IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2017] SGHC 65

Magistrate's Appeal No 9192 of 2016

Between

Public Prosecutor

… *Appellant*

And

Kong Hoo (Private) Limited

… *Respondent*

Magistrate's Appeal No 9193 of 2016

Between

Public Prosecutor

… *Appellant*

And

Wong Wee Keong

… *Respondent*

JUDGMENT

[Criminal Law] — [Offences] — [Endangered Species Act]

[Criminal Procedure and Sentencing] — [Trials]

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Public Prosecutor
v
Kong Hoo (Pte) Ltd and another appeal

[2017] SGHC 65

High Court — Magistrates' Appeals Nos 9192 and 9193 of 2016
See Kee Oon J
9 December 2016; 1 March 2017

30 March 2017 Judgment reserved.

See Kee Oon J:

Introduction

1 The respondents were each charged on a single count of importing a scheduled species without the necessary permit, an offence under s 4(1) of the Endangered Species (Import and Export) Act (Cap 92A, 2008 Rev Ed) ("ESA"). At the close of the Prosecution's case, the respondents entered a plea of no case to answer. This submission was accepted by the District Judge, who acquitted them without calling for their defence (see *Public Prosecutor v Wong Wee Keong* [2015] SGDC 300 ("*No Case GD (DC)*"). The Prosecution appealed, and the matter came before me ("the first appeal"). After reviewing the evidence and the arguments, I reversed the decision of the District Judge, set aside the orders of acquittal, and remitted the matter for the defence to be called (see *Public Prosecutor v Wong Wee Keong and another appeal* [2016] 3 SLR 965 ("*No Case GD (HC)*").

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2 At the continuation of the trial, the respondents elected to remain silent and offered no evidence in their defence. After hearing closing submissions, the District Judge found that the Prosecution had not made out its case beyond a reasonable doubt and acquitted the respondents (see *Public Prosecutor v Wong Wee Keong and another* [2016] SGDC 222 ("the *Trial GD*"). Against this second set of acquittals, the Prosecution have again appealed.

3 These appeals now before me present a situation which is unusual, but by no means without precedent. When I heard the first set of appeals, the Prosecution had just closed its case and the question before me was whether there was some evidence, not inherently incredible, that satisfied each and every element of the charges which had been framed. On that occasion, I decided that there was and remitted the matter for the defence to be called (see *No Case GD (HC)* at [101]). For present purposes, following the acquittal of the respondents at the close of trial, my task is to re-look at the same evidence which I first considered when I heard the first set of appeals but with different lenses. The question now before me is whether each and every element of the charges has been proven beyond a reasonable doubt. The respondents' principal submission is that when the entirety of the evidence is considered on this latter "maximum evaluation" basis (as opposed to the "minimum evaluation" of the evidence which they say was what took place at the close of the Prosecution's case), it is plain that the charges had not been made out and the orders of acquittal made by the District Judge were rightly granted.[1]

4 I will state from the outset that I do not find the expressions "minimum evaluation" and "maximum evaluation" to be particularly apposite. As Chan Sek Keong CJ explained, sitting in the High Court of Singapore, in *Re Nalpon*

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[1] Respondents' submissions at para 11.

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Zero Geraldo Mario [2012] 3 SLR 440 ("*Re Nalpon*") at [22], the use of these expressions "mischaracterises the nature of the judicial process in evaluating the evidence at that stage of a criminal trial." As the Privy Council explained in *Haw Tua Tau v Public Prosecutor* [1981–1982] SLR(R) 133 ("*Haw Tua Tau*") (a case on appeal from the Court of Criminal Appeal of Singapore) at [17], what has to be decided at the close of the Prosecution's case is a question of *law*, namely, whether there is some evidence (not inherently incredible) which, *if accepted* as accurate, *would* establish each essential element in the charge either directly or inferentially (see *No Case GD (HC)* at [33]). This stands in contrast with what has to be decided at the close of trial, which is whether each and every element of the charge *has been established* beyond a reasonable doubt.

5 In short, the difference between what takes place at the close of the Prosecution's case and at the close of trial is not one of *degree* (in terms of the intensity with which the evidence is scrutinised), but a difference in *kind* (the substantive question before the court is different). My task is now to consider whether, on an evaluation of the totality of the evidence given by the Prosecution's witnesses and tested in cross-examination, together with any inferences as might be properly drawn upon the respondents' election to remain silent, the guilt of the respondents has been proven beyond a reasonable doubt (see the decision of the Singapore Court of Appeal in *Oh Laye Koh v Public Prosecutor* [1994] SGCA 102 ("*Oh Laye Koh*") at [15]).

6 Turning to the facts, it is undisputed that the respondents had caused 29,434 logs derived from *Dalbergia spp. (Populations of Madagascar*) ("Madagascan rosewood") to be brought into Singapore onboard the MV Oriental Pride ("the Vessel"). Madagascan rosewood is specified in Appendix II of the Schedule to the ESA and is therefore defined as a "scheduled

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species", which may not be imported into Singapore without a permit issued by the Director-General of the Agri-Food and Veterinary Services ("Director-General"), which the respondents did not have. Thus, the sole issue before me, as it was when I heard the first set of appeals, is whether the Rosewood had been imported into Singapore or whether it was merely "in transit" within the meaning of s 2(2) of the ESA. If it was the former, the respondents are guilty of the charges they face; if it was the latter, then the acquittals ordered by the District Judge based on the charges preferred would have been rightly granted.

Background

7 Both the undisputed background facts as well as a detailed narrative of the evidence given by the Prosecution's witnesses can be found in my decision in the first set of appeals (see *No Case GD (HC)*") at [6]–[24]). For now, I will only summarise that which is necessary to provide context for my decision here. Where necessary, I will set out the detailed evidence of the various witnesses in the course of my reasoning and analysis.

8 In March 2013, Madagascan rosewood was listed in Appendix II to the Convention on International Trade in Endangered Species of Wild Flora and Flora (3 March 1973) 993 UNTS 243 (entered into force 1 July 1975) ("CITES"). In May 2013, the Agri-Food and Veterinary Authority of Singapore ("AVA") issued a circular to inform all traders about the inclusion of new species (including Madagascan rosewood) in the appendices of CITES (and, hence, its inclusion in the Schedule to the ESA) and about the regulatory requirements that this entailed. On 4 September 2013, the Secretariat of CITES informed the member states to the Convention that the Government of Madagascar had placed a zero export quota on Madagascan rosewood from 13 August 2013 to 13 February 2014. On 26 February 2014, another notification

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was sent to the member states to inform them that the Government of Madagascar had extended the zero export quota until 14 April 2014.[2] However, this second notification did not state whether the extension of the export embargo had taken effect immediately upon the expiry of the previous zero export quota period or if there had been a "break" between 13 February 2014 (when the zero export quota period specified in the first notification was to have expired) and 26 February 2014 (when the second notification was sent).[3]

9 Sometime in February 2014, the Vessel set sail from the port of Toamasina, Madagascar, with 29,434 logs of Madagascan rosewood ("the Rosewood"). On 19 February 2014, Singapore Customs received information from the Regional Intelligence Liaison Office Asia Pacific ("RILO AP"), a division of the World Customs Organisation, that they had a "strong suspicion" that an illegal shipment of Madagascan rosewood might soon be entering Singapore on board the Vessel. On 27 February 2014, Singapore Customs informed the AVA of what RILO AP had told them. On 28 February 2014, the Vessel arrived in Singapore waters and anchored in West Jurong Anchorage. A little over two weeks later, on 11 March 2014, the Vessel berthed at the Free Trade Zone of Jurong Port ("Jurong FTZ"). Singapore Customs obtained information on the vessel's schedule and its cargo manifests from an online portal maintained by Jurong Port. In the cargo manifests, it was stated that the consignee was one "Jaguar Express Logistics Pte Ltd" ("Jaguar Express") – a logistics company engaged by Kong Hoo – and that the port of discharge was Singapore.[4] This information was shared with the AVA on the

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2 *No Case GD (HC)* at [8]; Record of Proceedings of MA 9136 and 9137 of 2015 ("1st ROP") at p 564, para 4.

3 *No Case GD (HC)* at [8]; 1st ROP at p 564, para 4.

4 P6, P7 (1st ROP, pp 368 and 369).

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same day.[5]

10 That same day Jaguar Express began unloading the Rosewood and moved the unloaded logs to a yard in J16, another area within Jurong FTZ. Between 11 March 2014 and 14 March 2014, a total of 6164 rosewood logs was offloaded from the Vessel, leaving 23,270 logs on board.[6] On 14 March 2014, officers from the AVA boarded the Vessel and seized the rosewood logs which were onboard as well as the logs which had been offloaded. It was subsequently ascertained that the seized logs were indeed Madagascan rosewood and also that no CITES export permit had accompanied the shipment.

11 During the course of investigations a set of nine documents (collectively marked "D5") was given to the AVA by Mr Wong Wee Keong ("Mr Wong"), the respondent in the second of the two appeals before me (Magistrate's Appeal No 9193 of 2016). The first two of these were the bills of lading which accompanied the shipment, both of which listed Kong Hoo (Private) Limited ("Kong Hoo"), the respondent in the first of the two appeals before me (Magistrate's Appeal No 9192 of 2016), as the consignee of the vessel and the port of discharge as Singapore.[7] The remaining seven documents related to the export of the Rosewood from Madagascar. Apart from a letter issued by the Ministry of Environment and Forests of Madagascar (the "Madagascan Forestry Ministry") in 2010 authorising one "Zakaria Solihi" to export "about 5000 tonnes" of Madagascan rosewood, the rest of the documents were dated between 17 February 2014 and 18 February

5 1st ROP, p 27, line 24 to 1st ROP, p 28, line 5 (examination-in-chief of DSP Roy Tan).

