Muhammad Ridzuan bin Md Ali *v* Public Prosecutor and other matters [2014] SGCA 32

Case Number : Criminal Appeal No 3 of 2013; Criminal Motions Nos 68 and 69 of 2013

Decision Date : 28 May 2014

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; Andrew Phang Boon Leong JA; V K Rajah JA; Woo Bih Li J; Quentin Loh J

Counsel Name(s) : James Bahadur Masih (James Masih & Company); Joseph Tan Chin Aik (Atkins Law Corporation) and Dr Chuang Wei Ping (WP Chuang & Company) for the appellant in Criminal Appeal No 3 of 2013 and the applicant in Criminal Motions Nos 68 and 69 of 2013; Francis Ng, Wong Woon Kwong and Ailene Chou (Attorney-General's Chambers) for the respondent in Criminal Appeal No 3 of 2013, Criminal Motions Nos 68 and 69 of 2013.

Parties : Muhammad Ridzuan bin Md Ali — Public Prosecutor

Criminal Law – Statutory Offences – Misuse of Drugs Act

Criminal Law – Complicity – Common Intention

[LawNet Editorial Note: The decision from which this appeal arose is reported at [2013] 3 SLR 734.]

28 May 2014

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

1 Three different matters were before us at the hearing on 27 February 2014.

2 We dealt first with Criminal Motion No 69 of 2013 ("CM 69"), which was an application for leave by the appellant in Criminal Appeal No 3 of 2013 ("CCA 3"), Muhammad Ridzuan Bin Md Ali ("Ridzuan"), to amend his petition of appeal to include two additional grounds of appeal. As the Prosecution did not object to the amendments, we allowed the application.

3 We dealt next with CCA 3 which was an appeal against the decision of the High Court judge ("the Judge") in *PP v Abdul Haleem bin Abdul Karim and another* [2013] 3 SLR 734 ("the GD") to convict Ridzuan on the following charge ("the capital charge"):

> That you MUHAMMAD RIDZUAN BIN MD ALI,
>
> 1st charge
>
> on 6 May 2010, at about 6:40 pm, at Block 22 Jalan Tenteram #03-555 Singapore 320022, together with one **Abdul Haleem Bin Abdul Karim, NRIC No. SXXXXXXX-X**, in furtherance of the common intention of both of you, did traffic in a controlled drug specified in Class "A" of the First Schedule to the Misuse of Drugs Act, Chapter 185, to wit, by having in your possession for the purpose of trafficking, 7 large packets of substances, that were analysed and found to contain not less than **72.50 grams of diamorphine**, without any authorisation under the said Act or the Regulations made thereunder and you have thereby committed an offence under

section 5(1)(a) read with section 5(2) of the Misuse of Drugs Act read with section 34 of the Penal Code, Chapter 224, and punishable under section 33 read with the Second Schedule to the Misuse of Drugs Act, and further upon your conviction under section 5(1)(a) read with section 5(2) of the Misuse of Drugs Act read with section 34 of the Penal Code, you may alternatively be liable to be punished under section 33B of the Misuse of Drugs Act.

[emphasis in original]

4 After hearing the respective parties' arguments, we dismissed CCA 3 and upheld Ridzuan's conviction on the capital charge.

5 Having dismissed CCA 3, we proceeded to consider Criminal Motion No 68 of 2013 ("CM 68"). CM 68 arose from the same set of proceedings as CCA 3 and concerned a challenge by Ridzuan against the Public Prosecutor's decision not to issue a certificate of cooperation to him pursuant to s 33B(2)(*b*) Misuse of Drugs Act (Cap 185, 2008 Rev Ed) ("the MDA"), although such a certificate was issued to his co-accused ("Abdul Haleem"). Before delving into the merits of the application, we asked Ridzuan's counsel, Mr James Bahadur Masih ("Mr Masih"), to first address the Prosecution's preliminary objection that CM 68 was the incorrect procedure to obtain the remedy sought. After hearing parties' submissions on the aforementioned point, we dismissed CM 68.

6 We now give detailed grounds for our decisions in CCA 3 and CM 68.

Background facts

7 The facts were set out comprehensively in the GD and we will only summarise the material background facts to the extent that they assist in providing the context for the appeal.

8 Ridzuan was a 27 year-old Singaporean residing at Block 22 Jalan Tenteram #03-555, Singapore 320022 ("the Flat") at the time of his arrest. Both Ridzuan and Abdul Haleem were previously employed as bouncers in the same night club and knew each other for about a year prior to the date of their arrest.

9 It was not disputed that Ridzuan had asked Abdul Haleem if he was interested in selling heroin together as partners and that, subsequently, they agreed to purchase one "ball" of heroin to repack and sell. The arrangement was for Ridzuan to deal with the supplier and provide the capital to purchase the heroin. Both of them would do the repacking and also look for customers. The profit was to be divided between them equally.

10 On 4 May 2010, Ridzuan agreed to purchase one "ball" of heroin from one Afad for $7,000. Afad told Ridzuan to wait for a phone call from one Gemuk, who would tell him when he could collect the heroin from a "jockey", *ie*, a courier. At about 2.00pm on 5 May 2010, Gemuk called Ridzuan and told him that a jockey would deliver half a "ball" of heroin that day and the second half subsequently. Having made the necessary arrangements for collection, Ridzuan passed Abdul Haleem $7,000 in cash for the one "ball" of heroin and instructed him to collect the half a "ball" of heroin from the jockey.

11 After collecting one bundle of heroin from the jockey (which constituted their half a "ball" of heroin), Abdul Haleem returned to the Flat. Both of them proceeded to repack the heroin into 20 small plastic sachets, each containing about eight grams of heroin. There was also a small amount of granular heroin left over which they intended to pack together with the next batch of heroin that they were going to receive. With the bundle of heroin collected were two Erimin-5 tablets which Ridzuan claimed were "samples" from Gemuk.

12 On 6 May 2010 at about 5.00pm, Ridzuan received a call from Gemuk who told him to "standby" to collect the remaining half a "ball" of heroin. According to Ridzuan's long statement recorded on 11 May 2010, Gemuk had told him that "some more bundles of *heroin*" [emphasis added] were going to be passed to him; Ridzuan could just take the bundle that was his and other people would call Ridzuan to make arrangements to collect the rest of the bundles. Abdul Haleem also confirmed that Ridzuan had specifically told him that the jockey would be passing them additional bundles of *heroin*.

13 Ridzuan vehemently disputed the accuracy of that part of his long statement referred to in the preceding paragraph. He alleged that he had used the Malay word "dadah" to refer to *generic drugs* but the interpreter, Ms Marriana ("Marriana"), had translated his words inaccurately. This was the only material dispute in relation to the accuracy of his long statement. Ridzuan asserted that Gemuk never told him that he would be receiving additional bundles of heroin and denied telling Abdul Haleem that the jockey would be passing additional bundles of heroin to Abdul Haleem. Further, Gemuk also did not tell him how many additional bundles there would be or how many persons would be collecting those bundles.

14 The events that immediately preceded the discovery of the drugs and the arrest of both Ridzuan and Abdul Haleem by the Central Narcotics Bureau ("CNB") officers were not disputed and are set out in some detail at [7]–[11] of the GD. In brief, Abdul Haleem had returned to the Flat carrying a black sling bag. The black sling bag was subsequently retrieved from the Flat and was found to contain eight bundles similarly covered in black tape. In Ridzuan's contemporaneous statement given shortly after his arrest, he denied any knowledge of the presence or contents of the eight bundles in the black sling bag and claimed that Abdul Haleem had simply run into his bedroom with the black sling bag. In addition to these eight bundles, CNB officers also recovered from the Flat a plastic bag containing 20 plastic sachets filled with a brown crystalline substance, a single semi-filled plastic sachet with a brown granular substance, other drugs and various drug paraphernalia.

