IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2025] SGCA 40

Court of Appeal / Civil Appeal No 2 of 2023 (Summons No 16 of 2023)

Between

(1) Jumaat bin Mohamed Sayed
(2) Lingkesvaran Rajendaren
(3) Datchinamurthy a/l Kataiah
(4) Saminathan Selvaraju

… *Applicants*

And

Attorney-General

… *Respondent*

In the matter of Originating Application No 480 of 2022

Between

(1) Jumaat bin Mohamed Sayed
(2) Lingkesvaran Rajendaren
(3) Datchinamurthy a/l Kataiah
(4) Saminathan Selvaraju

… *Claimants*

And

Attorney-General

… *Defendant*

JUDGMENT

[Constitutional Law — Constitution — Interpretation]
[Constitutional Law — Natural Justice — Principles of natural justice]
[Constitutional Law — Equality before the law]
[Constitutional Law — Fundamental Liberties — Right to life and personal liberty]
[Criminal Law — Statutory Offences — Misuse of Drugs Act — Presumptions — Sections 17 and 18]
[Courts and Jurisdiction — Jurisdiction]

Jumaat bin Mohamed Sayed and others
v
Attorney-General

[2025] SGCA 40

Court of Appeal — Civil Appeal No 2 of 2023 (Summons No 16 of 2023)
Sundaresh Menon CJ, Belinda Ang Saw Ean JCA, Woo Bih Li JAD, See Kee Oon JAD and Judith Prakash SJ
23 January, 7 May 2025

28 August 2025 Judgment reserved.

Sundaresh Menon CJ (delivering the judgment of the court):

Introduction

1 On the face of it, this is an application to restore an appeal that was deemed to have been withdrawn under the Rules of Court. A panel of five judges was convened to deal with the matter because the underlying appeal that is sought to be restored raises some issues as to the constitutionality of ss 18(1) and 18(2) of the Misuse of Drugs Act 1973 (2020 Rev Ed) (the "MDA"). Those provisions make available to the Prosecution, upon proof of certain predicate facts, a statutory presumption as to the fact of possession of the drugs in question and the accused person's state of knowledge, until the contrary is proved. This is not the first time the constitutionality of the presumptions within the MDA has been challenged. On each previous occasion, the challenge was unsuccessful. Despite this, the applicants contend that the presumptions in

ss 18(1) and 18(2) of the MDA as interpreted and applied in Singapore over the last several decades, and most notably since the decision of the Privy Council in *Ong Ah Chuan and another v Public Prosecutor* [1979–1980] SLR(R) 710 ("*Ong Ah Chuan*"), violate Arts 9(1) and 12(1) of the Constitution of the Republic of Singapore (2020 Rev Ed) (the "Constitution") and the presumption of innocence. They therefore contend that the statutory presumptions should be struck down as void or at least read down in a manner that would bring them into conformity with the demands of the Constitution.

2 As we did in *Tan Seng Kee v Attorney-General and other appeals* [2022] 1 SLR 1347 ("*Tan Seng Kee*"), where the constitutionality of another provision of criminal law was similarly challenged, we first clarify the scope of the controversy before delving into the questions that this matter presents. To begin, this case is not about whether the presumptions in the MDA should be retained or repealed; that is for Parliament to determine. We are also not concerned with the *desirability or merits* of the policy on drug offences (and therefore of the legislative enactments) of Parliament; again, that is for Parliament to determine. The only issue before us concerns whether the presumptions in the MDA are inconsistent with the Constitution.

3 The doctrine of the separation of powers calls for each branch of the state – the Judiciary, the Executive and the Legislature – to respect the institutional space and legitimate prerogatives of the others. It follows that the courts must refrain from trespassing onto what is properly the territory of Parliament. It also follows that each branch must be allowed to exercise fully and fairly the powers it has been allocated. Hence, before the courts will strike down legislation, it must be satisfied that the legislation in question is inconsistent with the Constitution and that the conditions therefore exist to warrant such action (see *Tan Seng Kee* at [11]–[15]).

4 We are conscious that the application before us, that is, CA/SUM 16/2023 ("SUM 16"), is one step removed from the substantive constitutional questions raised in the underlying matter, that is HC/OA 480/2022 ("OA 480") and CA/CA 2/2023 ("CA 2"); as noted at the outset, the application before us is only one to reinstate an appeal that has been deemed withdrawn. While it is necessary to have regard to the applicable procedural requirements, it is, in our view, equally important to have regard to the substantive issues that would be raised in the appeal if it was to be reinstated. We accordingly invited the parties to go beyond the purely procedural questions and to address us on the substantive points, and we now set out our decision on these matters.

5 For completeness, we note that the presumptions in ss 17 and 18 of the MDA (the "MDA Presumptions") as they now stand are in materially the same terms as those that were in force at the time of the applicants' respective prosecutions and appeals. Likewise, the present Arts 9 and 12 of the Constitution are in materially the same terms as the corresponding Articles of the Constitution at that time. For this reason, unless there are material differences in the relevant statutory provision(s) being referenced, we will refer to (a) the Misuse of Drugs Act 1973 (2020 Rev Ed) and the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) as the "MDA"; and (b) the Constitution of the Republic of Singapore (2020 Rev Ed) and the Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint) as the "Constitution".

The procedural history

6 We first set out the procedural history of this matter.

7 The applicants are all prisoners who have been sentenced to death. They were each convicted of an offence of drug trafficking under s 5 of the MDA and

subsequently sentenced to the mandatory death penalty. Their appeals against conviction and sentence were dismissed by this court. An application for permission to make a review application under s 394H of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) brought by one of the applicants, Mr Datchinamurthy a/l Kataiah, was also dismissed by this court. We also dismissed a further application of the same nature as that previously mentioned that was filed by Mr Datchinamurthy.

The application in OA 480

8 On 22 August 2022, the applicants filed OA 480. They sought permission to apply for the following reliefs pursuant to O 24 r 5 of the Rules of Court 2021 ("ROC 2021"):

> a. A Declaration that the Presumptions contained in Section 18(1) and 18(2) of the Misuse of Drugs Act 1973 ("MDA") which were imposed upon the Claimants should be read down and given effect as imposing an evidential burden only in Compliance with Articles 9(1) and 12(1) of the Constitution and the Common law Presumption of innocence.
>
> b. Alternatively, a Declaration that the Presumption upon Presumption contained in Section 18(2) read with Section 18(1) of the MDA which were imposed upon the Claimants are unconstitution [*sic*] for violating Articles 9(1) and 12(1) of the Constitution.
>
> c. A Prohibitory order against the execution of the death sentences upon the Claimants.

9 OA 480 was dismissed by a Judge of the General Division of the High Court (the "Judge") on 25 November 2022: see *Jumaat bin Mohamed Sayed and others v Attorney-General* [2022] SGHC 291 ("*Jumaat (OA 480)*"). In brief, the Judge found that there were procedural difficulties with the application. She noted that the application had been brought beyond the three-month deadline imposed in the ROC 2021 (*Jumaat (OA 480)* at [17]–[18]), and further, that judicial review was not an appropriate mechanism for

the applicants to challenge their convictions and sentences since this amounted to a collateral attack on the court's earlier decisions in the criminal cases brought against them (*Jumaat (OA 480)* at [19]–[22]). The Judge nonetheless went on to consider the merits, and held that in any event, there was no arguable case that Arts 9(1) and 12(1) of the Constitution were infringed by the provisions in question; ss 18(1) and 18(2) of the MDA were consistent with the principles set out by the Privy Council in *Ong Ah Chuan* (see [59] below) (*Jumaat (OA 480)* at [40]–[47]). We expand on this below at [20]–[25].

The appeal in CA 2 and its deemed withdrawal

10 Dissatisfied with the Judge's decision in OA 480, the applicants filed an appeal on 23 December 2022, namely CA 2. The applicants then failed to file the necessary documents for the appeal stipulated in O 19 r 30(4) of the ROC 2021 within the specified deadline. As a result, CA 2 was deemed withdrawn pursuant to O 19 r 30(6) of the ROC 2021.

SUM 8

11 Some months later, on 31 March 2023, the applicants filed CA/SUM 8/2023 ("SUM 8"), in which they sought (a) the reinstatement of CA 2; and (b) an extension of time to file the relevant documents for CA 2 to no later than eight weeks following the determination of their applications for Mr Edward Fitzgerald KC and Mr Theodoros Kassimatis KC to represent them in the proceedings.

12 On 25 May 2023, Steven Chong JCA ("Chong JCA"), sitting as a single Judge of this court, summarily dismissed the application: see *Jumaat bin Mohamed Sayed and others v Attorney-General* [2023] 1 SLR 1437 ("*Jumaat (SUM 8)*"). Chong JCA found that OA 480 and CA 2 were, in essence, a

challenge against the applicants' convictions and therefore amounted to an impermissible attempt to reopen their concluded and unsuccessful criminal appeals. He concluded that there were no merits in CA 2 and therefore no basis to reinstate that appeal. Additionally, while the extent of the delay in filing the required documents for the appeal was short, the reason for the delay was questionable since the applications for the *ad hoc* admissions of Mr Edward Fitzgerald KC and Mr Theodoros Kassimatis KC had yet to be filed. We expand on Chong JCA's decision below at [27]–[28].

SUM 16

13 The applicants then filed SUM 16 on 6 June 2023, which is the matter before us. By this, they seek, in essence, orders that "the full Court of the Court of Appeal set aside" Chong JCA's decision in respect of SUM 8, and consequently, the reinstatement of CA 2 and an extension of time to file the relevant documents in that appeal.

14 Following this, applications for Mr Edward Fitzgerald KC and Mr Theodoros Kassimatis KC to represent the applicants were filed on 11 August and 11 July 2023, respectively. We refer to these as the "Admission Applications", both of which were heard on 23 November 2023 and subsequently dismissed by the General Division of the High Court on 30 January 2024: see *Kassimatis, Theodoros KC v Attorney-General and another and another matter* [2024] SGHC 24. Appeals to this court were dismissed on 8 November 2024: see *Kassimatis, Theodoros KC v Attorney-General and another and another appeal* [2024] 2 SLR 410 ("*Kassimatis (CA)*").

15 We subsequently heard the parties in SUM 16 on 23 January 2025. At that time, we observed that the parties had engaged primarily with the

procedural issues that arise in SUM 16. However, the underlying substantive issues – relating to the constitutionality of the presumptions within the MDA – had not been adequately canvassed in their submissions. We therefore invited the parties to tender further submissions on a number of issues, including on the nature and effect of the MDA Presumptions, and whether, and if so why, the presumptions may be incompatible with the Constitution.

The applicants' arguments in OA 480

16 The applicants' case in OA 480 had been framed in the following manner. They submitted that Arts 9 and 12 of the Constitution – which, among other things, encompass the fundamental rules of natural justice – guarantee the "presumption of innocence". As to the content of the "presumption of innocence", it was submitted that this necessitates that the Prosecution prove each and every element of the offence beyond a reasonable doubt. On this basis, it was submitted that ss 18(1) and 18(2) of the MDA violate the constitutionally protected "presumption of innocence" because their effect is to shift the legal burden of proof in respect of certain key elements of the offence in question from the Prosecution to the accused person. This is then exacerbated because the provisions can be "stacked", in that they can apply concurrently in the same case, allowing the Prosecution to make its case by proving just a scant set of facts.

17 In addition, because the presumptions in ss 18(1) and 18(2) of the MDA can only be displaced by the accused person proving the contrary on the balance of probabilities, there could be a situation where an accused person is convicted despite there being a reasonable doubt as to a particular element of the offence, for example, where he or she is able to raise a reasonable doubt as to the veracity of the presumed fact, but is unable to disprove that fact on the balance of

probabilities. This, according to the applicants, offends the "presumption of innocence".

18 The applicants added a gloss to their case, contending that the "presumption of innocence" should be given added weight when interpreting ss 18(1) and 18(2) of the MDA because of the severity of the penalties that are imposed for drug trafficking.

19 The applicants also submitted that in the event the court was not persuaded to strike down these provisions, it should nonetheless interpret them in such a way that the presumptions would interfere with the rights of accused persons to a degree that was no more than necessary. To this end, they submitted that the court should interpret the provisions in such a way that the statutory presumptions would be rebutted if the accused person was to raise a reasonable doubt as to the veracity of the presumed fact, rather than to disprove the presumed fact on the balance of probabilities. In other words, they contended that the presumptions should be read down to impose only an *evidential* rather than a *legal* burden of proof on the accused person in respect of the presumed fact.

The Judge's decision in OA 480

20 The Judge dismissed the application in OA 480, noting the procedural deficiencies in the application (see [9] above). On the substantive merits, the Judge analysed, among other things, the effect and ambit of the presumptions in s 18 of the MDA and their compatibility with Arts 9 and 12 of the Constitution.

21 On procedure, the Judge held that the application for permission to commence judicial review proceedings had been brought outside the

three-month period mandated under O 24 r 5(2) of the ROC 2021. Specifically, the application had been brought more than three months after the final judicial determinations were made in each of the applicants' criminal cases. While the Judge acknowledged the court's general power under O 3 rr 2(1) and 2(4) of the ROC 2021 to waive such non-compliance in the interests of justice, she did not do so as she found no merit in the application for permission (see *Jumaat (OA 480)* at [17]–[18]).

22 In addition, the Judge concluded that the declaratory reliefs that the applicants sought were ultimately directed at challenging the propriety of their convictions. This followed from the suggestion that the statutory presumptions relied on by the Prosecution were invalid. In these circumstances, the Judge considered that this amounted to a collateral attack on the earlier criminal decisions. If sufficient reason existed to reconsider their convictions, the proper mode for seeking such reconsideration would have been by way of a criminal review application. However, having regard to the issues raised, the applicants would not have been able to meet the requirements for the court to exercise its power of review under s 394H of the Criminal Procedure Code 2010 (2020 Rev Ed) ("CPC"), since, among other difficulties, it could not be said that these were new points that could not have been raised at the time of the original proceedings (see *Jumaat (OA 480)* at [19]–[22]).

23 Turning to the substantive merits of the application, the Judge first considered the effect and ambit of the presumptions under s 18 of the MDA. It was not disputed below (and also not disputed before us) that to rebut a fact that is presumed pursuant to s 18 of the MDA, the accused person is required to disprove it on the balance of probabilities. The Judge considered these presumptions to be "presumptions of *fact*" (see *Jumaat (OA 480)* at [27]–[34]).

24 The Judge considered that the applicants would have to establish that the operation of the presumptions under s 18 of the MDA was contrary to Arts 9 and/or 12 of the Constitution in order to obtain the relief they sought. The applicants' reliance on Art 12(1) of the Constitution was misplaced because they had not suggested that the provisions in question are discriminatory. In relation to Art 9(1) of the Constitution and the requirement that a statute must comply with the fundamental rules of natural justice, the Judge regarded *Ong Ah Chuan* as directly relevant. There, the Privy Council held that the equivalent of s 17 of the MDA, namely the presumption of trafficking, was not contrary to Art 9(1) of the Constitution. The applicants had not suggested that there was any difference between the presumption held to be constitutionally valid in *Ong Ah Chuan*, and the presumptions under s 18 of the MDA which were the subject of the application. In *Ong Ah Chuan*, the Privy Council held that while Art 9(1) did encompass the fundamental rules of natural justice, what this required was that a person should not be punished for an offence unless it has been established to the satisfaction of an independent and unbiased tribunal that he committed it and, as a corollary, that there should be material before the court that is logically probative of facts sufficient to constitute the offence with which the accused person is charged (see *Jumaat (OA 480)* at [34]–[47]). Having articulated this rule, the Privy Council nevertheless held that the presumption equivalent to that in s 17 of the MDA did not offend Art 9(1) of the Constitution. In the absence of any material difference between the operation of s 17 and s 18 of the MDA, the same position that applied in relation to the former should likewise apply to the latter.

