IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2023] SGCA 23

Criminal Appeal No 31 of 2022

Between

Muhammad Hamir B Laka

… *Appellant*

And

Public Prosecutor

… *Respondent*

In the matter of Criminal Case No 22 of 2022

Between

Public Prosecutor

And

Muhammad Hamir B Laka

GROUNDS OF DECISION

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

[Criminal Law — Defence of necessity]

Muhammad Hamir B Laka
v
Public Prosecutor

[2023] SGCA 23

Court of Appeal — Criminal Appeal No 31 of 2022
Sundaresh Menon CJ, Tay Yong Kwang JCA and Belinda Ang Saw Ean JCA
3 May 2023

21 July 2023

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

Introduction

1 The appellant, Muhammad Hamir B Laka, was convicted by a judge of the General Division of the High Court (the "Judge") of having in his possession for the purpose of trafficking, 39.71g of diamorphine (the "Drugs"), an offence under s 5(1)(*a*) read with s 5(2) of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) (the "MDA") (see *Public Prosecutor v Muhammad Hamir B Laka* [2022] SGHC 203 (the "Judgment")). The Judge sentenced the appellant to the mandatory death penalty. The appellant appealed against both his conviction and sentence. After hearing the parties, we dismissed the appeal and gave our reasons in brief. We now provide the full grounds of our decision.

Facts and the decision below

2 The appellant was arrested on the afternoon of 23 September 2019 in the Marine Parade vicinity. He had come to meet a person known as Zainudin in order to sell him some drugs. Zainudin had been arrested by the Central Narcotics Bureau (the "CNB") earlier that morning, and subsequently made arrangements with the appellant for the delivery of the drugs on the instructions of CNB officers. Upon his arrest, drugs were found in the appellant's possession as well as at his residence (the "Unit"). The drugs that were seized from the appellant and at the Unit were analysed by the Health Sciences Authority (the "HSA") and found to contain not less than 39.71g of diamorphine.

3 During the course of investigations, a total of eight statements were recorded from the appellant (collectively, the "Recorded Statements") as follows:

(a) A contemporaneous statement under s 22 of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) (the "CPC") was recorded at about 5.28pm on 23 September 2019 in the living room of the Unit (the "First Contemporaneous Statement").

(b) A contemporaneous statement under s 22 of the CPC was recorded at about 8.16pm on 23 September 2019 in the living room of the Unit.

(c) A cautioned statement under s 23 of the CPC was recorded at about 3.56pm on 24 September 2019 at the Police Cantonment Complex (the "PCC").

(d) Five long statements were recorded from 26 September to 1 October 2019 at the PCC, including:

(i) a statement recorded at about 10.23am on 28 September 2019 (the "Second Long Statement");

(ii) a statement recorded at about 2.03pm on 30 September 2019 (the "Third Long Statement"); and

(iii) a statement recorded at about 3.09pm on 1 October 2019 (the "Fifth Long Statement").

4 The appellant claimed trial to the following charge (the "Charge"):

> That you, [the appellant], are charged that you, on 23 September 2019, between 3 p.m. and 5 p.m., in 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) (the "Act"), to wit, by having in your possession for the purpose of trafficking:
>
> > (a) 112 packets and 38 straws containing not less than 1,525.55 g of granular/powdery substance which was pulverised and homogenised into a powdery substance analysed and found to contain not less than **37.91 g** of **diamorphine**, at your residence in Block 174C Hougang Avenue 1 #05-1565; and
> >
> > (b) 11 packets and 35 straws containing not less than 68.16 g of granular/powdery substance which was pulverised and homogenised into a powdery substance analysed and found to contain not less than **1.8 g** of **diamorphine**, on your person,
>
> totalling **39.71 g** of **diamorphine**, without any authorisation under the Act or the Regulations made thereunder, and you have thereby committed an offence under Section 5(1)(*a*) read with Section 5(2) and punishable under Section 33(1) of the Act.
>
> [emphasis in original]

5 The appellant raised the defence of necessity, contending that he urgently needed money to pay for surgery that was needed by his wife, who is diabetic. He also challenged the integrity of the chain of custody of the drug exhibits. Further, while the appellant accepted that his statements had been

given voluntarily, without threat, inducement or promise, he challenged the accuracy of parts of the Recorded Statements. For completeness, we note that the appellant also contended at trial that some of the drugs were for his own consumption but this was not accepted by the Judge, and the appellant did not pursue this on appeal.

