person trafficked a single compressed block weighing 2,000g and the HSA separated and certified 700g as cannabis, then the Prosecution could proceed with one charge in respect

of 700g of cannabis and another charge in respect of 1,300g of cannabis mixture. But this is not correct. Cannabis and cannabis mixture are two different drugs. Consistent with our reasoning at [28]–[31] above, removing the cannabis from the entire compressed block would only leave behind "vegetable matter of indeterminate origin or known to be of non-cannabis origin", which would not by itself qualify as "cannabis mixture" notwithstanding the detection of THC and CBN therein.

(b) Second, the Prosecution's approach in effect seeks to calculate the weight of Group 2 material alone by reference to weight measurements assessed at two different points in time, namely, before and after the HSA's analysis. Thus, the weight of cannabis measured after the HSA's analysis is subtracted from the weight of the cannabis block before the HSA analysis. At the risk of repetition, this overlooks the fact that the components of the compressed block are not static and the HSA's act of analysing the compressed block itself generates Created Fragmented Vegetable Matter. Some Created Fragmented Vegetable Matter may be Group 1 material that has become Group 2 material. In short, the form of the compressed block (and, consequently, its legal nature) changes with time owing to the HSA's analysis, and the constituent elements of the compressed block are, in Prof Amirthalingam's words, "in a state of flux".

35 Finally, the Dual Charging Practice exposes an accused person to two separate charges even though in the ordinary case, and absent proof to the contrary, such a person only contemplates transacting in one type of drug activity. This has the potential to give rise to arbitrary outcomes if the mandatory consecutive sentencing regime under s 307 of the CPC is engaged as a consequence.

Summary

36 For all the foregoing reasons, we were amply satisfied as to the correctness of our decision in *Saravanan* that the Dual Charging Practice is impermissible.

The HSA's certification practice post-*Saravanan*

37 In her affidavit, DLD Merula explained the HSA's revised certification procedure following *Saravanan*. Significantly, she raised a query regarding the permissibility of the HSA's practice of certifying Group 2 material alone as cannabis mixture:

> 20. Prior to *Saravanan*, the HSA had been certifying as 'cannabis mixture' the portion of a compressed block that comprises fragmented vegetable matter, and not certified as cannabis (*i.e.* the Group 2 plant material). This portion would have included vegetable fragments originally present in the block, and any vegetable fragments created during the analysis of the compressed block, whether these created fragments come from (a) the cannabis portion of the compressed block; or (b) the existing vegetable fragments of the block.
>
> 21. At [104] of *Saravanan*, the Court of Appeal interpreted 'cannabis mixture' in s 2 of the MDA as consisting of 'cannabis plant matter commingled with vegetable matter of indeterminate origin or known to be of non-cannabis origin.' [194]-[195] of Saravanan further indicates that the entire block (less anything that can be easily separated into Group 3) would be regarded as 'cannabis mixture'. Therefore, the HSA's understanding is that, post-*Saravanan*, the entire block (less anything that can be easily separated into Group 3) can be certified as cannabis mixture. Accordingly, post-*Saravanan*, the HSA has revised its certification practice from what is set out above at [20] to certify the total weight arising from (a) the portion certified as cannabis (i.e. the Group 1 material); and (b) the portion of fragmented vegetable matter that is of indeterminate origin (i.e. the Group 2 plant material inclusive of any vegetable fragments created during the analysis of the compressed block), as cannabis mixture.
>
> 22. However, at [178] of *Saravanan,* the Court of Appeal also stated that 'there is nothing objectionable with treating the

> fragmented vegetable matter in a block of cannabis-related plant material as cannabis mixture because cannabis mixture as we have defined it includes vegetable matter that is ultimately of indeterminate origin.' This suggestion at [178] of *Saravanan* may create some uncertainty regarding the HSA's revised certification practice *post-Saravanan,* specifically as to whether the HSA can, in addition to the revised certification practice at [21], additionally continue certifying the Group 2 plant material inclusive of any vegetable fragments created during the analysis of the compressed block material as cannabis mixture.

38 In short, the HSA expressed uncertainty as to whether its revised certification practice post-*Saravanan* – specifically whether the HSA could continue certifying the Group 2 plant material inclusive of Created Fragmented Vegetable Matter as cannabis mixture – was permissible.

39 In so far as the HSA's revised certification practice involves the certification of Group 2 material alone as "cannabis mixture", such a practice is impermissible. Again, the basis on which the HSA adopted this practice was premised on a misunderstanding of *Saravanan* at [178]. As explained at [27] above, *Saravanan* at [178] denotes that, assuming some Created Fragmented Vegetable Matter was once pure cannabis, it may be regarded as cannabis mixture when it is *a part of the whole* compressed block. That does not, however, entitle the Prosecution or the HSA to regard the Group 2 material *alone* as being cannabis mixture, because as we noted at [28]–[31] above Group 2 material in and of itself does not satisfy the statutory definition of "cannabis mixture" under s 2 of the MDA. In the absence of scientific evidence from the HSA demonstrating that Group 2 material is in fact a mixture of "cannabis" and some "vegetable matter of indeterminate origin or known to be of non-cannabis origin", the revised certification practice based on *Saravanan* at [178] is mistaken and should therefore be discontinued.

40 Accordingly, on the law as it stands, the HSA may not certify Group 2 plant material *alone* and separated from the compressed block that included the pure cannabis, as cannabis mixture. This must be so given the HSA's evidence that such material when taken alone is plant material that is of indeterminate origin and nothing else, even if subjectively they might believe it to have been pure cannabis at some stage, as was reflected in *Saravanan* at [105].