6 Respondents' submissions at para 32.

7 *No Case GD (HC)* at [2]; Prosecution's submissions at para 15; Respondents' submissions at para 22.

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2014.[8]

12 On 8 October 2014, the respondents were both charged for breaching s 5(1) of the ESA, which stipulates that scheduled species in transit in Singapore must be accompanied by valid CITES export documentation issued by the country of *export* and, where necessary, by valid CITES import documentation issued by the destination country.[9] On 3 June 2015, these charges were amended to ones under s 4(1) of the ESA and the trial took place on 15 and 16 July 2015. As noted above, the District Judge acquitted the respondents at the close of the Prosecution's case. I heard the Prosecution's appeal against the District Judge's decision over two days and allowed it on 19 February 2016, ordering that the matter be remitted for the Defence to be called. On 8 June 2016, the parties attended before the District Judge for the continuation of the trial. After delivering the standard allocution, the District Judge called upon the defence to be entered. The respondents elected to remain silent and did not call any other evidence.

The issues

13 Section 2 of the ESA defines what it means to "import" a scheduled species and when a scheduled species will be considered to be "in transit". It provides, in material part, as follows:

> 2(1) ***"import"*** means to *bring or cause to be brought into Singapore by land, sea or air any scheduled species other than any scheduled species in transit* in Singapore; …
>
> …
>
> 2(2) For the purposes of this Act, *a scheduled species shall be considered to be* ***in transit*** *if, and only if, it is brought into*

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8 *No Case GD (HC)* at [19]; 1st ROP at pp 574 and 580.

9 Respondents' submissions at para 40.

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> *Singapore solely for the purpose of taking it out of Singapore and —*
>
> > (*a*) it remains at all times in or on the conveyance in or on which it is brought into Singapore;
> >
> > (*b*) it is removed from the conveyance in or on which it was brought into Singapore and either returned to the same conveyance or transferred directly to another conveyance before being despatched to a place outside Singapore, and is kept under the control of the Director-General or an authorised officer while being so removed, returned or transferred; *or*
> >
> > (*c*) it is removed from the conveyance in or on which it was brought into Singapore and *kept under the control of the Director-General or an authorised officer for a period not exceeding 14 days, or such longer period as the Director-General may approve, pending despatch to a place outside Singapore*.
>
> [emphasis added in italics and bold italics]

14 As I explained in *No Case GD (HC)* at [38], the moment a scheduled species is brought into Singapore, as was the case here, it will be considered to have been imported unless it is deemed to only have been in transit – there is no *tertium quid* under the ESA. Section 2(2) of the ESA sets out two *cumulative* conditions that have to be satisfied for a scheduled species that had been brought into Singapore to be considered to have been in transit, namely (at [39]):

> (a) the scheduled species must have been brought into Singapore solely for the purpose of being taken out of Singapore (in the *No Case GD (HC)* at [42], I referred to this as the "sole purpose" condition); and
>
> (b) the facts must fall within one of the three mutually exclusive scenarios set out in paras (*a*) to (*c*) of s 2(2) of the ESA.

15 Insofar as the 23,270 logs of Rosewood which remained on board the

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Vessel are concerned, there is no dispute that they had remained "at all times in or on the conveyance in or on which it is brought into Singapore" within the meaning of s 2(2)(*a*) of the ESA. The only issue is whether the sole purpose condition has been satisfied. In respect of the 6164 logs which had been offloaded from the Vessel, s 2(2)(*c*) of the ESA is applicable and it requires, in addition to proof of the sole purpose condition, that the scheduled species must have been under the control of the Director General or an authorised officer" for the duration of its absence from the vessel (in the *No Case GD (HC)* at [42], I referred to this as the "control" condition).[10]

16 What this means, therefore, is that if the Prosecution proves that the sole purpose condition has not been met, then the charges which relate to the offence of importing the *entire shipment* of Rosewood without the requisite permit would have been made out in their entirety. If, however, the Prosecution only succeed in establishing that the control condition has not been satisfied then the charges would only have been made out in respect of the 6164 logs which had been offloaded.[11] As a practical matter, however, this is a distinction of little consequence because it is not disputed that *all* of the Rosewood was meant to be offloaded from the Vessel. Thus, if it can be shown that the control condition had not been satisfied in respect of the 6164 logs then it would invariably follow from the fact that the remaining 23,270 logs were meant to be offloaded in the same manner that the Prosecution would have made out a case against the respondents for (a) the offence of importing 6164 logs of Rosewood without a permit *simpliciter* as well as (b) the offence of *attempting* to import 23,370 logs of Rosewood without a permit (under s 4(1) of the ESA read with s 511 of the Penal Code (Cap 224, 2008

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10 Prosecution's submissions at para 23(d); Respondents' submissions at para 63.

11 Respondents' submissions at paras 152–154.

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Rev Ed)). It appears that this was also the way the District Judge approached this matter for she did not draw a distinction between the Rosewood which had been offloaded and those which remained on the Vessel. Instead, she proceeded on the basis that it would suffice for the Prosecution to prove *either* that the sole purpose condition *or* the control condition has not been met (see *No Case GD (DC)* at [55] and the *Trial GD* at [15]).

The District Judge's decision

17 As regards the sole purpose condition, the District Judge observed that the Prosecution's submissions "centred on the naming of [Kong Hoo] as a consignee in the shipping and commercial documents" and the absence of a named consignee in the alleged destination country (Hong Kong). However, she held that neither was conclusive evidence that the Rosewood had been imported (see the *Trial GD* at [16] and [19]). The District Judge found that the evidence instead showed that the Rosewood had been brought into Singapore merely for the purpose of taking it out again. She pointed to the following:

(a) The unchallenged evidence of Mr Alan Tan ("Mr Tan"), the managing director of Jaguar Express, was that he had been engaged to do the "whole project" of offloading, containerising, and transporting the Rosewood from Jurong Port to another port which was managed by the Port of Singapore Authority ("PSA"). This could only lead to one "inexorable conclusion… namely, the Rosewood was to be shipped out of Singapore" (at [21] and [22]).

(b) The fact that Jaguar Express had provided Kong Hoo with a quotation on the cost of ocean freight charges from Singapore to Hong Kong (exhibit D17) and had made several "tentative" bookings for containers to be reserved for Kong Hoo's use (at [23]). This, which she

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described as the "presence of binding legal obligations, the performance of which were underway" provided evidence that the respondents had a "confirmed present intention" by the respondents to ship the Rosewood, and not an "unconfirmed future intention" as the Prosecution submitted (at [24] and [25]).

18 Further, the District Judge declined to draw any adverse inference against the respondents in the light of their election to remain silent. She held that such an inference could not properly be drawn in the present case because there was "no evidence which the [respondents were] required to contradict or explain" because (a) the "relevant documents" had already been provided to the AVA in the course of investigations and (b) the evidence of Mr Tan as to the scope of his work and what was to be done with the Rosewood was "detailed and complete" (at [28]). In her assessment, the evidence of Mr Tan "affirmatively established beyond reasonable doubt that the Rosewood was to be transported from Jurong Port to PSA Port for shipment to Hong Kong" (*ibid*). In the premises, she held that the Prosecution had not discharged its burden of proving beyond a reasonable doubt that the Rosewood had not been brought into Singapore for the sole purpose of taking it out of Singapore (at [29]).

19 As regards the control condition, the District Judge held that the Rosewood had been under the control of an authorised officer of Singapore Customs from the time it entered Jurong FTZ (at [40]). Her reasons were as follows:

(a) Jurong FTZ is a "secured area for the temporary storage of goods and where controls are in place to supervise the unstuffing and

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stuffing of containers" over which officers of Singapore Customs exercised broad supervisory and enforcement powers (at [34]–[36]).

(b) There was no provision in the ESA which required a person to provide specific information about scheduled species for the purposes of transit (at [37]). In this regard, while there was some suggestion that a "TradeNet declaration … [wa]s required in a transit case", there was "no clear evidence as to the stage at which the declaration is made and how it is processed (at [38]). Instead, the "unchallenged evidence" of Mr Tan was that a declaration had to be made to Singapore Customs *before* the goods left a free trade zone (*ibid*).

(c) It was "clear" from Mr Tan's evidence that J16 had been "assigned by Singapore Customs for the discharge of the [Rosewood]" (at [35]).

20 After the District Judge had delivered her judgment, the Prosecution sought confirmation that the finding of the court was that the Rosewood was in transit. Upon receiving such confirmation, the Prosecution applied for the respondents' charges to be amended to ones under s 5(1) of the ESA. This was immediately rebuffed by the District Judge, who described it as a "strange application", noting that the same application had been made and refused at the close of the Prosecution's case.[12] The District Judge did not explicitly elaborate on the reasons for her refusal, but it is clear from the final section of the *Trial GD* that she did not think that such an amendment would be proper both because the amended charge was unlikely to have been made out and also because it would have been prejudicial to the Defence. This is clear from her

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12 Record of proceedings of Magistrate's Appeal Nos 9192 and 9193 of 2016 ("2nd ROP") at p 120.