25 In the light of several precedent decisions of this court, the Judge held that the "presumption of innocence" was consistent with the use of statutory presumptions (see *Jumaat (OA 480)* at [48]–[65]).

The decision in SUM 8

26 As mentioned previously, the applicants appealed against this decision in CA 2, which appeal was deemed to have been withdrawn. SUM 8 was the applicants' application to reinstate CA 2 (see [10]–[11] above).

27 Chong JCA, who dealt with SUM 8, held that OA 480, and consequently CA 2, was essentially a challenge against the applicants' convictions which in turn amounted to an attempt to review the *concluded* criminal appeals with respect to their convictions. The proper procedure to mount such a challenge following their concluded criminal appeals was by way of a criminal review application under s 394H of the CPC or by invoking the inherent power of the court. The applicants, however, would have failed to satisfy the cumulative requirements under s 394J of the CPC and thereby would have failed to establish a legitimate basis for the exercise of the appellate court's power of review because their arguments on the unconstitutionality of the presumptions in s 18 of the MDA could have been raised earlier with reasonable diligence. For the same reason, the court would not exercise its inherent power to reopen a concluded criminal appeal. The applicants could not circumvent the more stringent test mandated under s 394J of the CPC by purporting to frame the application under a different procedure, that is, by way of judicial review under O 24 r 5 of the ROC 2021. This fundamental procedural defect was sufficient to dispose of SUM 8 (see *Jumaat (SUM 8)* at [25]–[32]).

28 Nonetheless, Chong JCA considered the arguments raised by the applicants. He gave short shrift to the applicants' reason for the delay – that they faced challenges in filing the Admission Applications – especially since the Admission Applications had not even been filed yet and there was no explanation why this was so (see *Jumaat (SUM 8)* at [36]–[37]). Additionally,

there was no merit whatsoever in the reliefs sought in CA 2 and it served no purpose to either restore CA 2 or grant any extension of time for the filing of the necessary documents (see *Jumaat (SUM 8)* at [38]). He accordingly dismissed SUM 8.

The parties' cases in SUM 16

29 The parties' submissions on SUM 16 were initially largely confined to the procedural aspects of Chong JCA's order in SUM 8. As mentioned above at [15] and further explained below at [34]–[35], we considered this insufficient because the underlying substantive issues raised in OA 480 and CA 2 – relating to the constitutionality of the MDA Presumptions – had not been adequately canvassed. At our invitation, the parties tendered further submissions in response to several questions posed by us, including the following:

(a) What is the nature and status of the "presumption of innocence"? Does the "presumption of innocence" have constitutional status, or is it simply a rule of the common law? If the "presumption of innocence" has constitutional status, what is the content and substantive meaning of the presumption?

(b) Do the MDA Presumptions displace the legal burden on the Prosecution to prove the guilt of the accused person, or is it only an evidential presumption or inference that the court must draw upon proof of certain predicate facts?

(c) Are the MDA Presumptions incompatible with the "presumption of innocence" and if so, does that affect their validity?

30 As to the first of these categories of questions, the applicants submit that the "presumption of innocence" is the converse of the proposition that the

Prosecution must prove each element of an offence beyond a reasonable doubt. They contend that this is a fundamental rule of natural justice that is encapsulated within Art 9(1) of the Constitution, and they maintain that this was established in *Ong Ah Chuan* at [27]. As against this, the Attorney-General (the "AG") takes the position that the "presumption of innocence" is a rule of common law and does not have constitutional status. The AG does not accept that *Ong Ah Chuan* held that the "presumption of innocence" is part of the Constitution. The AG further argues that it is implausible that the presumption could be encapsulated within the Constitution when its meaning is unclear and potentially expansive. Further, the Constitution does not expressly refer to the presumption; it is not a fundamental rule of natural justice that can be read into the Constitution; and it cannot be implied as a matter of necessity from the express text of the Constitution.

31 As to the nature and effect of the MDA Presumptions, both parties agree that, upon proof of the relevant predicate fact(s), the MDA Presumptions require the court to presume the fact in question which forms an element of the offence and the burden is then on the accused person to disprove that fact. In this sense, they are rebuttable presumptions of law.

32 Finally, on the constitutionality of the MDA Presumptions, the applicants contend that the MDA Presumptions are unconstitutional under Art 9(1) of the Constitution because they contravene the fundamental rules of natural justice and also (unjustifiably) deprive accused persons of their "life" or "liberty". At the hearing on 7 May 2025, counsel for the applicants, Mr Marcus Teo ("Mr Teo"), sought to make an additional submission that the MDA Presumptions are also incompatible with Art 12(1) of the Constitution. The AG counters by arguing that the MDA Presumptions are compatible with the "presumption of innocence" because they do not displace the Prosecution's

overall legal burden to prove the offence beyond a reasonable doubt. In any case, the MDA Presumptions are not contrary to the Constitution which does not include or encompass the "presumption of innocence". Hence, if the MDA Presumptions are incompatible with the "presumption of innocence", the latter (being a common law principle) would be overridden by the former (being a statutory construct). Finally, the MDA Presumptions cannot be read down as prayed for by the applicants.

Issues to be determined

33 As has been noted, the parties' submissions in SUM 16 focused on a range of *procedural* issues. These concerned the jurisdiction of the court, the power of a single Judge of the Court of Appeal to make the orders in question in SUM 8, and the question of whether permission ought to be granted under s 58(4)(*b*) of the Supreme Court of Judicature Act 1969 (2020 Rev Ed) ("SCJA") to vary or discharge the order made in SUM 8 by Chong JCA.

34 In our judgment, however, it would have been unsatisfactory to consider these procedural issues without having regard to the *substantive* questions that were raised in CA 2 in relation to the constitutionality of the MDA Presumptions. It seemed to us inappropriate to adjudicate on SUM 16 in isolation from the substantive questions which would come to the fore if CA 2 was to be reinstated. Is there at least a degree of merit in those substantive questions that would warrant the reinstatement of CA 2?

35 At the same time, it was evident from the submissions that the substantive issues had not been sufficiently addressed. At the hearing on 23 January 2025, we questioned counsel in an attempt to tease out where these issues might lead, and this culminated in all counsel agreeing that it would indeed be sensible to address the substantive issues. We therefore framed a

series of questions and invited submissions upon them (see [29] above). The overarching question is whether the MDA Presumptions are inconsistent with the protections enshrined in Art 9(1) and, in the light of Mr Teo's late submission (see [32] above), also in Art 12(1) of the Constitution.

36 To this end, five main issues arise for our consideration:

(a) what the nature and effect of the MDA Presumptions are;

(b) whether the MDA Presumptions are inconsistent with a fundamental rule of natural justice that is enshrined in Art 9(1) of the Constitution;

(c) whether the MDA Presumptions violate the principle of equality under Art 12(1) of the Constitution;

(d) whether the court has the power to read down the MDA Presumptions; and

(e) in the light of our holdings on the foregoing issues, whether the reliefs sought in SUM 16 – principally for CA 2 to be reinstated – should be granted.

The MDA Presumptions are rebuttable presumptions of law that require an accused person to disprove the presumed fact(s) on the balance of probabilities

37 We first set out what the MDA Presumptions are, how they operate and what their nature is. Turning first to the express language of the provisions, s 17 of the MDA states:

> **Presumption concerning trafficking**
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> **17.** Any person who is proved to have had in his or her possession more than —

> [specified quantities of particular drugs]
>
> whether or not contained in any substance, extract, preparation or mixture, is presumed to have had that drug in possession for the purpose of trafficking unless it is proved that his or her possession of that drug was not for that purpose.

Sections 18(1) and 18(2) of the MDA state:

> **Presumption of possession and knowledge of controlled drugs**
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> **18.**—(1) Any person who is proved to have had in his or her possession or custody or under his or her control —
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> (*a*) anything containing a controlled drug;
>
> (*b*) the keys of anything containing a controlled drug;
>
> (*c*) the keys of any place or premises or any part thereof in which a controlled drug is found; or
>
> (*d*) a document of title relating to a controlled drug or any other document intended for the delivery of a controlled drug,
>
> is presumed, until the contrary is proved, to have had that drug in his or her possession.
>
> (2) Any person who is proved or presumed to have had a controlled drug in his or her possession is presumed, until the contrary is proved, to have known the nature of that drug.

38 These provisions operate such that upon proof of a *primary or predicate* fact, a *presumed* fact is established, which in turn may be rebutted when the contrary of that presumed fact is proved.

39 It is uncontroversial that the presumptions in ss 18(1) and 18(2) of the MDA can operate concurrently to presume, upon proof of the predicate fact, that the accused person had in his or her possession the relevant drugs and that the accused person had knowledge of the nature of those drugs. This is so simply as a matter of statutory interpretation, and we so held in *Zainal bin Hamad v Public Prosecutor and another appeal* [2018] 2 SLR 1119 ("*Zainal*") (at [46]):

> We emphasise, in particular, the fact that the statutory scheme of the MDA makes clear that s 18(2) is to operate as an ancillary provision to s 18(1), in the sense that where an accused is in physical control of an object, the Prosecution may rely on s 18 as a whole to invoke a presumption of possession and also of knowledge of what it is that the accused is in possession of. Further, s 18, as a whole, stands apart from s 17 in the sense that it is an entirely separate section and deals with the distinct issue of *knowing possession*. We add that Parliament has framed s 18(2) in terms that it may be invoked whether the fact of possession is proved or presumed.
>
> [emphasis in original]

(See also *Kassimatis (CA)* at [49], citing previous instances where the presumptions in ss 18(1) and 18(2) of the MDA have been used together, such as *Mohammad Farid bin Batra v Public Prosecutor and another appeal and other matters* [2020] 1 SLR 907 at [19]–[20], [32] and [111]–[114]; *Obeng Comfort v Public Prosecutor* [2017] 1 SLR 633 ("*Obeng Comfort*") at [38], [46] and [51]; and *Muhammad Ridzuan bin Md Ali v Public Prosecutor and other matters* [2014] 3 SLR 721 at [70]–[84]).

40 As for whether the presumption concerning trafficking in s 17 of the MDA may be applied alongside the presumptions in s 18 of the MDA, this court – in a line of authorities beginning with *Mohd Halmi bin Hamid and another v Public Prosecutor* [2006] 1 SLR(R) 548 – has held that the presumptions under the two provisions cannot be applied together in the same case (see also *Tang Hai Liang v Public Prosecutor* [2011] SGCA 38 at [18]–[19]; *Hishamrudin bin Mohd v Public Prosecutor* [2017] SGCA 41 at [48]; *Zainal* at [37]–[52]; and *Ramesh a/l Perumal v Public Prosecutor and another appeal* [2019] 1 SLR 1003 at [58]). Thus, the Prosecution may, in any given case, rely only on the presumption in s 17, or the presumptions in ss 18(1) and/or 18(2) of the MDA.

41 As to the *nature* of the MDA Presumptions, we first consider this at a conceptual level. In *Lau Siew Kim v Yeo Guan Chye Terence and another* [2008] 2 SLR(R) 108 ("*Lau Siew Kim*"), we explored the different types of presumptions and considered how they applied (at [43]–[44]):

> 43 The law recognises, either as a matter of common sense or policy, that in certain situations, specific assumptions or *presumptions* need to be made. In certain situations, these presumptions are conclusive, in which case they are irrebuttable and must be applied by the court without qualification. In other circumstances, the court is required to apply the presumption unless it is disproved. The weakest form of presumption is where there is no legal compulsion to apply it; it is left to the discretion of the court as to whether it should operate in the circumstances of the case: see Jeffrey Pinsler, *Evidence, Advocacy and the Litigation Process* (LexisNexis, 2nd Ed, 2003) at p 251. ***These presumptions are respectively characterised as irrebuttable presumptions of law, rebuttable presumptions of law and presumptions of fact. The category within which [the presumption] falls delineates the preliminary parameters for the court's application of that presumption – if it is a presumption of law, the court must apply the presumption whenever certain specific circumstances are present from the facts of a case; if it is a presumption of fact, however, the court has the discretion whether or not to apply [the presumption].***
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> 44 In Sudipto Sarkar & V R Manohar, *Sarkar's Law of Evidence* (Wadhwa and Company Nagpur, 16th Ed, 2007) ("*Sarkar*"), the authors lucidly explain the basis for presumptions of fact and law at vol 1, pp 101–102:
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> > ***Presumptions of fact*** or *natural presumptions* are inferences which are naturally and logically drawn from the experience and observation of the course of nature, the constitution of human mind, the springs of human action, the usages and habits of society. …
> >
> > …
> >
> > Presumptions of law or *artificial presumptions* are inferences or propositions established by law, – the inferences, which the law peremptorily requires to be made whenever the facts appear which it assumes as the basis of that inference. The presumptions of law are in reality rules of law, and part of the law itself and the court may draw the inference whenever the requisite

> facts are developed in pleadings [*etc*]. *Presumptions of law are based, like presumptions of fact on the uniformity of deduction which experience proves to be justifiable; they differ in being invested by the law with the quality of a rule, which directs that they* ***must*** *be drawn*; they are not permissive like natural presumptions which may or may not be drawn …
>
> [emphasis in original in italics and bold italics; emphasis added in bold underlined italics]

42 *Lau Siew Kim* concerned the characterisation of the presumption of resulting trust. We found that such a presumption "stems from a purported understanding of human nature derived, in turn, from common experience and the societal climate", thereby suggesting it was a presumption of *fact*. But we noted that it had come to be "elevated to become a *rule of law*" in that "[i]t is a *principle of equity* which, though also based on the 'uniformity of deduction which experience proves to be justifiable', is additionally imbued or 'invested by the law with the quality of a rule'" [emphasis in original] (*Lau Siew Kim* at [45]). We concluded there that the presumption of resulting trust is a rebuttable presumption of *law* arising whenever certain circumstances are present, although the *strength* of the presumption may vary according to the facts of the case and contemporary community attitudes and norms. We went on to observe that one might even view the presumption of resulting trust as a mixed presumption of law *and* of fact (*Lau Siew Kim* at [46]). The categories of presumptions set out in *Lau Siew Kim* were later affirmed in *Lim Koon Park and another v Yap Jin Meng Bryan and another* [2013] 4 SLR 150 ("*Lim Koon Park*") (at [55]–[58]).