Whether the sentence imposed was manifestly excessive

41 We turn finally to the appellant's appeal against sentence in CCA 35. The Prosecution had applied the Dual Charging Practice and the appellant was originally charged with abetting one Ilango s/o Venayagam ("Ilango") to possess for the purposes of trafficking 1,317.7g of cannabis and, in another charge, 1,461.85g of cannabis mixture. He initially claimed trial. However, the Prosecution eventually agreed to reduce the capital charges to non-capital ones, and the appellant on 27 September 2019 pleaded guilty to a charge of abetting Ilango to traffic in a Class A controlled drug by instigating him to possess not less than 329.99g of cannabis for the purpose of trafficking. The appellant also consented to having another charge of instigating Ilango to possess not less than 659.99g of cannabis mixture for the purpose of trafficking be taken into consideration for the purpose of sentencing. The Judge held that the indicative starting point was between 13 to 15 years' imprisonment and 10 to 11 strokes of the cane. She took into account the appellant's guilty plea but found the following to be aggravating: (a) the fact that the appellant played an active role in the onward distribution of a substantial amount of drugs; and (b) the fact that he offended while on bail. As such, the Judge sentenced the appellant to 15 years' imprisonment and 10 strokes of the cane, with the imprisonment term backdated to the date of remand, namely, 24 October 2015. The appellant argued that that the sentence of 15 years' imprisonment was manifestly

excessive, while the Prosecution sought to uphold the sentence imposed by the Judge.

42 It was not disputed that the appellant and Ilango met on 21 October 2015 to discuss a "job". At around 5am on 22 October 2015, the appellant instructed Ilango to head to Jurong Port to collect what Ilango knew to be cannabis. Ilango, who himself asked one "Ravan" to accompany him, was directed by the appellant to visit the SPC Petrol Kiosk along Jalan Buroh and to board a lorry at the kiosk. Ilango entered the lorry and there collected a black haversack, which contained the relevant drugs. After proceeding to Ravan's unit, Ilango was instructed by the appellant to cut and repackage the drugs to certain sizes. At around 3.15pm, the appellant again gave Ilango further instructions to divide the consignment of drugs and to set some aside for the appellant's collection. Ravan assisted Ilango in this. At 4pm, the appellant called Ilango and instructed him to meet downstairs. The appellant intended to traffic in all the drugs after he had taken possession of them from Ilango. Ravan and Ilango met the appellant at the basement carpark and were arrested. Officers from the Central Narcotics Bureau ("CNB") later searched Ravan's and Ilango's respective units and found, in aggregate, the drugs in the quantities specified at [41] above.

43 The parties in CCA 35 agreed that: (a) the Judge "[did] not take into account the TIC charge"; (b) the indicative starting point for the custodial term was somewhere between 13 and 15 years' imprisonment; and (c) the fact that the appellant offended while on bail was an aggravating factor (see *Vasentha d/o Joseph v Public Prosecutor* [2015] 5 SLR 122 ("*Vasentha*") at [63]). However, the appellant submitted that his imprisonment term should be reduced to 13 years, for two main reasons. First, the appellant argued, on the basis of facts asserted in his own mitigation plea, that Ilango had already been dealing in drugs prior to speaking with him. He asserted that it was Ilango who

suggested to the appellant that he would collect the drugs if the appellant paid him, and hence the appellant did not pressure Ilango. Second, the appellant asserted that he performed a limited function under direction. Again, on the basis of facts asserted in his mitigation plea, it was said that an individual named "Daud" allegedly asked him to collect and deliver the relevant drugs on the next day. It was suggested on this basis that there was in fact an absence of aggravating factors, and that the appellant's culpability was low and taken together with his plea of guilt, the sentence of 15 years' imprisonment was manifestly excessive.

44 We disagreed. Given that the quantity of cannabis involved in this case was at the upper end of the range, the indicative starting sentence would have been 15 years' imprisonment based on the sentencing framework in *Vasentha* at [47] and applied in *Public Prosecutor v Sivasangaran s/o Sivaperumal* [2016] SGDC 214 at [19]. Further, the Judge was correct to have characterised the appellant's role as "active". While the appellant might not necessarily have coerced Ilango, the appellant did actively instigate Ilango to commit the offence as he issued instructions to Ilango at every step of the transaction. In fact, Ilango was directed to do more (including repackaging the drugs) than what he had initially agreed to do (which was just to collect some drugs). Even assuming for the sake of argument that the appellant had himself been acting under directions (which was not something that was reflected in the statement of facts), and that Ilango had acted voluntarily, this did not detract from the fact that the appellant demonstrated considerable knowledge, involvement and control over the entire operation as evidenced in the fact that he directed Ilango throughout the process. We rejected the suggestion that the act of involving others in a crime could only constitute an aggravating factor if done with coercive force, as this was wholly misconceived. Such coercion would have been a *further* aggravating factor. But

in and of itself, procuring the involvement of others in a criminal venture is an aggravating factor because it widens the circle of offending actors. We also did not accept that such instigation would in some way be less aggravating simply because it was done on the instructions of another. Taking the foregoing into account, as the Judge did, the appellant's plea of guilt was rightly accorded less weight as a mitigating factor. In the round, it could not be said that the sentence imposed by the Judge was manifestly excessive.

45 We therefore dismissed the appellant's appeal against his sentence and affirmed the sentence imposed by the Judge below.

Conclusion

46 For these reasons, we maintained our holding in *Saravanan* regarding the impermissibility of the Dual Charging Practice, and dismissed the appellant's appeal against his sentence. Finally, we again express our gratitude to Prof Amirthalingam for his assistance with this matter.

Sundaresh Menon
Chief Justice

Andrew Phang Boon Leong
Justice of the Court of Appeal

Judith Prakash
Justice of the Court of Appeal

Tay Yong Kwang
Justice of the Court of Appeal

Steven Chong
Justice of the Court of Appeal

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