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closing remarks, where she observed, first, that despite "any reverberations that this case may have created", the fact of the matter was that at the material time, the Rosewood was neither prohibited from export (by Madagascar, the country of origin) nor prohibited from being imported (by Hong Kong, the country of final destination): at [41]; and second, that the prosecution had "flipped-flopped [sic] on the charge against the defendants" as it had initially framed a charge on the basis that the Rosewood was in transit without a valid CITES export permit (a charge under s 5(1) of the ESA) but soon "abandoned" this charge and amended it to a charge of importation without a permit" under s 4(1) of the same: at [44].

The application to adduce further evidence

21 I heard the parties' submissions in the present appeals on 9 December 2016 and reserved judgment. On 3 February 2017, while the written judgment in this matter was being prepared, the Prosecution filed Criminal Motion No 5 of 2017 ("the Motion") to seek to admit further evidence in the form of a letter with several enclosures from Mr Wong Siew Hong of M/s Eldan Law LLP dated 20 January 2017, who had been retained to act for the Government of the Republic of Madagascar. These enclosures comprised, among other things, official communiques between the Madagascan Government and the Secretariat of CITES, letters from the Madagascan Directorate of Customs on the subject of the Vessel's movements, and letters from the Director General of the Madagascan Bureau of Independent Anti-Corruption. These documents, it was said, would have the effect of "demonstrat[ing] that the evidence that [the respondents] produced in court are false."[13] In the covering letter, Mr Wong Siew Hong expressed regret that the evidence only surfaced at this late

[13] Letter from M/s Eldan Law dated 20 January 2017.

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stage and explained that he had travelled to Madagascar in December 2016 to take instructions from his client and had been given the documents then.

22 The Prosecution conceded that the documents in question were relevant *not* to the charges which the respondents currently faced – that is to say, those framed under s 4(1) of the ESA – but it submitted that they were relevant to the *potential alternative* charges under s 5(1) of the ESA which it submitted that the District Judge *could and should* have framed in substitution of the present charges.[14] Broadly summarised, their argument was as follows. Under s 5(1) of the ESA, every scheduled species in transit in Singapore must be accompanied by valid export documentation and, where required by the country of ultimate destination, valid import documentation. Valid export documentation included, in this context, "written documentation issued by the competent authority of the country of export" (see s 5(1)(*a*) of the ESA). The key issue was whether the documents in D5 fit this description. The Prosecution submitted that the documents sought to be admitted were relevant to this inquiry because they purported to show the following:

(a) The embargo against the export of Madagascan rosewood had been extended on 14 February 2014 (that is to say, that there was no "break in the zero export quota: see [8] above), thus suggesting that the export documents in D5, if not outright forgeries, were at least issued in breach of the Madagascan Government's own export embargo.[15]

(b) The Vessel did not anchor at any customs ports in Madagascar in the first quarter of 2014 (contrary to what was stated to be the case: see [9] above), thus calling into question the authenticity of a

14 Prosecution's submissions in CM 5/2017 at paras 11–12.

15 Prosecution's submissions in CM 5/2017 at para 18(b) and Affidavit of Wong Siew Hong dated 15 February 2017 at paras 11–12.

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"Departure Formality Report" purportedly issued by the Maritime Authority of Madagascar, which had been produced by the respondents.[16]

(c) Certain export documents in D5 (chiefly, the export authorisation documents in which it was said that Mr Zakaria Solihi was authorised to export Madagascan rosewood: see [10] above) might be forgeries as they bore identical serial numbers to other official documents which related to completely different subjects.[17]

23 I heard the Motion on 1 March 2017 and dismissed it. The decision of the English Court of Appeal in *Ladd v Marshall* [1954] 1 WLR 1489 ("*Ladd v Marshall*") is the *locus classicus* on the reception of fresh evidence on appeal. At 1491, Denning LJ (as he then was) held that fresh evidence would only be received on appeal if the following conditions were satisfied:

(a) First, the evidence "could not have been obtained with reasonable diligence for use at the trial";

(b) Second, the evidence "would probably have an important influence on the result of the case, although it need not be decisive"; and

(c) Third, the evidence must be "such as is presumably to be believed, or in other words, it must be apparently credible, although it need not be incontrovertible."

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16 D19; Prosecution's submissions in CM 5/2017 at para 18(c) and Affidavit of Wong Siew Hong dated 15 February 2017 at para 15.

17 Prosecution's submissions in CM 5/2017 at para 18(a); Affidavit of Wong Siew Hong dated 15 February 2017 at paras 16–21.

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24 Following the lead of the Singapore High Court in *Soh Meiyun v Public Prosecutor* [2014] 3 SLR 299 at [14] ("*Soh Meiyun*"), I will refer to these as the conditions of "non-availability", "relevance", and "reliability" respectively. In *Soh Meiyun*, Chao Hick Tin JA noted that these principles had been promulgated in the civil context and that while it was once thought that they could be transposed for use in the criminal context without change, the modern approach was less restrictive. While the *Ladd v Marshall* conditions continue to be useful points for consideration, they were not applied as strictly in the criminal context. In particular, Chao JA noted that the condition of non-availability was perhaps of less importance (at [15]). I pause to observe that *Soh Meiyun* dealt with the subject in the context of an application by the *accused* – there are reasons in my view to think that a stricter approach should apply where it is the Prosecution that is making such an application, but I express no concluded view on this point because even applying the more liberal approach set out in *Soh Meiyun*, I would still have considered that this was not a proper case for the evidence to be admitted. My reasons are as follows.

25 First, there was the question of non-availability of the evidence sought to be adduced. The Prosecution ought to have been aware at least as early as the time of the first appeal last year (which was heard in February 2016) that they could have located these potential sources of information. By that time, Mr Wong Siew Hong had already been instructed by the Madagascan Government, and this was or ought to have been a fact known to the Prosecution, since he kept a watching brief at the hearings of the first appeal, where the possibility of an alternative charge under s 5(1) of the ESA was also at issue.[18] It seemed to me, therefore, that the Prosecution knew from that point

[18] Affidavit of Wong Siew Hong dated 15 February 2017 at para 3; Respondents' submissions in CM 5/2017 at para 44.

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that they had a potential source of information which might be relevant to the alternative charge under s 5(1) of the ESA. The District Judge on hearing the remitted trial had gone on to rule in favour of the respondents, resulting in the appeals presently before me. She issued her written grounds of decision in August 2016. There was ample time, with the exercise of reasonable diligence, to procure these documents before the hearing of these appeals which took place in December 2016. For reasons which remain unclear to me and have not been adequately explained, this had not been done.

26 Instead, the only explanation put forth was that Mr Wong Siew Hong had travelled to Madagascar in December 2016 (after the appeals were heard) and the documents were only brought to the Prosecution's attention in January 2017.[19] With respect, this was a wholly inadequate explanation. It bears emphasis that the question is not whether the evidence sought to be admitted was *already in* the possession of the applicant at the time of the trial, but whether it *could with reasonable diligence have been so procured for use*. On the facts, it seemed to me that the evidence could have been obtained earlier. I was therefore not persuaded that the "non-availability" condition had been satisfied.

27 Turning to the reliability of the evidence**,** the fresh evidence – being documents and statements produced by persons out of court – is entirely hearsay. There was no agreement for the documents to be admitted and while Mr Wong Siew Hong had deposed that the officials from the Madagascan Government would avail themselves to testify in Singapore if necessary, the fact still remained that the evidence was being sought to be introduced through him *for the purpose of these appeals*.[20] There was no certainty as to whether

19 Prosecution's submissions in CM 5/2017 at para 23.

20 Affidavit of Wong Siew Hong dated 15 February 2017 at para 23.

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the foreign witnesses would attend before the court, who amongst them would actually be prepared to travel to Singapore to testify, or when this might be done. Furthermore, none of the makers of the documents in question had attested to anything by way of affidavit and the evidence only came in the form of an affidavit filed by Mr Wong Siew Hong. The upshot of all this was that the evidence, even if admissible, could not be given much weight.

28 More crucially, the evidence did not appear to be inherently reliable when viewed in the full context of what the Prosecution themselves had placed before the court at trial. This was not the first time that the authenticity of the documents in D5 had been canvassed. This was a subject explored during investigations. Between 3 and 4 December 2014, a delegation from Madagascar visited Singapore following the seizure. On 9 January 2015, Mr Ramaparany Ramanana of the Madagascan Forestry Ministry wrote to Ms Lye Fong Keng ("Ms Lye") of the AVA, referencing the earlier visit in December, and stated that he "confirm[ed] the authenticity of the documents."[21] There was no explanation why there has been an apparent shift in the Madagascan Government's position on certain aspects of evidence (*eg*, CITES documents and whether the vessel was anchored off Madagascar at all). In the absence of such explanation, the reliability of the documents sought to be tendered is questionable.

29 Finally, there was the issue of prejudice. When the matter was remitted for the defence to be called, the charge that was preferred against each respondent was one under s 4(1) of the ESA and the evidence was as it stood before me at the time of the first appeal. The respondents clearly made their decision not to offer evidence in their own defence on that basis. If the Motion

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21 ROP, p 111, line 17 to p 113, line 12.

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were allowed, fairness would demand that the respondents be permitted at least the opportunity of reconsidering their decision not to give evidence, if not a retrial of the matter in its entirety. Either way, this would allow re-litigation of the matter at a stage when the appeals have already been heard and judgment is about to be delivered. In *Mohammad Zam bin Abdul Rashid v Public Prosecutor* [2007] 2 SLR(R) 410 at [6], the Court of Appeal stressed that the power granted to the court to permit further evidence on appeal always had to be "balanced by the public interest in the finality of trial and ensuring that trials are not reopened each time evidence that should have been admitted at first instance was not admitted." I bear this well in mind. In my judgment, this was not a case in which leave should be given for further evidence to be adduced.