6 The Judge was satisfied that all three elements of the offence of trafficking in a controlled drug under s 5(1)(*a*) read with s 5(2) of the MDA had been established beyond a reasonable doubt. Specifically, (a) the appellant was in possession of a controlled drug; (b) the appellant had knowledge of the nature of the drug; and (c) the appellant's possession of the controlled drug was for the purpose of trafficking which was not authorised (Judgment at [80]). In particular, the Judge noted that the appellant had identified the Drugs as "[h]eroin and [i]ce" in his First Contemporaneous Statement and "ice" and "panas" (the latter being the Malay word that the appellant used to refer to diamorphine), in the Fifth Long Statement (Judgment at [84]). Moreover, the Judge noted the appellant's admission in the First Contemporaneous Statement that he had procured "panas" from one Rosli for the purpose of selling this to others for a profit. The Judge also noted the appellant's admissions in his Second and Third Long Statements, in which the appellant explained that he had started selling drugs because he needed money to meet his family's expenses in light of his wife's ill health and detailed how he had agreed to Rosli's suggestion that he sell "panas" instead of "ice", apparently because this was more lucrative (Judgment at [88]).

7 The Judge rejected the appellant's defences. In relation to the defence of necessity, the Judge noted the appellant's attempt to rely on the English case of *R v Shayler* [2001] 1 WLR 2206, but did not think this was of assistance because

the defence of necessity is codified in s 81 of the Penal Code (Cap 224, 2008 Rev Ed) (the "Penal Code"). The Judge found that the appellant's wife's condition, "though grave", was not "of such a nature and so imminent as to justify or excuse" the appellant's actions, as would be required to invoke the defence under s 81 of the Penal Code. Further, the Judge reasoned that the appellant could not be said to have been acting in good faith when he deliberately sought out Rosli for supplies and actively approached customers to resell them. The Judge also observed that the appellant could have sought alternative ways to raise funds to pay for his wife's medical bills (Judgment at [142]–[143]).

8 The Judge also rejected the appellant's argument that there had been a break in the chain of custody of the drug exhibits. After examining the evidence relating to each step of the chain of custody of the drug exhibits, the Judge found that the Prosecution had established the integrity of the chain of custody in handling the drug exhibits and had proven beyond a reasonable doubt that the drug exhibits analysed by the HSA were the same as those seized from the appellant at the time of his arrest and during the raid of the Unit (Judgment at [139]).

9 Finally, the Judge rejected the appellant's argument that the Recorded Statements had been inaccurately recorded. The Judge observed that in the appellant's testimony in court, the admissions contained in the Recorded Statements had largely been maintained. The Judge found that the issues raised by the appellant pertaining to the Recorded Statements were "not serious" and did not affect his admission to the various elements of the Charge (Judgment at [57]). The Judge accordingly convicted the appellant and imposed the death penalty which was mandated in the circumstances.

The appeal

10 The appellant appealed against his conviction and sentence and raised three main grounds of appeal. First, the appellant submitted that the defence of necessity under s 81 of the Penal Code was made out because he had only trafficked in the Drugs in order to raise funds to pay for his wife's medical bills. According to him, his wife's grave medical condition was "of such a nature and so imminent" as to justify his actions. Counsel for the appellant, Ms Luo Ling Ling ("Ms Luo"), also sought to emphasise that from his perspective, he could not find any other way to raise funds and had to resort to selling drugs.

11 Second, he contended that there was a break in the chain of custody of the drug exhibits. In support of this contention, he raised the following arguments:

(a) there were discrepancies in the weight of the drug exhibits measured in the CNB Exhibit Management Room ("EMR") as compared to that measured by the HSA;

(b) there were corrections and inconsistencies in relation to the field diary maintained by the investigating officers at the time of the appellant's arrest (the "Field Diary");

(c) there were inconsistencies in the evidence of the Prosecution's witnesses as to whether Ziplock or tamper-proof bags had been used to store the drug exhibits;

(d) the appellant did not see the weight of the drug exhibits during the weighing process in the Unit;

(e) the weight of each drug exhibit was not read out to the appellant during the weighing process at the CNB Headquarters; and

(f) the DNA traces of the photographer and swabber who handled the drug exhibits were found on some of the exhibits.

12 Third, the appellant argued that in view of certain inaccuracies in the Recorded Statements, a conviction that relied on his statements for proving the elements of the Charge would be unsafe.

Our decision

13 We were satisfied that each of these three grounds pertained to matters that had been raised below and considered by the Judge. We agreed with the Judge's conclusions and found these grounds of appeal to be without merit. We now elaborate by considering each in turn.

Defence of necessity

14 We begin by examining the defence of necessity, this being the aspect of the appeal on which Ms Luo focussed much of her oral submissions at the hearing before us.

The appellant's case

15 The appellant had been working part-time to deliver items for one Abang Jo since 2016. In early 2019, however, as Abang Jo's requirements reduced, the appellant found himself struggling to support his family financially. Around this time, his wife developed diabetic symptoms, including swelling in her leg, for which she subsequently underwent surgery on 25 December 2019. According to the appellant, he had no other sources of funds and had to assume full

responsibility for his wife's medical bills. He eventually decided to traffic in methamphetamine in early April 2019 and later in diamorphine in order to raise funds.

16 According to the appellant, his wife's medical condition was "of such a nature and so imminent" as to justify or excuse his actions. While the Judge concluded that the appellant's wife's medical condition was not "objectively" of such a nature, the appellant maintained this was incorrect because s 81 of the Penal Code was wide enough to "cover cases where the accused had mistakenly perceived the harm to be of such [a] nature". In other words, the appellant's position was that the danger need not objectively meet the criteria set out in s 81 of the Penal Code, and "what matter[ed] [was] the perception of the accused".

