Prabagaran a/l Srivijayan *v* Public Prosecutor
[2015] SGCA 64

Case Number	: Criminal Appeal No 12 of 2014
Decision Date	: 30 November 2015
Tribunal/Court	: Court of Appeal
Coram	: Chao Hick Tin JA; Andrew Phang Boon Leong JA; Tay Yong Kwang J
Counsel Name(s)	: Eugene Thuraisingam and Suang Wijaya (Eugene Thuraisingam LLP) and Chenthil Kumarasingam (Quahe Woo & Palmer LLC) for the appellant; Wong Kok Weng and Goh Yi Ling (Attorney-General's Chambers) for the respondent.
Parties	: PRABAGARAN A/L SRIVIJAYAN — PUBLIC PROSECUTOR

Criminal Law – Statutory Offences – Misuse of Drugs Act

[LawNet Editorial Note: This was an appeal from the decision of the High Court in [2014] SGHC 222.]

30 November 2015

Tay Yong Kwang J (delivering the grounds of decision of the court):

Introduction

1 In the early morning of 12 April 2012, Prabagaran a/l Srivijayan ("the Appellant"), a Malaysian, then 24 years of age, drove a Malaysian-registered car, a Hyundai Sonata, into Singapore. The car had two black bundles hidden underneath the tray inside the centre arm rest console between the driver's seat and the front passenger's seat. The bundles were subsequently found to contain not less than 22.24g of diamorphine. Accordingly, the Appellant was charged under s 7 of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) ("MDA"):

> That you, **PRABAGARAN A/L SRIVIJAYAN**,
>
> on 12 April 2012, at about 5.15 a.m., at Woodlands Checkpoint, Singapore, inside Malaysian-registered vehicle bearing registration number JHY 93, did import a controlled drug specified as a "Class A drug" in the First Schedule to the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) ("the Act"), to wit, two packets of granular substance which was analysed and found to contain not less than **22.24 grams of diamorphine**, without any authorisation under the Act or the regulations made thereunder, and you have thereby committed an offence under s 7 and punishable under s 33 of the Act, and further upon your conviction under s 7 of the Act, you may alternatively be liable to be punished under s 33B of the Act.

2 The Appellant claimed trial. On 22 July 2014, the trial judge ("the Judge") convicted the Appellant. In so doing, the Judge disbelieved the Appellant's account that he did not know there were drugs in the car. On 22 September 2014, the Judge sentenced the Appellant to suffer the punishment of death under s 33 of the MDA. The sentence is mandatory as the Prosecution decided not to issue a certificate of substantive assistance under s 33B(2)(*b*) of the MDA.

3 The Appellant appealed against his conviction. On 2 October 2015, we dismissed the appeal.

We now set out the reasons for our decision.

The Appellant's final account of the facts

4 There were various accounts proffered by the Appellant on what happened in the days leading up to his arrest. This is his final account which combines all that he said to the police which is not inconsistent with his evidence at trial and the evidence he gave during the trial.

5 The critical events began with the Appellant's departure from a printing company called "ECS" which was located at Kaki Bukit, Singapore. The Appellant was employed as a "machine operator" [note: 1] in ECS. He found the work tough and did not turn up for work regularly. Sometime in February or early March 2012, he stopped turning up for work [note: 2] without informing ECS that he wanted to stop working there. When ECS tried to contact him, he did not answer the call. On the sixth day that he did not turn up for work, his work permit was cancelled and ECS stopped contacting him, [note: 3] even though the work permit and the gate pass into ECS were still in his possession.

6 In April 2012, the Appellant found new employment as a pump attendant at a Caltex petrol kiosk in Bukit Batok, Singapore. [note: 4] His first day of work was to be 9 April 2012 and his working hours were from 3pm to 11pm. However, the Appellant decided not to work that day. He spent part of the morning looking for other jobs (namely, security jobs at two guard posts and at a Woodlands warehouse) and looking around the Bukit Batok Caltex petrol kiosk. [note: 5] He was riding his motorcycle bearing registration number JMV 9765 that day. At about 7am to 8am, he returned to Malaysia.

7 He stayed in Malaysia for the rest of the day. [note: 6] That night, he went to the house of a close friend, "Balu", which was located in Skudai. He planned to return the work permit and the gate pass to ECS the next day and anticipated that it would be tiring to "go to two locations at ECS and Caltex", so he wanted Balu's help to borrow a car which he could rest in. [note: 7] Balu managed to borrow a car from his close friend, "Nathan", for the Appellant's use. Nathan also knew the Appellant but the Appellant did not consider Nathan and himself to be close friends, given that they only met about two to three months ago when the Appellant was visiting Balu at Balu's house. [note: 8]

8 On 10 April 2012, the Appellant rode his motorcycle to Balu's house to collect Nathan's car, which was parked at Balu's house. The Appellant left his motorcycle behind at Balu's house and drove Nathan's car towards Singapore. [note: 9] This was about 4am to 5am. The Appellant had set off early in the morning in order "to avoid the ERP on the expressways that [he] will take to get to Kakit Bukit. … The ERP timing that [he] was avoiding was 7.30am to 9.30am." [note: 10] If he had driven through the Electronic Road Pricing ("ERP") gantry when it was operating, he would be fined $70 because there was no "machine inside the car for the ERP". [note: 11]