15 The eight bundles and 21 plastic sachets were analysed by the Health Sciences Authority and the results indicated that the eight bundles as well as the brown crystalline substance found in the 21 plastic sachets contained diamorphine. Heroin is the street name of diamorphine. The diamorphine found in seven of the eight aforementioned bundles formed the subject of the capital charge and the diamorphine found in the remaining bundle and the 21 plastic sachets formed the subject of a non-capital charge (which we note was not before us in the present appeal). Although the bundles were received as an undifferentiated whole, the Prosecution gave the two accused persons the benefit of the doubt and selected the bundle that contained the lowest amount of diamorphine (*ie*, the bundle containing not less than 9.30 grams of diamorphine) as the bundle that the two accused persons claimed to have received for the purpose of sale by them.

The decision below

16 Ridzuan and Abdul Haleem were convicted on both the capital and non-capital charges. Abdul Haleem did not appeal against his conviction on both charges. As Ridzuan appealed only against his conviction on the capital charge, we summarise the Judge's findings which pertain to that charge. His reasoning will be explored in more detail in our analysis below.

17 The Judge found that Ridzuan was deemed to have been in joint possession with Abdul Haleem of the seven bundles of heroin pursuant to s 18(4) of the MDA as he knew that Abdul Haleem would be collecting additional bundles of drugs from the jockey and Abdul Haleem had collected the said bundles with his consent and on his instructions. Alternatively, Ridzuan was presumed to have been in possession of the said bundles pursuant to s 18(1)(*c*) of the MDA as he had admitted to having in his possession or custody "the keys of any place or premises or any part thereof in which a controlled

drug is found" *ie*, the Flat. The Judge further observed that no evidence had been adduced to rebut this presumption (see the GD at [35]).

18 The Judge also held that based on Ridzuan's own account, Abdul Haleem and he had the common intention to traffic the seven additional bundles of heroin as they had received them from the jockey for the purpose of transporting, sending or delivering the bundles to other customers of Gemuk (see the GD at [36]).

19 Turning to the question of whether Ridzuan knew the nature of the drug, the Judge held that there was sufficient evidence to establish actual knowledge on Ridzuan's part that the seven bundles contained heroin. In this regard, he rejected Ridzuan's belated claim at trial that a crucial portion of his statement had been translated erroneously (see the GD at [39]–[40]; see also above at [13]). In any case, the Judge found that Ridzuan had failed to rebut the presumption of knowledge under s 18(2) of the MDA which arises where possession of a controlled drug was proved or presumed (see the GD at [47]).

20 In so far as the sentence to be imposed was concerned, the Judge held that although s 33B(2)(*a*) of the MDA applied, literally speaking, only to a person who acted as a courier, it should not be construed so pedantically such that it would exclude persons who carried out an incidental act of storage or safe-keeping in the course of delivering the drugs. He hence found that both Ridzuan and Abdul Haleem satisfied the requirements under either ss 33B(2)(*a*)(ii) or 33B(2)(*a*)(iii) of the MDA as it was their uncontroverted evidence that they had accepted the seven bundles from the jockey only for the purpose of subsequently handing them over to other customers of Gemuk, even though they also admitted that they had intended to keep the bundles for a short period of time before delivery (see the GD at [55]).

21 However, unlike Abdul Haleem, Ridzuan did not satisfy s 33B(2)(*b*) of the MDA as he had failed to obtain a certificate from the Public Prosecutor for "substantively assist[ing] the [CNB] in disrupting drug trafficking activities within or outside Singapore". The conjunctive requirements in ss 33B(2)(*a*) and 33B(2)(*b*) of the MDA were thus not met and the alternative sentencing option of life imprisonment in s 33B(1)(*a*) of the MDA could not be considered. He was therefore sentenced to the mandatory death sentence as prescribed by s 33 of the MDA.

The Appellant's case

22 Although the specific written and oral submissions made by Mr Masih are dealt with fully in the relevant portions of the grounds below, we think it useful to summarise them from the outset for purposes of clarity and in order to delineate the relevant issues.

23 The core of Mr Masih's case was that Ridzuan did not have actual knowledge of either the *quantity* or *nature* of the drugs that were being delivered to Abdul Haleem. Mr Masih argued that, up to the time of his arrest, Ridzuan neither had physical possession of the black sling bag in which the seven bundles of heroin were contained nor did he see or physically handle the seven bundles of heroin.

24 Flowing from this, Mr Masih argued that the presumption of joint possession under s 18(4) of the MDA could not arise as Ridzuan did not know and consent to Abdul Haleem's possession of the seven bundles of heroin. He also argued that the presumption of possession under s 18(1)(*c*) of the MDA did not arise as Ridzuan did not know that he was in possession of the seven bundles in the black sling bag.

25 Mr Masih further argued that the Judge erred in finding that Ridzuan had been wilfully blind to the nature of the drugs contained in the seven bundles. In this regard, Mr Masih pointed out that Ridzuan did not have the opportunity to examine the contents of black sling bag as he never had physical possession of it.

26 Finally, Mr Masih argued that there was no common intention between Ridzuan and Abdul Haleem to receive the seven bundles of heroin. He alleged that there was no evidence that Ridzuan had agreed to receive such a large quantity of heroin for the purpose of handing them over to Gemuk's other customers subsequently.

The issues before this court in CCA 3

27 Before setting out the issues that had to be dealt with by this court, we think it pertinent to note that Ridzuan was jointly charged with Abdul Haleem for trafficking in furtherance of a common intention, *ie*, s 5(1)(*a*) read with s 5(2) of the MDA, read with s 34 of the Penal Code (Cap 224, 2008 Rev Ed) ("the PC"). Section 34 of the PC ("s 34 PC") states:

> When a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if the act were done by him alone.

The purpose of s 34 PC is to impute *constructive* liability on a secondary offender in relation to an offence arising from a criminal act committed by the actual doer in furtherance of the common intention shared by the actual doer and the secondary offender (see the decision of this court in *Daniel Vijay s/o Katherasan and others v Public Prosecutor* [2010] 4 SLR 1119 ("*Daniel Vijay*") (at [76])).

28 In this regard, the "actual doer", Abdul Haleem, was convicted by the Judge of trafficking controlled drugs pursuant to s 5(1)(*a*) read with s 5(2) of the MDA. Abdul Haleem had not disputed that he had carried the seven bundles of heroin in his black sling bag after collecting them from the jockey and was thus in physical possession of the said bundles. He had also made a number of express admissions, both in his long statements and in his oral testimony, that he had been aware that all the bundles contained heroin when he collected them from the jockey on 6 May 2010 and had intended to bring the drugs to the Flat for subsequent delivery to Gemuk's other customers. The Judge thus held that all the elements of the capital charge under s 5(1)(*a*) read with s 5(2) of the MDA were met.