The parties' cases on appeal

30 I turn now to the merits of the appeal. Mr Kwek Mean Luck ("Mr Kwek"), counsel for the Prosecution, submits that neither the sole purpose nor the control conditions had been satisfied and that the District Judge had erred in both fact and in law in concluding that they had been. Turning, first, to the sole purpose condition, Mr Kwek contends that the District Judge had failed to:[22]

> (a) Consider the totality of the evidence, particularly the documentary evidence, which he argues "constituted an overwhelming body of circumstantial evidence that Singapore was intended as the ultimate destination of [the Rosewood]".
>
> (b) Place adequate weight on the respondents' failure to identify the identity of the buyer in Hong Kong who was to have received the

22 Prosecution's submissions at para 54.

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Rosewood in support of their claim that the Rosewood was only in transit in Singapore.

(c) Draw an adverse inference against the respondents for electing not to take the stand to give evidence in their defence, particularly in relation to the issue of the purpose for which the Rosewood had been brought to Singapore (which was a matter within their knowledge).

31 On the control condition, Mr Kwek submits that the District Judge had misapplied the test which had been laid down in *No Case GD (HC)*.[23] He contends that in order for a scheduled species to be deemed to be within the "control" of the Director-General or an authorised officer within the meaning of s 2(2) of the ESA, it would not suffice to show that the species had been placed within a "secured area under [Singapore] Customs' jurisdictional control" (in this case, Jurong FTZ). Instead, he submits that the Director-General or the authorised officer (as the case may be) must be shown to have had *actual knowledge* of the existence of the scheduled species.[24] He argues that this requirement has not been met because (a) the cargo declarations submission to Jurong Port were "sorely lacking in material detail" and (b) it was clear from the evidence which had been led at the trial that Singapore Customs was unaware of the fact that the Rosewood was being unloaded, let alone that it had exercised any control over the process or specifically designated J16 for the unloading of the Rosewood.[25]

32 Mr Muralidharan Pillai ("Mr Pillai"), counsel for the respondents, submitted to the contrary. On the sole purpose condition, he contends that

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23 Prosecution's submissions at para 30(b).

24 Prosecution's submissions at paras 78, 83, and 89.

25 Prosecution's submissions at paras 92 and 94.

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there is sufficient evidence to raise a reasonable doubt as to the Prosecution's case that the respondents had brought the Rosewood into Singapore *other* than for the sole purpose of taking it out again.[26] Specifically, he points to:

(a) The evidence given by Mr Tan in relation to the scope of his work, namely, that he was hired to containerise and move the Rosewood from Jurong Port to PSA Port. In this regard, he stresses that while the bookings made by Mr Tan for the containers for shipment to Hong Kong were expressed to be "tentative" (see [17(b)] above), what was *not* tentative was the fact that *Mr Tan* (more specifically, Jaguar Express) had a binding contractual obligation to make arrangements for the Rosewood to be shipped overseas.[27]

(b) Mr Wee's testimony that he "understood" that the Rosewood was meant to be containerised and shipped out of Singapore.[28]

(c) The "inconsistent positions" the Prosecution had taken throughout the investigative process. He noted that the Prosecution had first proceeded against the respondents on the basis of a charge under s 5(2) of the ESA, which was framed on the basis that the Rosewood was bound for Hong Kong before "chang[ing] tack to assert that the rosewood logs were brought into Singapore with no intention to be brought out of Singapore."[29]

33 Drawing on the above, Mr Pillai further submits that the District Judge had rightly ruled that no adverse inference was to be drawn in the

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26 Respondents' submissions at para 85.

27 Respondents' submissions at paras 90–91.

28 Respondents' submissions at para 92.

29 Respondents' submissions at para 98.

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circumstances since (a) the evidence led by the Prosecution did not "satisfy the evidential threshold on a standard of "beyond reasonable doubt" and (b) the evidence that had been led thus far did not "*call for an explanation which the accused* ***alone*** *can give*" [emphases in original]. Adding to this, he contends that the respondents' case was adequately made out on the basis of the documentary evidence before the court and on the evidence of the *Prosecution's* own witnesses (in particular, that of Mr Tan) and that there was nothing further that Mr Wong could add that would not be criticised as being "self-serving".[30]

34 On the control condition, Mr Pillai submits that the Prosecution's failure to call any witnesses to "affirmatively state that Singapore Customs *lacked* knowledge of the [Rosewood]" is "fatal" to its case, given that the burden of proof lies on the Prosecution to establish that the requisite control was absent.[31] In any event, Mr Pillai adds, the evidence on the events prior to the seizure (in particular, the correspondence exchanged between Singapore Customs and RILO AP: see [9] above) in fact showed that Customs officers knew, and were in a position to determine how the Rosewood would be used or moved.[32]

Analysis

35 After careful consideration of the competing arguments, I conclude that the Prosecution has proved beyond a reasonable doubt that the respondents had in fact imported the Rosewood. Where the sole purpose condition is concerned, I consider, with respect, that the District Judge had

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30 Respondents' submissions at para 140(b).

31 Respondents' submissions at paras 155, 158, and 170.

32 Respondents' submissions at paras 159–168.

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erred – first, by failing to consider the totality of the evidence and reaching a conclusion which was, in all the circumstances, against the weight of the evidence; and second, by failing to draw an adverse inference against the respondents for their refusal to give evidence when called upon to do so. Where the control condition is concerned, I hold that the District Judge had misapprehended the appropriate test for "control" and had, in so doing, wrongly concluded that the Rosewood was within the control of an authorised officer at the relevant time.

The sole purpose condition

36 The sole purpose condition relates to the accused's *motive* for bringing the scheduled species to Singapore and is therefore a fact which is especially within his/her knowledge (see *No Case GD (HC)* at [39(a)]). This attracts the operation of s 108 of the EA, which states that where "any fact is especially within the knowledge of any person, the burden of proving that fact is upon him" (see s 108 of the Evidence Act (Cap 97, 1997 Rev Ed) ("EA")). Section 108 of the EA does not have the effect of imposing a burden on the accused to prove that no crime had been committed (see the decision of the High Court in *Public Prosecutor v Chee Cheong Hin Constance* [2006] 2 SLR(R) 24 at [95]). Instead, it only applies in "exceptional cases" where it would be "impossible or at any rate disproportionately difficult" for the Prosecution to prove a fact which is especially within the knowledge of the accused which he can "prove without difficulty or inconvenience" (*ibid*). As the Court of Appeal recently explained (albeit in a civil context), s 108 of the EA only comes into play after the plaintiff has established a *prima facie* case against the defendant and the defendant then seeks to avoid liability by asserting a fact which is especially within his knowledge: in such a case, the defendant bears the burden of proving the alleged fact to avoid liability (see *Yap Son On v Ding*

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Pei Zhen [2017] SLR 219 at [80(c)], citing the decision of the Singapore High Court in *Surender Singh s/o Jagdish Singh and another (administrators of the estate of Narindar Kaur d/o Sarwan Singh, deceased) v Li Man Kay and others* [2010] 1 SLR 428 at [221]).

37 In this case, the Prosecution has made out a *prima facie* case that the Rosewood had not been brought into Singapore solely for the purpose of taking it out again (see *No Case GD (HC)* at [66]) and the respondents accept that they now bear the burden of raising reasonable doubt that the sole purpose condition has been met. However, they submit that this burden should properly be characterised as an "evidential", and not a "legal" burden.[33] What they mean by this, presumably, is that they bear the "tactical onus to contradict, weaken or explain away the evidence that has been led" rather than a primary "obligation to persuade the trier of fact that, in view of the evidence, the fact in dispute exists [or does not exist, as the case might be]" (see the decision of the Singapore Court of Appeal in *Britestone Pte Ltd v Smith & Associates Far East, Ltd* [2007] 4 SLR(R) 855 at [58]–[59]). This obligation of contradiction is one which they say they have adequately discharged despite their election to remain silent, purely on the basis of the "existing documentary evidence and the oral evidence that the [*Prosecution's own*] witnesses have given."[34]

38 With this in mind, and considering the matters raised by the parties in their submissions, I approach this issue in three parts:

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33 Respondents' submissions at paras 57(b), 73(a), and 86.

34 Respondents' submissions at para 140(b).

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(a) First, I will evaluate the strength of the evidence put forward by the Prosecution in support of its submission that the sole purpose condition has not been satisfied.

(b) Second, I will consider the evidence which the respondents identify as militating against a finding of guilt.

(c) Last, I will consider whether adverse inferences should be drawn on account of the respondents' election to remain silent.

The Prosecution's case

39 When I considered this matter in the first appeal, I noted that there were two aspects of the evidence which militated against the District Judge's assessment that the sole purpose condition had been satisfied (see *No Case GD (HC)* at [64]). The first was the "substantial body of circumstantial evidence" which suggested that the Rosewood had not been brought into Singapore solely for the purpose of taking it out again (at [53]). This comprised the various documents in D5 (which include, among other things, the bills of lading for the shipments and various documents issued by statutory bodies in Madagascar), all of which list Kong Hoo, a local company, as the consignee of the shipment and, where relevant, Singapore as the port of discharge or the destination of the shipment. Of particular relevance are four documents which were issued by the Madagascan Forestry Ministry between 17 and 18 February 2014 authorising Mr Zakaria Solihi to export a total of 30657 logs of Madagascan rosewood (the "export documents"). The export documents identify Kong Hoo as the consignee and list Kong Hoo's business address in Singapore as the destination of the shipment of Rosewood.[35]

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35 1st ROP at pp 570, 574, 576, and 580.