9 At the Woodlands Checkpoint, the Appellant realised that he had left the work permit and the gate pass at home. As he was not allowed to make a U-turn back into Malaysia, he drove into Singapore, down the Bukit Timah Expressway to somewhere near the Turf Club, went for a toilet break and then rested in the car for a while before driving back to Balu's house in Malaysia. He returned the car at Balu's house and rode his motorcycle home. After taking a nap at home, he made a second trip, this time on his motorcycle, to Singapore to the Caltex petrol kiosk in Bukit Batok where he was required to report by 2.30pm. His shift started at 3pm and ended at 11pm. After work, he returned home. [note: 12] The day ended without the Appellant returning the work permit and the gate

pass to ECS.

10 On 11 April 2012, at about 10am or 11am, the "motorbike shop" where the Appellant bought his motorcycle called about the overdue monthly instalments payable on the motorcycle loan. The motorbike shop contacted the Appellant through his brother's handphone as it did not have his contact number. It did, however, have the number of his brother, who was the guarantor for the loan and who had also bought a motorcycle from the shop. [note: 13] During the call, the Appellant was threatened with repossession of his motorcycle. [note: 14] The Appellant thought he had more time and said so: "I have time until 28th of April. Why are you asking for the payment earlier?" The shop staff explained: "By 28th of April, it will be more than 3 months." By that, the shop staff meant that the Appellant already owed three months of instalments for January, February and March 2012. The Appellant promised that he would try to pay. [note: 15]

11 In the afternoon of 11 April 2012, the Appellant rode his motorcycle into Singapore. He worked at the Caltex petrol kiosk from 3pm to 11pm. [note: 16] He then rode back to Malaysia to Balu's house, arriving there after 1am on 12 April 2012. The Appellant requested to borrow Balu's motorcycle as he was afraid that his own motorcycle would be repossessed if he rode it into Singapore again and was caught by the "motorbike shop staff". [note: 17] Balu refused, explaining that the road tax on his motorcycle had not been paid. Balu proposed that the Appellant borrow Nathan's car. Balu called Nathan to ask if the Appellant could borrow his car. Nathan agreed and told Balu that the Appellant could take the car in the morning. Having sorted out his problems regarding his transport for the next day, the Appellant returned home and slept. [note: 18]

12 A few hours later, at about 4am on 12 April 2012, the Appellant woke up. He called Balu to tell Nathan that he was going over to Nathan's house to get the car. He planned to enter Singapore earlier to make a second attempt to return the work permit and the gate pass to ECS and then to sleep in the car until the time for work at the Caltex petrol kiosk in the afternoon. Like the days before, his shift would start at 3pm and end at 11pm. [note: 19] At about 4.15am to 4.30am, the Appellant rode his motorcycle to Nathan's house in Tampoi. [note: 20] At about 4.30am, he reached Nathan's house and made a phone call to Nathan. Nathan did not pick up the phone. So the Appellant shouted for Nathan outside the house. Nathan went to the gate of the house and let the Appellant take his car. [note: 21] The Appellant left his motorcycle behind in Nathan's house. [note: 22]

13 As the Appellant drove towards Woodlands Checkpoint, he made a detour to buy breakfast at a McDonald's restaurant in Tampoi. He parked the car at the parking lot which was between a Petronas petrol station and the McDonald's restaurant. [note: 23] He left the car unlocked and the car engine running. [note: 24] When he was buying his breakfast, he took a call from a person whom he knew as "Batte" or "Batu". He knew Batte/Batu was also heading to Singapore on 12 April 2012 for an interview, so he asked Batte/Batu if he wanted the Appellant to buy breakfast for him. Batte/Batu told him there was no need to do so. [note: 25]

14 The Appellant continued driving towards the Woodlands Checkpoint. He ate his breakfast in the car along the way. At around 5am, he reached Woodlands Checkpoint and cleared the Singapore Customs. He was about to leave when he noticed that the passenger side window could not be closed fully. He alighted and went around the car, opened the passenger seat door and tried to raise the window by pushing the button. An officer standing nearby enquired about the situation and the Appellant explained that the window could not close fully. Upon hearing that, the officer said, "Is that so? Come, let's check the vehicle." The officer directed him to drive into an inspection pit and to get

out of the car. A search of the car took place. There and then, the two black bundles containing diamorphine were found and the Appellant was arrested. [note: 26]

The prosecution's case

15 The prosecution's case was that when the Appellant drove through the immigration booths at the checkpoint, an officer from the Immigration and Checkpoints Authority ("ICA") noticed the black-tinted windows of the car and decided to stop it. The ICA officer asked the Appellant to drive to an inspection pit.

16 At the inspection pit, another ICA officer searched the Appellant and his belongings but nothing incriminating was found. Two ICA officers then searched the car. When one of them lifted the tray inside the arm rest console between the driver's and the front passenger's seats, the two black bundles were found. It was not disputed that the bundles were later analysed and found to contain not less than 22.24g of diamorphine.