29 Therefore, should it be proven beyond a reasonable doubt that the elements of s 34 PC are satisfied, constructive liability for the offence of trafficking in controlled drugs would be imposed on Ridzuan and he would have accordingly been convicted of the capital charge. In other words, the elements for the charge of trafficking under s 5(1)(*a*) read with s 5(2) of the MDA *did not need to be additionally made out against him*. Thus, in *Foong Seow Ngui and others v Public Prosecutor* [1995] 3 SLR(R) 254, this court observed as follows (at [62]):

> … the actual offence constituted by the criminal act was possession of the drugs for the purpose of trafficking and the persons who committed the criminal act were Foong and Lim … and s 34 was invoked to render Tan liable for that criminal act. *If s 34 applies in this case, as we think that it does, it does not matter whether Tan had possession of the drugs at the material time*. [emphasis added]

30 Nevertheless, it appears that out of an abundance of caution (and, correctly in our view, given

that Ridzuan was facing a capital charge), the learned Judge also proceeded with an analysis of whether the elements for a charge of trafficking under s 5(1)(*a*) read with s 5(2) of the MDA were made out against Ridzuan.

31 In light of the foregoing, we propose to consider the issues arising from the appeal in the following order:

(a) First, whether the Judge erred in finding that Ridzuan and Abdul Haleem were trafficking in furtherance of a common intention, *ie*, s 5(1)(*a*) read with s 5(2) of the MDA, read with s 34 PC.

(b) Further and/or in the alternative, whether the Judge had erred in finding that the elements of the offence of trafficking against Ridzuan had been made out; in particular that:

(i) Ridzuan was in joint possession of the said drugs with Abdul Haleem pursuant to s 18(4) and/or failed to rebut the presumption of possession arising pursuant to s 18(1)(*c*) of the MDA;

(ii) Ridzuan had actual knowledge of the nature of the said drugs and/or had failed to rebut the presumption of knowledge arising pursuant to s 18(2) of the MDA; and

(iii) Ridzuan was in possession of the drugs for the purpose of trafficking.

32 The parties' specific submissions on each issue (and sub-issue) will be dealt with below in the relevant portions of the grounds dealing with each particular issue (or sub-issue).

Reasons for our decision in CCA 3

33 Before considering the issues proper, we think it apposite to restate the legal principles governing appellate intervention in criminal appeals. The applicable principles were set out again by this court in *Public Prosecutor v Mohammed Liton Mohammed Syeed Mallik* [2008] 1 SLR(R) 601 (at [32]–[33]). To summarise, an appellate court will not disturb the findings of fact of the trial judge unless they were arrived at against the weight of the evidence. However, the position apropos the proper inferences to be drawn from findings of fact is different – intervention by an appellate court will be justified where the primary or objective evidence on record does not support the inferences drawn by the trial judge.

Was there a common intention between Ridzuan and Abdul Haleem?

34 The applicable law in so far as s 34 PC is concerned has been set out in the decision of *Daniel Vijay*. Three elements must be present before constructive liability can be imposed pursuant to s 34 PC, namely: (a) the criminal act element ("*a criminal act*"); (b) the common intention element ("*in furtherance of the common intention of all*") and (c) the participation element ("*a criminal act … done by several persons*"). We note from the outset that the parties' respective contentions centred primarily on whether element (b) was made out on the facts of this case. Nevertheless, we think it apposite to first deal briefly with elements (a) and (c).

35 In so far as element (a) is concerned, the "criminal act" refers to the aggregate of all the diverse acts done by the actual doer and secondary offender(s) which collectively give rise to the offence that they have been charged with (see *Daniel Vijay* at [92]). In the present case, this would encompass the arrangements made by Ridzuan with Gemuk to take delivery of the seven additional bundles of heroin from the jockey as well as Abdul Haleem's collection of the bundles from the jockey

pursuant to those arrangements. In light of the undisputed evidence of Abdul Haleem's possession of the seven additional bundles, it was clear to us that this element was satisfied.

36 Turning to element (c), it was emphasised by this court in *Lee Chez Kee v Public Prosecutor* [2008] 3 SLR(R) 447 ("*Lee Chez Kee*") that participation, not presence, is the key ingredient in imposing liability under s 34 PC and that this is a question of fact to be decided in each case (see *Lee Chez Kee* at [146]). The secondary offender satisfies this requirement of participation if he participates in the specific criminal act committed by the actual doer which gives rise to the offence charged *or* if he participates in some other criminal act that is done in furtherance of the common intention of all the offenders, *ie*, he participated in any of the diverse acts which altogether formed the unity of criminal behaviour resulting in the offence charged and that offence was commonly intended by all the offenders (see *Daniel Vijay* at [163]). Applying the above legal principles to the facts of the present case, we found that the requirement of participation was met. Ridzuan had not denied that he had been the person in contact with Gemuk to arrange for the collection of the additional bundles and had received instructions from Gemuk, which were in turn passed on to Abdul Haleem in order for the latter to collect the said drugs from the jockey.

37 As mentioned earlier at [34], the parties' respective contentions primarily centred on whether element (b) (the common intention element) was made out on the facts of the present case. The Judge found that both Ridzuan and Abdul Haleem had a common intention to traffic drugs as they had both received the seven additional bundles of diamorphine for the purpose of transporting, sending or delivering the same to other customers of Gemuk. In this regard, it should be observed that "trafficking" is defined in s 2 of the MDA to mean selling, giving, administering, transporting, sending, delivering or distributing or offering to do any of these.

38 In their long statements and at trial, neither Ridzuan nor Abdul Haleem had disputed that the pre-arranged plan between them was for Ridzuan to safekeep, in the Flat, the additional bundles of drugs the jockey passed to Abdul Haleem until Gemuk's other customers called and made arrangements to collect the additional bundles. In this regard, we agreed with the Judge that Ridzuan's allegation that he had only intended to hold the bundles for a short period of one or two hours was irrelevant inasmuch as the purpose of trafficking crystallised between Ridzuan and Abdul Haleem when they agreed to receive the additional bundles from the jockey. In any event, Ridzuan himself had conceded under cross-examination that he had never articulated his intention to keep the bundles only for a limited period of time to either Gemuk or Abdul Haleem.

39 The crux of Ridzuan's case on appeal, as we understood it, was that Ridzuan and Abdul Haleem had, at the very highest, the common intention to receive some drugs from Gemuk's jockey for the purposes of handing them over to Gemuk's other customers subsequently. However, this common intention did not extend to receiving the seven additional bundles of heroin which formed the subject matter of the capital charge. To illustrate this point, Mr Masih raised at the hearing before us the hypothetical scenario where two accused persons had agreed to only obtain one additional bundle but the co-accused subsequently obtained 100 bundles instead. He submitted that liability for the 100 bundles could not be imputed to the secondary offender as this act clearly did not fall within the common intention of the parties.

40 The Prosecution, on the other hand, contended that it was clear from the evidence that the common intention shared by Ridzuan and Abdul Haleem was to collect from the jockey *any* quantity of bundles containing drugs of *any* nature for subsequent distribution to Gemuk's various customers.

41 Turning to the relevant legal principles, in the Indian Privy Council decision of *Mahbub Shah v Emperor* AIR (32) 1945 PC 118, Sir Madhavan Nair, delivering the judgment of the Privy Council,

stated as follows (at 120):

> … common intention within the meaning of the section implies a pre-arranged plan, and to convict the accused of an offence applying the section it should be proved that the criminal act was done in concert pursuant to the pre-arranged plan. As has been often observed, it is difficult if not impossible to procure direct evidence to prove the intention of an individual; in most cases it has to be inferred from his act or conduct or other relevant circumstances of the case.

It was subsequently clarified by this court in *Lee Chez Kee* (at [159]) and reiterated in *Daniel Vijay* (at [109]) that so long as the evidence shows that parties were acting in concert, a common intention can also form only a moment before the commission of the offence, develop on the spot, or during the course of the commission of the offence.