17 The appellant also contended that the "concept of reasonableness" meant that he could avail himself of the defence of necessity even if his actions went beyond the "least harmful response" possible. Instead, it was necessary to "consider a number of possible responses all of which could be regarded as reasonably necessary" in the circumstances. Accordingly, the appellant submitted that the Judge erred in basing his conclusion on the fact that the appellant could have sought alternative ways of earning an income because this failed to consider that the option of illegally selling drugs was "an option … reasonably believed by the [a]ppellant to be reasonably necessary in order to pay for his wife's medical bills". From the appellant's perspective, given his level of education and skill, and his alleged efforts to raise funds that had not been successful, there "would not have been other viable methods" for him to earn a sufficient amount in the available time to pay for his wife's medical bills.

18 Further, notwithstanding his knowledge of the harmful consequences that would follow from his actions, the appellant contended that he had acted in good faith, without criminal intent, because he would not have trafficked in the Drugs had his wife not been facing such a grave medical condition.

The Prosecution's case

19 The Prosecution acknowledged the gravity of the appellant's wife's medical condition at the material time, as well as the fact that the appellant held a low-income job. However, the Prosecution raised both factual and legal arguments to refute the appellant's case that he could avail of the defence of necessity.

20 On the facts, the Prosecution argued that the appellant had "provided no evidence that he unsuccessfully sought financial aid" in order to pay for his wife's medical bills. Further, the Prosecution highlighted that the appellant could have sought alternative ways of paying for the medical bills. This included selling valuable items such as a gold bracelet, two watches and jewellery were found in the appellant's possession.

21 The Prosecution also contended that the defence of necessity was "intended to cover situations in which far greater harm would have occurred had the offending act not been done", citing *Low Song Chye v Public Prosecutor and another appeal* [2019] 5 SLR 526 ("*Low Song Chye*") at [53]. The Prosecution contended that in the present case, the appellant's choice to traffic the Drugs was one which would harm countless lives and could not be said to have been "reasonable and proportionate" to the pressure of his circumstances, especially considering that he had not shown how his actions were *necessary* to save his wife's life.

The applicable law

22 The defence of necessity is codified in s 81 of the Penal Code, which provides as follows:

> **Act likely to cause harm but done to prevent other harm**
>
> **81.** Nothing is an offence merely by reason of its being done with the knowledge that it is likely to cause harm, if it be done in good faith for the purpose of preventing or avoiding other harm to person or property.
>
> *Explanation.*—It is a question of fact in such a case whether the harm to be prevented or avoided was of such a nature and so imminent as to justify or excuse the risk of doing the act with the knowledge that it was likely to cause harm.
>
> *Illustrations*
>
> (*a*) *A*, the captain of a steam vessel, suddenly and without any fault or negligence on his part, finds himself in such a position that, before he can stop his vessel, he must inevitably run down a boat *B*, with 20 or 30 passengers on board, unless he changes the course of his vessel, and that, by changing his course he must incur risk of running down a boat *C*, with only 2 passengers on board, which he may possibly clear. Here, if *A* alters his course without any intention to run down the boat *C*, and in good faith for the purposes of avoiding the danger to the passengers in the boat *B*, he is not guilty of an offence, though he may run down the boat *C*, by doing an act which he knew was likely to cause that effect, if it be found as a matter of fact that the danger which he intended to avoid was such as to excuse him in incurring the risk of running down the boat *C*.
>
> (*b*) *A* in a great fire pulls down houses in order to prevent the conflagration from spreading. He does this with the intention, in good faith, of saving human life or property. Here, if it be found that the harm to be prevented was of such a nature and so imminent as to excuse *A*'s act, *A* is not guilty of the offence.
>
> (*c*) *X*, the commander of a naval vessel, is deployed in response to a threat of a terrorist attack against a ferry terminal in Singapore. *X* receives information that vessel *A*, with a crew of 6, has been hijacked by terrorists and is approaching the ferry terminal at great speed and is likely to collide into the terminal. There is insufficient time to evacuate the persons at the terminal, which is estimated to be about 100. *X* orders vessel *A* to stop her manoeuvre immediately and fires a warning signal.

> However, vessel *A* continues her advance towards the terminal. Here, if *X* gives an order to fire at vessel *A* to disable it, without any intention to cause harm to the crew members of vessel *A*, and in good faith for the purpose of avoiding the danger to the persons at the terminal, he is not guilty of an offence. This is so even though he knows that he is likely to cause harm to the crew members of vessel *A*, if it be found as a matter of fact that the danger which *X* intends to avoid is such as to excuse him in incurring the risk of firing at vessel *A*.