17 In his various statements to Central Narcotics Bureau ("CNB") officers, the Appellant claimed that he did not know anything about the bundles of drug as the car belonged to his friend, Nathan. He also stated that he had done nothing wrong and was only coming to Singapore to work.

18 The prosecution adduced the record of the various calls made to and from the Appellant's handphone. It showed that Balu called the Appellant at 12.20pm on 11 April 2012 and at 1.22am on 12 April 2012. The Appellant returned Balu's calls at 4.15am. At 4.57am, Nathan called the Appellant. At 5.06am, the Appellant called Batte/Batu and then Nathan. At 5.12am, Batte/Batu returned the call. About three minutes later, the Appellant was arrested by the CNB. At 5.20am, Balu called the Appellant. At 5.38am, Batte/Batu called. At 6.03am, Nathan called. At 6.34am, Balu called again. These latter calls were not answered by the Appellant as he was already in CNB's custody.

The decision of the Judge

19 The Judge found the story "implausible to have even created any doubt in my mind as to his knowledge of the drugs in his possession". Key threads to the story were missing (see *Public Prosecutor v Prabagaran a/l Srivijayan* [2014] SGHC 222 ("the GD") at [14]–[16]):

(a) How would leaving the motorcycle in Nathan's house and taking Nathan's car help against the repossession of the motorcycle by the shop?

(b) How long did the Appellant intend to keep Nathan's car or to leave his motorcycle at Nathan's' house?

(c) Why did the Appellant need to contact Balu and trouble Nathan at 4am in the morning?

(d) Why was the Appellant driving a car to Singapore at 5am when he was only required to start his shift as a petrol pump attendant at 3pm?

20 The Judge did not think that there was any evidence with respect to what the Appellant "did or said when he was arrested and his car searched" that exculpated him in any way. Although the Appellant testified that "he had left the car unlocked and unattended when he went into McDonalds to get his breakfast", the Judge found "no evidence to suggest that someone else planted the drugs in the car during that time" (GD at [15]).

21 The result was that the Appellant failed to rebut the presumption of his possession of the drugs under s 21 of the MDA and the presumption of his knowledge of the nature of the drug under s 18(2) of the MDA. Consequently, the Judge convicted him of importing drugs under s 7 of the MDA.

Our decision

22 The same issue has arisen before us: whether the Appellant has rebutted the presumptions under ss 18(2) and 21 of the MDA by proving on a balance of probabilities that he did not know that there were drugs in the car.

23 The presumptions read as follows:

> **Presumption of possession and knowledge of controlled drugs**
>
> **18.** – …
>
> (2) Any person who is proved or presumed to have had a controlled drug in his possession shall, until the contrary is proved, be presumed to have known the nature of that drug.
>
> …
>
> **Presumption relating to vehicle**
>
> **21**. If any controlled drug is found in any vehicle, it shall be presumed, until the contrary is proved, to be in the possession of the owner of the vehicle and of the person in charge of the vehicle for the time being.

24 If the Appellant could show that he had no knowledge of the drugs in the car, he could not be in possession of them. If he was able to do that, he would have rebutted the presumption of possession under s 21 and the further presumption under s 18(2) pertaining to knowledge of the nature of the drugs would not arise.

25 The Appellant's defence was that he borrowed a car not knowing that it was carrying drugs. The Appellant raised the possibility that Balu or Nathan had made use of him to bring drugs into Singapore by planting drugs in the car. They knew the Appellant had two destinations: ECS and the Caltex petrol kiosk. So either Balu's uncle who worked at ECS or Balu's cousin, Puven, who worked at Caltex petrol kiosk could retrieve the drugs from the car in Singapore by using a spare key. [note: 27]

26 In our opinion, the Appellant's case that he borrowed a car for innocent purposes could not be established on the evidence. There were significant inconsistencies in the Appellant's evidence concerning the purported reasons he had for borrowing Nathan's car.

The Appellant was not borrowing a car for the reasons that he claimed

Repossession of the Appellant's motorcycle

27 We first examine the Appellant's reason that he was trying to thwart repossession of his motorcycle by the motorcycle shop. The Appellant claimed that he had not paid the monthly instalments from January 2012 to April 2012 and the motorcycle shop therefore threatened on 11 April 2012 that it would repossess the motorcycle.

28 Several obvious incongruities surface in the Appellant's evidence. For a person who feared repossession, the Appellant did not remember the name, address or telephone number of the motorcycle shop. [note: 28] According to the Appellant, the motorcycle shop which was supposedly going to repossess the Appellant's motorcycle did not know "what [the Appellant] was working as in Singapore and where [the Appellant] was working at" [note: 29] or even what the Appellant's contact number was. [note: 30] This raises the questions as to how the motorcycle shop was going to locate the Appellant's motorcycle in order to repossess it and why the Appellant feared immediate repossession.

29 A minor issue to note is whether the motorcycle shop had the right to repossess the motorcycle in the first place. Going by the notice of repossession that the Appellant adduced, it was a finance company, Wilayah Credit Sdn Bhd, [note: 31] rather than the motorcycle shop, which had entered into a hire-purchase agreement with the Appellant. The right to repossess the Appellant's motorcycle therefore belonged to Wilayah Credit Sdn Bhd, not the motorcycle shop.