42 The existence (or otherwise) of such a common intention must frequently be inferred from the offenders' conduct and all the other relevant circumstances of the case (see *Daniel Vijay* at [97]). Hence, in *Tan Chuan Ten and another v Public Prosecutor* [1997] 1 SLR(R) 666, this court looked at any act which the secondary offender did which was part of the criminal act committed by the primary offender or which facilitated the commission of the criminal act; it also looked for a pre-arranged plan made by them or any evidence showing that they acted in concert (at [15]).

43 The criminal act will be considered to be done *in furtherance* of the common intention of all the offenders only if that common intention included an intention to commit the very criminal act done by the actual doer (see *Daniel Vijay* at [166]). The issue that arose in the present case therefore was whether the common intention between Ridzuan and Abdul Haleem had included an intention to commit the very criminal act done by Abdul Haleem, *ie*, the possession of the said seven additional bundles of heroin for the purpose of trafficking.

44 Ridzuan's evidence at trial, which was repeated by Mr Masih at the appeal hearing, was that when he agreed to Gemuk's request, he had only expected "one or two" extra bundles. Had he known that there were so many additional bundles of heroin, he would not have accepted the bundles. Ridzuan further disputed the Judge's finding that he had actual knowledge that the bundles contained heroin. He maintained that he was neither informed by Gemuk about the nature of the additional drugs they were going to receive from the jockey and the number of additional bundles that were going to be handed over to his co-accused, nor was he given the opportunity to inspect the contents of the black sling bag.

45 We deal first with the Judge's finding that Ridzuan had *actual* knowledge that the seven additional bundles contained heroin. At this juncture, we think it pertinent to observe that knowledge of the *nature* of the drug is also an element of a charge of trafficking under s 5(1)(*a*) of the MDA (see below at [59]). Nevertheless, in light of Ridzuan's objections above about the nature of the drugs, we think it appropriate to deal with this issue here.

46 The Judge found that there was no merit to Ridzuan's objections to the accuracy of the following portion of his long statement recorded on 11 May 2010 by ASP Stanley Seah ("ASP Seah"):

> At about 5 pm, Gemuk called me to standby to receive the other half "ball" that I was supposed to receive. He also told me that he will also be passing me some more bundles of *heroin* to me and told me to just take one bundle that was mine. [emphasis added]

Ridzuan had alleged at trial that he had used the Malay word "dadah" to refer to generic drugs and had not specified heroin, his words having been mistranslated by the interpreter, Marriana (see also

above at [13]).

47 The Judge preferred the evidence of Marriana, who, although unable to specifically recall the details of what happened over two years ago, explained that as a matter of usual procedure, when the generic term for drugs was used by an accused, she would translate this literally and then clarify with the accused what the specific drug was. The Judge also accepted her evidence that she had read the statement word by word back to Ridzuan before he signed it. Additionally, the Judge placed some reliance on ASP Seah's evidence that, during the recording Ridzuan's long statements, Ridzuan had given his statements in a mixture of Malay and English and there were instances where he had clarified answers that Marriana had interpreted into English. Ridzuan had also confirmed ASP Seah's account under cross-examination.

48 Although we noted that Marriana was not a certified Bahasa Melayu interpreter and that Abdul Haleem had also given evidence to the effect that he did not really understand the Malay she had used, this nevertheless had to be weighed against the fact that Ridzuan had been educated in English up to O-Levels and, by *his own averment*, had paid close attention to what Marriana was interpreting to ASP Seah and would have corrected her if she had interpreted his words inaccurately. In the premises, we found that the Judge did not err against the weight of evidence in finding that it was unlikely Ridzuan would have failed to correct the interpreter if she had misinterpreted his words.

49 In any event, the Judge also relied on *other* (equally, if not more important) pieces of evidence to arrive at his conclusion. He observed that, whilst Ridzuan had specifically challenged the use of the word "heroin" in the portion of his long statement he had sought to impugn, he had not taken issue with the collective description of the half "ball" and the additional bundles as "heroin" in the second part of the same paragraph:

> … After the call from Gemuk, I told [Abdul Haleem] that the *heroin is coming and there may be more than one bundle*. [emphasis added]

Moreover, in his subsequent long statement recorded on 12 May 2010, Ridzuan had stated as follows:

> … After Gemuk called, I told [Abdul Haleem] softly what Gemuk told me about the jockey coming in soon and *that we will be receiving more than half a "ball"… [Abdul Haleem] then subsequently went to collect the heroin. When [Abdul Haleem] went out to collect the heroin* … [emphasis added]

Ridzuan also did not challenge this portion of his statement. In the circumstances, it appeared that Ridzuan did not differentiate between the half "ball" of heroin and the additional drugs to be obtained from the jockey, and had instead referred to them *collectively* as "heroin", even though his own position was that he had been specific when using the term heroin.

50 The Judge also accepted the veracity of Abdul Haleem's evidence in his long statement and under cross-examination that Ridzuan had told him that the jockey would be passing them additional bundles of *heroin*. First, we noted that it was never put to Abdul Haleem during his cross-examination by Ridzuan's then counsel that Ridzuan did not in fact tell him that the bundles contained heroin. Secondly, Abdul Haleem's evidence had implicated himself instead of reducing the magnitude of or importance of his involvement. In this regard, we found that the Judge did not err in law in applying the principles articulated by this court in *Chai Chien Wei Kelvin v PP* [1998] 3 SLR(R) 619 to his treatment of the Abdul Haleem's evidence. There was also nothing in the record of proceedings which suggested that the Judge's finding that Abdul Haleem was "a candid and forthright witness who did not attempt to downplay his responsibility" (see the GD at [41]) was against the weight of evidence.

51 Further, as the Judge observed, Ridzuan's own evidence was that Gemuk's instruction to Ridzuan was to take one bundle containing the half ball of heroin which belonged to him from the bundles being delivered. There was no specification of, or identification on, the eight unmarked bundles to differentiate Ridzuan's half ball of heroin. Ridzuan subsequently confirmed under cross-examination that he had not asked Gemuk which bundle belonged to him or how he was to identify his bundle although he sought to qualify this by saying that Gemuk had promised to call him again when delivery was made. Ridzuan further conceded that he had never asked Gemuk what the other drugs were. In the circumstances, we were of the view that a reasonable inference to be drawn from Ridzuan's failure to inquire was that he had known that the other bundles were identical and contained similar quantities of heroin as his own half ball of heroin.

52 In the premises, we agreed with the Judge's finding that Ridzuan had actual knowledge of the nature of the drugs in the additional bundles that were passed to Abdul Haleem and him.

53 However, the Judge did not make a finding as to whether Ridzuan had actual knowledge of the *number* of additional bundles of drugs that were being passed to Abdul Haleem and him through the jockey. We were also of the view that there was nothing from the available evidence that would allow such a finding to be made. This brought us squarely to Mr Masih's contention that there was no common intention between Ridzuan and Abdul Haleem to traffic the seven additional bundles of heroin.

54 We turn now to consider the evidence before us with regard to the issue of common intention between Ridzuan and Abdul Haleem. We thought it pertinent that, despite his averment that he was only willing to receive one or two extra bundles of drugs, Ridzuan had conceded that he had not asked Gemuk how many bundles would be passed to him or told Gemuk that he was only willing to accept a limited number of bundles. He had also conceded that he had not instructed Abdul Haleem to accept a specific number of bundles or a limited number of bundles. Abdul Haleem's testimony confirmed this as he was not told how many extra bundles of heroin were going to be delivered to him that day. Moreover, even after Abdul Haleem collected the bundles and called Ridzuan to inform him that he needed help to pay for the taxi fare, there was no discussion between them about the number of bundles the jockey had just passed to Abdul Haleem. Ridzuan had also not informed the police in any of his recorded statements that he had been unwilling to accept so many additional bundles. All this strongly suggested to us that his assertion at trial was one based purely on the wisdom of hindsight.