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40 The relevance of these export documents, I explained then, lay in the fact that the unchallenged evidence of Ms Lye was that under CITES procedure, the name of the consignee listed on an export document would be the name of the recipient in the *ultimate destination* (in this case, Hong Kong), and never the name of the third party handling the shipment in transit (see *No Case GD (HC)* at [57]). This was a fact which was clearly known to the Madagascan Forestry Ministry, the authority responsible for the implementation of CITES in Madagascar, which had purportedly issued these export documents. Gathering these threads together, I concluded thus (at [59]):

> It is notable that *all* the [export documents] in D5 – which the respondents contended were valid national export documents and which were issued by the Madagascan Forestry Ministry, the Management Authority responsible for the implementation of CITES in Madagascar – list Kong Hoo as the consignee of the shipment of Rosewood. I put aside, for present purposes, the dispute over the authenticity of these documents and whether the zero export quota had ever been lifted (see [8] and [19]–[22] above). What is undisputed is that almost all of these documents were issued either on 17 February 2014 or 18 February 2014, *after* Madagascan rosewood had been listed as a scheduled species in Appendix II of CITES. ***If it were inferred, as I think is reasonable, that D5 had been issued in accordance with usual CITES procedure, then it would follow that the fact that a Singaporean company (Kong Hoo) was listed as the consignee in D5 suggests that Singapore was the destination country for the shipment.*** [emphasis in original in italics; emphasis added in bold italics]

41 My point was that at the time these export documents were issued, Madagascan rosewood was already protected under CITES. Whether or not there was a domestic export embargo would not change the fact that the Rosewood was still protected under CITES and would still be subject to the regulatory requirements set out therein. Thus, even assuming in favour of the respondents that the export documents are authentic and also assuming that there was a "break" in the zero export quota, it would stand to reason that the

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Madagascan Forestry Ministry would – in authorising an export of Madagascan rosewood – comply with standard CITES procedure and list the ultimate destination of the shipment in authorising the export of the Rosewood. There was no evidence to explain why the usual CITES procedure might not have been adhered to in this case. In my judgment, therefore, the fact that Kong Hoo was listed as the named consignee was a significant point that strongly suggested that Singapore was the ultimate destination for the shipment.

42 However, the District Judge did not, in the final analysis, consider this point to be particularly persuasive. After observing that it was "highly incongruous" that the original charge preferred against the respondents was one under s 5(1) of the ESA and was based on the premise that the Rosewood was to be shipped to Hong Kong, she expressed her complete agreement with the following three arguments made by the respondents, whose submissions she cited at length (see the *Trial GD* at [19]):

> (a) First, it was clear that even *the AVA* did not think that the fact that a local consignee was named in the shipping documents was conclusive, as evinced by the fact that even after being informed that a local consignee was named in the documents, it "continued to be unsure of whether the case was an import or transhipment."
>
> (b) Second, there is nothing in the applicable legislation or regulations raised that suggests that the named consignee on the CITES export documents must reflect the name of the ultimate recipient in the country of ultimate destination"; and further, no "independent evidence of practice or norm to support the contention that the CITES export permits must name the ultimate consignee was ever adduced."

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(c) Third, the Prosecution had already conceded the point where it acknowledged that the identity of the consignee was not conclusive.

43 These points can be dealt with briefly. First, when the AVA was contacted by Singapore Customs, it was only informed that the named consignee on the *bills of lading* was Kong Hoo. At the time, it did not have sight of the *export documents* issued by the Madagascan Forestry Ministry, which it only received from Mr Wong during the course of investigations (see [9]–[11] above). Thus, no weight can be placed on the AVA's actions at the time. Second, it is incorrect to say that there is no evidence of a practice that CITES export permits will state the name of the consignee in the ultimate destination country – there was. This was the uncontroverted evidence of Ms Lye, who testified that CITES export permits were always issued on what she described as a "back-to-back" basis such that the named consignee on the permit "has to be the company in the final destination, the ultimate destination" (see *No Case GD (HC)* at [57]–[58]).[36] In this regard, I should also point out that Mr Pillai also accepted, during the trial, that Ms Lye was the "subject matter expert" on the subject of CITES regulations.[37] Third, while the District Judge was correct to say that the mere fact that a local company is listed as the consignee in the export and shipping documents may not be *determinative* (this is a point which the Prosecution also concedes on appeal[38]), it is certainly highly probative.

44 The second aspect of the evidence which I considered was the absence of any details of what would happen to the Rosewood after it leaves Singapore. Chiefly, I noted that there was (a) no information of the putative

36 1st ROP, p 169, lines 7–24.

37 1st ROP, p 135, line 24.

38 Prosecution's submissions at para 57.

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buyer in Hong Kong, (b) no documentation of sale to a party in Hong Kong (or anywhere else in the world for that matter), and (c) no *confirmed* bookings for the on-shipment of the Rosewood. While Mr Tan testified that he had been told that the Rosewood was meant for transhipment to Hong Kong, he had not been given the details of the consignee in Hong Kong who was to receive the Rosewood or the name of the ultimate buyer (see *No Case GD (HC)* at [60]). What was particularly striking was the fact that when Mr Wong was interviewed, he was asked to disclose the identity of the buyer in Hong Kong who was to receive the shipment of Rosewood but "refused" to do so. As I explained at [63], this refusal to disclose the identity of the Hong Kong buyer was incongruous because providing evidence of such a buyer "would go a long way towards absolving [the respondents] of legal liability".

45 The District Judge only dealt with this point obliquely in the section of her GD where she analysed the evidence of Mr Tan. I will turn to that shortly. For now, however, it suffices to say that when this matter came before me for the first time, the effect of these two aspects of the evidence, I concluded, was that the Prosecution had made out a *prima facie* case that the sole purpose condition had not been satisfied. I accepted that Mr Tan's evidence could possibly point in the other direction, but the question before me then was simply whether his testimony provided evidence of such a "convincing and conclusive" character that it "so discredited the Prosecution's evidence or showed it to be so manifestly unreliable that it *would not be possible to convict* on it" [emphasis added] (see *No Case GD (HC)* at [65]). On that occasion, I had no difficulty answering that question in the negative. However, the question before me in the present appeals is different. Now, I have to weigh all of the evidence and decide whether, on a final evaluation, the charges have been proven beyond reasonable doubt. This requires me to consider whether

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the effect of Mr Tan's evidence (as well as the other matters which Mr Pillai raised: see [32] above) is such that reasonable doubt has been cast on whether the respondents had imported the Rosewood into Singapore. I turn to that task.

The evidence of Mr Tan

46 Briefly summarised (see *No Case GD (HC)* at [23]), Mr Tan's evidence was that he had been engaged to unload the Rosewood from the vessel, containerise it, and then truck it from Jurong Port to PSA Port. According to Mr Tan, he had been told by Mr Wong that the Rosewood was meant to be shipped to Hong Kong and, to that end, he had provided Kong Hoo with two quotations. The first was for ocean freight charges from Singapore to Hong Kong (exhibit D17); the second was for the cost of moving the cargo from Jurong Port to PSA Port (exhibit D18). Both of these quotations were signed by Mr Wong on behalf of Kong Hoo and marked "Confirmed & Accepted". Further to that, Mr Tan also made a "tentative booking" for 30 containers on a vessel which was bound for Hong Kong on 16 March 2014. Taking all of this into consideration, the District Judge found that Mr Tan's evidence "led to only one "inexorable conclusion", namely, that the "Rosewood was to be shipped out of Singapore" (see the *Trial GD* at [22]) as it "irrefutably show[ed]" that there was a confirmed present intention by the [respondents] to ship the [Rosewood]" (at [24]).

47 Mr Tan's evidence was largely unchallenged, and there is no basis to disagree with the District Judge's finding that he was a "candid witness". However, it is important to parse his evidence carefully. When he took the stand, he explained that Jaguar Express held itself out as a "one-stop logistic" company. What he meant by this was that even though it was engaged primarily in the business of providing haulier services (that is, the

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transportation of goods by road) for customers who were transhipping goods, he would also – on request – act as a freight broker and assist his customers by "book[ing] the freight for them to go to which country".[39] This can be seen from D17 and D18.

(a) D17 relates to the charges for freighting goods from Singapore to Hong Kong on a "CY to CY" (container yard to container yard) basis and it sets out, among other things, the freight and the terminal handling charges that would be levied per container.[40] At the end of the first page it records that Jaguar Express had "[t]entatively" identified four vessels with a capacity to carry 120 containers but there is no indication that any particular departure date had been selected. This is consistent with Mr Tan's testimony at trial, where he explained that as at the date of seizure (14 March 2014), he had only made a single "tentative booking" for 30 containers worth of space on a vessel scheduled to depart on 16 March 2014 (see [46] above). On the second page of D17, it was said that "[a]ll other charges such as shipping charges i.e. LCL [less than container load], FCL [full container load] and other related charges … will be borne by Kong Hoo." This makes it clear that Jaguar Express's role was simply that of broker – its obligations extended only to securing a suitable vessel for Kong Hoo's use at a time and date of its election, and not the actual carriage of the goods.

(b) D18, on the other hand, relates to the haulier arm of Jaguar Express's business. In the subject line of the document, it is explicitly said that this was for a "Quotation for Log Wood (3000MT [metric

39 1st ROP, p 191, lines 9–15.