30 Assuming the motorcycle shop had the right to repossess the Appellant's motorcycle, whether on behalf of Wilayah Credit Sdn Bhd or otherwise, there is the further question of whether the risk of repossession materialised as at 12 April 2012. Firstly, the notice of repossession from Wilayah Credit Sdn Bhd was delivered only on 7 May 2012. [note: 32] Secondly, what appears to be communicated over the telephone call with the motorcycle shop was that the Appellant had until 28 April 2012 to make payment: [note: 33]

A:	My … younger brother handed the phone to me. I spoke to the motor shop person. I informed him that I just started a job and I have not got my salary. I asked him, "I have time until 28th of April. Why are you asking for the payment earlier?" He said, "By 28th of April, it will be more than 3 months."
Court:	He said?
Witness:	Yes.
Court:	Yes.
Witness:	I told him I would try.

Thirdly, if there was indeed a threat of immediate repossession, the Appellant did what he said would incur the risk repossession by riding his motorcycle into Singapore soon after the phone call on 11 April 2012. He received the phone call from the motorcycle shop at about 10am to 11am that day. [note: 34] He would have left for work soon thereafter in order to start his shift at 3pm.

31 Based on the foregoing, the Appellant either did not receive the telephone call threatening repossession or had an allowance of at least a few days to make repayment to avoid repossession. In either case, the real reason for borrowing Nathan's car could not be the fear of immediate repossession of his motorcycle.

Napping in Nathan's car

32 The only other avowed reason for borrowing Nathan's car was that the Appellant wanted to nap

in a car after he returned the work permit and the gate pass to ECS and before his shift at Caltex petrol station started. [note: 35] This reason consists of three parts: firstly, the Appellant intended to nap in a car; secondly, the Appellant intended to return the work permit and the gate pass to ECS; and thirdly, the Appellant had to enter Singapore at an early hour to do so and to avoid road charges or a fine.

33 The purported intention to borrow a car to nap in is irreconcilable with the Appellant's evidence that he initially sought to borrow a motorcycle from Balu. Because Balu did not accede to his request, the alternative was to borrow the car. The borrowing of the car therefore had nothing to do with being able to take a nap in it.

34 In respect of his purported intention to return the work permit and the gate pass to ECS, it is strange that he would have such an intention on 10 April 2012, long after he had stopped working at ECS either in February 2012 or early March 2012 without informing ECS and after having ignored calls from ECS. Further, he made a total of 25 entries into Singapore [note: 36] since the termination of his employment at ECS. On none of these 25 entries before 10 April 2012 did he make any effort to return the work permit and the gate pass. Even on the 26th visit on 10 April 2012, he could not return the items as he forgot to bring them along. He did not inform ECS on 10 or 12 April 2012 that he was going to return the items. [note: 37] There was no evidence to explain why the Appellant would suddenly decide to return the items to ECS on 10 and 12 April 2012.

35 We now come to the issue about entering Singapore in the early hours of the morning. The Appellant had to start work at 3pm on 12 April 2012. On the day before (*ie*, 11 April 2012), he worked from 3pm to 11pm. [note: 38] Waking up at 4am [note: 39] to enter Singapore at 5am would be extremely inconvenient and tiring for him, especially since he got to bed only way past midnight. There would also be an interval of many hours before the Appellant's work at 3pm. The Appellant asserted that he entered Singapore very early in the morning because he wanted to avoid the ERP charges between 7.30 am and 9am. By coming in very early, he would not have to pay the ERP charges or a fine for not having an in-vehicle unit in the car when it passed under the ERP gantry. However, there was no need to enter Singapore at about 5am for this. He could have equally achieved his aim by entering Singapore past 9am, which would have been much more convenient for him, and which would have given him ample time to return the work permit and the gate pass and then to commence work at 3pm.

36 Each part of the Appellant's reason for borrowing the car defies belief. It is clear to us that they were not the truth.

The Appellant's evidence does not add up

37 Beyond borrowing Nathan's car, there are various aspects of the Appellant's case that did not add up. When regarded holistically, they show that the Appellant was not truthful. In turn, they cast further doubt on the Appellant's claim of absence of knowledge about the drugs in the car.

Leaving the car unlocked and unattended at McDonald's

38 On the Appellant's evidence, he left the car unlocked and unattended, with the engine running, while he bought breakfast at McDonald's. This, the Appellant contended, showed that he thought that there was nothing valuable in the car, such as the two bundles of diamorphine worth almost $70,000. [note: 40] If he knew about the drugs, he said that he would have locked the car.

39 It is unbelievable that the Appellant would leave the borrowed car unlocked with its engine running. The car itself is valuable property even if it was an old one. Someone could steal the car by driving it away. It is also extremely odd that the Appellant would be so careful in not wanting to lose his motorcycle through repossession but could be completely nonchalant about the possibility of losing a friend's car.