55 In any event, even if we were to accept Ridzuan's own case that he had expected and was prepared to receive only up to two additional bundles, the total amount of diamorphine found in any two of the bundles that were handed over to Abdul Haleem on 6 May 2010 (even factoring in the bundle with the least amount of heroin that formed part of the subject matter of the undisputed non-capital charge) would have exceeded the threshold of 15 grams with respect to a sentence of capital punishment.

56 Furthermore, from his assertion that he was willing to accept only one or two bundles of heroin, it appeared to us that Ridzuan had been prepared to receive *heroin* from Gemuk, although he then sought to qualify this by saying that he would not have accepted that many bundles if heroin had been involved. In our view, this concession should be seen in light of his failure to ask Gemuk what other drugs were going to be delivered to him in addition to his half ball of heroin.

57 In the premises, we found that neither Ridzuan nor Abdul Haleem had addressed their minds to the specific *number* of additional bundles to be collected from Gemuk. The present case was clearly far removed from the hypothetical scenario raised by Mr Masih at the appeal (see above at [39]) where accused persons agree only to obtain one additional bundle but the co-accused subsequently

obtains 100 bundles instead. All along, the common intention of both Ridzuan and Abdul Haleem had been to collect any number of bundles of heroin handed to them by the jockey, in addition to their own half ball of heroin, which were to be distributed to Gemuk's other customers subsequently. This common intention clearly *encompassed* the intention to commit the very criminal act done by Abdul Haleem, *ie*, the possession of the said seven additional bundles of heroin for the purpose of trafficking. Hence, the criminal act was carried out in furtherance of their common intention and element (b) of s 34 PC was therefore satisfied.

58 To conclude, we found that the elements of s 34 PC were made out and that constructive liability for the capital offence should thus be imputed to Ridzuan. The elements of the capital charge were thus proven beyond a reasonable doubt. Nevertheless (and, in particular, because Ridzuan had been convicted in the court below of a capital offence), we proceeded to consider the second issue as to whether the Judge had erred in also finding that the elements of the offence of trafficking had been made out.

Were the elements of the offence of trafficking made out?

59 It is established law (see also the GD at [28]) that the required elements for a charge of trafficking under s 5(1)(*a*) of the MDA are:

(a) possession of a controlled drug – which may be proved or presumed pursuant to s 18(1) of the MDA, or deemed pursuant to s 18(4) of the MDA;

(b) knowledge of the *nature* of the drug – which may be proved or presumed pursuant to s 18(2) of the MDA; and

(c) proof that possession of the drug was for the purpose of trafficking which was not authorised.

60 As mentioned above (at [38]), Ridzuan had not disputed that the seven additional bundles of drugs were for the purpose of trafficking. The rest of these grounds of decision will thus focus on the other elements (*viz*, elements (a) and (b) in the preceding paragraph).

Was Ridzuan in possession of the seven additional bundles of heroin pursuant to s 18(4) of the MDA?

61 Section 18(4) of the MDA provides as follows:

> Where one of 2 or more persons with the knowledge and consent of the rest has any controlled drug in his possession, it shall be deemed to be in the possession of each and all of them.

The requirements of knowledge and consent have been explored in Canadian case law as the Canadian Criminal Code (c 46, RSC 1985) contains a similarly worded general provision (at s 4(3)(*b*)):

> Where one of two or more persons, with the knowledge and consent of the rest, has anything in his custody or possession, it shall be deemed to be in the custody and possession of each and all of them.

62 In *R v Lou Hay Hung* [1946] 3 DLR 111, the Ontario Court of Appeal considered s 5(2) of the Canadian Criminal Code (c 36, RSC 1927), the predecessor of the above provision, and held (at 122) that both "knowledge" and "consent" were necessary. The court went on to hold that cooperation with and active assistance to the person who had actual possession of the drugs by the accused

person was "going beyond mere indifference or negative conduct" and amounted to "consent" (see at 123). In the British Columbia Provincial Court decision of *R v Guilbride* (2004) BCPC 101, it was held (at [192]) that consent could be inferred from an accused person's direct participation in the operation or activity relating to the drugs, including participation in a common design.

63 In *R v Terrence* [1983] 1 SCR 357, the Supreme Court of Canada affirmed the proposition to the effect that consent cannot exist without the co-existence of some measure of *control* by the person over the subject matter being deemed to be in his or her possession. Thus, in situations where the association, interest or participation of the accused cannot be reasonably regarded as an exercise of control over the subject matter, it would not amount to consent: see, for example, the British Columbia Court of Appeal decision of *R v Colvin and Gladue* [1942] BCJ No 26 (at [19]). However, as was observed by MacDonnell J in the Ontario Court of Justice decision of *R v Gibbs* 2002 CarswellOnt 4607 (at [21]–[22]):

> … The ability to choose is inherent in the concept of consent. If an individual has no power or authority in relation to an item, to say that he has consented to its possession strips the concept of consent of meaning. …
>
> … ***while control is an essential element of consent, it is not synonymous with it*** . That is, while an accused must be shown to have had a measure of control over the subject matter in question, proof of a measure of control does not end the inquiry. While ***consent*** does not require that the accused *desire* that the other person be in possession, it ***does require the ability to make a choice . It is possible to imagine circumstances wherein an individual might have a measure of control yet, because of other circumstances, have no meaningful ability to choose*** . …
>
> [emphasis in italics in original; emphasis added in bold italics]

Subsequently in *R v Mohamad* 2004 CarswellOnt 335, the Ontario Court of Appeal affirmed (at [61]) that "control" did not require an accused person to exercise physical control over the object in question (in this case, stolen property) but, rather, referred (correctly, in our view) to his or her *power or authority* over the object in question.

64 Turning to our local cases, in the Singapore High Court decision of *Public Prosecutor v Lim Ah Poh and anor* [1991] 2 SLR(R) 307, Kan Ting Chiu JC (as he then was), delivering the judgment of the court, discussed some of the Canadian authorities mentioned above (at [64]–[70]). Although he correctly observed that they were not definitive or binding on our courts, he nevertheless opined that they were helpful guides for determining what constituted consent and concluded (at [71]) that "[a]cquiescence or condonation is not enough. There must be some dealing between the parties in relation to the drug, such as an agreement to buy it or help in concealing it." This decision was subsequently approved and applied by this court in *Hartej Sidhu & another v Public Prosecutor* [1994] 2 SLR(R) 541.

65 In so far as the element of "control" was concerned, we were satisfied that it was established on the facts of the present case. Ridzuan had not merely passively acquiesced to the collection of the additional bundles. On the contrary, he had been instrumental in putting Abdul Haleem in actual physical possession of the additional bundles. It had not been disputed that it was *Ridzuan* who had made the necessary arrangements with Gemuk and that Abdul Haleem had collected the additional bundles of drugs pursuant to these arrangements.