23 There is a paucity of local case law on the defence, apart from *Low Song Chye*, which was cited by the Prosecution. In *Low Song Chye*, the accused appealed against his conviction on a charge of voluntarily causing hurt. He had pushed the victim towards a wall, grabbed her neck and slapped her with "very great force" on the side of her face (at [7]). His appeal to the High Court was dismissed, and among other things, he was unsuccessful in his attempt to raise the defence of necessity. The High Court affirmed the magistrate's finding that the accused had intended to hurt the victim, and therefore, s 81 of the Penal Code did not apply. The court held, among other things, that the accused would not have been able to show that he had acted "in good faith", and further reasoned that that the illustrations to s 81 of the Penal Code suggested that the defence of necessity was intended to cover situations in which far greater harm would have occurred had the offending act not been done (at [53]). *Low Song Chye* therefore suggests that the defence may not be invoked where harm is *intentionally* caused or if the harm to be avoided is not considerably more than the harm that is risked or inflicted by the offender.

24 Given the limited detailed analysis of the defence in our case law, we think it is apposite to clarify the requirements and principles relating to the defence of necessity. The starting point is the interpretation of s 81 of the Penal Code, which, as observed by the Judge and accepted by the parties, codifies the defence of necessity in Singapore.

25 The approach to the purposive interpretation of legislation is well established and set out in *Tan Cheng Bock v Attorney-General* [2017] 2 SLR 850 ("*Tan Cheng Bock*"). As we observed in *Tan Cheng Bock* (at [43]), when seeking to draw out the legislative purpose behind a provision, primacy should be accorded to the text of the provision and its statutory context. Extraneous material may be used in limited ways, including to confirm that the ordinary meaning arrived at is the correct one (see s 9A(2)(*a*) of the Interpretation Act 1965 (2020 Rev Ed); *Tan Cheng Bock* at [47(a)]). With these guiding principles in mind, we turn to consider s 81 of the Penal Code.

26 On a plain reading of s 81 of the Penal Code and its accompanying explanation, we observe that there are two limbs to be satisfied before one may avail of the defence of necessity:

(a) the accused person must have done an act that he knew was *likely* to cause harm (the "subject act"); and

(b) the accused person must have done the subject act in good faith and for the purpose of preventing or avoiding other harm (the "avoidance of harm purpose").

We refer to these as the "two requirements".

27 These requirements are to be understood in the context of the explanation to s 81, which provides that in every case, it has to be considered as a matter of fact whether the "harm to be prevented or avoided" was "of such a nature and so imminent as to justify or excuse the risk of doing the act". In short, the two requirements are to be weighed against each other so that what would normally be unjustifiable, namely carrying out the subject act, may in certain circumstances be excused because it is done for the avoidance of harm purpose

— that is, to prevent or avoid imminent injury or harm of such gravity to others that it justifies or excuses the risk of doing the subject act.

28 To understand this better, we think it is apposite to have regard to the fact that s 81 was amended in 2019 by the Criminal Law Reform Act 2019 (Act 15 of 2019) (the "Amendment Act"). Before the amendment, s 81 of the Penal Code read as follows:

> Nothing is an offence merely by reason of its being done with the knowledge that it is likely to cause harm, if it be done *without any criminal intention to cause harm*, and in good faith for the purpose of preventing or avoiding other harm to person or property.
>
> …
>
> [emphasis added]

29 The original wording of the provision referenced a distinction between the carrying out of an act with the "knowledge that it is likely to cause harm" and the "criminal intention to cause harm". For the avoidance of doubt, the accompanying illustrations and explanation were not affected by the amendment. Therefore, prior to the amendment, acts that were done with the "criminal intention to cause harm" could not be justified or excused under the provision. The amendment to s 81 of the Penal Code removed the italicised words, "without any criminal intention to cause harm". The question arises as to what the effect of the deletion of these words was. The amendment followed a recommendation that was made in the Penal Code Review Committee Report (2018) (the "PCRC Report"). The Committee explained in the PCRC Report that the recommendation to remove the reference to "criminal intention" was made in view of its separate recommendation to codify the definition of "intention" in the Penal Code, to include oblique intention (meaning the intention that is ascribed to a person in respect of an effect or result that will be

virtually certain to result from his or her voluntary act, even though he or she may not have had any specific desire to achieve that result). The concern was that the latter recommendation might render s 81 unworkable if the italicised words in the extract at [28] above, containing the word "intention", were to be retained. We reproduce the committee's explanation (at p 239 of the PCRC Report):

> Section 81 provides a total defence where something is done with the knowledge that it is likely to cause harm for the purpose of preventing or avoiding other harm to person or property. However, this includes a proviso that this act cannot be done with an *intention* to cause harm, and it must be in good faith for the purpose of preventing or avoiding harm.
>
> The [committee] notes that the highlighted proviso, if extended to oblique intention, may render s 81 unworkable due to the proviso becoming excessively wide. Referring to Illustration (*b*), when A pulls down houses to save human life or property in a fire, he obliquely intends to harm those houses as he knows with virtual certainty that they will be destroyed …
>
> [emphasis in original]

30 The proposed change to s 81 was accordingly effected by s 24 of the Amendment Act. The legislative intent behind the amendment was therefore a consequence of extending the definition of "intention" in the Penal Code to include oblique intention and the concern that this could render s 81 unworkable. It should be noted that under s 81, the subject act may well be done with the oblique intention to cause harm. But it seems to us that the amendment did not detract from the intention behind the distinction that was previously drawn in the provision, and which excluded from the defence those acts that were done with a "*criminal* intention to cause harm" [emphasis added].