40 1st ROP, p 647.

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> tonnes] to 4000MT" (unlike D17, where there is no mention of the Rosewood at all) and that what was being contemplated was the movement of the goods from "Jurong Port to PSA Port", and nothing more. This is clear from the body of the document, where there is a list of the fees Jaguar Express would levy for, among other things, supplying the forklifts needed for the unloading of the Rosewood.[41]

48 One major subject of disagreement between the parties was whether those documents constituted binding contracts or whether they were mere "quotations" (by which I presume they mean, to put it in contractual parlance, mere invitations to treat or, at best, offers which had not yet been accepted).[42] As a matter of law, the question whether they were binding contracts does not turn on the name used in the title of the document (though it is certainly relevant), but on the intention of the contracting parties. More specifically, the question is whether there was a meeting of minds to be bound by terms which are both certain and complete (see *Likpin International Ltd v Swiber Holdings Ltd and another* [2015] 5 SLR 962 at [42]). Whether this is so or not is, in my judgment, neither here nor there. Even if I assume in favour of the respondents that the documents constitute binding contracts, all they show is that the respondents had a firm intention to containerise and move the Rosewood from Jurong Port to PSA Port and that they had, additionally, retained the services of Jaguar Express to act as their agent to secure them a vessel to transport 120 containers to Hong Kong *on request* and at an *as yet unconfirmed date*. Neither of these documents "irrefutably shows", as the District Judge held to be the case, that the respondents had a "*confirmed present* intention" [emphasis added] to ship the Rosewood out of Singapore (see the *Trial GD* at

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41 1st ROP, p 649.

42 Prosecution's submissions at para 47; Respondents' submissions at paras 90–91.

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[24]).

49 The overall picture does not change even when we consider Mr Tan's testimony. Shortly after he took the stand, Mr Tan was asked what the scope of his work was, and the following exchange was recorded:[43]

> Q: After the logs are stuffed into containers, what are you supposed to do with them?
>
> A: Again?
>
> Q: What is the scope of your job after they are stuffed into containers?
>
> A: Okay, after the – okay, the wood, once off-load at the landing area, we are to stuff inside the container and trans-ship to the other port, to PSA port.
>
> Q: After that?
>
> A: After that our job is clear.
>
> Q: Your job is done?
>
> A: Yes.

The purport of Mr Tan's evidence, in other words, is that he was engaged primarily to truck the goods from Jurong Port to PSA Port but knew little about arrangements for the shipment of the goods *out* of Singapore A little later, he was asked to provide more details on the scope of his work and he said this:[44]

> Q: You were supposed to assist Mr Wong to convey the cargo to Hong Kong, does your job stop there, or are you supposed to also discharge from Hong Kong?
>
> A: Convey, what do you mean by convey.
>
> Q: Bring the cargo to Hong Kong.
>
> A: No, we don't bring the cargo to Hong Kong, shipping line will bring the container to Hong Kong.

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43 1st ROP, p 186, line 18 to p 187, line 5.

44 1st ROP, p194, lines 1–19.

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> Q: So you arrange --
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> A: Our job is that once we move the freight -- once the container reach PSA, once the container reach PSA, once custom have take out the [red seal] we bring it to PSA, PSA crane lift down to the floor, it's no more our problem already.
>
> Q: So once the containers reach the vessel to leave Singapore, your job is done?
>
> A: One the container reach PSA, our job is done.
>
> Q: Were you given any particulars of the Hong Kong consignee or buyer of the cargo?
>
> A: No.

50 The District Judge gave short shrift to what she considered to be the Prosecution's misconceived attempt to "discredit the unchallenged evidence by submitting that the bookings of the vessels were tentative" (see the *Trial GD* at [24]). She pointed out that Mr Tan's evidence had to be understood in context. She noted that Mr Tan had explained during the trial that he was not sure how long it would take for all the Rosewood to be unloaded and containerised so he had made a tentative booking for a smaller number of containers (that is to say, smaller than the "100 over containers" that would be required for the full shipment of Rosewood)[45] with the expectation that he would confirm the reservation once he had better knowledge of the progress of the work (*ibid*).[46] This, she held, provided a plausible explanation for why the bookings were tentative. If this were the whole of the relevant context, then I would be inclined to agree with the District Judge that the argument on the tentative nature of the bookings would not take the Prosecution very far. However, the points to be examined are finer than that. It is not just the 16 March 2014 booking that is tentative, but the *entire* nature of the on-shipment project. As I noted above, there were:

45 1st ROP, p 191, line 23.

46 1st ROP, p 192, lines 8–16; p 193, lines 15–25.

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(a) no indications from the shipping or export documents in D5 that the Rosewood was bound for anywhere other than Singapore;

(b) no confirmed departure dates for the Rosewood; and

(c) no evidence of a foreign consignee who would receive the Rosewood or the buyer in respect of whom the respondents would owe a contractual obligation to deliver the Rosewood to by a stipulated time.

51 Mr Tan explained that the bookings of the containers were to be made in batches based on the quantity offloaded, each batch catering for about 6000 logs and requiring 30 containers.[47] D17 had thus made reference to four vessels with a capacity to carry 120 containers. Tentatively, the vessel carrying the first shipment was to leave for Hong Kong on 16 March 2014. After each shipment of 30 containers, Jaguar Express would book another 30 containers "basing on the cargo at hand" for departure in three days' time. Going by Mr Tan's estimates, therefore, it would have easily taken more than 120 containers to ship all the 29,434 logs and at least 15 days (starting from 16 March 2014) to carry out the operation. However, even after the 6164 logs had been offloaded, the respondents took no steps to confirm the booking of the containers and arrange for containerisation for shipment. Mr Tan's explanation tellingly reveals that before the AVA moved in on 14 March 2014, all that Jaguar Express had done was to call the shipping line and "roughly to tell them say that we will be booking 30 containers, but we still not knowing to confirm yet". One would reasonably have expected, if there had indeed been a genuine and confirmed buyer in Hong Kong (or elsewhere), that there ought to

47 1st ROP, p 192, lines 8–16; p 193, lines 15–25..

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have been confirmed bookings by 14 March 2014 for the first batch of containers to be shipped.

52 The upshot of all this, as I explained in my first judgment, is that there is "no clarity from the evidence thus far that the ultimate destination for the Rosewood was always meant to be Hong Kong or, for that matter, *any* other place outside Singapore" (see *No Case GD (HC)* at [66]). The only definite obligation – the "whole project", as Mr Tan put it[48] – was the haulier work of moving the goods from Jurong Port to PSA Port. However, what was to happen to the Rosewood after that was not a matter that was clear from the evidence. Of course, it was possible, as I previously opined, that the "respondents might well be able to satisfactorily explain these matters away but they were *matters which called out for an explanation*" [emphasis added] (at [64]). As it turned out, the respondents have elected not to testify. This raises the following questions: why not, whether an adverse inference should be drawn against them, and, if so, what the appropriate inference ought to be.

Should any adverse inferences be drawn?

53 Section 291(3) of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) provides that if an accused has been called on by the court to give evidence but refuses to do so under oath or on affirmation, the court, "in deciding whether the accused is guilty of the offence, may draw such inferences from the refusal as appear proper." In *Haw Tua Tau*, the Privy Council opined that the proper inferences to be drawn would "depend on the circumstances of the particular case, and is a question to be decided by applying ordinary principles" (at [21]). The following guiding propositions can be distilled from the authorities:

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48 1st ROP, p 185, line 11.

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(a) An adverse inference would properly be drawn where the "facts clearly call for an explanation which the accused ought to be a position to give" (see the decision of the House of Lords in *Murray v Director of Public Prosecutions* [1994] 1 WLR 1 at 11 *per* Lord Slynn, cited with approval by the Singapore Court of Appeal in *Chai Chien Wei Kelvin v Public Prosecutor* [1998] 3 SLR(R) 619 at [82]).

(b) An adverse inference may justifiably be drawn where the circumstantial evidence is such as to demand that the accused proffer some explanation, even if the objective evidence does not itself establish guilt (see *Oh Laye Koh* at [15]).

(c) In appropriate cases, the proper inference to be drawn is that of guilt itself (see the decision of the Singapore Court of Appeal in *Took Leng How v Public Prosecutor* [2006] 2 SLR(R) 70 ("*Took Leng How*") at [42]). In other cases, an adverse inference is an "additional factor to consider in assessing whether the appellant's guilt had been established beyond reasonable doubt" which can lend weight to an assessment of the accused's culpability and, when considered cumulatively with the other evidence, be sufficient to establish guilt (see *Oh Laye Koh* at [17]).

(d) An adverse inference cannot be drawn solely for the purpose of bolstering a weak case; there must be basis for a drawing of an inference and it "cannot fill in any gaps in the prosecution's case; it cannot be used as a make-weight (see *Took Leng How* at [43], citing the decision of the High Court of Australia in *Weissensteiner v R* (1993) 178 CLR 217).

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(e) An adverse inference cannot be drawn if it appears to the court that the accused's "physical or mental condition makes it undesirable for him to be called on to give evidence" (see s 291(6) of the CPC).