43 And as to the related question of what the burden on the Prosecution is in such circumstances, we find it helpful to recall the observations of Yong Pung How CJ (sitting in the High Court) in *Lee Boon Leng Joseph v Public Prosecutor* [1996] 3 SLR(R) 655 (at [27]):

> … One needs no reminder that the burden on the Prosecution is always one of proof beyond reasonable doubt. In cases where a statutory presumption operates, it is still incumbent on the Prosecution to prove beyond reasonable doubt the facts necessary to trigger the presumption. …

44 There is a further question as to what the burden is on the party faced with the task of rebutting a presumed fact. This was explained by the learned authors of Colin Tapper, *Cross and Tapper on Evidence* (Oxford University Press, 12th Ed, 2010) (at pp 133–134):

> The structure of all true presumptions requires first the proof of a basic fact or facts. Different consequences then follow so far as the establishment of the presumed fact is concerned. At its weakest, the only effect of proving the basic fact is that the presumed fact *may* be found by the trier of fact. In other words, the logical inference of the presumed fact from proof of the basic fact attracts a measure of formal endorsement, and casts at most a tactical burden of rebuttal. Such presumptions have no effect upon the burden of proof in either of its two principal senses, and need here no further consideration. [Footnote: In traditional terminology, these would be described as presumptions of fact.] Two possibilities remain, one relating to the evidential, and one relating to the persuasive, burden. [Footnote: In traditional terminology, these would be described as rebuttable presumptions of law.] ***If, after proof of the basic fact, the presumed fact must be taken to be established in the absence of evidence to the contrary, then an evidential burden has been cast upon the opponent of the presumed fact and the presumption can reasonably be described as an evidential presumption. On the other hand, if, after proof of the basic fact, the presumed fact must be taken to be established unless the trier of fact is persuaded to the appropriate standard of the contrary, then a persuasive burden has been cast upon the opponent of the presumed fact, and the presumption can reasonably be described as a persuasive presumption.*** …
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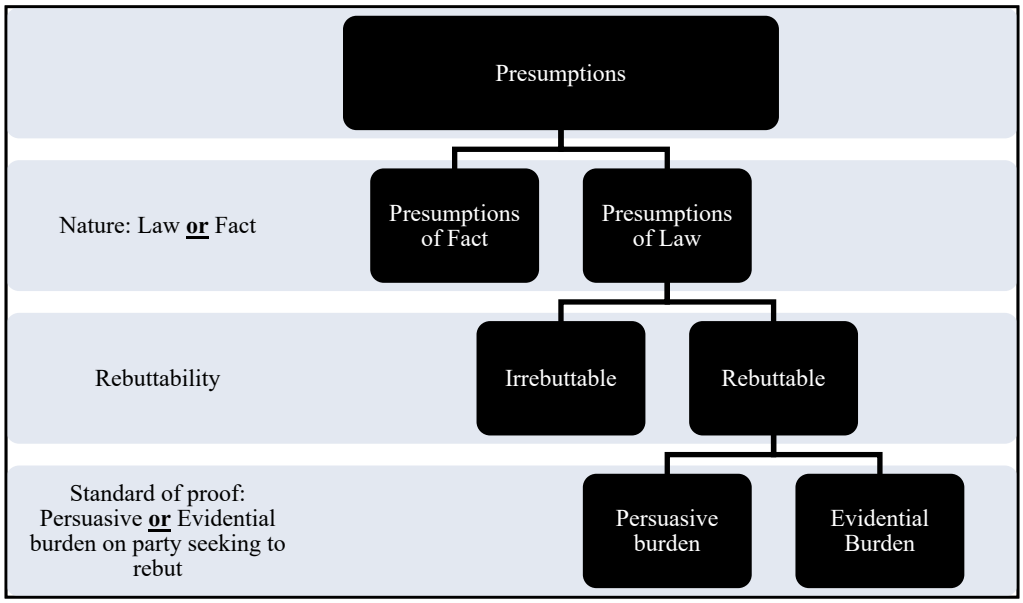
> [emphasis in original in italics; emphasis added in bold italics and bold underlined italics]

45 For ease of understanding, we consider that presumptions can generally be categorised in the following manner:



46 In that light, we turn to the nature of the MDA Presumptions. First, as was noted in *Kassimatis (CA)* ([14] above) (at [48]), the MDA Presumptions, are evidential tools that operate to presume specific facts that are relevant to the issues before the court.

47 Next, as to their nature, and using the taxonomy noted above, it was not disputed that the MDA Presumptions are rebuttable presumptions of law that place the persuasive burden on the accused person to disprove the presumed fact on the balance of probabilities. In our judgment, this is correct and reflects the consistent interpretation by this court of the MDA Presumptions since their enactment.

(a) In relation to the presumption under s 18(1) of the MDA, in *Ilechukwu Uchechukwu Chukwudi v Public Prosecutor*

[2021] 1 SLR 67 (at [171]), we held that "[u]nder s 18(1), the legal burden is on the [accused person] to adduce sufficient evidence to demonstrate that, on the balance of probabilities, he did not actually know about the presence of the item … that turned out to be drugs".

(b) Similarly, in relation to the presumption under s 18(2) of the MDA, in *Masoud Rahimi bin Mehrzad v Public Prosecutor* [2017] 1 SLR 257 (at [41]–[42]), we said it was "settled law in Singapore that an accused against whom the s 18(2) presumption operates bears a legal burden of rebutting this presumption on a balance of probabilities" [emphasis in original omitted]. Accordingly, the accused person will not rebut the presumption of knowledge even if he or she is able to raise a reasonable doubt in relation to that discrete issue, because this is insufficient to prove the contrary of the presumed fact.

(c) In relation to the presumption under s 17 of the MDA, in *A Steven s/o Paul Raj v Public Prosecutor* [2022] 2 SLR 538, we held (at [22]) that where the presumption of trafficking is engaged, the burden is on the accused person to prove on the balance of probabilities that the drugs in his or her possession were not for the purpose of trafficking.

48 We reiterate that this has been the settled jurisprudence of this jurisdiction throughout the existence of the MDA. This derives from the language of the provisions which state that upon proof of the predicate facts, certain other facts shall be presumed unless the contrary is "proved". It follows that the MDA Presumptions are rebuttable presumptions of law that impose a persuasive burden on the accused person to disprove the presumed fact on the balance of probabilities.

49 However, this is not to say that the MDA Presumptions have the effect of displacing or "shifting" the Prosecution's legal burden to prove the guilt of the accused person onto that person. The legal burden to establish the offence remains with the Prosecution because, as this court explained in *Britestone Pte Ltd v Smith & Associates Far East, Ltd* [2007] 4 SLR(R) 855 (at [60]):

> … [t]he legal burden of proof – a permanent and enduring burden – does not shift. A party who has the legal burden of proof on any issue must discharge it throughout. Sometimes, the legal burden is spoken of, inaccurately, as 'shifting'; but what is truly meant is that another issue has been engaged, on which the opposite party bears the legal burden of proof.

50 In the specific context of drug offences, in *Roshdi bin Abdullah Altway v Public Prosecutor and another matter* [2022] 1 SLR 535 (at [72]–[73]), we explained in the following terms that the Prosecution always bears the legal burden of proving the charge against the accused person:

> 72 The law governing the burden of proof and the evidential burden in criminal cases is well established. As explained in *Public Prosecutor v GCK and another matter* [2020] 1 SLR 486 ("*GCK*") at [130], the 'legal burden' is the burden of proving a fact to the requisite standard of proof and this is encapsulated in ss 103 and 105 of the Evidence Act (Cap 97, 1997 Rev Ed) ("EA"). **The legal burden does not shift throughout the trial. The Prosecution always bears the legal burden of proving the charge against the accused person *beyond a reasonable doubt*.**
>
> 73 **The accused person may, however, sometimes bear the legal burden of rebutting a statutory presumption** or proving certain statutory defences and exceptions to liability. Thus, s 107 of the EA provides that an accused person must prove that he comes within any of the 'general exceptions in the Penal Code [Cap 224, 2008 Rev Ed]' or 'any special exception or proviso contained in any other part of the [Penal Code], or in any law defining the offence'. **In such situations, the legal burden is on the accused person to prove, *on the balance of probabilities*, the existence of such facts** (see, in this regard, Jeffrey Pinsler, *Evidence and the Litigation Process* (LexisNexis, 6th Ed, 2017) ("*Pinsler*") at para 12.012).
>
> [emphasis in original in italics; emphasis added in bold]

51 Thus, the MDA Presumptions do not displace or shift the overall legal burden of the Prosecution to prove the guilt of the accused person. It remains for the Prosecution to establish each constituent element of the charged offence, whether by proving them outright or by proving a predicate fact beyond a reasonable doubt in order to invoke a relevant presumption that by operation of law would give rise to a presumed fact. But in relation to such a presumed fact, the burden is on the accused person to rebut the presumed fact. And in the specific context of the MDA, the accused person can only discharge that burden by proving the contrary on the balance of probabilities.

The MDA Presumptions are not incompatible with Art 9(1) of the Constitution

The fundamental rules of natural justice enshrined in Art 9(1) of the Constitution

52 We turn then to evaluate the applicants' arguments that the MDA Presumptions, understood in this way, are inconsistent with Art 9(1) of the Constitution. Naturally, we first turn to Art 9(1) of the Constitution, which states:

> **Liberty of the person**
>
> **9.**—(1) No person shall be deprived of his life or personal liberty save in accordance with law.

53 As explained by Lord Diplock in *Ong Ah Chuan* (at [26]), the term "law" in Art 9(1) of the Constitution encompasses a system of law that incorporates those fundamental rules of natural justice that had formed part and parcel of the common law of England that was in operation in Singapore at the time of the commencement of the Constitution:

> In a Constitution founded on the Westminster model and particularly in that part of it that purports to assure to all

> individual citizens the continued enjoyment of fundamental liberties or rights, *references to 'law' in such contexts as 'in accordance with law'* [as appears in Art 9(1) of the Constitution], 'equality before the law' [as appears in Art 12(1) of the Constitution], 'protection of the law' and the like, in their Lordships' view, *refer to a system of law which incorporates those fundamental rules of natural justice that had formed part and parcel of the common law of England that was in operation in Singapore at the commencement of the Constitution.* It would have been taken for granted by the makers of the Constitution that *the 'law' to which citizens could have recourse for the protection of fundamental liberties assured to them by the Constitution would be a system of law that did not flout those fundamental rules.* If it were otherwise it would be misuse of language to speak of law as something which affords 'protection' for the individual in the enjoyment of his fundamental liberties, and the purported entrenchment (by Art 5) of Arts 9(1) and 12(1) would be little better than a mockery.
>
> [emphasis added in italics]

54 This was explained by this court in *Yong Vui Kong v Attorney-General* [2011] 2 SLR 1189 ("*Yong Vui Kong (Clemency)*") (at [104]), as meaning that those fundamental rules therefore have the status of constitutional rules and can only be abrogated by a constitutional amendment and not by ordinary statute:

> To elaborate, the effect of the Privy Council's ruling in *Ong Ah Chuan* … is that the *Ong Ah Chuan* rules of natural justice have been incorporated into the content or meaning of the term 'law' as used in Arts 9(1) and 12(1) of the Singapore Constitution, and form part of 'the "law" to which citizens [can] have recourse for the protection of [the] fundamental liberties assured to them by the [Singapore] Constitution' (see *Ong Ah Chuan* at 670–671). It follows that these fundamental rules have the status of constitutional rules and, thus, can only be abrogated or amended by a constitutional amendment under Art 5 of the Singapore Constitution. …

55 Further, following from this, legislation that violates any of the fundamental rules of natural justice incorporated in Art 9(1) of the Constitution may be invalidated on the ground of inconsistency with the Constitution. Article 9(1) does not justify or deem valid all legislation that deprives a person of his life or personal liberty (see *Tan Seng Kee* ([2] above) at [254], citing *Yong*

Vui Kong v Public Prosecutor and another matter [2010] 3 SLR 489 at [16] and [75]), since the words "in accordance with law" under Art 9(1) have been interpreted to go beyond formal validity (in the sense of a valid enactment by the Legislature) to incorporate the fundamental rules of natural justice, which are procedural rights aimed at securing a fair trial (see *Tan Seng Kee* at [254], citing *Yong Vui Kong v Public Prosecutor* [2015] 2 SLR 1129 ("*Yong Vui Kong (Caning)*") at [64]).

56 Underpinning the foregoing analysis is the recognition that a right, even if not expressly stated in the Constitution, may be found to be implicitly embedded within its provisions either as a result of construing a given provision in its context or entirety, or as a matter of necessary implication in the light of the Constitution's other express provisions. For example, this court has previously acknowledged that the right to vote, which is not expressly found in the text of the Constitution, is a constitutional right and is best understood as a right found in the Constitution either as a result of construing the Constitution in its entirety or as a matter of necessary implication in the light of the reference to elections contained in other articles of the Constitution (see *Daniel De Costa Augustin v Attorney-General* [2020] 2 SLR 621 ("*Daniel De Costa*") at [7]–[9]; see also *Yong Vui Kong (Caning*) at [69]–[70]). However, where a right cannot be found in the Constitution in these ways, the courts do not have the power effectively to create such rights out of nothing (*Yong Vui Kong (Caning*) at [73]–[75]; *Chijioke Stephen Obioha v Public Prosecutor* [2017] 1 SLR 1 ("*Chijioke Stephen Obioha*") at [14]; *Daniel De Costa* at [8]; *Tan Seng Kee* at [245]).

57 The applicants are not seeking to invoke particular constitutional *rights*, such as the right to freedom of speech or the right to choose one's religion. Rather, they seek to enforce those fundamental rules of natural justice which

were held in *Ong Ah Chuan*, and affirmed in *Yong Vui Kong (Clemency)*, as being embedded within Art 9(1) of the Constitution.

58 The immediate question this gives rise to is what exactly the content of those fundamental rules of natural justice are, that were held to be encompassed within Art 9(1) of the Constitution.

The MDA Presumptions are consistent with the fundamental rules of natural justice referred to in Ong Ah Chuan

59 In the course of the oral arguments, the applicants confirmed that their case is premised on what was said by Lord Diplock in *Ong Ah Chuan* at [27], which we set out for convenient reference:

> One of the fundamental rules of natural justice in the field of criminal law is that *a person should not be punished for an offence unless it has been established to the satisfaction of an independent and unbiased tribunal that he committed it.* This involves the tribunal's being satisfied that all the physical and mental elements of the offence with which he is charged, conduct and state of mind as well where that is relevant, were present on the part of the accused. To describe this fundamental rule as the 'presumption of innocence' may, however, be misleading … What fundamental rules of natural justice do require is that there should be material before the court that is logically probative of facts sufficient to constitute the offence with which the accused is charged.
>
> [emphasis added]

60 The applicants submit that at least one of the following three rules may be understood as being encompassed within what Lord Diplock described as "the fundamental rules of natural justice in the field of criminal law", with constitutional status:

(a) the "Presumption of Innocence", which they contend means that the Prosecution must prove each element of an offence beyond a reasonable doubt;

(b) the "Balance of Probabilities Rule", which they contend means that the Prosecution must prove each element of an offence on the balance of probabilities; or

(c) the "More Probable Case Rule", which they contend means that the Prosecution must establish a factual case, on the existence of each element of an offence, which is more probable than the case advanced by the accused person, even if neither case is proven.

61 We first consider what the "presumption of innocence" might mean, especially since the substantive prayers in OA 480 were expressly premised on this concept and much attention was devoted to this in the submissions. The applicants appear to us to have equated the "presumption of innocence" with the proposition that the Prosecution must adduce evidence sufficient to prove each element of an offence beyond a reasonable doubt. However, they do not explain how they reach that conclusion. In our judgment, that is but one of several possible conceptions of the "presumption of innocence".

62 As the AG points out, the "presumption of innocence" is of ancient vintage, tracing its roots to Babylonian times. Yet, there is little consensus as to its substantive meaning and content. Indeed, we note that the cases have associated the "presumption of innocence" with a range of ideas, which can be distilled to at least three, if not four, conceptions.