31 The distinction between "knowledge that [an act] is likely to cause harm" and the "criminal intention to cause harm" is an important one. As

explained in *Ratanlal & Dhirajlal's Law of Crimes: A Commentary on the Indian Penal Code, 1860 vol 1* (H K Sema & O P Garg, eds) (LexisNexis, 34th Ed, 2018) ("*Ratanlal*") at pp 460–461:

> Under no circumstances can a person be justified in intentionally causing harm; but if he causes the harm without any criminal intention, and merely with the knowledge that it is likely to ensue, he will not be held responsible for the result of his act, provided it be done in good faith to avoid or prevent other harm to person or property …

32 The authors of *Ratanlal* (at p 461) go on to explain the meaning of "criminal intention" as follows:

> … 'Criminal intention' simply means the purpose or design of doing an act forbidden by the criminal law without just cause or excuse. An act is intentional if it exists in idea before it exists in fact, the idea reali[s]ing itself in the fact because of the desire by which it is accompanied. The motive for an act is not a sufficient test to determine its criminal character. By a motive is meant anything that can contribute to give birth to, or even to prevent, any kind of action. Motive may serve as a clue to the intention; but although the motive be pure, the act done under it may be criminal. Purity of motive will not purge an act of its criminal character.

It is clear from the foregoing that the legislative purpose of s 81 of the Penal Code was *not* to provide an excuse or justification for premeditated criminal conduct, irrespective of the offender's "[p]urity of motive".

33 The requirement under s 81 of the Penal Code that the act to be excused or justified must have been "done in *good faith* to avoid or prevent other harm to person or property" [emphasis added] underscores this point. Good faith is explained in s 52 of the Penal Code (which has since been repealed and replaced in the same terms by s 26B of the Penal Code 1871 (2020 Rev Ed) as follows: "[n]othing is said to be done or believed in good faith which is done or believed without *due care and attention*" [emphasis added]. In the context of s 81, this

must mean that the assessment of the risk of the subject act, and the purpose and the justification for running that risk must have been done with due care and attention given the circumstances that the accused person was in. It seems to us to be virtually impossible to conceive of a situation in which a premeditated decision to engage in criminal conduct can be said to have been made in good faith. As we explained to Ms Luo during the arguments, if it were otherwise, it would suggest that the defence of necessity could be invoked to excuse a deliberate and wilful criminal act based on the offender's subjective assessment of the relative harm of doing that act against the perceived benefits. That is untenable, in our judgment.

34 We echo here the observations of Lord Denning MR, albeit in a civil context, in *Southwark London Borough Council v Williams and another* [1971] Ch 734 ("*Southwark*") (at p 743): "the doctrine [of necessity] must … be carefully circumscribed. Else necessity would open the door to many an excuse." On the facts of *Southwark*, Lord Denning MR considered that the appellants' homelessness did not afford them a defence to trespass for squatting in empty houses owned by the respondent.

35 We turn next to the three illustrations which follow the text and explanation of s 81 and highlight the following features:

(a) In each illustration, the subject act is done *not* as a premeditated act, but as an act decided upon on the spur of the moment for the purpose of preventing or avoiding what is honestly and reasonably believed to be much greater imminent harm.

(b) In each illustration, the subject act is never done with the intention to inflict harm but to avoid greater harm, such that the risk of some harm being caused by the subject act may be excused.

(c) It is the operative intent underlying the commission of the subject act, namely the avoidance of greater harm, that determines whether it was an act in good faith.

36 In our judgment, the illustrations to s 81 of the Penal Code both affirm our view that the defence will not avail where the accused person made a premeditated decision to engage in criminal conduct, and also limit the permissible character of the subject act.

(a) In illustration (*a*), the captain of a steam vessel makes the decision to change course and incur the risk of running down boat *C* when he "*without any fault or negligence* … finds himself in such a position that … he must inevitably run down boat *B* [or incur risk of running down boat *C*]". It bears emphasising that the captain alters the course of his vessel "without *any intention to run down* boat *C*" but rather, only to "[incur] the *risk of running down* the boat *C*" [emphasis added].

(b) In illustration (*b*), *A* is faced with a "great fire" and pulls down houses to prevent it from spreading, with the "intention, in good faith, of saving human life or property".

(c) In illustration (*c*), *X* has "insufficient time" to evacuate persons at a ferry terminal in the face of the hijacked vessel *A* that is "approaching the [terminal] at great speed and is likely to collide into

> the terminal". Despite *X*'s attempts to compel vessel *A* to desist, vessel *A* continues to advance and *X* is therefore excused from *incurring the risk* of firing at vessel *A* if he gave the order "*without any intention to cause harm* to the crew members of vessel *A*, and in good faith for the purpose of avoiding the danger to the persons at the terminal".