66 However, Mr Masih's submissions on appeal raised another pertinent question. He submitted

that joint possession under s 18(4) of the MDA could not have arisen where Ridzuan did not know and consent to Abdul Haleem's possession of the *seven* additional bundles of *heroin*. The question that arose, therefore, was whether it would have sufficed that Ridzuan had known and consented to Abdul Haleem possessing additional bundles of drugs, *ie*, leaving aside the quantity and/or nature of the drugs. The Judge appeared to think that the answer to this question ought to be in the affirmative (see the GD at [35]). This question, to the best of our knowledge, has not arisen for consideration in previous decisions.

67 Consider the hypothetical scenario where an accused knew that another person possessed a straw of heroin and agreed to purchase it from him. However, unbeknownst to the accused, that other person also had in his possession a crate of heroin. In the circumstances, it would seem highly artificial to impute the possession of this crate of heroin to the accused pursuant to s 18(4) of the MDA. Indeed, it could not be said that the accused had by any means known of, and consented to, the other person's possession of the crate of heroin. A similar conclusion should, in our view, follow where it is the nature of the drug (as opposed to the quantity of the drug) which is at issue.

68 In our view, ultimately, the question to be determined is what the accused person had knowledge of and consented to. This is a question of *fact*. On the particular facts of this case, the quantity and nature of the drugs in Abdul Haleem's possession did not matter as Ridzuan had known and consented to Abdul Haleem being in possession of drugs of any nature or quantity (see above at [54] and [56]–[57]).

69 In the premises, we found that the Judge had not erred in finding that Ridzuan was deemed to be jointly in possession of the drugs with Abdul Haleem pursuant to s 18(4) of the MDA.

Was Ridzuan in possession of the seven additional bundles of heroin pursuant to s 18(1)(c) of the MDA?

70 The applicable legal principles here are well-established. The presumption under s 18(1)(*c*) of the MDA is not dependent upon the ownership of the premises in which the drug concerned was found, but will be raised once an accused person is proved to have had in his possession or custody or under his control the keys of the place or the premises in which the drugs were found: see, for example, the decision of this court in *Sharom bin Ahmad v PP* [2000] 2 SLR(R) 541 (at [29]). In this regard, Mr Masih was, with respect, incorrect in submitting that the presumption would arise only where the accused person has clear knowledge that he was in possession of the said drugs.

71 Ridzuan had admitted that he had in his custody the keys to the Flat in which the drugs were found. We agreed with the Judge's finding that no evidence was adduced to rebut the presumption of possession. Ridzuan could not deny knowledge of the presence of the black sling bag in the Flat since he had been in the bedroom when Abdul Haleem entered with it. Neither could he deny knowing that the bag contained drugs since Abdul Haleem had gone to collect the said drugs pursuant to Ridzuan's arrangement with Gemuk in the first place. The present case clearly differed from the hypothetical scenario offered by Mr Masih of a person rushing into a flat where a group of people are having a party and throwing a huge bag of heroin on top of the flat owner's cupboard.

Did Ridzuan have knowledge of the nature of the drugs?

72 In accordance with the analysis set out above (at [45]–[52]), we agreed with the Judge's finding of *actual* knowledge on the part of Ridzuan as to the nature of the drugs contained in the seven additional bundles. Nevertheless, for completeness, we will proceed to consider the Judge's other findings.

73 First, we consider his finding that, in any event, Ridzuan was *presumed* to have known of the nature of the drugs pursuant to s 18(2) of the MDA. The relevant provision states:

> Any person who is proved or presumed to have had a controlled drug in his possession shall, until the contrary is proved, to be presumed to have known the nature of that drug.

74 The Judge dismissed Ridzuan's then counsel's submissions that the presumption of knowledge under s 18(2) of the MDA could not be invoked where the accused was not in physical possession of the drug. We agreed with his decision. First, as the Judge correctly observed, the two decisions by this court that had been relied upon by counsel for his proposition, *viz*, *Nagaenthran a/l K Dharmalingam v Public Prosecutor* [2011] 4 SLR 1156 ("*Nagaenthran*") and *Dinesh Pillai a/l K Raja Retnam v Public Prosecutor* [2012] 2 SLR 903 ("*Dinesh Pillai*"), did not purport to limit the s 18(2) presumption to cases where the accused person had physical possession of the drug. Secondly, we agreed that the express words of s 18(2) of the MDA clearly contemplated that the provision applied where possession of the drug was presumed without any requirement for physical custody or control (see *Nagaenthran* (at [26])). Finally, s 18(3) of the MDA provides that a presumption of knowledge cannot be rebutted by the mere fact that the accused did not have physical possession of the drug. It must therefore follow that s 18(2) of the MDA cannot be disapplied by the fact the accused was not in physical possession of the drug. In the premises, the Judge had not erred in finding that physical possession of the drug was unnecessary for the presumption of knowledge to arise pursuant to s 18(2) of the MDA.

75 In order to rebut the presumption of knowledge under s 18(2) of the MDA, an accused person has to adduce sufficient evidence to demonstrate, on a balance of probabilities, that he or she did not know the nature of the drug *ie*, the actual controlled drug proven or presumed to be in the accused person's possession: see *Nagaenthran* (at [31]). In *Dinesh Pillai*, this court further refined the principles applicable to the rebuttal of the presumption of knowledge (at [18]):

> … As s 18(2) has been triggered in the present case, the appellant bears the burden of proving on a balance of probabilities that he did not know *or could not reasonably be expected to have known* the nature of the controlled drug that was found inside the Brown Packet. … [emphasis added]

The court in *Dinesh Pillai* accepted that an accused (here, Ridzuan) would also not be able to rebut the presumption by a mere assertion of his lack of knowledge had he been wilfully blind as to the nature of the drugs.

76 Wilful blindness refers to a person *deliberately refusing* to inquire into facts and from which an inference of knowledge may be sustained (see *Nagaenthran* (at [30])). Put simply, wilful blindness is the *legal equivalent* of actual knowledge. Wilful blindness, however, is *not* negligence or an inadvertent failure to make inquiries. Thus, in *Dinesh Pillai* the court held that the appellant concerned had been wilfully blind in refusing to take reasonable steps to find out what he was asked to deliver (*ie*, by opening the package) despite suspecting that it contained something illegal.

77 In the present appeal, Mr Masih cited three cases in support of Ridzuan's appeal – *Public Prosecutor v Hla Win* [1995] 2 SLR(R) 104 ("*Hla Win*"), *Public Prosecutor v Khampali Suchart* [1996] SGCA 38 ("*Khampali Suchart*") and *Khor Soon Lee v Public Prosecutor* [2011] 3 SLR 201 ("*Khor Soon Lee*"). We were of the view that all three cases were distinguishable from the present case on their facts.

78 In *Hla Win*, it should be noted that the decision was not unanimous. The minority judge was, in

fact, of the view (at [53]–[60]) that the respondent had been wilfully blind and that, in any event, he had not rebutted the statutory presumption that he knew that he was carrying the drugs in question. The majority judges, on the other hand, were of the view (at [38]–[41]) that there were insufficient grounds for overturning the trial judge's findings of fact to the effect that the respondent had rebutted the statutory presumption just mentioned. The trial judge had accepted as credible the respondent's evidence that he had been instructed to smuggle precious stones from Bangkok to Cebu by an individual who was a known moneychanger and gem trader and had been satisfied on a balance of probabilities that the respondent did not know that the bag in fact contained heroin. It should be noted that the situation in the present case was, in fact, quite different. The Judge found for the reasons elucidated at [47] and [48] of the GD (summarised below at [81]) that there was nothing in Ridzuan's testimony or the objective evidence to persuade him as to the truth of Ridzuan's assertion that he did not know that the additional bundles contained heroin. We agreed with the Judge.