40 The Appellant's statement to the police initially stated: "I spent about 15 to 20 minutes to buy and eat my breakfast at the Macdonald's there. … When I was queuing for my food and eating it, I was unable to see my car." During the trial, he disputed the accuracy of his statement and said that the detail about where he ate his breakfast was wrong. He amended his statement about eating breakfast at McDonald's to say that he ate his breakfast in the car while he was driving. In our view, the Appellant must have realised the absurdity of his evidence about leaving the car unlocked with its engine running while he queued to buy food and then ate his food in the restaurant. He therefore tried to shorten the event by saying he brought the food back to the car and ate along the way. His initial statement was obviously contrived to create the possibility that someone could have planted the drugs in the unlocked car while he was in the restaurant.

The phone calls in the morning

41 There were numerous telephone calls which were made and received by the Appellant prior to his arrest and some that were missed by the Appellant after his arrest at 5.15am. A tabular summary of these telephone calls [note: 41] is set out below:

Date	Time	Call type	Caller/Person called	Number
11 April 2012	12.20pm	Received	Balu	0167011908 [note: 42]
12 April 2012	1.22am	Received	Balu	0167321821 [note: 43]
12 April 2012	4.15am	Dialled	Balu	0167321821
12 April 2012	4.57am	Received	Nathan	0163100757 [note: 44]
12 April 2012	5.06am	Dialled	Batte/Batu [note: 45]	0146318771 [note: 46]
12 April 2012	5.06am	Dialled	Nathan [note: 47]	0149807030 [note: 48]
12 April 2012	5.12am	Received	Batte/Batu	0146318771
12 April 2012	5.20am	Missed	Balu	0167321821
12 April 2012	5.38am	Missed	Batte/Batu	0146318771
12 April 2012	6.03am	Missed	Nathan	0163100757
12 April 2012	6.34am	Missed	Balu	0167011908

42 We will highlight here two of the telephone calls which were the subject of some strange and inconsistent explanations by the Appellant. The evidence on these two calls fortified our view that the Appellant was not telling the truth during the trial.

43 The first is the call made to Balu at 4.15am. The Appellant said the call was made so that Balu could "alert" Nathan to the fact that the Appellant was taking the car the morning. The Appellant said

he did not think of Nathan as his close friend and since the car was borrowed from Nathan through Balu, that was "why [he] called Balu in the morning to ask him to call Nathan". [note: 49] It was also the Appellant's evidence that Balu had already contacted Nathan the night before to ask for permission to borrow the car on the Appellant's behalf and Nathan agreed. It would appear therefore that the call had no purpose except to inform Nathan what he already knew. Subsequent to this call, the Appellant made another phone call to Nathan when he was outside Nathan's house, which undermined the purpose of his earlier call to Balu. If the Appellant was going to call Nathan anyway, why did he have to call Balu earlier to alert Nathan?

44 At one point during cross-examination, the Appellant reversed the order of the telephone calls made. He said that the purpose of the call to Balu was "to tell him that [he] was going to take the car from Nathan and also [he had] informed Nathan". [note: 50] It implied that the Appellant contacted Balu after contacting Nathan. Not only does this contradict the Appellant's own evidence, it makes no sense that the Appellant had to ring up Balu at 4.15am to notify him of what he just told Nathan.

45 In respect of the call at 5.06am made to Batte/Batu, during cross-examination, the Appellant said that Batte/Batu called him first but that call was disconnected before they could have a conversation, so he was merely returning a call. [note: 51] However, in his statement recorded on 17 April 2012, he said that he initiated the call to Batte/Batu while he was at McDonald's to ask Batte/Batu if he wanted the Appellant to buy breakfast for him. [note: 52] The Appellant also recounted that Batte/Batu called to ask the Appellant where he was [note: 53] and what the condition of the traffic jam was. He added that Batte/Batu had "no need … to call and enquire where [he] was going" and "Batte/Batu had worked in Singapore previously and he should very well know how the condition of the jam in the early morning". [note: 54] If all that Batte/Batu wanted to know was the answer to those two questions, it would not explain why the 5.06am call followed by two other calls at 5.12am (which was received) and 5.38am (which was missed), especially given the context that the Appellant did not know Batte/Batu well. He described Batte/Batu as Balu's friend. [note: 55]

Stepping out of the car to adjust a window

46 The Appellant claimed that after the boot of the car was checked at the Woodlands Checkpoint, he stepped out of the car and walked to the front passenger side to check a faulty window as it could not be raised after he had lowered it. [note: 56] He opened the door there and tried to raise the window by pushing the electronic button. Two immigration officers were standing nearby. One of them asked him what was happening and he told the officer that "the window was spoilt". Then the officer said, "Is that so? Come, let's check the vehicle." From this, the Appellant argued that his acts of stopping the car and stepping out to check the window, which attracted the attention of the officer and prompted the search of the car, militated against the inference that he knew about the presence of drugs in the car.