54 Applying these principles to the facts, I conclude that an adverse inference should be drawn. As I explained in the previous section, the evidence on the issue thus far was ambivalent and called for an explanation. The question whether the Rosewood had been brought into Singapore solely for the purpose of being brought out again is a matter that is entirely within Mr Wong's knowledge. He could have placed the matter beyond any doubt by taking the stand to give evidence on, among other things, (a) the details of his commercial relationship with Mr Solihi and how he had come to be engaged as the consignee of the shipment of Rosewood; (b) the details of his plan to trans-ship the Rosewood, including the identity of his buyer in Hong Kong; and (c) why he elected not to provide Ms Lye with any details of the ostensible buyer in Hong Kong when he was questioned. And of course, if he had taken the stand, his evidence would have been tested in cross-examination, which is the cornerstone of the adversarial process for getting to the truth (see the decision of the Singapore Court of Appeal in *Teo Wai Cheong v Crédit Industriel et Commercial and another appeal* [2013] 3 SLR 573 at [25]).

55 Mr Pillai had argued that there would be little utility in having Mr Wong take the stand because any evidence he might give at this juncture would "most likely be criticised … as being self-serving." With respect, I find this submission difficult to follow. Taken to its logical conclusion, it would mean that adverse inferences could *never* be drawn against an accused for a refusal to testify on the basis that any evidence given by the accused would invariably be deemed "self-serving". Indeed, it is precisely in circumstances

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when the evidence given by a witness is criticised as being self-serving that cross-examination comes into its own. The evidence of the witness can then be tested and a comparison can be made between what is said on the stand and what was disclosed in statements he made in the course of investigations. Should there be unexplained discrepancies, the witness's credit can be impeached, or submissions can then be made that adverse inferences be drawn (see ss 258 and 261 of the CPC).

56 For these reasons, I do not agree with Mr Pillai that there is "nothing material that Mr Wong may add" or that there was "no utility for Mr Wong to add to the combined strength of the evidence".[49] There plainly was. The question is what adverse inference should properly be drawn from the respondents' refusal to give evidence. In my judgment, the proper inference would be that which I set out at [63] of the *No Case GD (HC)*:

> … It might reasonably be inferred, from the respondents' refusal to disclose the name of their Hong Kong buyer and from the absence of any documentation of sale or any confirmed bookings for the on-shipment of the Rosewood, that the respondents did not have any confirmed buyer in Hong Kong. If they did, there would have been no reason for them to withhold this information from the AVA or from the court, particularly since it would go a long way towards absolving them of legal liability. Following from this, ***the proper interpretation of the evidence would seem to be that the respondents had brought the Rosewood into Singapore in the hope that it might be shipped to Hong Kong if a suitable Hong Kong buyer could be found but with the intention that until and unless this came to pass, the Rosewood was to remain within Singapore***. [emphasis in original removed; emphasis added in bold italics]

Conclusion on the sole purpose condition

57 In order to show that a scheduled species had been "brought into Singapore *solely* for the purpose of taking it out of Singapore*"* [emphasis

[49] Respondents' submissions at para 140(b)(iv).

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added], what is required is a concrete present intention, at the time of entry of the scheduled species into Singapore, for it to be brought out; a contingent future intention is not sufficient. What I mean by this is that there must be proof that the scheduled species is definitely to leave Singapore at some defined date(s); it will not be enough to show – as I have found to be the case here – that the departure remains tentative and subject to the satisfaction of a condition (in this case, the successful sourcing of a buyer in Hong Kong) which might or might not be fulfilled.

58 In my judgment, this comports with the purpose and object of the ESA. The danger of having goods in transit, as I explained in the *No Case GD (HC)*, is two-fold. First, it would allow middlemen to keep goods in limbo in a transit country while they shopped for buyers (at [67] and [68]). Second, it would open the door for smugglers to circumvent CITES protections by disposing of their scheduled species *en route* (at [91]). These dangers persist so long as the specimens remain in transit. The point, for present purposes, is that if a contingent future intention were sufficient, the door would be open for a scheduled species to remain in a transit country indefinitely, thereby lengthening the period of vulnerability. This would undermine the clear Parliamentary intent behind the enactment of the ESA, which is to prevent Singapore, a major international shipping hub, from being used as a staging area for the illegal trade in endangered species (at [93]).

59 As I explained in the *No Case GD (HC)* at [89], the drafters of CITES were concerned that the administrative burden of issuing certificates might be too onerous and so they were careful to specify that there should be no need for certificates to be issued if specimens "were only *passing through* the territory of a third state" [emphasis added] (see David S Favre, *International Trade in Endangered Species: A Guide to CITES* (Martinus Nijhoff

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Publishers, 1989) at p 168). I have stressed the words "passing through" because it contemplates a situation in which the specimens are but journeying through a third state *en route* to its destination. The ESA, which had been passed to give effect to Singapore's obligations under CITES, should as far as possible be interpreted in a manner which gives effect to the objects of the Convention.

60 In ruling this way, I am of course mindful of what I said at [70], which is that the courts cannot set out a test for "transit" which is "*contra legem* the express words of the ESA." This means that I cannot rule, as the Prosecution submitted in the first appeal ought to be the case, that if export documents do not contain details of (a) the ultimate destination of the shipment and (b) a named consignee in that destination country then the shipment must have been considered to have been imported. That would clearly amount to a re-writing of the statute. Rather, I am interpreting the words of s 2(2) of the ESA by holding that in order for it to be said that a scheduled species had been brought into Singapore "solely" for the purpose of being taken out again, what is required is proof that the person in question had a concrete present intention to take it out of Singapore again. In my judgment, this is properly within the scope of the court's interpretive jurisdiction.

61 Viewing matters in the round, I hold that the totality of the evidence, coupled with the adverse inference drawn from the respondents' silence, is sufficient to prove that the sole purpose condition has not been satisfied. On this basis alone, the appeal should be allowed because the Rosewood cannot be considered to have been lawfully imported in compliance with the ESA. However, for the sake of completeness, I will go on to examine the arguments presented in respect of the control condition.

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The control condition

62 At [94] of the *No Case GD (HC)*, I held that:

> … the "control" envisaged by s 2(2)(*c*) of the ESA must be a form of ***active control*** *in the sense that the person in question both* ***knows of the existence of the goods*** *and is* ***in a position to determine how these goods should be used or moved***. This control must be operative. It *cannot merely be the sort of passive superintendence or jurisdictional control contemplated in the notion of "customs control"* (see [81] above). For instance, it *would not suffice if the goods were merely placed in a location where it is subject to the enforcement authority or power of the Director-General or the authorised officer if no* ***actual steps*** *were taken for some form of* ***conscious oversight*** *to be exercised over the scheduled species*. This would also comport with the way that s 2(2) of the ESA is drafted, which seems to contemplate that scheduled species which leave the conveyance they arrived in should nevertheless remain at least as secured as they would be if they had remained on board (see [88] above). [emphasis in original removed; emphasis added in italics and bold italics]

63 As is clear from the above, in order for a scheduled species to be under the "control" of an "authorised officer", two conditions must be satisfied: (a) the authorised officer must *know* of the existence of the goods and (b) the authorised officer must have the *power* to determine how those goods should be used and moved. The touchstone is that of "conscious oversight" – "actual steps" must be taken to secure the integrity of the shipment and it would not suffice if the goods were merely placed within a zone over which the authorised officer exercised general control. If the goods are not in the physical custody of the authorised officer then it must "usually be shown that [the authorised officers] had taken precautions to secure the integrity of the shipment" (at [95]).

64 In the present case, it is not disputed that the Director-General of Customs (and, by extension, the customs officers under his charge who are

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"authorised officers" within the meaning of s 2(1) of the ESA) has the power to control the movement of goods in Jurong FTZ. This was the unchallenged evidence of Deputy Superintendent Roy Tan of Singapore Customs (see *No Case GD (HC)* at [13]) and it is clearly established by statute. Two points will be sufficient to illustrate this. First, the Director-General of Customs is generally empowered to give directions as to the entry or exit of goods in a free trade zone (see reg 2(*c*) of the Free Trade Zone Regulations (Cap 114, Rg 1, 2014 Rev Ed)); second, the stuffing and unstuffing of every container may only take place under the supervision of a customs officer (see reg 10 of the Customs (Container) Regulations (Cap 70, Rg 1, 2002 Rev Ed)).[50] The crux of the dispute, therefore, lies with the criterion of knowledge.

The District Judge's analysis

65 The District Judge dealt with the issue of knowledge at [35] of the *Trial GD*, where she observed as follows:

> …The evidence of Mr Alan Tan establishes *that permission had to be sought from Jurong Port to discharge the cargo.* He said:
>
> Q: After that, do you know where the cargo was moved to?
>
> A: Okay, the cargo was moved when the vessel Oriental Pride came in to Singapore, we discharge the cargo. Before that, the regulation of applying for any vessel to come in to Jurong Port or Singapore port, that's to discharge the cargo. So Jurong Port will give us a landing area. So-called to put the cargo, whether you want to do for local state or trans-shipment state, they will give you an area to put, to leave the -- taking out from the vessel to the landing area.
>
> So the Oriental Pride, Jurong Port have give us an area to put all the wood at the landing area.

[50] Prosecution's submissions at paras 83 and 89; Respondents' submissions at paras 179–182.