63 First, at its most general level, the "presumption of innocence" may be taken as a reference to the rule that the Prosecution carries the burden of adducing sufficient evidence to prove an accused person's guilt. This is captured in the oft-cited remarks of Viscount Sankey LC in *Woolmington v The Director of Public Prosecutions* [1935] AC 462 ("*Woolmington*") (at 481–482):

> … *Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt* subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner, as to whether the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal. *No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.* …
>
> [emphasis added]

64 It may be noted that the passage recognises that even with a singular golden thread, there may be statutory exceptions. In *Chua Boon Chye v Public Prosecutor* [2015] 4 SLR 922 ("*Chua Boon Chye*"), this court was confronted with the question of whether a third party's previous conviction was admissible as evidence against the accused person. In answering this question in the affirmative, the court held that it would be an exaggeration to say that this would entail a "significant inroad" being driven into the "presumption of innocence", and noted that "[t]he mere fact that a third party's conviction is adduced as evidence does not detract from the fact that *the Prosecution still bears the burden of proof*" [emphasis added] (*Chua Boon Chye* at [66(b)]). Further, as will become evident from our analysis of *Ong Ah Chuan* later in this judgment, there is nothing inherently objectionable in the Prosecution being able, in certain circumstances, to prove some part of its case by invoking a statutory presumption that is drawn from a predicate fact that has been proved, and where that presumption may be rebutted by the accused person.

65 Second, the "presumption of innocence" has also been treated as being synonymous with the principle that the accused person is presumed innocent

until proven otherwise. In *XP v Public Prosecutor* [2008] 4 SLR(R) 686 ("*XP v PP*"), V K Rajah JA ("Rajah JA") noted (at [90]–[91]):

> 90 The presumption of innocence is the cornerstone of the criminal justice system and the bedrock of the law of evidence. *As trite a principle as this is, it is sometimes necessary to restate that every accused person is innocent until proved guilty.* As Viscount Sankey LC authoritatively declared in *Woolmington v The Director of Public Prosecutions* [1935] AC 462 at 481-482 (most recently approved in *Took Leng How v PP* [2006] 2 SLR(R) 70 at [27]): …
>
> 91 In other words, as the English Court of Criminal Appeal put it in *R v Dennis Patrick Murtagh and Kenneth Kennedy* (1955) 39 Cr App R 72 at 83, *it is 'not for the accused to establish their innocence'*, save of course in certain special circumstances expressly mandated by Parliament. There are sound policy reasons for this stance. …
>
> [emphasis added]

66 Rajah JA had earlier stated as much in *Jagatheesan s/o Krishnasamy v Public Prosecutor* [2006] 4 SLR(R) 45 ("*Jagatheesan*") (at [61]):

> … A trial judge must also bear in mind that the starting point of the analysis is not neutral. *An accused is presumed innocent* and this presumption is not displaced until the Prosecution has discharged its burden of proof. …
>
> [emphasis added]

67 Although we term this a second conception, it is not distinct from the first, but instead, it may be understood as the rationale or explanation that underlies the first conception. In other words, the Prosecution bears the burden to adduce evidence that is sufficient to prove an accused person's guilt *because* that person is presumed to be innocent to begin with.

68 Third, the "presumption of innocence" could be understood as also encompassing a pronouncement on the particular *standard of proof* that is applicable in this context. On this basis, the Prosecution would carry the burden of adducing evidence that is sufficient to prove an accused person's guilt *beyond*

a reasonable doubt. The applicants adopt this specific understanding of the "presumption of innocence".

69 Although there are allusions to this even in Viscount Sankey's observations in *Woolmington* (at 481–482) (see [63] above), it has been fleshed out in our jurisprudence as well. In *AOF v Public Prosecutor* [2012] 3 SLR 34 (at [314]–[315]), this court observed:

> 314 *It cannot be overemphasised that the need to convict an accused person (such as the Appellant) based on the standard of proof beyond a reasonable doubt* is – as pointed out above – a time-honoured and integral part of our criminal justice system …
>
> 315 *Indeed, any approach to the contrary would be wholly inconsistent with the presumption of innocence* that is the necessary hallmark of any criminal justice system. *It is precisely this presumption that underlies the fundamental principle set out at the outset of this Judgment (see above at [2]) – that the Prosecution bears the legal burden of proving its case against the accused (here, the Appellant) beyond a reasonable doubt.*
>
> [emphasis added]

70 To similar effect, V K Rajah J (as he then was) in *Jagatheesan* (at [46] and [58]–[60]) had this to say:

> 46 *The requirement that the Prosecution has to prove its case against an accused beyond reasonable doubt is firmly embedded and entrenched in the Evidence Act (Cap 97, 1997 Rev Ed) ("EA") as well as in the conscience of the common law.* In fact, this hallowed principle is so honoured as a principle of fundamental justice that it has been accorded constitutional status in the United States (*In re Winship*, 397 US 358 (1970) ("*Winship*") and in Canada (*R v Vaillancourt* [1987] 2 SCR 636). *It is a doctrine that the courts in Singapore have consistently emphasised and upheld as a necessary and desirable prerequisite for any legitimate and sustainable conviction …*
>
> …
>
> 58 … It is also vital to appreciate that the principle that the Prosecution bears the burden of proving its case beyond reasonable doubt embodies two important societal values.

> 59 ***First, it 'provides concrete substance for the presumption of innocence': Winship* at 363.** It is axiomatic that the presumption of innocence is a central and fundamental moral assumption in criminal law. It cannot be assumed that an individual is guilty by mere dint of the fact that he has been accused of an offence, unless and until the Prosecution adduces sufficient evidence to displace this presumption of innocence. …
>
> 61 To summarise, *the Prosecution bears the burden of proving its case beyond reasonable doubt*. … The doctrine is a bedrock principle of the criminal justice system in Singapore because while it protects and preserves the interests and rights of the accused, it also serves public interest by engendering confidence that our criminal justice system punishes only those who are guilty.
>
> [emphasis added in italics and bold italics]

71 Rajah JA in *XP v PP* also described this as "the ultimate rule" (at [31]) and he quite simply stated that "[t]he court cannot convict if a reasonable doubt remains to prevent the presumption of innocence from being rebutted" (at [94]). He went on to state (at [98]):

> … The question for the court in every case is not whether it suspects the accused has committed the crime but whether the Prosecution has proved beyond any reasonable doubt that he has indeed committed it. It is trite that courts can never convict on the basis of suspicion and/or intuition. *Such is the conclusion demanded by and enshrined in that cardinal principle, the presumption of innocence, upon which is founded the most elemental rule of the criminal justice system: that the Prosecution must establish guilt beyond any reasonable doubt.* …
>
> [emphasis added]

72 Even more recently, in *Public Prosecutor v GCK and another matter* [2020] 1 SLR 486 ("*GCK*"), this court stated (at [126]):

> *The fundamental rule of proof beyond a reasonable doubt is considered hallowed precisely because it rests upon the bedrock principle of the presumption of innocence, which is the very foundation of criminal law.* As a practical measure, the rule reduces the risk of convictions arising from factual error. This practical mechanism is itself grounded on the principle that

> allowing for the wrongful conviction of the innocent does violence to our societal values and fundamental sense of justice: see the concurring judgment of Harlan J in the United States Supreme Court case of *Re Winship* 397 US 358 (1970) ("*Winship*") at 373, which was cited in *Jagatheesan s/o Krishnasamy v Public Prosecutor* [2006] 4 SLR(R) 45 ("*Jagatheesan*") at [46] …
>
> [emphasis added]

73 Finally, the "presumption of innocence" has also been seen as a rule of fairness that operates as a shield against punishment without conviction (meaning that it may not be seen only as a rule of proof). In a sense, this may be seen as reflecting the operation of the earlier conceptions, in that because an accused person is presumed to be innocent to begin with, it would be unjust to visit punishment upon that person *unless* the Prosecution had proved that person's guilt, beyond a reasonable doubt in order to secure a conviction, and it is only upon proof to such a standard that we would have confidence that *only* the guilty are liable to be punished.

74 In *GCK*, we observed (at [126]):

> … But there is also an equally powerful rationale that animates the rule [of proof beyond a reasonable doubt], which is that *the coercive power of the State that flows from a conviction is legitimised precisely because it is based on this very principle of proof beyond a reasonable doubt*. The faith that our society places in our criminal justice system stems from its confidence that *only the guilty are punished*: see the majority opinion delivered by Brennan J in *Winship* at 364; see also *XP* ([72] *supra*) at [99], and *Jagatheesan* at [46] and [60].
>
> [emphasis added]

75 The existence of these various conceptions suggests that it would be misleading to regard the "presumption of innocence" as something that is well understood to mean *only* that which the applicants contend (see [60(a)] above). However, what is relevant for our purposes is that it is in that specific sense that the applicants mount their primary case.

76 On this basis, they submit that the MDA Presumptions are constitutionally invalid because they infringe the Presumption of Innocence in the sense that they contend, though they also have two alternative positions that contemplate different standards of proof as noted at [60] above. As to the alternative positions, the applicants contend that even if the Presumption of Innocence does not have constitutional status, at least the Balance of Probabilities Rule or the More Probable Case Rule should. This is because where the Prosecution relies on the MDA Presumptions to establish some of the elements of the offence and its case is just as persuasive as but not more so than the case for the Defence seeking to rebut the relevant presumption, the presumption would require the court to proceed as though the elements of the offence had nonetheless been established.

77 To illustrate, suppose the Prosecution wishes to rely on ss 18(1) and 18(2) of the MDA to establish the elements of possession and knowledge of the nature of the drugs in question. The Prosecution would need only to prove the predicate fact that gives rise to the presumptions, being one of those set out in ss 18(1)(*a*)–18(1)(*d*) of the MDA, namely that the accused person was in possession of:

(a) anything containing a controlled drug;

(b) the keys of anything containing a controlled drug;

(c) the keys of any place or premises or any part thereof in which a controlled drug is found; or

(d) a document of title relating to a controlled drug or any other document intended for the delivery of a controlled drug.

78 The applicants submit that upon proving the predicate fact, the Prosecution would only have adduced some probative evidence pointing to the veracity of the presumed facts (namely, the possession and knowledge of the drugs). Suppose further that the accused person in turn adduces some probative evidence to disprove the presumed facts, albeit evidence that is insufficient to disprove those facts on the balance of probabilities, he or she would have failed to rebut the presumption, and the court will therefore proceed on the basis of the presumed facts. In such a situation, the applicants say that all three positions set out at [60] above would have been infringed:

(a) The Presumption of Innocence – in the sense contended by the applicants – would be infringed because the Prosecution would not have proven the elements of knowledge or actual possession beyond a reasonable doubt where the accused person was able to adduce evidence to raise a reasonable doubt as to these elements.

(b) The Balance of Probabilities Rule would be infringed because it does not follow that the Prosecution would have made its case in relation to the presumed facts on the balance of probabilities where the accused person has failed to rebut those facts on that standard.

(c) The More Probable Case Rule would be infringed where the strength of the case advanced by the accused person to rebut the presumed facts, while not being *more* probable, is *as* probable as the presumed fact.

79 We pause to observe that these positions are highly theoretical constructs which we nonetheless engage with precisely because the applicants have framed their case as such.

80 In our judgment, *Ong Ah Chuan* does not stand for any of the three rules advanced by the applicants. To understand this, it is necessary to unpack just what was meant by Lord Diplock when he referred to a "fundamental rule of natural justice" in *Ong Ah Chuan* (at [27]). Once that is done, it will become readily apparent that *Ong Ah Chuan* does not support the applicants' contentions as to the existence of any of the three rules they have advanced, as summarised at [60] above. The applicants have based their case on the extract of *Ong Ah Chuan* at [27], but in our judgment, this has to be seen in the context of the paragraphs that follow (at [28] and [29]) and also keeping in mind that the issue in that case concerned the constitutionality of the presumption of trafficking. We reproduce these paragraphs together:

> 27 One of the fundamental rules of natural justice in the field of criminal law is that a person should not be punished for an offence unless it has been established to the satisfaction of an independent and unbiased tribunal that he committed it. This involves the tribunal's being satisfied that all the physical and mental elements of the offence with which he is charged, conduct and state of mind as well where that is relevant, were present on the part of the accused. To describe this fundamental rule as the 'presumption of innocence' may, however, be misleading to those familiar only with English criminal procedure. Observance of the rule does not call for the perpetuation in Singapore of technical rules of evidence and permitted modes of proof of facts precisely as they stood at the date of the commencement of the Constitution. These are largely a legacy of the role played by juries in the administration of criminal justice in England as it developed over the centuries. Some of them may be inappropriate to the conduct of criminal trials in Singapore. What fundamental rules of natural justice do require is that *there should be material before the court that is logically probative of facts sufficient to constitute the offence* with which the accused is charged.
>
> 28 In a crime of specific intent where the difference between it and some lesser offence is the particular purpose with which an act, in itself unlawful, was done, in their Lordships' view *it borders on the fanciful to suggest that a law offends against some fundamental rule of natural justice because it provides that upon the Prosecution proving that certain acts consistent with that purpose and in themselves unlawful were done by the accused, the court shall infer that they were in fact done for that*

> *purpose unless there is evidence adduced which on the balance of probabilities suffices to displace the inference. The purpose with which he did an act is peculiarly within the knowledge of the accused. There is nothing unfair in requiring him to satisfy the court that he did the acts for some less heinous purpose if such be the fact.* Presumptions of this kind are a common feature of modern legislation concerning the possession and use of things that present danger to society like addictive drugs, explosives, arms and ammunition.
>
> 29 In the case of the Drugs Act any act done by the accused, which raises the presumption that it was done for the purpose of trafficking, is *per se* unlawful, for it involves unauthorised possession of a controlled drug, which is an offence under s 6. No wholly innocent explanation of the purpose for which the drug was being transported is possible. *Their Lordships would see no conflict with any fundamental rule of natural justice and so no constitutional objection to a statutory presumption (provided that it was rebuttable by the accused)***,** that his possession of controlled drugs in any measurable quantity, without regard to specified minima, was for the purpose of trafficking in them. The Canadian Narcotic Control Act 1960–61, so provides by s 10. In contrast to this the Drugs Act only raises the rebuttable presumption when the quantity of drugs in the possession of the accused exceeds the appropriate minimum specified in s 15. It is not disputed that these minimum quantities are many times greater than the daily dose taken by typical heroin addicts in Singapore; *so, as a matter of common sense, the likelihood is that if it is being transported in such quantities this is for the purpose of trafficking.* All that is suggested to the contrary is that there may be exceptional addicts whose daily consumption much exceeds the normal; but these abnormal addicts, if such there be, are protected by the fact that the inference that possession was for the purpose of trafficking is rebuttable.
>
> [emphasis added]

81 It is clear from these paragraphs that Lord Diplock stated in no uncertain terms that the fundamental rules of natural justice are consistent with, and not offended by, the Prosecution's ability to rely on statutory presumptions to establish particular elements of the offence, and the court *shall* find that those elements of the offence are made out unless the accused person is able to rebut the presumption on the balance of probabilities. This directly contradicts the submissions of the applicants as distilled above. In our judgment, there is

therefore no room to interpret Lord Diplock's holding in *Ong Ah Chuan* at [27] as encompassing any of the three rules that the applicants have put forward.