47 However, the Appellant's account has to be contrasted with the accounts of the ICA officers present. Neither SGT Chen Zhongfu Roger nor SSGT Chan Tim Fatt could remember that the Appellant stepped out of the car. [note: 57] On the contrary, SSGT Chan Tim Fatt testified that the car was stopped while the Appellant was in it and he directed the Appellant to drive into the inspection pit because the car windows had dark tint and he could not see the driver. [note: 58]

48 There was no reason for the ICA officers to search the car because it had a faulty window. Further, the Appellant's account differed from his statement recorded on 17 April 2012. That

statement reflected that the "driver's side window", [note: 59] not the front passenger's side window, was partially wound down and could not be raised back up. This account was only belatedly amended at trial. [note: 60]

The Samsung handphone found on the Appellant

49 One final inconsistency in the Appellant's evidence concerned the ownership of a Samsung mobile phone found on the Appellant. In the statement recorded on 16 April 2012, the Appellant unreservedly proclaimed the Samsung mobile phone to be his. [note: 61] However, during cross-examination, the Appellant inexplicably changed his evidence to say that the phone was Balu's. [note: 62]

Analysis of the evidence

50 On the totality of the evidence, we agree with the Judge that the Appellant has not rebutted the twin presumptions of possession and knowledge under ss 18(2) and 21 of the MDA. The lies and omissions which permeated the Appellant's evidence weighed heavily against his claim that he borrowed a car without knowing that it had drugs in it. His account of absence of knowledge about the drugs in the car was highly improbable and, as indicated above, absurd in some aspects. On a balance of probabilities, the Appellant has not proved that he had no knowledge of the drugs.

There is no failure in the criminal justice process

The Appellant has not been prejudiced by a failure to secure admissible objective evidence

51 We now consider the Appellant's argument on whether his conviction should be overturned or, in the alternative, whether new evidence should be admitted or a re-trial be ordered because he was prejudiced by the failure to secure admissible objective evidence.

52 At the heart of this argument lies the contention that the CNB should have conducted more investigations on the leads which the Appellant had provided, namely, that there were two individuals named Nathan and Balu who could have made use of the Appellant by hiding the drugs in the car. If he managed to clear the checkpoint, he surmised that Nathan and Balu would have gone to the Caltex petrol station and used a spare key to gain access to the car. Counsel for the Appellant, Mr Eugene Thuraisingam, emphasised the fact that the Appellant had provided the contact numbers of Nathan and Balu and had disclosed that he knew the way to Nathan's house and to Balu's house. Mr Thuraisingam suggested that the CNB should have traced or called the numbers or allowed the Appellant to guide them to the houses in Malaysia because the Appellant could not do the same himself while incarcerated. The goal was to secure the attendance of Nathan and Balu at trial, if possible, or to adduce relevant evidence arising from the investigations, if any.

53 Mr Thuraisingam also submitted that the failure of the CNB to investigate the matter properly ought to influence the court's assessment of the evidence before it at two levels. Firstly, due regard must be given to the inherent difficulties that an accused person would have in securing the attendance of material witnesses or in adducing favourable objective evidence. Secondly, the level of cogency of the evidence required to establish a case on a balance of probabilities must be lower for an accused who was prevented by impracticality from adducing evidence than for an accused who made tactical decisions to exclude evidence.

54 The Appellant's claim that he could have been made use of by Nathan and Balu to import drugs

into Singapore unknowingly was speculative. This was especially so when seen in the light of the highly improbable and sometimes absurd evidence that we have mentioned earlier. The Appellant could not have been prejudiced by the lack of objective corroborative evidence when his testimony was devoid of credibility in the first place. He did not even manage to set out a plausible defence which he could then claim could not be corroborated for want of such corroborative evidence through no fault of his.

55 The two cases cited by the Appellant demonstrate this point. In *Khor Soon Lee v Public Prosecutor* [2011] 3 SLR 201 ("*Khor Soon Lee*"), the Court of Appeal considered that the accused there had raised a credible defence to a charge of importation in that he had taken precautions not to deal in drugs which would result in capital punishment and he had the assurance from his supplier, Tony, that he was not carrying diamorphine. The Court of Appeal found (at [27]) that "the Appellant has adduced evidence to the effect that he had hitherto always been dealing in the Controlled Drugs, which (in turn) constitute evidence of a *consistent pattern of conduct that was not contradicted by the Prosecution in the court below*" [emphasis in the original]. "Controlled Drugs" was defined in the judgment (at [21]) as four named drugs excluding diamorphine. What was missing in evidence was Tony's testimony because Tony had earlier been granted a discharge not amounting to an acquittal and had left the jurisdiction. The court opined at [26] that it obviously did not know what precisely Tony's testimony would have been had he been called as a witness but at the very least, the accused there "ought *not* to be prejudiced by the absence of Tony's testimony as a result of the Prosecution's decision to apply for a DNAQ" (discharge not amounting to an acquittal). The court at [29] also considered Tony to be a "significant witness" and assumed that his "testimony, if given, would have buttressed the Appellant's case". In any case, the Court of Appeal also sounded "a strong cautionary note" at [29] that "given the finely balanced set of facts in the present appeal, nothing in this case sets a precedent for future cases (which ought, in any event, to turn on their own particular facts)".