37 It may be observed from these illustrations that the drafters had gone to lengths to provide details circumscribing the parameters under which the defence may be available. Importantly, the illustrations emphasise that the accused person may only invoke the defence if he does not harbour the intention to cause harm save where this is an oblique intention, and in that case, it must have been acted upon solely to avoid or prevent an imminent threat of much greater harm. Further, what underlies each of these fact situations is that the accused person is faced with a set of circumstances that compel her to commit the offending act, and run the *risk* of some harm ensuing, in good faith *for the purpose of avoiding or preventing greater harm*. We emphasise the distinction drawn in the illustrations between running the *risk* that inheres in doing the subject act, and the *certainty of imminent and much greater harm that would otherwise ensue*.

38 This is consistent with the explanation to s 81 of the Penal Code which provides that the harm to be prevented or avoided must be "of such a nature and so imminent as to justify or excuse the risk of doing the act". This places an emphasis both on the imminence of the harm to be avoided as well as its scale and likelihood in relation to the risk that inheres in carrying out the subject act. This, as we have already noted, is reflected in the illustrations.

39 Thus, in illustration (*a*), the contrast is between the choice of the captain of a steam vessel to "incur *risk* of running down a boat *C*, with *only 2 passengers* on board, which *he may possibly clear*" as opposed to "*inevitably* run[ning] down a boat *B*, with *20 or 30 passengers* on board" [emphasis added], the latter being the harm that is "of such a nature and so imminent as to justify or excuse" the subject act. In illustration (*b*), the relevant harm to be avoided or prevented is the spread of a "conflagration", in other words, an extensive fire. In illustration (*c*), there is specific mention of "*insufficient time* to evacuate the persons at the terminal, which is estimated to be *about 100*" [emphasis added].

40 We observe that the position under Canadian law is similar in some respects. The Supreme Court of Canada in *R v Latimer* [2001] 1 SCR 3 ("*Latimer*") reiterated the three requirements for invoking the common law defence of necessity (at [28]):

> … First, there is the requirement of *imminent peril or danger*. Second, the accused must have had no reasonable legal alternative to the course of action he or she undertook. Third, there must be *proportionality between the harm inflicted and the harm avoided*.
>
> [emphasis added]

The Court in *Latimer* held (at [31]), in relation to the third requirement, that although the principle of proportionality does not require that one harm had always to clearly outweigh the other, "the two harms must, at a minimum, be of a comparable gravity". We do not think this observation applies in the context of s 81 given the clear thrust of the illustrations which suggest that the defence may only be invoked where the risk of some harm is run in order to avoid the greater likelihood of much greater harm (see [37] above).

41 As for the first requirement of imminent peril or danger, the Court in *Latimer* (at [29]) cited its earlier decision, *Perka v R* [1984] 2 SCR 232, in which it was stated that "[a]t a minimum the situation must be so emergent and the peril must be so pressing that normal human instincts cry out for action and make a counsel of patience unreasonable". On the other hand, "[w]here the situation of peril clearly should have been foreseen and avoided, an accused person cannot reasonably claim any immediate peril". On the facts, the Court reasoned that the proposed surgery that the accused person's daughter needed "did not pose an imminent threat to her life, nor did her medical condition" and it was "not reasonable for the [accused] to form [the belief that the surgery amounted to an imminent peril], particularly when better pain management was available" (*Latimer* at [38]). In our judgment, this analysis is also true when assessing the avoidance of harm purpose element under s 81.

42 In sum, s 81 of the Penal Code read with its accompanying explanation and illustrations makes clear that an accused person may not avail of the defence of necessity just to avoid or prevent some sort of harm that may be anticipated. The Court must be satisfied that the nature of the harm sought to be avoided or prevented was of sufficient gravity and imminence, viewed in relation to the risk of harm that was occasioned by the offending act.

43 We summarise the applicable principles:

(a) The defence will not avail where the accused person engages in deliberate or premeditated criminal conduct or the deliberate and wilful infliction of harm.

(b) To avail of the defence, the offender must have acted in good faith and must have assessed the risk that inhered in the subject act and

the justification for running that risk with due care and attention, though this will be considered having regard to the circumstances he was in.

(c) The defence may in principle be invoked if the offender has the oblique intention to cause some harm but acted solely for the purpose of avoiding much greater harm.

(d) The harm to be avoided must reasonably be apprehended to:

(i) be imminent;

(ii) be more likely and more serious than the harm risked by the subject act; and

(iii) leave the accused person with no reasonable legal alternative course to take.