82 We also note that in coming to this view, Lord Diplock observed, in the context of a presumption as to the purpose for which the accused person had the item in question in his or her possession, that:

> (a) It was fanciful to suggest that such a presumption offends any rule of natural justice where it provides that upon proving a certain fact, the court shall infer the requisite purpose which is consistent with that predicate fact.
>
> (b) As to the standard of proof upon the accused person, it was not unfair to require him to disprove the presumed fact on the balance of probabilities because this was a matter within his or her knowledge.
>
> (c) Such a presumption was seen as a common feature of legislation regulating the use of items dangerous to society.
>
> (d) The presumed fact was consistent with the inferences to be drawn from the proven, predicate fact(s), and if there was any substance in the contention that the presumed fact is not true, it would be open to the accused person to adduce the evidence to rebut it and the accused person would be best placed to do that.

83 In as much as the applicants *rely* on *Ong Ah Chuan*, there is no need to consider whether to depart from that seminal decision. But it is also material to keep in mind the reasons underlying Lord Diplock's view. In our respectful view, those reasons continue to have force. It follows that the propositions advanced in these proceedings on behalf of the applicants are not only wrong in

principle, but they also fail to engage with the rationale underlying *Ong Ah Chuan*.

84 As to what the fundamental rules of natural justice do entail, this was expressly explained in *Ong Ah Chuan* (at [27]):

> … What fundamental rules of natural justice do require is that *there should be material before the court that is logically probative of facts sufficient to constitute the offence* with which the accused is charged.
>
> [emphasis added]

85 This formed the basis on which Lord Diplock held that the presumption of trafficking in s 15 of the Misuse of Drugs Act 1973 (Act 5 of 1973) (corresponding to s 17 of the MDA) was constitutionally valid. The statutory presumption of trafficking builds on proof of the predicate fact (the quantity of drugs found in the possession of the accused person) that is logically probative of the presumed fact (the purpose of trafficking). Thus, it is permissible for the Prosecution to establish that the accused person is in possession of the drug for the purpose of trafficking by proving the large quantity of drugs found in the accused person's possession, which is a predicate fact that is logically probative of the fact of trafficking. As was held in *Ong Ah Chuan* (at [29]), "as a matter of common sense, the likelihood is that if [the drug] is being transported in such [excessive] quantities this is for the purpose of trafficking".

86 In our judgment, what was said in relation to the presumption of trafficking is equally applicable to the presumptions in s 18 of the MDA. As reproduced above at [37], s 18(1) of the MDA provides that upon proof of certain circumstances by the Prosecution, a person is presumed to have had a controlled drug in his possession. As we observed in *Obeng Comfort* ([39] above) (at [34]), this provision deals with secondary possession of the drug in

that the accused person is proven to possess, control or have custody of something which has the drug or which relates to the title in, or delivery of the drug. Seen in this way, it becomes clear that the predicate facts under ss 18(1)(*a*)–18(1)(*d*) of the MDA are logically probative of the presumed fact of possession of the drugs which are contained in or are related to the thing in issue given that those predicate facts lead to the inference of actual possession of the drugs. Likewise, with regard to the presumption under s 18(2) of the MDA, it is reasonable to infer that a person who is in possession of a thing is aware of its nature. This is why, as a matter of common sense and practical application, a person seeking to rebut the presumption of knowledge should be able to say what he thought or believed he was carrying (see *Zainal* ([39] above) at [23(b)] and *Obeng Comfort* at [39]). We explained as much in *Mohammad Azli bin Mohammad Salleh v Public Prosecutor and another appeal and other matters* [2020] 1 SLR 1374 (at [62]):

> [The presumptions of possession and knowledge] apply in a logical and sensible fashion, in that they operate upon proof of one or more of the *indicia* of possession and knowledge. In the natural course of things, possession, custody or control over a container or premises (meaning secondary possession) will tend also to entail an awareness of the existence of the things located within it (meaning actual possession). Likewise, it is reasonable to assume that a person who is in possession of a thing will usually be aware of its nature.

87 Nor is the constitutional position offended by a provision that imposes on the accused person the burden of disproving the presumed facts on the balance of probabilities. We reiterate our observations at [81]–[83] above. As noted there, Lord Diplock had expressly held that there is nothing unconstitutional or unfair in requiring the accused person to bear the burden of disproving the presumed facts on the balance of probabilities, especially where the relevant facts are peculiarly within his or her knowledge. We agree.

88 As to this, Mr Teo, counsel for the applicants, submitted that it is a fallacy to think that it would be *easier* for the accused person to prove facts peculiarly within his or her knowledge. He pointed to there being a difference between a fact that is peculiarly within the knowledge of the accused person and one that is easy for the accused person to prove, noting that the latter did not follow from the former.

89 We agree that one does not necessarily follow from the other. But this is not relevant. The rules of evidence are not validated by their ease of being fulfilled. And the point that Lord Diplock was making, which we agree with, is that as between the Prosecution and the accused person, it is undoubtedly the case that the accused person is better placed to provide an account for and to discharge the burden of proving matters that are peculiarly within his or her knowledge. Mr Teo's response to this was to point to the fact that there are many other provisions of the criminal law that retain the burden on the Prosecution to prove elements such as the accused person's knowledge or intention, which, likewise are peculiarly within his or her knowledge. With respect, this misses the point. The MDA Presumptions are not in place *because* the presumed facts are within the knowledge of the accused person. They are in place as a legislative choice to address a problem that is thought to be a scourge on society (see [112]–[120] and [125]–[126] below). The fact that they pertain to matters within the accused person's knowledge is a consideration that goes to whether this is ultimately an unfair imposition. In our judgment, the question in the final analysis is whether it is constitutionally impermissible for Parliament to provide that upon proving certain predicate facts beyond a reasonable doubt – such as the quantities of drugs in the accused person's possession or that the accused person was in possession of a thing containing drugs – the court shall infer or presume a consequential fact until and unless the accused person is able to rebut

it. As we have demonstrated, the position established by the Privy Council since at least 1980 is that there is nothing unconstitutional about this.

90 Hence, we reject the applicants' submissions that *Ong Ah Chuan* stands for any of the three rules advanced.

91 Faced with the compelling logic of having to interpret what Lord Diplock meant in *Ong Ah Chuan* at [27] *by reference to* the context of what His Lordship said in [28]–[29], Mr Teo fell back to suggesting that Lord Diplock's observations on the operation of the presumptions in [28]–[29] were erroneous because those observations rested on a misunderstanding of the nature of the MDA Presumptions, which His Lordship treated as just inferences. Mr Teo referred us to [14]–[15] of *Ong Ah Chuan* in support of this argument:

> 14 Proof of the purpose for which an act is done, where such purpose is a necessary ingredient of the offence with which an accused is charged, presents a problem with which criminal courts are very familiar. Generally, in the absence of an express admission by the accused, the purpose with which he did an act is a matter of inference from what he did. Thus, in the case of an accused caught in the act of conveying from one place to another controlled drugs in a quantity much larger than is likely to be needed for his own consumption *the inference that he was transporting them for the purpose of trafficking in them would, in the absence of any plausible explanation by him, be irresistible – even if there were no statutory presumption such as is contained in s 15 of the Drugs Act.*
>
> 15 As a matter of common sense the larger the quantity of drugs involved the stronger the inference that they were not intended for the personal consumption of the person carrying them, and the more convincing the evidence needed to rebut it. All that s 15 does is to lay down the minimum quantity of each of the five drugs with which it deals at which the inference arises from the quantity involved alone that they were being transported for the purpose of transferring possession of them to another person and not solely for the transporter's own consumption. There may be other facts which justify the inference even where the quantity of drugs involved is lower than the minimum which attracts the statutory presumption

> under s 15. In the instant cases, however, the quantities involved were respectively 100 times and 600 times the statutory minimum.
>
> [emphasis in original omitted; emphasis added in italics]

92 With respect, we think it is fanciful to suggest that Lord Diplock did not understand either the operation of the presumptions, or the distinction that he himself drew between inferences and presumptions. It is clear to us that at [14]–[15] of *Ong Ah Chuan*, Lord Diplock first examined how the quantity of drugs in the possession of the accused person could give rise to an inference of trafficking even in the absence of the statutory presumption and perhaps in the light of surrounding events, and then considered that the object of the presumption was to specify the quantities at which the inference *must* be drawn even absent other facts. Lord Diplock was acutely aware of the obligatory nature of the presumption in that it mandated the court to find that the presumed facts were established and that the burden would then lie on the accused person to disprove this on the balance of probabilities. At [28], Lord Diplock observed that the court "shall infer" the presumed facts unless the accused person displaces that finding on the balance of probabilities:

> In a crime of specific intent where the difference between it and some lesser offence is the particular purpose with which an act, in itself unlawful, was done, in their Lordships' view it borders on the fanciful to suggest that a law offends against some fundamental rule of natural justice because it provides that upon the Prosecution proving that certain acts consistent with that purpose and in themselves unlawful were done by the accused, the court *shall infer* that they were in fact done for that purpose unless there is evidence adduced *which on the balance of probabilities suffices to displace the inference.* …
>
> [emphasis added]

93 This is also clear from [16] and [17(b)] where Lord Diplock explained the mechanism of the statutory presumption of trafficking in similar terms:

> 16 Whether the quantities involved be large or small, however, *the inference is always rebuttable*. The accused himself best knows why he was conveying the drugs from one place to another and, *if he can satisfy the court, upon the balance of probabilities only*, that they were destined for his own consumption he is entitled to be acquitted of the offence of trafficking under s 3.
>
> 17 So the presumption works as follows: When an accused is proved to have had controlled drugs in his possession and to have been moving them from one place to another:
>
> …
>
> (b) if the quantity of controlled drugs being moved was in excess of the minimum specified for that drug in s 15, that section creates a rebuttable presumption that such was the purpose for which they were being moved, and *the onus lies upon the mover to satisfy the court, upon the balance of probabilities*, that he had not intended to part with possession of the drugs to anyone else, but to retain them solely for his own consumption.
>
> [emphasis added]

94 We, like Lord Diplock, accept that as a matter of common sense, courts can, having regard to the quantity of the drugs, the surrounding circumstances and the absence of any other explanation, conclude (as an inference in the absence of an admission) *without resorting to the presumption* that the purpose for which the accused person came into possession of the drugs was to traffic them. However, arriving at this finding by way of an inference is distinct from doing so pursuant to a statutory presumption, and Lord Diplock was plainly aware of the difference. It is wrong to suggest that Lord Diplock mistakenly thought the statutory presumption in *Ong Ah Chuan* was in fact just a reference to an inference.

95 Accordingly, we reject the applicants' submission that Lord Diplock did not properly understand his own holding in *Ong Ah Chuan* in respect of the nature of the statutory presumption of trafficking.

The court cannot read new rights into the Constitution

96 On the basis that *Ong Ah Chuan* does not stand for any of the three rules advanced by the applicants, they submit in the alternative that what are considered to be the fundamental rules of natural justice may evolve over time. On this basis, they invite the court to hold that at least one of the three rules should *now* be accepted as a fundamental rule of natural justice. In effect, the applicants, as Mr Teo candidly acknowledged, invite the court to read new rights into the Constitution.

97 We reject the invitation because it is without any legal or normative basis.

98 We first note that nothing was put before us to explain how we should approach the questions of whether the fundamental rules of natural justice have changed over time; of how that process of change may have occurred and of the provenance of the legal developments that have led to the asserted change; of whether, and if so the basis on which, one or more of the three rules advanced by the applicants may now properly be regarded as a fundamental rule of natural justice that has constitutional status. In lieu of addressing these key questions, the applicants rely on the decision of the Privy Council in *Haw Tua Tau and others v Public Prosecutor* [1981–1982] SLR(R) 133 (specifically at [26]) for the proposition that fundamental rules of natural justice do change with the times. With respect, this reliance is misplaced. It was noted in the same paragraph that the fundamental rules of natural justice that are relevant for the court's consideration in that case were those that had crystalised by 1963 when the earliest iteration of the Constitution came into force, and not those in existence in 1981 when the appeal was heard:

> *Their Lordships recognise, too, that what may properly be regarded by lawyers as rules of natural justice change with the times*. The procedure for the trial of criminal offences in England at various periods between the abolition of the Court of Star Chamber and High Commission in the 17th century and the passing of the Criminal Evidence Act in 1898 involved practices, particularly in relation to the trial of felonies, that nowadays would unhesitatingly be regarded as flouting fundamental rules of natural justice. Deprivation until 1836 of the right of the accused to legal representation at his trial and, until 1898, of the right to give evidence on his own behalf are obvious examples. Nevertheless, throughout all that period the rule that an accused person could not be compelled to submit to hostile interrogation even in trials for misdemeanours, at which he was a competent witness on his own behalf, remained intact; and if their Lordships had been of the opinion that there was any substance in the argument that the effect of the amendments made to the Criminal Procedure Code by Act 10 of 1976 was to create a genuine compulsion on the accused to submit himself at his trial to cross-examination by the Prosecution, as distinguished from creating a strong inducement to him to do so, at any rate if he were innocent, their Lordships, before making up their own minds, would have felt it incumbent on them to seek the views of the Court of Criminal Appeal as to whether the practice of treating the accused as not compellable to give evidence on his own behalf had become so firmly based in the criminal procedure of Singapore that *it would be regarded by lawyers as having evolved into a fundamental rule of natural justice by 1963 when the Constitution came into force*.
>
> [emphasis in original omitted; emphasis added in italics]

99 That the content of the relevant fundamental rules of natural justice *having constitutional status* is to be determined *at the commencement of the Constitution* was also made clear in *Ong Ah Chuan* (at [26]):

> In a Constitution founded on the Westminster model and particularly in that part of it that purports to assure to all individual citizens the continued enjoyment of fundamental liberties or rights, references to 'law' in such contexts as 'in accordance with law', 'equality before the law', 'protection of the law' and the like, in their Lordships' view, *refer to a system of law which incorporates those fundamental rules of natural justice that had formed part and parcel of the common law of England that was in operation in Singapore at the commencement of the Constitution*. It would have been taken for granted by the makers of the Constitution that the 'law' to

> which citizens could have recourse for the protection of fundamental liberties assured to them by the Constitution would be a system of law that did not flout those fundamental rules. If it were otherwise it would be misuse of language to speak of law as something which affords 'protection' for the individual in the enjoyment of his fundamental liberties, and the purported entrenchment (by Art 5) of Arts 9(1) and 12(1) would be little better than a mockery.
>
> [emphasis added]

100 This is correct and it must be so when one is concerned with determining the corpus of law that is embedded within the Constitution at its inception. Otherwise, the Constitution would be liable to being amended by judges whose province it is to pronounce upon what the unwritten rules of the common law are. We return here to our observations at [98] on the important questions which we note had not been addressed at all by or on behalf of the applicants. This is not to say that a court cannot reconsider an earlier pronouncement even on a constitutional issue and conclude that that was erroneous in principle and to be departed from. But that is not the nature of the present argument advanced by the applicants that we are dealing with. We have already explained why we see no reason for thinking *Ong Ah Chuan* was not correctly decided. The present argument is that even so, the constitutional law may have changed organically. This is what we reject for the reasons we have just articulated. What Lord Diplock held in 1980 in *Ong Ah Chuan* as the fundamental rules of natural justice at the time the Constitution came into force stands as the law today. And in so far as the applicants are inviting this court to read new rights into the Constitution, we reiterate what we held in *Yong Vui Kong (Caning)* (at [73] and [75]) that unenumerated rights cannot be read into the Constitution:

> 73 … In our judgment, **where a right cannot be found in the Constitution (whether expressly or by necessary implication),** ***the courts do not have the power to create such a right out of whole cloth simply because they consider it to be desirable*** or perhaps to put in terms that might appear to be more principled, to be part of natural law.