56 Similarly, in *Veeramani Manikam v Public Prosecutor* [2015] SGHC 201 ("*Veeramani Manikam*"), which was an appeal from the District Court to the High Court, the High Court Judge opined that the accused had provided a "highly plausible explanation" (at [11]) for driving into Singapore a car which carried drugs. He claimed that he was ferried by a customer of a pub after a night of drinking and was abandoned somewhere along the road before the Malaysian Customs. He was then awakened by a Malaysian traffic police officer who threatened to issue a summons if he did not move the car. Complying with this order, he drove it past the Malaysian Customs and proceeded towards the Singapore Woodlands Checkpoint because he was unable to make a U-turn. He claimed that he intended to make a U-turn after the Woodlands Checkpoint. Evidence to ascertain the veracity of the accused's story, such as whether there was in fact a U-turn before the Malaysian Customs and the accused's assertions of events in Johor Baru, was missing. Therefore, the court adjourned the matter for facts in the accused's story to be verified and, if necessary, for fresh evidence to be taken. The High Court Judge heard further evidence subsequently and came to the conclusion that the accused had rebutted the presumptions in ss 18(2) and 21 of the MDA. He therefore allowed the appeal and set aside the conviction.

57 The courts in both cases discussed above were of the view that the respective accused persons had given plausible or believable defences. Further, the relevant evidence that was missing was due to no fault of the accused person (in the case of *Khor Soon Lee*) or attributable at least to the fact that the accused person was not legally represented at the trial (in the case of *Veeramani Manikam*). The Appellant in our case was represented by two defence lawyers during the trial in the High Court (who are not the lawyers before us in the Court of Appeal). More importantly, as we have emphasised at [54] above, the Appellant's evidence was in itself highly improbable and sometimes absurd.

58 The alleged failure of the CNB to make further investigations was not raised during the trial. The full extent of the investigations made was therefore not explored. Consequently, any allegation before the Court of Appeal that certain investigations were not carried out is speculative.

59 The more important question is the extent of the CNB's duty to investigate. This clearly involves operational matters. The CNB has to assess the value and the viability of making any particular investigation in each case. It has to make judgment calls on the usefulness of any information given to it. It has to consider its resources and its statutory powers of investigation. For instance, it cannot be expected to traverse the globe to investigate merely because an accused person mentions the names of ten persons in ten different countries together with their contact numbers. Further, it must not be forgotten that Parliament has set out statutory presumptions in the MDA to assist the CNB and the Prosecution in their work and it is therefore incumbent on accused persons to produce the necessary evidence to rebut the presumptions. Such evidence, as the two cases discussed above have shown, could possibly be the oral testimony of the accused persons if it is considered to be credible on a balance of probabilities.

There is no basis to assert that material evidence was not adduced by the Prosecution

60 In relation to the revelation during cross-examination that there were CNB officers who interviewed the Appellant a few days after his arrest, [note: 63] Mr Thuraisingam submitted that there was no disclosure of the follow-up by the CNB officers. Mr Thuraisingam pointed out that as the CNB officers in question were not put on the witness list, they could not be asked whether they found anything of significance in their investigations.

61 The arguments assumed that there were investigations done by the CNB officers in question, coupled with a failure by the Prosecution to disclose details of the investigations. The Prosecution is fully aware of its duty to disclose any material evidence that is discovered even if it is not in favour of the Prosecution's case. If it was felt that the matter was worthwhile pursuing at trial, the defence counsel could have easily asked for the names of the officers in question and applied to the Judge that they be called to testify. The submissions before us amounted to nothing more than bare assertions that there was further information uncovered and that there was non-disclosure of such information. We are therefore not persuaded that further evidence should be taken.

Conclusion

62 Under the MDA, the onus is on the Appellant to rebut the presumptions that he possessed the drugs in the car and that he knew the nature of the drugs, on a balance of probabilities. The Appellant has failed to do so. Like the Judge, we were left in no doubt that the Appellant was guilty of importing the drugs into Singapore. We therefore dismissed the appeal, and upheld the conviction and consequently, the mandatory death sentence.

[note: 1] ROP Vol 2, Exhibit P13, p 75, para 5.

[note: 2] ROP Vol 1, NE, Day 4, 22 May 2014, p 10 line 31 – p 11 line 5.

[note: 3] ROP Vol 2, Exhibit P15, pp 81–82, paras 27–28.

[note: 4] ROP Vol 1, NE, Day 4, 22 May 2014, p 15 line 22; ROP Vol 2, Exhibit P13, p 74, para 2.

[note: 5] ROP Vol 1, NE, Day 4, 22 May 2014, p 15, lines 5–27.

[note: 6] ROP Vol 1, NE, Day 4, 22 May 2014, p 15 line 30 – p 16 line 17.

[note: 7] ROP Vol 1, NE, Day 4, 22 May 2014, p 16 lines 20–24.

[note: 8] ROP Vol 2, Exhibit P15, p 80, para 22.

[note: 9] ROP Vol 1, NE, Day 4, 22 May 2014, p 16 lines 19–20; p 18 lines 5–10.

[note: 10] ROP Vol 2, Exhibit P14, p 77, para 10.

[note: 11] ROP Vol 2, Exhibit P15, p 82, para 29.

[note: 12] ROP Vol 1, NE, Day 4, 22 May 2014, p 17, lines 24–31; ROP Vol 2, Exhibit P14, p 77, para 11; Exhibit P15, p 81, para 26.

[note: 13] ROP Vol 1, NE, Day 5, 23 May 2014, p 5 lines 18–19.

[note: 14] ROP Vol 2, Exhibit P15, p 82, para 30.