Whether the defence is made out

44 We considered the defence in the light of these principles. In the present case, the appellant made a deliberate, premeditated decision to traffic the Drugs. The appellant admitted in his First Contemporaneous Statement that: (a) he had "approached [Rosli] for ice" and later "approach[ed] Rosli … to ask for panas supply"; and (b) the "panas [was] meant for selling …" at a price of "3 straws [for] $50", "1 packet [for] $120" and "1 set of 16 packets [for] $600" (see Judgment at [88(a)]). This was not a case of a subject act being committed to directly prevent greater imminent harm. On the contrary, this was a premeditated decision to traffic in drugs of increasing potency and harm to realise greater rewards, ostensibly to pay for his wife's treatment. It is therefore clear that the defence of necessity under s 81 was not available here.

45 Further, the harm caused by the appellant's actions cannot be understated. As described by the Minister for Law, Mr K Shanmugam at the Second Reading of the Misuse of Drugs (Amendment) Bill (*Singapore Parliamentary Debates, Official Report* (14 November 2012) vol 89 (Mr K Shanmugam, Minister for Law)) at p 1227:

> Globally, the number of drug users has increased from 180 million to 210 million in the last 10 years. The number of deaths due to drugs has increased from around 100,000 to over 260,000. The mean age for deaths due to drugs is in the mid-30s.
>
> …
>
> The impact of drugs in Singapore – two thirds of the local prison population are drug offenders. Eighty percent have drug antecedents. This is the same everywhere – drug offenders usually commit other crimes. There is also the impact on families, victims of offenders, on society at large …

46 In our judgment, these observations further underscored the inadmissibility of the defence. But even leaving aside these insurmountable legal hurdles, the appellant had, in any event, wholly failed to adduce the sort of evidence that would have been needed to enable him to mount the defence. Ms Luo accepted at the hearing before us that there was no evidence to show (a) exactly what assets the appellant had access to; (b) what efforts he made to raise funds for his wife's operation; (c) what the projected and actual cost of the operation and hospitalisation might have been; (d) what the urgency of the situation was; and (e) who ultimately paid for the operation. Such evidence would have been crucial to even begin considering the defence assuming it was legally tenable. We therefore had no hesitation in affirming the Judge's ruling that the appellant could not avail of the defence of necessity.

Chain of custody of the drug exhibits

47 The second point taken by Ms Luo went to the integrity of the chain of custody of the drug exhibits. As earlier set out (at [11]), the appellant raised six discrete points to cast doubt on the integrity of the chain of custody. At the hearing before us, Ms Luo focused on three of those points: (a) the seeming discrepancy between the weights measured in the EMR as compared to that measured by the HSA; (b) the fact that DNA traces of the photographer and swabber were found on some of the drug exhibits; and (c) the purported inconsistency in the evidence of the Prosecution's witnesses as to whether ziplock or tamper-proof bags had been used to store the drug exhibits.

The applicable principles

48 We begin by setting out the applicable principles as to whether a reasonable doubt has been raised as to the integrity of the chain of custody.

49 It is well established that the burden is on the Prosecution to establish the chain of custody beyond a reasonable doubt. The inquiry into the chain of custody is undertaken to satisfy the Court that the drug exhibits analysed by the HSA are the very ones that were initially seized by the CNB officers from the accused. The Prosecution does this by accounting for the movement of the exhibits from the point of seizure to the point of analysis. The Defence may seek to suggest a break in the chain of custody, by showing that at one or more stages, a reasonable doubt has been raised as to the identity of the exhibits. However, speculative arguments that seek to raise a theoretical possibility of a break in chain of custody would not suffice (*Mohamed Affandi bin Rosli v Public Prosecutor and another appeal* [2019] 1 SLR 440 at [39] and [56]).

50 In our brief oral grounds, we observed that Ms Luo seemed to approach the issue from the perspective that proving the integrity of the chain of custody required a perfect match between the weight recorded by the investigating officer at the time of seizure and the weight recorded by the HSA at the time of analysis. This is not the case. In ascertaining whether the Prosecution has established the chain of custody, the focus is on the identity of the drug exhibits (meaning, establishing that the exhibits seized were the ones ultimately analysed by the HSA). While discrepancies in the weight of the exhibits seized as compared to that of the exhibits analysed by the HSA may, under certain circumstances, raise a reasonable doubt as to whether the two sets of exhibits are the same, it is important to be cognisant of the different purposes and processes applied when the exhibits are weighed by the investigating officers at the point of seizure as compared to by the HSA at the point of analysis. At the point of seizure, the investigating officers seek to preserve the original state of the exhibits, which will eventually be examined during the trial, as well as to obtain the weight for inclusion in the holding charge. When it comes to the HSA, the purpose of weighing the exhibit is to ascertain, with scientifically acceptable accuracy, the specific amount of a controlled drug that is contained in the package having regard to the fact that this will often be mixed with other material. The weighing process will necessarily differ, given the different goals of each weighing process (for instance, in terms of whether the exhibits are weighed with or without their packaging and the instruments used to weigh the exhibits). Thus, to focus on discrepancies in weights without explaining how the discrepancies may lead a court to infer that there is a break in the chain of custody would be unhelpful.