> We note that even among natural law theorists, there is no consensus on what natural law requires of judges. …
>
> …
>
> 75 Further, **reading unenumerated rights into the Constitution would entail judges sitting as a super-legislature and enacting their personal views of what is just and desirable into law, which is not only undemocratic but also antithetical to the rule of law.** In our judgment therefore, there is no basis for reading rights into the Constitution on the basis of natural law, and we reject the Appellant's arguments under this rubric.
>
> [emphasis in original in italics; emphasis added in bold]

101 As we noted in *Tan Seng Kee* ([2] above) (at [245]), these holdings have been repeatedly cited and affirmed in our local jurisprudence (see, for example, *Chijioke Stephen Obioha* ([56] above) at [14] and *Daniel De Costa* ([56] above) at [8]).

102 For completeness, we did not find it appropriate or useful to have regard to or place much weight on the constitutional developments in *other jurisdictions* in undertaking an exercise of interpreting *Singapore*'s Constitution. While we do not shut our eyes to developments in other jurisdictions, especially where there is a shared legal and constitutional heritage and where tracing the history of a provision may be relevant, the exercise of constitutional interpretation is, in the final analysis, a matter of determining our domestic legal arrangements. As Yong Pung How CJ noted in *Chan Hiang Leng Colin and others v Public Prosecutor* [1994] 3 SLR(R) 209 (at [51]–[52]), citing the observations of Thomson CJ in *Government of the State of Kelantan v Government of the Federation of Malaya* [1963] MLJ 355:

> [T]he Constitution is primarily to be interpreted within its own four walls and not in the light of analogies drawn from other countries such as Great Britain, the United States of America or Australia.

103 This is even more so where the wording of our Constitution differs from that of other jurisdictions. As was observed in *Ong Ah Chuan* (at [22]):

> These articles are among eight articles in Pt IV of the Constitution under the heading 'Fundamental Liberties'. The eight articles are identical with similar provisions in the Constitution of Malaysia, but differ considerably in their language from and are much less compendious and detailed than those to be found in Pt III of the Constitution of India under the heading 'Fundamental Rights'. They differ even more widely from those amendments to the Constitution of the United States of America which are often referred to as its Bill of Rights. In view of these differences their Lordships are of the opinion that decisions of Indian courts on Pt III of the Indian Constitution should be approached with caution as guides to the interpretation of individual articles in Pt IV of the Singapore Constitution; and that decisions of the Supreme Court of the United States on that country's Bill of Rights, whose phraseology is now nearly 200 years old, are of little help in construing provisions of the Constitution of Singapore or other modern Commonwealth constitutions which follow broadly the Westminster model.

The MDA Presumptions are not incompatible with Art 12(1) of the Constitution

104 At the hearing of 7 May 2025, Mr Teo sought to supplement the applicants' written submissions with an oral submission on the incompatibility of the MDA Presumptions with Art 12(1) of the Constitution. Although this had not been raised in the written submissions, we allowed Mr Teo to pursue the point in the interest of ensuring that the applicants had every opportunity to advance their case.

105 Article 12(1) of the Constitution provides:

> **Equal protection**
>
> **12.**—(1) All persons are equal before the law and entitled to the equal protection of the law.

106 Article 12(1) of the Constitution provides for equality before the law and the equal protection of the law for all persons. As we noted in *Lim Meng Suang and another v Attorney-General and another appeal and another matter* [2015] 1 SLR 26 ("*Lim Meng Suang*") (at [90]) and again in *Tan Seng Kee* (at [302]), Art 12(1) is framed at a general level and is in the nature of a declaratory statement of principles relevant to the right to equality. This is given effect by recognising that although there can be no absolute equality in any society, where the State treats individuals differently, the distinctions drawn must be intelligible and bear a rational relationship to the object that the State seeks to achieve (see *Tan Seng Kee* at [305]; *Lim Meng Suang* at [60]; and *Public Prosecutor v Taw Cheng Kong* [1998] 2 SLR(R) 489 at [54] and [58]–[59]). This is referred to in various ways including as the "reasonable classification" test.

107 The right to equality that is enshrined in Art 12(1) of the Constitution is fundamental and basic. As a result, while Parliament has a wide ambit to legislate, it will not be assumed that every differentiating measure that it enacts bears a rational relation to the object sought to be achieved. Such a presumption of constitutionality under Art 12(1) is impermissible because it entails meeting an objection of unconstitutionality by presuming the validity of the very act which is being challenged (*Tan Seng Kee* at [303], citing *Saravanan Chandaram v Public Prosecutor and another matter* [2020] 2 SLR 95 at [154]).

108 Over the years, when considering whether a legislative or executive action offends Art 12(1), the courts have applied the reasonable classification test. In *Tan Seng Kee*, we acknowledged that this had been applied in somewhat different ways in *Lim Meng Suang* and in the more recent decision of *Syed Suhail bin Syed Zin v Attorney-General* [2021] 1 SLR 809 ("*Syed Suhail*"). While we had set out the broad differences between the approaches taken in

those decisions (*Tan Seng Kee* at [308]–[328]) – which we omit here for the sake of brevity – we did not pronounce on which of these was preferrable because it was not necessary to do so then, and indeed now. Notably, the parties in this case did not suggest otherwise.

109 The applicants' case on Art 12(1) can be understood as follows. The MDA Presumptions impose the burden on the accused person to *disprove* the relevant presumed fact – which forms an element of the offence that he or she is charged with – on the balance of probabilities. This creates a differentia between, on the one hand, accused persons charged with drug offences that can be made out in part by invoking the MDA Presumptions and, on the other hand, accused persons charged with other criminal offences where life and liberty is at stake, for which there is a requisite mental element to be proved in order to make out the offence, and in respect of which there is no statutory provision for a rebuttable presumption of law to apply in respect of one or more elements of that offence. Hence, the latter group of persons are generally not subject to a burden of proof on certain elements of the offence that arises by operation of a statutory presumption.

110 Mr Teo accepted that in assessing the legality of this differentiation, it was necessary to determine what the object of Parliament was in drawing this distinction. He submitted that the legislative purpose of the MDA Presumptions is to overcome the evidential difficulty that would be faced by the Prosecution in proving the state of mind of the accused person, especially in the face of a bare denial and a claim to know nothing about the relevant drugs that may be found in his or her possession or otherwise be associated with him or her. In so far as the purpose of the MDA Presumptions is to overcome this evidential difficulty by requiring the accused person to give credible evidence of his or her own case, Mr Teo submitted that the presumptions are over-inclusive because

the same purpose could be achieved by imposing only an *evidential* burden on the accused person. As explained above at [44], an evidential presumption would effectively place the initial evidential burden on the accused person to adduce some credible evidence that the relevant element of the offence is not established, before the evidential burden reverts to the Prosecution to adduce evidence that is sufficient to prove that element beyond a reasonable doubt. While Mr Teo accepted that there is no requirement for a "complete coincidence" between the differentia that is applied and the legislative object that is sought to be achieved by drawing that differentia, he submitted that the nexus between the object and the differentia must not be so tenuous as to be incapable of withstanding scrutiny. He also relied on our observation in *Syed Suhail* (at [63]), that "the court had to be searching in its scrutiny" as the MDA Presumptions affected life and liberty.

111 In response, the Deputy Attorney-General, Mr Goh Yihan SC ("Mr Goh"), argued that the State *has* provided a legitimate reason for the differentia, that being to ease the burden of proof on the Prosecution in relation to *drug offences* specifically. Mr Goh submitted that there is a reasonable basis for Parliament to adopt a different approach to drug offences due to the distinctive nature of such offences and the legislative policy that has been adopted in this regard given the prospect of widespread harm to society.

112 In our judgment, the differentia can and has been rationally justified by the objective of the MDA Presumptions. One can begin with *Ong Ah Chuan* (at [28]) where the Privy Council noted that presumptions of the same type are a common feature in the context of a variety of offences that share certain features:

> … The purpose with which he did an act is peculiarly within the knowledge of the accused. There is nothing unfair in requiring

> him to satisfy the court that he did the acts for some less heinous purpose if such be the fact. *Presumptions of this kind are a common feature of modern legislation concerning the possession and use of things that present danger to society like addictive drugs, explosives, arms and ammunition.*
>
> [emphasis added]

113 In line with this, the Parliamentary debates indicate that the MDA Presumptions were, and are considered to be, a vital tool to combat the specific vices of drug trafficking and abuse in Singapore given its particular vulnerabilities. Not only does Singapore face a general risk of increased drug abuse due to the growing global prevalence of drug use, our geographical proximity to the "Golden Triangle" – a region in Southeast Asia known historically for being one of the world's most prolific and notorious areas for the production and trafficking of controlled illicit drugs – is seen as calling for stronger laws and enhanced enforcement measures in order to safeguard this nation from the threat of drug trafficking.

114 Most recently, the Minister for Home Affairs and Minister for Law stated in a Ministerial Speech on 8 April 2025 that the MDA Presumptions served to keep the vice of drug trafficking at bay in Singapore (see Singapore Parl Debates; Vol 95, Sitting No 162; [8 April 2025] (K Shanmugam, Minister for Home Affairs and Minister for Law)):

> Why are the presumptions in drug cases necessary? It is essentially to protect Singapore from drug trafficking.
>
> …
>
> While many other countries have faced huge difficulties in combating drugs, Singapore has been able to maintain one of the lowest rates of drug abuse in the world. That is despite the worsening global drug situation and our location at the doorstep of the Golden Triangle, one of the world's leading areas for the production of illicit drugs. …

> The presumptions have been an essential part of the legal framework that enables us to deal effectively with the drug problem.

115 This justification is neither new nor has it only recently been articulated. Parliament has, since the enactment of the MDA, unremittingly emphasised the social ills related to drug trafficking and drug use in Singapore as the justification for its tough legislative stance. In 1973, at the second reading of the Misuse of Drugs Bill (Bill No 46/1972) which was later enacted as the Misuse of Drugs Act (Act 5 of 1973), the earliest predecessor to the MDA as it currently stands, and which first introduced the presumption of trafficking, the Minister for Health and Home Affairs noted the unique challenges faced by Singapore in this area (see Singapore Parl Debates; Vol 32, Sitting No 9; Cols 415–416; [16 February 1973] (Chua Sian Chin, Minister for Health and Home Affairs)):

> The ill-gotten gains of the drug traffic are huge. The key men operating behind the scene are ruthless and cunning and possess ample funds. They do their utmost to push their drugs through. Though we may not have drug-trafficking and drug addiction to the same degree as, for instance, in the United States, we have here some quite big-time traffickers and their pedlars moving around the Republic selling their evil goods and corrupting the lives of all those who succumb to them.
>
> They and their trade must be stopped. To do this effectively, heavy penalties have to be provided for trafficking. Clause 15 [which is similar to s 17 of the current MDA] specifies the quantities of controlled drugs which, if found in the possession of a person unless the contrary is proved, will be presumed to be in his possession for the purposes of trafficking.

116 The Minister for Health and Home Affairs reiterated as much at the second reading of the Misuse of Drugs (Amendment) Bill (Bill No 55/1975) in 1975 (see Singapore Parl Debates; Vol 34, Sitting No 18; Cols 1379–1381; [20 November 1975] (Chua Sian Chin, Minister for Health and Home Affairs)), which this court also cited in *Tan Kiam Peng v Public Prosecutor* [2008] 1 SLR(R) 1 (at [27]):

> Rampant drug addiction among our young men and women will also strike at the very foundations of our social fabric and undermine our economy. Once ensnared by drug dependence they will no longer be productive digits contributing to our economic and social progress. They will not be able to carry on with their regular jobs. … Thus, as a developing country, our progress and very survival will be seriously threatened.
>
> Singapore, as it is situated, is in a rather vulnerable position. The 'Golden Triangle' straddling Thailand, Laos and Burma, which is the source of supply of narcotics, is not far from Singapore. Being a busy port, an important air communication centre and an open coastline easily accessible from neighbouring countries, it makes detection of supplies of narcotics coming in difficult. Further, the manufacture of morphine and heroin is not a complicated process and can be done in as small a space as a toilet. Our Central Narcotics Bureau has intelligence information that much of the heroin brought into Singapore has been manufactured in illicit laboratories clandestinely established in a neighbouring country. The Central Narcotics Bureau also reported that there was an abortive attempt to set up an illicit heroin laboratory in Singapore itself.

117 In March 2023, at the second reading of the Misuse of Drugs (Amendment) Bill (Bill No 9/2023), the Minister of State for Home Affairs noted the importance of Singapore's tough drug laws in controlling the incidence of drug offences (see Singapore Parl Debates; Vol 95, Sitting No 94; [21 March 2023] (Assoc Prof Dr Muhammad Faishal Ibrahim, Minister of State for Home Affairs)):

> In Singapore, our situation is different. Our tough laws have kept the drug situation here relatively under control. We must continue to keep drugs at bay, to prevent the harms from overwhelming us. To this end, we continually review and refine our laws and policies to keep pace with the evolving drug landscape and local trends.

118 In May 2024, the Minister for Home Affairs and Minister for Law, in a speech on Singapore's National Drug Control Policy, noted the unique risk Singapore faces (see Singapore Parl Debates; Vol 95, Sitting No 136; [8 May 2024] (K Shanmugam, Minister for Home Affairs and Minister for Law)):

> Closer to home, in Southeast Asia, the Golden Triangle, where the borders of Myanmar, Thailand and Laos meet, is a major drug producing region. The [United Nations Office on Drugs and Crime] reported in 2022 that East and Southeast Asia are 'literally swimming' in meth. In 2022 alone, 151 tonnes of meth were seized in the region.
>
> …
>
> With that, let me now turn to the situation in Singapore and the threat we face here from the drug trade. We are a big target for drugs that this region is being flooded with. Despite our stiff penalties, some traffickers try their luck because of the profits they can earn. The street price for drugs is much higher in Singapore than many other parts in this region. Our purchasing power is much higher, our gross domestic product (GDP) is much higher, our wealth is much higher, so, it is obvious.

119 In March 2025, the Minister of State for Home Affairs highlighted the problems presented by drug offences and Singapore's susceptibility to the same (see Singapore Parl Debates; Vol 95, Sitting No 157; [4 March 2025] (Assoc Prof Dr Muhammad Faishal Ibrahim, Minister of State for Home Affairs)):

> Drug abuse threatens public safety and impacts innocent victims, as those under the influence of drugs may resort to crime to feed their habit, or commit violence against others.
>
> Even though Singapore's drug situation is under control, we still have drug-related crimes. We are an attractive market for drug traffickers. Our purchasing power means that the street price of drugs in Singapore can be many times higher than in other countries, allowing traffickers to reap massive profits.

120 It is plain beyond doubt that the general approach towards drug offences taken by Parliament over the years has been influenced by its strong belief in the necessity of eliminating drug trafficking and abuse in Singapore as best it can. Further, it is clear from these debates that Parliament has taken the view that the MDA Presumptions specifically are an essential part of the toolkit that is deployed by our enforcement agencies in order to keep the scourge of drug trafficking within confines. Notably, Mr Teo accepted at the hearing that Parliament and the Government have reiterated on multiple occasions that drugs

are a particular problem for Singapore, and this certainly formed part of Parliament's purpose in enacting and maintaining the MDA presumptions.

121 We accept that one facet of the legislative purpose of the MDA Presumptions is to overcome the evidential difficulty of proving the state of mind of the accused person. This is evident in several statements made in the course of the Parliamentary debates.