79 Turning to the decision of this court in *Khampali Suchart*, one central thread was similar to that of the majority of the court in *Hla Win*: the appellate court must pay the requisite deference to the trial judge's findings of fact even if (as in this particular case) there might be some reservations on its part. It is also important to note that what was at issue, in the main, in *Khampali Suchart* was whether or not the respondent concerned had in fact referred to the specific drug, which the trial judge (with whom this court agreed) held was *not* the case; in contrast, in the present appeal, Ridzuan was in fact held to have referred to the specific drug, *viz*, heroin.

80 In *Khor Soon Lee*, this court placed some reliance on three key facts in finding that the appellant in that case had not been wilfully blind as to the nature of the drugs. First, he had on a significant number of occasions in the past only assisted in transporting Erimin, Ketamine, Ecstasy and Ice. He had never transported diamorphine. The court noted that this constituted evidence of *a consistent pattern of conduct* which had not been contradicted by the Prosecution in the court below (see at [23] and [27]). Secondly, he had sought assurances from his dealer that the deliveries would not involve diamorphine as he was afraid of the death penalty, to which his dealer assured him that he would not place diamorphine in the packages that the appellant carried. Thirdly, the appellant had a personal friendship with his dealer and clearly trusted him. In the circumstances, the court held that the appellant's failure to check the package was understandable. Finally, it should also be noted that the court was of the view that the facts were "rather unusual" and, in the circumstances, that "a strong cautionary note ought to be sounded" (at [29]):

> … Given the *finely balanced set of facts* in the present appeal, *nothing in this case sets a precedent for future cases* (which ought, in any event, to *turn on their own particular facts*). *Still less will future courts countenance* accused persons seeking to "manufacture defences" in order to effect a similar fact pattern. [emphasis added]

81 This was *not* the situation in the present case. Besides the two tablets of Erimin which were, according to Ridzuan himself, "samples", Ridzuan only ever obtained heroin from Gemuk. We agreed with the Judge that Ridzuan should have been reasonably suspicious that other bundles also contained heroin since Gemuk had not distinguished Ridzuan's bundle of heroin from the other bundles of drugs. Moreover, unlike the appellant in *Khor Soon Lee*, Ridzuan never sought assurances from Gemuk that the other bundles would not contain diamorphine or express his concerns about facing the possible death penalty. Ridzuan's evidence that he had been prepared to receive any type of drug from Gemuk, *including heroin*, was in our view, also highly suggestive of his state of mind at that time.

82 At this juncture, we think it apposite to deal with Mr Masih's argument that Ridzuan never had the opportunity to examine and ascertain the contents of the black sling bag. Whilst we accepted that a physical examination of the bundles would have been impractical in the circumstances, we also

noted that Ridzuan had not even taken the reasonable step of inquiring about the type of drugs the bundles contained during his phone conversations with Gemuk when making the arrangements for collection and subsequently with Abdul Haleem *after* the additional bundles were collected. It bore emphasising that Ridzuan was no gullible individual like the accused in *Khampali Suchart*; he had, on his own evidence, previously dealt with Ice and had clearly been the prime mover in this particular enterprise.

83 In the premises, we were of the view that the Judge had been correct in concluding that Ridzuan's conduct amounted to wilful blindness and therefore the s 18(2) MDA presumption was not rebutted.

84 For the above reasons, we agreed with the Judge and found that the Prosecution had succeeded in proving beyond a reasonable doubt that the elements of the offence of trafficking in controlled drugs under s 5(1)(*a*) read with s 5(2) of the MDA were made out against Ridzuan.

Reasons for our decision in CM 68

The criminal motion

85 We think it useful to state from the outset how CM 68 came to be heard before us. In Ridzuan's amended petition of appeal, the fourth ground of appeal alleged that the failure and refusal of the Public Prosecutor to issue a certificate of substantive assistance pursuant to s 33B(2)(*b*) of the MDA to Ridzuan constituted a violation of the Constitution of the Republic of Singapore. The petition went on to state that "[t]he … ground of appeal will be argued on a separate criminal motion".

86 The separate criminal motion was CM 68. The following orders were prayed for:

(a) that the sentence of execution of the Accused be set aside ("Prayer 1");

(b) that the case be remitted back to the Public Prosecutor –

(i) with directions to adopt the proper procedure to be taken as regards the further or other evidence before the decision on whether or not to issue a certificate pursuant to s 33B(2)(*b*) of the MDA is taken ("Prayer 2");

(ii) with directions that the Public Prosecutor re-considers his decision not to issue a certificate in favour of the Accused ("Prayer 3");

(c) that the case be reviewed by the trial Judge after such re-determination by the Public Prosecutor for the appropriate and necessary order to be made ("Prayer 4"); and

(d) such further and/or other orders as may be required in the interests of justice ("Prayer 5").

The Prosecution's preliminary objection

87 The Prosecution raised a preliminary objection to the effect that the Court of Appeal was not the appropriate forum before which to seek the reliefs sought by Ridzuan in CM 68. The Prosecution observed that Prayers 2 and 3 were tantamount to seeking public law remedies – for a *quashing order* in relation to the Public Prosecutor's determination that Ridzuan had not substantively assisted the CNB to be quashed and for a *mandatory order* that the Public Prosecutor be mandated to determine the issue afresh.

88 The Prosecution therefore submitted that the proper course of action in order to challenge the Public Prosecutor's exercise of discretion in not issuing him a certificate of substantive assistance was for Ridzuan to take out judicial review proceedings before the High Court by way of originating summons in accordance with O 53 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) ("the ROC").

89 As the Prosecution's objections went towards our jurisdiction to hear the matter, we invited Mr Masih to respond to these objections. To his credit, Mr Masih honestly and candidly admitted that the procedure with which he had gone about to obtain the reliefs listed above (at [86]) was incorrect. He further accepted that the correct procedure would have been to apply for the prerogative orders pursuant to O 53 of the ROC and that the proper forum for the application was the High Court.

90 In any event, this application provides us with an opportunity to once again clarify the jurisdiction and powers of this court with respect to prerogative orders.

What was the nature of CM 68?

91 Before delving further into the question of the Court of Appeal's jurisdiction and powers, we think it apposite to first consider the nature of CM 68. As was observed above (at [85]), its genesis was most unusual since it was averred to have been the means by which the fourth ground of appeal against Ridzuan's conviction and sentence was to be argued.

92 It was clear to us, however, that there could be no true appeal against Ridzuan's sentence until and unless the Public Prosecutor's decision not to issue the certificate of substantive assistance was set aside and a certificate issued. Absent the issuing of such a certificate, the conjunctive requirement in s 33B(2)(*b*) of the MDA would not be satisfied and the alternative sentencing option of life imprisonment in s 33B(1)(*a*) of the MDA could not be considered by the Judge. The constitutionality of the mandatory nature of the death penalty itself was emphatically confirmed by this court in *Nguyen Tuong Van v PP* [2005] 1 SLR(R) 103.

93 Mr Masih also clearly understood this to be the case as evidenced by the reliefs sought in CM 68. Prayers 2 and 3, in particular, sought orders from this court to compel the Public Prosecutor to comply with its procedural obligations as well as to reconsider exercising its discretionary power. These reliefs were clearly in the nature of a mandatory order which compels an inferior court, tribunal or other public body to perform its public duty (see G P Selvam (gen ed), *Singapore Civil Procedure 2013* (Sweet & Maxwell Asia, 2013) at para 53/1/1). Mr Masih also confirmed this at the hearing before us.