Whether a reasonable doubt has been raised

51 The arguments raised by the appellant on appeal substantially pertained to points that were raised before and considered by the Judge. We broadly agreed with the Judge's analysis and considered that no reasonable doubt had been raised as to the integrity of the chain of custody.

52 As earlier noted at [47] above, Ms Luo first emphasised the discrepancies in the weight of the drug exhibits measured in the EMR as compared to that measured by the HSA. In particular, she argued that if, as accepted by the Judge (see Judgment at [135]), the reason for the discrepancies is that the exhibits were weighed in their packaging in the EMR, whereas the HSA removed the packaging before weighing the drug exhibits, then the discrepancy should be consistent across the various exhibits. However, there was some variance in the discrepancies across the exhibits (see Judgment at [132]).

53 This did not take the appellant's case very far. As we pointed out to Ms Luo at the hearing, the variance between the discrepancies for each exhibit does not say very much in the absence of evidence, for instance, that the packaging of each exhibit was the same. To put it simply, the packaging for a larger parcel would have weighed more than that for a smaller parcel.

54 Ms Luo also pointed to the variance between the weight measured at the EMR compared to that measured by the HSA for one of the exhibits, Exhibit A1H, which variance was particularly large. This point too did not take the appellant's case very far. As accepted by Ms Luo, the discrepancy for Exhibit A1H in particular was not pursued at the trial below. In any event, as was also

accepted by Ms Luo, the diamorphine identified in Exhibit A1H did not count towards the 39.71g of diamorphine that formed the subject of the Charge.

55 Ms Luo next pointed to the DNA traces of the photographer and swabber that were found on the drug exhibits. She argued that the presence of the DNAs indicated that the HSA might have "potentially mixed up the batches of drugs" such that the identity of the drugs analysed was called into question. We were of the view that this argument simply did not follow. The DNA traces were of individuals connected with the case at hand who had interacted in some way with the exhibits. We accepted that adherence to proper procedure and the taking of precautionary measures were important, and that the contamination of exhibits should have been avoided. However, the presence of DNA traces of persons connected to the case and who were involved in the weighing process could not, on its own, suggest a break in the chain of custody. The analysis might have been different if, for instance, DNA traces of persons *unconnected* to the case were found on the drug exhibits, but that was not the case here.

56 Finally, Ms Luo pointed to the purported inconsistencies in the evidence of the Prosecution's witnesses as to whether Ziplock or tamper-proof bags had been used to store the drug exhibits. We saw no merit in this argument, which was raised below and rejected by the Judge. The Judge explained that the purported inconsistency was more apparent than real (see Judgment at [125]). One of the Prosecution witnesses, Mr Loi, testified that he believed tamper-proof bags had been used instead of Ziplock bags. This was apparently contrary to the evidence of other officers. However, Mr Loi also explained that he had testified as such because that was the CNB's protocol at the time that he gave evidence in court, and that in fact, he could not recall whether tamper-proof bags had been used in the appellant's case specifically. The Judge also reasoned that

the discrepancy was "minor and insignificant" given that the type of bag in which the Drugs were stored was of little relevance, especially given that the location and movement of the Drugs had been accounted for. Nor did the Defence suggest that the exhibits had been tampered with.

57 For completeness, we note that the appellant raised three other points relating to the chain of custody on appeal as follows: (a) there were corrections and inconsistencies in relation to the Field Diary; (b) the appellant did not see the weight of the drug exhibits during the weighing process in the Unit; and (c) the weight of each drug exhibit was not read out to the appellant during the weighing process at the CNB Headquarters. These arguments were canvassed before the Judge, who considered each in detail and rejected them (see Judgment at [107]–[118], [104]–[106] and [127]–[128] respectively). We were in broad agreement with the Judge and saw no reason to disturb his findings. We therefore uphold the Judge's finding that the Prosecution had established the chain of custody beyond a reasonable doubt.

Purported inaccuracies in the Recorded Statements

58 For completeness, we touch on the appellant's argument as to the purported inaccuracies in the Recorded Statements. The appellant's contentions relating to this argument were included in his written submissions but not pursued at the oral hearing before us. Having perused the appellant's written submissions, we were satisfied that the Judge had examined the appellant's contentions in detail and rejected them, finding that the inaccuracies alleged were "minor" and "[did] not raise a reasonable doubt as to the accuracy of his statements that [went] towards proving the elements of [the Charge]" (see

Judgment at [53]–[71]). We were in broad agreement with the Judge and saw no reason to disturb his finding.

Conclusion

59 For these reasons, we dismissed the appellant's appeal, and upheld the sentence imposed by the Judge.

Sundaresh Menon
Chief Justice

Tay Yong Kwang
Justice of the Court of Appeal

Belinda Ang Saw Ean
Justice of the Court of Appeal

Luo Ling Ling, Noor Heeqmah binte Wahianuar, and Joshua Ho Jin Le (Luo Ling Ling LLC); Krishna Ramakrishna Sharma (Fleet Street Law LLC) for the appellant;
Kevin Yong and Heershan Kaur (Attorney-General's Chambers) for the respondent.