122 For instance, in responding to questions on the MDA Presumptions in 2019, the Senior Parliamentary Secretary to the Minister for Home Affairs identified the difficulty of proving the mental element of drug offences and explained how the MDA Presumptions operated to resolve this difficulty (see Singapore Parl Debates; Vol 94, Sitting No 106; [8 July 2019] (Amrin Amin, Senior Parliamentary Secretary to the Minister for Home Affairs)):

> *In practice, it can be difficult to prove a person's state of mind. To address this, the MDA builds in presumptions.* When these presumptions apply, a person charged with importing prohibited drugs can be presumed to know of their presence, as well as their nature. It is then for the accused to give sufficient evidence to rebut the presumptions.
>
> …
>
> *We have presumptions under the MDA because it can be difficult to prove a person's state of mind as it is something that is intangible and cannot be seen.* The presumptions under the MDA impose a legal burden on accused persons to rebut the presumed facts on a balance of probabilities. *The presumptions were introduced precisely to address the difficulty of proving an accused person's subjective state of knowledge.* This has been our policy intent, right from the beginning.
>
> [emphasis added]

123 This was reiterated by the Minister of State for Home Affairs in March 2023, at the second reading of the Misuse of Drugs (Amendment) Bill (Bill No 9/2023) (see Singapore Parl Debates; Vol 95, Sitting No 94; [21 March

2023] (Assoc Prof Dr Muhammad Faishal Ibrahim, Minister of State for Home Affairs)):

> We should remember that the fundamental reason for the use of presumptions in drug offences is because the facts, which are being presumed, are often exclusively within the accused persons' knowledge. In the example given by Mr Ng relating to having a key to a place, the presumption places the onus on the person found in possession of such a key to explain why he did not know the drugs were there, in spite of having the key to that particular place.
>
> …
>
> Whether the presumption can be rebutted turns on whether the accused's account is to be believed or not. He cannot simply say he did not know, or he did not care. The facts or evidence required to rebut the presumption, would very much depend on the nature of the defence raised by the individual and a credibility of his account.

124 To similar effect, the Minister for Home Affairs and Minister for Law stated in his Ministerial Speech on 8 April 2025 (see Singapore Parl Debates; Vol 95, Sitting No 162; [8 April 2025] (K Shanmugam, Minister for Home Affairs and Minister for Law)):

> The MDA presumptions deal with the practical challenges in proving certain facts that are often exclusively within the accused person's knowledge or which it would not be practical for the Prosecution to get direct evidence of. For example, the Prosecution will be able to prove that the drugs were in the accused person's possession. But it would be very easy for the accused to claim that he did not know they were drugs and by that way try and avoid conviction. And if he runs that defence, then it may not be easy for the Prosecution to rebut that claim or go get the necessary evidence to prove that the accused was indeed aware that they were drugs. For example, the evidence may be overseas and often quite elusive.
>
> Therefore, the presumptions deal with the accused's knowledge of the nature of the drugs.
>
> Under the MDA, the onus is on the accused to prove that he did not know that what was found to be in his possession were drugs – and these are usually facts within his knowledge.

The Minister proceeded to provide two examples of the evidential difficulties in drug cases and the consequent importance of being able to have recourse to the statutory presumptions.

125 However, to confine it to this would be to have an incomplete picture of the purpose of the MDA Presumptions in the context of Parliament's broader policy against drug offences. Parliament's decision to enable the Prosecution to rely on these presumptions must be seen alongside its strong policy stance taken to strengthen the hands of the enforcement agencies against drug trafficking. As noted by the Minister for Home Affairs and Minister for Law, "[t]he presumptions have been an essential part of the legal framework that enables us to deal effectively with the drug problem" (see [114] above). To similar effect were the remarks of the Minister for Home Affairs in 1993 in the context of a debate on the Arms Offences (Amendment) Bill 1993 (Bill No 30 of 1993) – which introduced presumptions akin to the MDA Presumptions. There, the Minister stated that the presumption of trafficking is part of the broader policy of signalling Singapore's uncompromising position in respect of drug trafficking (see Singapore Parl Debates, Vol 61, Sitting No 5; Cols 436–437 [30 August 1993] (Prof S Jayakumar, Minister for Home Affairs)):

> For years, we have had mandatory death penalty if a drug trafficker is caught in possession beyond 15 grams of heroin. *We do not ask for the prosecution to prove that he had an intention to give this drug to so and so.* It is death penalty because *such a large amount of drugs cannot be for purposes of his consumption.* This is well-known among drug trafficking syndicates. The signal has gone out. So the drug trafficking syndicates know it before they try their luck in Singapore.
>
> [emphasis added]

126 Pulling the threads together, we are satisfied that there is a rational nexus between the differentia drawn in relation to the MDA Presumptions as compared to other serious offences, and the legislative objective which is to

provide a robust pro-enforcement toolkit to enable the enforcement agencies to tackle and overcome the scourge of the drug trade in this country, having regard to, among other things, the profit motives of traffickers, the need and ability of the Government to impact the risk calculus of the crime syndicates, and our proximity to a prolific and notorious drug-producing region. It follows that the MDA Presumptions do not offend Art 12(1) of the Constitution.

There is no power to read down the MDA Presumptions

127 The applicants' alternative submission that the MDA Presumptions ought to be read down as imposing only an evidential burden to raise a reasonable doubt as to the presumed fact can be disposed of given our conclusion that the MDA Presumptions are not unconstitutional.

128 In any case, this submission would fail. In so far as the applicants seek to rely on the court's inherent power to read down the MDA Presumptions, we consider that there is no basis to find such a remedial power within the Constitution to begin with, nor any basis to imply such a power into the Constitution. Article 4 of the Constitution already provides for the courts' *limited* remedial powers to declare void any law enacted after the commencement of the Constitution, which is inconsistent with it, to the extent of their inconsistency (see *Prabagaran a/l Srivijayan v Public Prosecutor and other matters* [2017] 1 SLR 173 ("*Prabagaran*") at [41] and [44]). As such, there is no need for the implication of *further* remedial powers, like the power to construe unconstitutional legislation in a manner that would render it constitutional as argued in *Prabagaran* (at [49]–[50]), or the power to read down unconstitutional legislation as the applicants contend here.

129 Further, even if this court had the power that the applicants suggest, it is unclear how this power is to be exercised; how this power is to be understood

alongside Art 4 of the Constitution; and importantly, whether the scope of the power can extend to overriding the fundamental purpose of that provision. In relation to the last of these questions, we observe that reading down the MDA Presumptions to impose on the accused person only an evidential burden, as opposed to a persuasive burden of proving the contrary of the presumed fact, would diminish the effectiveness of the MDA Presumptions since, at least notionally, it would be easier to satisfy the lower burden. This would undermine the very purpose of the presumptions as an important component of the robust pro-enforcement toolkit available to the enforcement agencies to tackle and overcome the scourge of the drug trade in this country, as we have explained above.

Coda: Our observations on the MDA Presumptions

130 This is sufficient to dispose of the substantive issues in the underlying appeal in CA 2. Simply put, there are no merits in our view. However, we make some observations on the MDA Presumptions. It is a matter for Parliament to decide how it will structure the anti-narcotics legislation, including the MDA Presumptions, in order to address the ultimate objective of defeating those who seek to profit from the illicit trade in narcotics in Singapore. The role of the courts is limited to determining the constitutionality of the legislative provisions and in doing so, the court does not have an open-ended mandate to evaluate legislation on the basis of *its* policy preferences (see *Tan Seng Kee* ([2] above) at [328]), whatever those might be.

131 Even so, it is worth noting how the MDA Presumptions have been construed and applied by the courts over the past 45 years since *Ong Ah Chuan*.

132 First, the MDA Presumptions build on predicate facts that have to be proved by the Prosecution beyond a reasonable doubt. The presumed facts

generally follow as a matter of logic and common sense from the predicate facts. For instance, where the Prosecution proves that the accused person was in possession of an excessive quantity of drugs much higher than the quantity that would be needed for personal consumption, the natural inference is that the accused person was carrying the drugs for the purposes of trafficking. What the MDA Presumptions do is to codify the natural conclusions to be drawn from the proven facts and mandate the courts to deem these conclusions as proven until and unless they are rebutted.

133 Second, the MDA Presumptions are rebuttable. The accused person bears the burden of proof to rebut the presumptions on the balance of probabilities. If the circumstances are such that they do not justify the presumed facts, the accused person can displace the presumption by adducing sufficient evidence. The accused person is clearly best placed to explain why and how he or she came into possession of the drugs; and if he or she claims ignorance of its nature, to give a credible account of what he or she thought it was (see *Obeng Comfort* ([39] above) at [39]–[40]).

134 That the burden of proof is placed on the accused person to rebut the MDA Presumptions in these circumstances is also consonant with s 108 of the Evidence Act 1893 (2020 Rev Ed), which provides:

> **Burden of proving fact especially within knowledge**
>
> 108. When any fact is especially within the knowledge of any person, the burden of proving that fact is upon that person.

135 Furthermore, this court has consistently held that in evaluating attempts to rebut the MDA Presumptions, the court should bear in mind the inherent difficulties of proving a negative, in this context, the *lack* of knowledge, and the burden on the accused person should not be so onerous that it becomes virtually

impossible to discharge (see *Muhammad Nabill bin Mohd Fuad v Public Prosecutor* [2020] 1 SLR 984 at [92]; *Gopu Jaya Raman v Public Prosecutor* [2018] 1 SLR 499 at [2] and [24]; *Zainal* ([39] above) at [23]; *Harven a/l Segar v Public Prosecutor* [2017] 1 SLR 771 at [2].)

136 Finally, as stated above at [40], the presumptions in ss 17 and 18 of the MDA cannot operate together in the same case (see *Zainal* at [37]–[52]). The Prosecution may only rely on the presumption in s 17, or the presumptions in ss 18(1) and/or 18(2), in each case. Thus, it is not the case that *all* the inferential elements of the offence may be presumed against the accused person. As we held in *Zainal* (at [52]):

> … it is important for the Prosecution to identify clearly whether it intends to rely on the presumption of trafficking under s 17 of the MDA, in which case it must prove the facts of both possession and knowledge; or conversely whether the Prosecution intends to rely on either or both of the presumptions under s 18 of the MDA, in which case it must prove the fact of trafficking.

Summary of our holdings on the MDA Presumptions

137 Our holdings on the MDA Presumptions and their constitutionality may be summarised as follows:

(a) The law in Singapore is that the legal burden is on the Prosecution to establish each element of an offence. It will generally have to do this by adducing evidence that is sufficient to establish those elements beyond a reasonable doubt. However, there is nothing to prevent Parliament from providing that one or more elements of the offence may be established by way of a presumption of law especially where this is in relation to a logical inference flowing from predicate

facts and pertains to matters within the knowledge of the accused person. Such a presumption should be capable of being rebutted.

(b) The MDA Presumptions are rebuttable presumptions of law that place a persuasive burden on the accused person. Upon proof of the *predicate* fact by the Prosecution beyond a reasonable doubt, the *presumed* fact will be established, unless it is disproved by the accused person proving the contrary, on the balance of probabilities.

(c) The presumptions in ss 18(1) and 18(2) of the MDA can operate concurrently such that upon proof of the predicate facts, it shall be presumed that the accused person had in his or her possession the drugs and that he or she had knowledge of the nature of those drugs. However, the presumption concerning trafficking in s 17 of the MDA may not be applied concurrently with the presumptions in s 18 of the MDA.

(d) The MDA Presumptions do not have the effect of displacing or "shifting" the Prosecution's legal burden to prove the guilt of the accused person onto that person. This remains with the Prosecution, though as explained above, the Prosecution may seek to discharge its burden in certain discrete aspects by recourse to the MDA Presumptions, subject to the right of the accused person to displace the same.

(e) The fundamental rules of natural justice are consistent with, and not offended by, the Prosecution's ability to rely on the MDA Presumptions to establish the relevant offence. It is constitutionally permissible for the Prosecution to establish the necessary element of trafficking or possession, as the case may be, by proof of the predicate fact(s) beyond a reasonable doubt, given that those predicate fact(s) are logically probative of the presumed facts.

(f) Any differentia between on the one hand, accused persons being prosecuted for drug offences that can be made out by invoking the MDA Presumptions, and on the other hand, accused persons charged for criminal offences where life and liberty are at stake and for which there are no equivalent presumptions, is rationally justified by Singapore's zero-tolerance policy to drugs in light of our vulnerabilities.

The decision in SUM 16

138 Having dealt with the merits of the underlying issues in CA 2, we turn to address the application in SUM 16, which is to set aside Chong JCA's order in SUM 8. To cut to the chase, given our finding that there is no merit in the substantive arguments that the applicants hope to pursue in CA 2, there is no cause to revive CA 2; it is therefore unnecessary to set aside the orders made in SUM 8. However, we take the opportunity to provide guidance on the legal principles that apply when dealing with an application to set aside the order of a single Judge of the Court of Appeal pursuant to s 58(4)(*b*) of the SCJA.

139 As summarised above at [27], Chong JCA dismissed SUM 8 primarily for the reason that OA 480 was an attempt to review the concluded criminal appeals with respect to the applicants' convictions. He thought that the proper procedure to mount such a challenge ought to be by way of a criminal review application. However, in the present circumstances, there was no material before the court which would warrant the exercise of the court's statutory powers under the CPC or inherent powers to reopen a concluded criminal appeal.

140 In support of their application to set aside the order made in SUM 8, the applicants submit that Chong JCA, as a single Judge of the Court of Appeal, did not have jurisdiction to hear and decide SUM 8 and, alternatively, that even if

he did have jurisdiction, the applicants ought to be granted permission to apply to vary or discharge the order made in SUM 8. They also argue that Chong JCA, as a single Judge of the Court of Appeal, had no power to refuse SUM 8 pursuant to s 58(1)(*a*) of the SCJA where such refusal would be dispositive of the appeal, or pursuant to s 58(1)(*b*) of the SCJA where such refusal would be prejudicial to the claims of the parties.

141 On the other hand, the AG submits that Chong JCA did have jurisdiction to hear and decide SUM 8 pursuant to s 54(1)(*a*) read with para 3(1)(*c*) of the Seventh Schedule to the SCJA. The AG further submitted that the applicants should not be granted permission to apply to vary or discharge the order made in SUM 8.

Chong JCA had jurisdiction to hear and determine SUM 8

142 In our judgment, Chong JCA had jurisdiction to hear and decide SUM 8 as a single Judge of the Court of Appeal, pursuant to para 3(1)(*d*) of the Seventh Schedule read with s 58(1) of the SCJA.

143 Paragraph 3(1) of the Seventh Schedule to the SCJA reads:

> **Court of Appeal cases that may be heard and decided by single Judge or 2 Judges**
>
> 3.—(1) Despite section 50(1), the following cases may be heard and decided by the Court of Appeal consisting of a single Judge or 2 Judges:
>
> (*a*) an application —
>
> (i) to record a judgment, or an order, that is made by consent of the parties; or
>
> (ii) to make an order that is incidental to any such judgment or order;
>
> (*b*) an application to adduce further evidence in proceedings before the Court of Appeal;

> (*c*) an application for costs, or any other matter that remains to be dealt with, after an application or appeal to the Court of Appeal is withdrawn;
>
> *(d) an application for any direction or order mentioned in section 58(1).*
>
> [emphasis added]

144 Section 58(1) of the SCJA reads:

> **Incidental directions and interim orders**
>
> **58.**—(1) The Court of Appeal may make one or more of the following directions and orders in any appeal or application pending before it (called in this section the pending matter):
>
> (*a*) any direction or order incidental to the pending matter not involving the decision of the pending matter;
>
> (*b*) any interim order to prevent prejudice to the claims of the parties pending the determination of the pending matter;
>
> (*c*) any order for security for costs, and for the dismissal of the pending matter for default in furnishing security so ordered.