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> It is clear from Mr Alan Tan's evidence that J16 was assigned by *Singapore Customs* for the discharge of *the logs*.
>
> [emphasis added]

66 With respect, there are at least three problems with this passage. First, there appears to be a disconnect in the reasoning. The District Judge seems to have inferred, from the fact that permission had to be sought from Jurong Port for the discharge of the cargo, that *Singapore Customs* knew of the existence of the Rosewood. As the Prosecution rightly pointed out, the conflation of the two entities is problematic.[51] As is clear from the schema of the Free Trade Zones Act (Cap 114, 2014 Rev Ed) and the subsidiary legislation issued thereunder, the "authority" of a free trade zone (in this case, Jurong Port Pte Ltd) is distinct from Singapore Customs, which exercises broad supervisory powers over the entry and exit of *all* goods in Singapore and whose officers, additionally, are "authorised officers" within the meaning of s 2(2) of the ESA. It is therefore erroneous to equate permission granted by Jurong Port for the unloading of the cargo with permission granted by Singapore Customs.

67 Secondly, the District Judge moved too quickly from the fact that permission had to be sought for "the cargo" to be unloaded to inferring that J16 had been assigned for the discharge of "the [rosewood] logs" [emphases added]. The relevance of that is this. At the time permission was sought for the discharge of the shipment, the only information about the shipment Jurong Port had (at least as far as the evidence on record shows) was contained in the two cargo manifests which had been submitted to its online system. The cargo manifests only contained the bland description "pieces logs" without any indication that the logs in question were scheduled species protected under the ESA (see the *Trial GD* at [34]).[52] Thus, even assuming for the sake of

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51 Prosecution's submissions at para 94.

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argument that no distinction is to be drawn between Jurong Port and Singapore Customs (as Mr Pillai argued), the fact that permission had been granted for "the cargo" (which, at the time, was known only to be "pieces logs") to be unloaded at J16 would provide no basis for inferring that Singapore Customs had known of the existence of the Rosewood and permitted it to be unloaded at J16.

68 Thirdly, and perhaps most problematically, the District Judge's finding that Singapore Customs had assigned J16 for the unloading of the Rosewood appears to fly in the face of the established facts. For a start, if Singapore Customs had indeed assigned J16 for the discharge of the Rosewood (thus suggesting that it had permitted or sanctioned that it be unloaded there) then why would it have assisted the AVA with the interdiction of the shipment? Furthermore, the evidence clearly shows that the AVA (and, presumably, Singapore Customs who was assisting the AVA with the detention of the Rosewood[53]) was unaware that the Rosewood was being unloaded. This much is clear from the evidence of the four AVA officers who were involved in the seizure, all of whom testified that they only discovered that a portion of the Rosewood had been unloaded *after* they had boarded the Vessel and were informed of this by a member of the crew.[54] Their evidence on this was unchallenged during cross-examination and I accept it as evidence that the relevant authorities (the AVA and Singapore Customs) neither knew nor permitted the Rosewood to be unloaded. For this reason, I also reject Mr

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52 1st ROP at pp 304–305.

53 1st ROP, p 51, lines 13–21.

54 Conditioned statement of Leong Yew Chung at para 3 (1st ROP, pp 315–316); conditioned statement of Raghbir Singh at para 4 (1st ROP, p 318); conditioned statement of Kee Boon Hwei at para 4 (1st ROP, pp 320–321); conditioned statement of Cheong Vincent at para 4 (1st ROP, p 324). See also, the oral testimony of Kee Boon Hwei (1st ROP, p 225, line 19 to p 226, line 12).

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Pillai's submission that the Prosecution had failed to lead evidence that the control condition had not been satisfied.[55]

69 The District Judge was aware of the inadequacy of the description in the cargo manifests, but she did not appear to think that it was a problem, for she later wrote, expressing agreement with the submissions of the respondents, that there "is no provision in the ESA requiring a person to provide specific information about scheduled species for the purposes of transhipment" (see the *Trial GD* at [37]). Instead, she pointed out that all that was required under the ESA was that the scheduled species be accompanied by valid export documentation from the country of export or re-export, as the case might be. Presumably, she found that there was such documentation, because of the export documents which were marked as D5. Furthermore, she later observed, the evidence of Mr Tan was that before the Rosewood could leave Jurong FTZ, a permit would first have to be obtained from Singapore Customs and this would require them to declare the nature of the cargo sought to be moved and a "red seal" would have to be placed on the container before it left Jurong FTZ for PSA Port to ensure that there would be no tampering *en route* (at [38]–[39]).

70 These points are correct, so far as they go, but they do not provide an adequate answer to the matters in issue. The complaint here is *not* that the respondents had failed to provide a "full and correct statement of the goods in transit". As is clear from s 39(1)(*b*) of the Customs Act (Cap 70, 2004 Rev Ed), this is an obligation which falls on the *master* on every vessel entering Singapore, and *not* on the consignee of the goods. Rather, the issue here is that in order for the Rosewood to be said to have been within the "control" of an

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55 Respondents' submissions at para 158.

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authorised officer at all times, the evidence must show that the authorised officers in question knew of the existence of the scheduled species, and the points listed by the District Judge in the *Trial GD*, taken at their highest, only establish that Singapore Customs *would have been* apprised of the contents of the shipment *at the point of their departure from Jurong FTZ*. However, the requirement under s 2(2) of the ESA is clear and unequivocal: in order for a scheduled species to be considered "in transit", it must be within the control of an authorised officer *throughout* the period of time it spends outside a conveyance (see *No Case GD (HC)* at [94]).

Whether knowledge can be inferred from the tip-off

71 In his submissions, Mr Pillai took me through the sequence of events leading up to the seizure of the Rosewood in order to establish that Singapore Customs *knew* – because of the tip-off from RILO AP (see [9] above) – about the Rosewood and were therefore able to exert the requisite control over the shipment from the time it was unloaded at Jurong FTZ.[56] With respect, however, I cannot agree with this argument. As is clear from the correspondence, neither Singapore Customs nor RILO AP *knew* if the Vessel contained Madagascan rosewood – instead, there was merely a "strong suspicion" that it did (see the *No Case GD (HC)* at [10]). Instead, it was the unchallenged evidence of Ms Lye that confirmation could only be had *after* the AVA officers had boarded the Vessel and examined exposed heartwood of the logs (at [14]). This much is clear, also, from the seizure form which was issued shortly after the AVA officers boarded the vessel. In it, it was stated that a total of "29,434 PIECES OF ALLEGED ROSEWOOD (DALBERGIA BARONII) LOGS**"** [capitalisation in original; emphasis added in underline] had been seized under s 11(1) of the ESA.

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[56] Respondents' submissions at paras 159–167.

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72 Furthermore, I think it is important not to miss the wood for the trees and to step back and examine the core of the notion of control. During the first appeal, the issue before me was whether goods which are deemed to be under "customs control" within the meaning of the Customs Act must *ipso facto* be deemed to be under the "control" of an "authorised officer" within the meaning of s 2(2)(*c*) of the ESA. I answered that in the negative. In my judgment, purposively construed, it was clear that the object of the control requirement was to ensure that "scheduled species which leave the conveyance they arrived in should nevertheless remain at least as secured as they would be if they had remained on board" (at [94]). That being the case, it would not suffice if the scheduled species were merely placed in a locality over which an authorised officer exercised dominion or jurisdictional control (at [98]). Instead, it had to be shown that "*actual steps* had been taken for some form of *conscious oversight* to be exercised over the scheduled species" [emphasis added] (at [94]); and whether such control existed was a "question of fact the answer to which would depend on the circumstances of each case" (at [95]). There is no evidence of such conscious oversight here. Even if it were the case that Singapore Customs and/or the AVA had confirmation that the Vessel contained Rosewood (perhaps because of inside information or otherwise), it would not be sufficient, as there is no evidence that active steps had been taken to secure the integrity of the shipment.

73 In my judgment, therefore, the conclusion to be drawn from the evidence is that "[t]here is no evidence from Mr Tan that any [authorised officer] … was aware of the fact that the Rosewood was being unloaded, let alone that they exercised any control over the process" (see *No Case GD (HC)* at [97]). I would therefore allow the appeal on this ground as well.

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Conclusion

74 As a final point, I note that much has been made of the Prosecution having allegedly flip-flopped on the charge against each respondent by first preferring a charge under s 5(1) of the ESA before amending it to a charge under s 4(1) of the ESA and then, finally, reverting to its original case under s 5(1) of the ESA in the alternative (see the *Trial GD* at [44]).[57] As I observed in *Public Prosecutor v Chua Siew Wei Kathleen* [2016] 2 SLR 713 at [51], if a prosecution is poorly conducted, this will manifest itself in, among other things, weak evidence and poorly-particularised charges. These are matters which will be subjected to the court's scrutiny and are likely to affect the outcome of the case, and might well not be capable of being remedied on appeal as was the case here in relation to the applications to adduce further evidence on appeal. However, the manner in which the Prosecution exercises its charging decision cannot – absenting proof of bad faith, malice, or unconstitutional behaviour – *per se* have a bearing on the forensic exercise, which is to determine whether each and every element of the offence has been proved beyond a reasonable doubt.

75 Having held that the charges under s 4(1) of the ESA are made out, I do not need to consider if the District Judge had erred in not acceding to the Prosecution's request for an amendment of the charges.

76 Pursuant to s 390(1)(*a*) of the CPC, I set aside the acquittals ordered by the District Judge and convict the respondents of the charges preferred against them. I will now hear parties on the proper sentence to be passed.

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57 Respondents' submissions at para 46.

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See Kee Oon
Judge

Kwek Mean Luck, Tan Wen Hsien, Sarah Shi, and Zhuo Wenzhao (Attorney-General's Chambers) for the appellant;
K Muralidharan Pillai, Paul Tan, and Jonathan Lai (Rajah & Tann Singapore LLP) (instructed), Choo Zheng Xi (Peter Low LLC) for the respondents.

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