94 As was observed by this court in *Ng Chye Huey and another v PP* [2007] 2 SLR(R) 106 ("*Ng Chye Huey*") the issuance of prerogative writs (now known in the ROC as prerogative orders) is an expression of the High Court's *supervisory* jurisdiction. This supervisory jurisdiction has its origins not in statute but in the common law – the ancient jurisdiction in error of the King's Bench where prerogative writs would be issued to control the exercise of jurisdiction of inferior courts. According to Denning LJ (as he then was) in the English Court of Appeal decision of *R v Northumberland Compensation Appeal Tribunal Ex parte Shaw* [1952] 1 KB 338 at 346–347:

> [T]he Court of King's Bench has an *inherent jurisdiction to control all inferior tribunals, not in an appellate capacity, but in a supervisory capacity*. This control extends not only to seeing that the inferior tribunals keep within their jurisdiction, but also to seeking that they observe the law. The control is exercised by means of a power to quash any determination by the tribunal which, on the face of it, offends against the law. … When the King's Bench exercises its control over

tribunals in this way, it is not usurping a jurisdiction which does not belong to it. *It is only exercising a jurisdiction which it always had*. [emphasis added]

95 This inherent supervisory jurisdiction has now been put on a statutory footing in s 27(1) of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) ("the SCJA") (see also *Ng Chye Huey* at [53]). The supervisory jurisdiction of the High Court has also been extended to actions by administrative tribunals and other public bodies discharging public functions (see the Singapore High Court decision of *Haron bin Mundir v Singapore Amateur Athletic Association* [1991] 2 SLR(R) 494 at [18]–[19]; this point was uncontroverted on appeal in the decision of this court in *Singapore Amateur Athletic Association v Haron bin Mundir* [1993] 3 SLR(R) 407).

The Court of Appeal's jurisdiction

96 It is now trite law that our Court of Appeal is a creature of statute and hence is only seised of the jurisdiction that has been conferred upon it by the relevant provisions in the legislation creating it. Such a jurisdiction-conferring provision is an essential prerequisite that an applicant before this court *must* satisfy in order to have a legal basis upon which to canvass the substantive merits of his or her application. Buttressing this point, this court clarified in its recent decision of *Re Nalpon Zero Geraldo Mario* [2013] 3 SLR 258 (at [34]) that references to the "inherent jurisdiction of the court" were in fact references to the exercise by the court of its fund of powers conferred on it by virtue of its institutional role to dispense justice, rather than an inherent "authority" to hear and determine a matter.

97 The Court of Appeal's jurisdiction is generally of an appellate nature as is clear from s 3(*b*) of the SCJA which provides that the Court of Appeal exercises "appellate civil and criminal jurisdiction". The question therefore is whether this court has original supervisory jurisdiction such as to be able to hear the substantive merits of the criminal motion. In *Ng Chye Huey*, it was observed (at [63]) that there are in fact no provisions in the SCJA which confer on the Court of Appeal supervisory jurisdiction. Such jurisdiction, if at all, is to be exercised only by the High Court pursuant to s 27(1) of the SCJA.

98 More specifically in relation to the Court of Appeal's criminal jurisdiction, s 29A(2) of the SCJA states as follows:

> The criminal jurisdiction of the Court of Appeal shall consist of appeals against any decision made by the High Court in the exercise of its original criminal jurisdiction, subject nevertheless to the provisions of this Act or any other written law regulating the terms and conditions upon which such appeal may be brought.

This provision clearly suggests that this court has no jurisdiction under this provision to hear any proceeding other than an appeal against a decision made by the High Court in the exercise of its original criminal jurisdiction.

99 For completeness, there are two other provisions to be considered. The first is s 29A(4) of the SCJA which provides as follows:

> The Court of Appeal shall, for the purposes of and subject to the provisions of this Act, have full power to determine any question necessary to be determined for the purpose of doing justice in any case before the Court.

As was observed by Yong Pung How CJ in the decision of this court in *Abdullah bin A Rahman v Public*

Prosecutor [1994] 2 SLR(R) 1017 (at [11]), this provision is concerned with the Court of Appeal's *power* in a situation where it *already has been seised* of jurisdiction to hear a particular matter. This was affirmed by this court in the subsequent case of *Koh Zhan Quan Tony v Public Prosecutor* [2006] 2 SLR(R) 830 (at [18] and [28]).

100 The second provision is s 29A(3) of the SCJA which provides as follows:

> (3) For the purposes of and incidental to —
>
> (*a*) the hearing and determination of any appeal to the Court of Appeal; and
>
> (*b*) the amendment, execution and enforcement of any judgment or order made on such an appeal,
>
> the Court of Appeal shall have all the authority *and jurisdiction* of the court or tribunal from which the appeal was brought.
>
> [emphasis added]

As is evident from its express wording, unlike s 29A(4) of the SCJA, the above provision does not only confer a *power* but also *jurisdiction.* However, it is also clear that this provision will only be engaged *where there already exists an appeal before the Court of Appeal* as can be seen in the observation made by this court in the decision of *Denko-HLB Sdn Bhd v Fagerdala Singapore Pte Ltd* [2002] 2 SLR(R) 336 at [28]:

> … It also seems to us that the effect of s 29A(3) is that the Court of Appeal will only have the powers of the High Court, where there is in existence an appeal. It is only at the hearing of the appeal, or at the hearing of a matter incidental to the appeal, that the Court of Appeal would have the powers which are conferred upon the High Court. …

This court recently reiterated this point in *Au Wai Pang v Attorney-General and another matter* [2014] SGCA 23 (at [73]) and added that the precise contours of the line to be drawn between a free-standing and incidental application can only be determined "on a case by case basis". As explained above at [92], there was no true appeal against the sentence imposed on Ridzuan. Moreover, the nature of CM 68 was a free-standing application seeking reliefs in the nature of a mandatory order (see above at [93]). In the premises, neither s 29A(3) nor s 29A(4) of the SCJA assisted Mr Masih.

101 At this juncture, we think it apposite to address Mr Masih's written submissions on the Prosecution's objections which he did not (correctly, in our view) pursue at the hearing before this court. In particular, he sought to rely on the decisions of this court in *Ramalingam Ravinthran v Attorney-General* [2012] 2 SLR 49 and *Yong Vui Kong v Public Prosecutor* [2010] 2 SLR 192 in support of the criminal motion. We were of the view that these two decisions could be clearly distinguished from our present case. Both decisions concerned the legal issue as to whether the Court of Appeal had exhausted its jurisdiction, *viz*, the conviction and sentence of an accused person; this logically required the Court of Appeal to have been seised of jurisdiction in the first place. This was clearly not the situation here, since whether or not this court was seised of jurisdiction in the first place was the very question to be determined.

102 In the premises, the proper forum to hear the merits of the substantive arguments Mr Masih sought to make on behalf of his client in CM 68 was the High Court. The correct procedure to invoke

the High Court's supervisory jurisdiction by seeking judicial review was by way of an application under O 53 of the ROC (see *Ng Chye Huey* at [55]). At the hearing, Mr Masih applied for a stay of execution pending his O 53 application and we granted this application.

Conclusion

103 For the reasons set out above, we dismissed both CCA 3 and CM 68.

104 We directed that a fresh application for a mandatory order, if any, should be filed in the High Court by Ridzuan's counsel within 2 months, *ie*, by 26 April 2014. We also ordered a stay of execution on the Appellant's sentence in CCA 3 until 26 April 2014; should a fresh application for a mandatory order be made, the stay of execution would be in force until the final determination (including any appeals) of such application and any other related applications.

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