[note: 15] ROP Vol 1, NE, Day 4, 22 May 2014, p 12 lines 15–19; p 19 lines 7–19.

[note: 16] ROP Vol 2, Exhibit P13, p 74, para 2.

[note: 17] ROP Vol 2, Exhibit P14, p 76, para 8; p 78, para 18; Exhibit P19, p 103, para 61.

[note: 18] ROP Vol 1, NE, Day 4, 22 May 2014, p 20 lines 12–31; p 21 lines 6–12; ROP Vol 2, Exhibit P19, p 103, para 59.

[note: 19] ROP Vol 2, Exhibit P14, p 78, para 17.

[note: 20] ROP Vol 1, NE, Day 4, 22 May 2014, p 21 lines 13–18.

[note: 21] ROP Vol 1, NE, Day 4, 22 May 2014, p 21 line 27 – p 22 line 2.

[note: 22] ROP Vol 2, Exhibit P14, p 76, para 8; p 77, para 13.

[note: 23] ROP Vol 2, Exhibit P18, p 100.

[note: 24] ROP Vol 2, Exhibit P14, p 78, para 15.

[note: 25] ROP Vol 1, NE, Day 4, 22 May 2014, p 22 lines 18–21; ROP Vol 2, Exhibit P17, pp 89–90, para 50.

[note: 26] ROP Vol 1, NE, Day 4, 22 May 2014, p 23 line 5 – p 24 line 22; ROP Vol 2, Exhibit P17, p 86,

para 34.

[note: 27] Appellant's written submissions at p 34, para 52.

[note: 28] ROP Vol 1, NE, Day 5, 23 May 2014, p 4 lines 21–25.

[note: 29] ROP Vol 2, Exhibit P 15, p 82, para 30.

[note: 30] ROP Vol 2, Exhibit P15, p 82, para 30.

[note: 31] ROP Vol 2, Exhibit D2, p 123.

[note: 32] ROP Vol 2, Exhibit D2, p 123.

[note: 33] ROP Vol 1, NE, Day 4, 22 May 2014, p 19 lines 7–15.

[note: 34] ROP Vol 1, NE, Day 4, 22 May 2014, p 19 lines 3–5.

[note: 35] ROP Vol 2, Exhibit P14, p 78, para 17.

[note: 36] ROP Vol 2, Exhibit P20, pp 107–108.

[note: 37] ROP Vol 2, Exhibit P14, p 78, para 16.

[note: 38] ROP Vol 2, Exhibit P13, p 74, para 2.

[note: 39] ROP Vol 1, NE, Day 4, 22 May 2014, p 21 lines 13–16.

[note: 40] ROP Vol 1, NE, Day 6, 22 July 2014, p 8 lines 2–6.

[note: 41] ROP Vol 1, NE, Day 2, 15 May 2014, p 18 lines 12–17; p 19 line 8 – p 20 line 10.

[note: 42] ROP Vol 2, Exhibit P17, p 89, para 49.

[note: 43] ROP Vol 2, Exhibit P15, p 82, para 31.

[note: 44] ROP Vol 2, Exhibit P17, p 89, para 48.

[note: 45] ROP Vol 1, NE, Day 5, 23 May 2014, p 10 lines 9–28.

[note: 46] ROP Vol 1, NE, Day 4, 22 May 2014, p 27 lines 7–9; ROP Vol 2 Exhibit P17, pp 89–90, para 50.

[note: 47] ROP Vol 1, NE, Day 5, 23 May 2014, p 10 lines 9–28.

[note: 48] ROP Vol 2, Exhibit P15, p 82, para 31.

[note: 49] ROP Vol 1, NE, Day 5, 23 May 2014, p 8 lines 4–20.

[note: 50] ROP Vol 1, NE, Day 4, 22 May 2014, p 34 lines 17–18

[note: 51] ROP Vol 1, NE, Day 5, 23 May 2014, p 11 lines 15–22.

[note: 52] ROP Vol 2, Exhibit P17, pp 89–90, para 50.

[note: 53] ROP Vol 1, NE, Day 4, 22 May 2014, p 22 lines 12–21.

[note: 54] ROP Vol 1, NE, Day 4, 22 May 2014, p 34 lines 9–15.

[note: 55] ROP Vol 2, Exhibit P17, p 90, para 51.

[note: 56] ROP Vol 1, NE, Day 4, 22 May 2014, p 23 lines 20–28.

[note: 57] ROP Vol 1, NE, Day 1, 14 May 2014, p 16 line 27 – p 17 line 4 (Sgt Chen Zhongfu Roger); p 24 lines 20–25 (SSgt Chan Tim Fatt).

[note: 58] ROP Vol 1, NE, Day 1, 14 May 2014, p 24 lines 8–11.

[note: 59] ROP Vol 2, Exhibit P17, p 86, para 33.

[note: 60] ROP Vol 1, NE, Day 4, 22 May 2014, p 31 line 27 – p 32 line 9.

[note: 61] ROP Vol 2, Exhibit P15, p 82, para 31.

[note: 62] ROP Vol 1, NE, Day 4, 22 May 2014, p 26 lines 5–9.

[note: 63] ROP Vol 1, NE, Day 3, 20 May 2014, p 9 lines 21–30.