145 In our judgment, SUM 8 was an application for a direction or order that falls within the ambit of s 58(1) of the SCJA. Being an application for an extension of time to file the appeal documents and for the reinstatement of CA 2, SUM 8 effectively prayed for directions or orders that are incidental to, but not involving the decision of, a pending matter pursuant to s 58(1)(*a*) of the SCJA. SUM 8 similarly comprised prayers for interim orders to prevent prejudice to the claims of the parties pending the determination of the pending matter under s 58(1)(*b*) of the SCJA.

146 As a preliminary matter, it is uncontroversial to regard CA 2 as a "pending matter" despite its deemed withdrawal (see *Bank of India v Rai Bahadur Singh and another* [1993] 2 SLR(R) 1 ("*Bank of India*") at [17]–[19]; *The Attorney-General v R Anpazhakan* [1999] SGCA 38 at [11]–[13]; and *Au*

Wai Pang v Attorney-General [2014] 3 SLR 357 ("*Au Wai Pang*") at [16]). The settled test is whether any further step of any sort could be taken in the proceeding or if the court could still make an order in relation to it. That an application for an extension of time and for reinstatement of CA 2 in the form of SUM 8 could be brought, and that O 19 r 30(6) of the ROC 2021 allows for this court to make such order to displace the deemed withdrawal of an appeal, leads us to conclude that CA 2 is a "pending matter".

147 The applicants argue that Chong JCA's decision in SUM 8 was an order that was dispositive of the appeal and does not come within the ambit of s 58(1)(*a*) of the SCJA. They contend that Chong JCA's refusal to grant the extension of time had the effect of preventing the applicants from pursuing CA 2 such that the order was not "incidental" to, but instead *dispositive* of the appeal.

148 This argument is misconceived for the simple reason that CA 2 was not disposed of due to Chong JCA's dismissal of SUM 8. CA 2 was already deemed withdrawn due to the applicants' non-compliance with the procedural rules. In dismissing SUM 8, Chong JCA simply declined to exercise the court's power to revive CA 2. That CA 2 remains withdrawn after the determination of SUM 8 is the combined result of the applicants' non-compliance with the procedural rules and their unmeritorious application for an extension of time. Chong JCA made neither any substantive determination in relation to CA 2 nor a direction or order that *involved* the decision of that pending matter.

149 The applicants rely on two earlier decisions of this court, namely *Tan Chiang Brother's Marble (S) Pte Ltd v Permasteelisa Pacific Holdings Ltd* [2002] 1 SLR(R) 633 ("*Tan Chiang*") and *Sumitomo Corp Capital Asia Pte Ltd v Salim Anthony and other applications* [2004] 4 SLR(R) 451 ("*Sumitomo*"). Both cases do not assist them. *Tan Chiang* was concerned with an application

to set aside a notice of appeal. This court held that a single Judge could not hear such an application because an order to set aside a notice of appeal and to consequently strike out the appeal cannot be considered an interlocutory order; such order had the object of putting an end to the appeal rather than to obtain any interlocutory or further reliefs. That application is immediately distinguishable from the present case: whereas the issue in *Tan Chiang* concerned bringing an incipient appeal to an early end, SUM 8 was an application to seek interlocutory relief for an extension of time to file the appeal documents and to revive CA 2. Its object was not to put an end to a pending appeal, but rather, it was an attempt to bring back to life an appeal which had already been brought to an end by the applicants' procedural non-compliance.

150 In *Sumitomo*, the single Judge held that he did not have the jurisdiction to hear an application to adduce further evidence on appeal because a direction or order to this effect would fail to qualify as an "incidental direction not involving the decision of the appeal". That is because the fresh evidence adduced would probably have an important influence on the result of the case, in turn affecting the decision of the appeal. Accordingly, the order would *involve* the decision of the appeal (*Sumitomo* at [9]–[10]). This specific holding in *Sumitomo* has since been overtaken by legislative amendments: para 3(1)(*b*) of the Seventh Schedule to the SCJA (see [143] above) now provides that a single Judge can hear and decide the application to adduce further evidence. In any event, *Sumitomo* is distinguishable from the present case. Unlike an application to adduce further evidence where the evidence would have a bearing on the merits of the substantive appeal, an application for an extension of time to file the appeal documents does not by itself affect the merits.

151 The applicants also rely on *Au Wai Pang* at [24], which states:

> … [A] single judge may make *interim* orders aimed at preventing prejudice or preserving the *status quo*. Administrative efficiency is ultimately justified by the fact that the interim orders are *not dispositive of the substantive appeal.* This is plainly evident from s 36(3) of the SCJA, which states that "[e]very order so made may be discharged or varied by the Court of Appeal". There is nothing to discharge or vary if the single judge refuses to grant an extension of time. If an extension of time is not granted, this would be dispositive of the appeal and conclusively settle the respective legal entitlements of the parties, who would be bound by the judgment below. An application for an extension of time to file an originating summons is therefore manifestly not the type of case which was intended to be heard by a single judge.
>
> [emphasis in original]

152 This reliance is misplaced; the holding at [24] should be construed in the specific context of *Au Wai Pang*, which is distinguishable from the present case. *Au Wai Pang* concerned an application for an extension of time to file an application for leave to apply for an order of committal. The duty judge, sitting as a single Judge of the Court of Appeal, had granted the applicants the extension of time to file the application. However, a three-judge panel of this court later held (at [13]–[14]) that the single Judge had no power to grant the extension of time because there were no "pending" proceedings before the Court of Appeal. The application for an extension of time in the context of that case necessarily meant that the committal application was not filed within the stipulated timeline and because that had not been validly commenced in the first place, there was no "pending" matter before the court. Properly understood in its context, the court's observations reproduced above do *not* stand for the proposition that a single Judge has no power to refuse an extension of time application because such an order will be dispositive of the substantive appeal. *Au Wai Pang* is therefore of little assistance in the context of SUM 8 where CA 2 was indeed a "pending" matter (see [146] above).

153 In addition to their argument on s 58(1)(*a*) of the SCJA, the applicants further argue that s 58(1)(*b*) of the SCJA does not grant the single Judge the power to refuse the extension of time application as the refusal was not an order that "prevent[ed] prejudice to the claims" of the applicants pending the determination of the appeal. They argue that Chong JCA's decision in SUM 8 "removed the [applicants'] right of appeal" and did not prevent prejudice to the applicants nor the respondents. In effect, the applicants' submission is that only an order to grant the extension of time would fall within s 58(1)(*b*) of the SCJA. This submission falls away for the simple reason that para 3(1)(*d*) of the Seventh Schedule read with s 58(1)(*b*) of the SCJA is concerned with the reliefs prayed for and the *object* of the application, and not the actual *outcome* of the application, which the applicants are fixated on. The *outcome* of SUM 8 does not change the fact that the *object* of SUM 8 was to seek an extension of time and a reinstatement of CA 2 which are, plainly, reliefs sought for the purposes of preventing prejudice to the applicants' constitutional challenge in CA 2, therefore making the application one for orders of the kind contemplated in s 58(1)(*b*) of the SCJA. In any event, as we have stated above, it is wrong to attribute the removal of the applicants' right of appeal or the prejudice suffered to Chong JCA's dismissal when these were consequences that flowed directly from the applicants' procedural non-compliance.

154 Finally, what is apparent from the above arguments is that the applicants are in effect contending that a single Judge has the power to *grant* an extension of time but no corresponding power to *refuse* that same application in the exercise of his or her discretion, since only the latter will mean that the applicants cannot pursue their appeal and are prejudiced. That is wrong and cannot be tenable. As this court held in *Bank of India* (at [20]), the legislative intent behind s 58(1) of the SCJA was to avoid burdening a three-judge court with interlocutory applications relating to an appeal which could be

expeditiously and less expensively disposed of before a single judge. The applicants' arguments would defeat this legislative intent of achieving the efficient allocation of judicial resources. In addition, any concern that the interests of the parties are not protected by the decision of a single Judge would be adequately addressed by s 58(4) of the SCJA, which serves as an additional safeguard to protect the parties' interests. Indeed, that forms the basis of the applicant's alternative argument, to which we now turn.

Permission should not be granted to the applicants to apply to vary or discharge the order in SUM 8 pursuant to s 58(4)(b) of the SCJA

155 In the alternative, the applicants submit that SUM 16 be treated as an application to discharge Chong JCA's order. In this regard, s 58(4)(*b*) of the SCJA provides:

> (4) A direction or an order under subsection (1) may also be made by a single Judge, in which case the following provisions apply:
>
> …
>
> (*b*) *an application to vary or discharge the direction or order may only be made with the permission of the single Judge or any other Judge*, and a decision by any Judge to give or refuse permission is final.
>
> [emphasis added]

156 As there is no decision interpreting this provision, we invited the parties to provide further submissions on the approach to be taken in considering whether to grant permission under s 58(4)(*b*) of the SCJA.

The appropriate test

157 Both parties submit that reference may be made to the decision of the Appellate Division of the High Court ("AD") in *Darsan Jitendra Jhaveri and others v Lakshmi Anil Salgaocar (suing as the administratrix of the estate of*

Anil Vassudeva Salgaocar) and another [2024] 1 SLR 759 ("*Darsan*"). *Darsan* concerned an application under s 41(8) of the SCJA for a three-judge panel to rehear the appellant's application to adduce further evidence on appeal. His application had earlier been dismissed by a two-judge panel of the AD. Section 41(8) of the SCJA reads:

> (8) Where an application for permission to adduce further evidence in an appeal before the Appellate Division is heard and decided by a single Judge or 2 Judges, *any party may request the full panel of the Appellate Division hearing the appeal to rehear arguments* in respect of the application for permission to adduce further evidence.
>
> [emphasis added]

158 The AD in *Darsan* held (at [11]–[12]) that it would not be logical to grant such a request as of right, because that would "open the floodgates as every party who is dissatisfied with the decision of a one or two-member *coram* would be incentivised to apply for arguments to be reheard by the full *coram*". The AD also noted the statutory objective of having such an application dealt with at first instance by a one or two-member *coram* so as to "make better use of judicial resources". It followed that the court retained the discretion to allow or deny such a request, and in considering how discretion should be exercised, the AD held (at [22]) that there must be cogent reasons for the request:

> [A]n applicant requesting the full *coram* to rehear an application has to provide cogent reasons for the request. This means that the applicant is to establish that: (a) there can be said to be a realistic basis for saying that the original decision contains a legal error or involves a discretion exercised on a wrong principle or otherwise exercised improperly; and (b) there is practical utility in conducting another hearing.

159 In our judgment, this is equally applicable to s 58(4)(*b*) of the SCJA for the following reasons. First, both provisions deal fundamentally with the reconsideration by a full panel of an appellate court of an application earlier heard by a panel comprising less than three judges. It is important to recognise

that such applications cannot be equated with a typical appeal where the merits of the underlying matter are being reviewed for the first time. Rather, the SCJA has designated these applications as capable of being determined by the decision of a single judge or two judges of the appellate court, without convening the full panel of the court. Second, the legislative intent behind a request for a rehearing of the application to adduce further evidence aligns with that of requiring permission to vary or discharge a single Judge's order. In both instances, the purpose is to make efficient use of judicial resources and to only allow meritorious applications to proceed further. This can be distilled from the second reading of the Supreme Court of Judicature (Amendment No 2) Bill (Bill No 33/2018), where the Senior Minister of State for Law explained the legislative intent behind the requirement for the court's permission to make an application to discharge or vary incidental directions or orders under the predecessor of s 58 of the SCJA (see Singapore Parl Debates; Vol 94, Sitting No 84; [2 October 2018] (Edwin Tong Chun Fai, Senior Minister of State for Law)):

> In the same vein, clause 8 introduces a new requirement for leave of court to make an application to discharge or vary incidental directions or orders made by the court under section 36 of the Act. This is in respect of directions or orders which are ancillary to the main appeal and are unlikely to touch on the substantive merits of the case. *The requirement for leave of court ensures that court resources would be directed appropriately to deal only with meritorious applications to discharge or vary.*
>
> In deciding whether to grant leave or not for a party to vary or discharge a direction or order under section 36, *the Court of Appeal will consider if such directions and orders are in fact ancillary to the appeal, or whether they go towards the merits of the appeal. Leave would be granted where it would be in the interest of justice to do so.*
>
> [emphasis added]

160 Apart from the fact that the legislative purpose is to ensure efficient use of judicial resources by only allowing meritorious applications to proceed, the test for permission to be granted under s 58(4)(*b*) of the SCJA would entail, at the minimum, a consideration of the merits of the application to discharge or vary the order and the interests of justice of the case. In our judgment, the test formulated in *Darsan* is consistent with this object as the threshold of requiring cogent reasons ensures that permission will be granted only in cases of meritorious applications to vary or discharge the original decision.

161 In sum, the test governing whether permission should be granted under s 58(4)(*b*) of the SCJA is directed at whether it is in the interests of justice to grant such permission. To this end, the applicant will have to provide cogent reasons suggesting:

(a) a realistic basis for saying that the decision by the single Judge contains a legal error or involves a discretion exercised on a wrong principle or otherwise exercised improperly; and

(b) that there is practical utility in varying or discharging the single Judge's order, bearing in mind:

(i) the interests of all parties to the litigation;

(ii) the time and expense involved; and

(iii) the degree to which the issues on the ultimate appeal, if proceeded with, may have become moot or overtaken by other events such as the existence of other pending hearings that may effectively resolve the substantive issues in dispute.

Permission should not be granted under the proposed test

162 In our judgment, permission should not be granted to the applicants as there is no basis for suggesting that Chong JCA's decision in SUM 8 contained a legal error or involved a discretion exercised on a wrong principle or was otherwise exercised improperly. Chong JCA had jurisdiction to hear and determine SUM 8 pursuant to s 58(1) of the SCJA. More importantly, as we have set out above, there is no merit to the underlying matter in CA 2, and there is therefore no practical utility at all in reinstating the appeal. It is evident that the applicants' dissatisfaction is not with the fact that Chong JCA did not consider the merits of their case, but rather with the unfavourable conclusion reached by Chong JCA after considering the same.

163 Finally, we add that there is no impediment for the single Judge who decided the procedural matter to be part of the reconsidering panel in an application under s 58(4)(*b*) of the SCJA because the application for permission is not an appeal. This much is also clear from the language of s 58(4)(*b*): "an application to vary or discharge the direction or order may only be *made with the permission of the single Judge* or any other Judge, and a decision by any Judge to give or refuse permission is final" [emphasis added]. Although Chong JCA was not part of the present panel of the court, there was no legal restriction preventing him from having been so empanelled.

Conclusion

164 For these reasons, we dismiss SUM 16 in its entirety.

165 Given the important questions of public interest that were raised, we make no order as to costs for the proceedings before us. We note that, similarly,

no costs were ordered in OA 480 and SUM 8. The usual consequential orders will apply.

Sundaresh Menon
Chief Justice

Belinda Ang Saw Ean
Justice of the Court of Appeal

Woo Bih Li
Judge of the Appellate Division

See Kee Oon
Judge of the Appellate Division

Judith Prakash
Senior Judge

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