IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2022] SGHC 291

Originating Application 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 — Accused person — Rights]
[Constitutional law — Fundamental liberties — Right to life and personal liberty]
[Constitutional law — Natural justice — Right to fair hearing]
[Criminal law — Statutory offences — Misuse of Drugs Act]

Jumaat bin Mohamed Sayed and others
v
Attorney-General

[2022] SGHC 291

General Division of the High Court — Originating Application No 480 of 2022
Valerie Thean J
14 November 2022

25 November 2022 Judgment reserved.

Valerie Thean J:

1 This application is brought by four inmates of Changi Prison who have been sentenced to the mandatory death penalty for offences under the Misuse of Drugs Act 1973 (2020 Rev Ed) ("MDA"). These four claimants, Jumaat bin Mohamed Sayed ("Jumaat"), Lingkesvaran Rajendaren ("Lingkesvaran"), Datchinamurthy a/l Kataiah ("Datchinamurthy"), and Saminathan Selvaraju ("Saminathan") apply under O 24 r 5 of the Rules of Court (2021 Rev Ed) ("ROC") for permission to seek the following relief:

> 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.

2 I dismiss the application for the reasons that follow.

Background

3 The claimants were convicted and sentenced to the death penalty by the High Court. Their appeals against conviction and sentence have been dismissed. The facts pertinent to the claimants' convictions were detailed in the following:

(a) *Public Prosecutor v Jumaat bin Mohamed Sayed* [2018] SGHC 176 ("*Jumaat*") at [1]–[44]. The Court of Appeal upheld Jumaat's conviction on 3 July 2019.

(b) *Public Prosecutor v Lingkesvaran Rajendaren and another* [2018] SGHC 234 at [1]–[31]. The Court of Appeal upheld Lingkesvaran's conviction on 27 March 2019.

(c) *Public Prosecutor v Christeen d/o Jayamany and another* [2015] SGHC 126 at [1]–[17]. The Court of Appeal upheld Datchinamurthy's conviction on 5 February 2016, and his application for review was dismissed by Chao Hick Tin SJ on 5 April 2021 (see *Datchinamurthy a/l Kataiah v Public Prosecutor* [2021] SGCA 30 at [5] and [49]).

(d) *Public Prosecutor v Zulkarnain bin Kemat and others* [2018] SGHC 161 at [1]–[46]. The Court of Appeal upheld Saminathan's conviction on 8 May 2020 (see *Mohammad Rizwan bin Akbar Husain v Public Prosecutor and another appeal and other matters* [2020] SGCA 45 at [107]).

Proper defendant

4 A preliminary matter arose out of the submissions filed by the defendant, who makes the point that this application ought to have been brought against the Attorney-General ("AG") in the light of s 19(3) of the Government Proceedings Act 1956 (2020 Rev Ed). The AG does not take any objection on that ground, and in their submissions dealt with the application as one brought against the AG. At the hearing, the claimants did not object to the AG's position and did not object to a substitution of the PP for the AG. I therefore exercised my powers under O 3 r 2 of the ROC to substitute the PP for the AG at the commencement of the hearing.

Claimants' arguments

5 The claimants argue that Arts 9 and 12 of the Constitution of the Republic of Singapore (2020 Rev Ed) ("Constitution") protect the fundamental rules of natural justice, which are procedural rights aimed at securing a fair trial.[1] One such right is the presumption of innocence, as was described by the House of Lords in *Woolmington v Director of Public Prosecutions* [1935] AC 462 ("*Woolmington*"). This presumption has been repeatedly recognised by the Singapore courts as an integral part of our criminal justice system: see *AOF v Public Prosecutor* [2012] 3 SLR 34 ("*AOF*") at [314]–[315] and *Public Prosecutor v GCK and another matter* [2020] 1 SLR 486 at [126]. This shows that the presumption of innocence is "entrenched in Singapore law, and is guaranteed by the Constitution under Art 9(1) and Art 12(1)".[2]

---

1 Claimants' Written Submissions ("CWS") at paras 5–9.

2 CWS at para 13.

6 The claimants submit that ss 18(1) and 18(2) of the MDA violate the constitutionally protected presumption of innocence. This is because the presumption of innocence mandates that the prosecution prove each and every element of the offence beyond a reasonable doubt. In contrast, the presumptions in ss 18(1) and 18(2) shift the *legal* burden of proof in respect of certain key elements of the offence in question to the accused person. In addition, the presumptions in ss 18(1) and 18(2) can "stack", in that the presumption under s 18(1) operates to shift the burden of proof in respect of possession to an accused person, and also triggers the presumption of knowledge under s 18(2).

7 In the alternative, the claimants submit that the twin presumptions should be read down to impose only an evidential (rather than legal) burden on the accused.[3] They rely on the Hong Kong case of *HKSAR v Hung Chan Wa* [2006] HKCU 1464 ("*Hung Chan Wa*") for this.[4] At the hearing, this was the main submission of the claimants.

8 Further, because these presumptions must be rebutted by the accused person *on the balance of probabilities*, there could be a situation where an accused person is convicted even though a reasonable doubt exists as to his guilt: for example, where he is able to raise some doubt about either his knowledge or possession, but is unable to satisfy the court of his defence on a balance of probabilities. This offends the presumption of innocence. The claimants rely on *R v Lambert* [2002] 2 AC 545 ("*Lambert*") and *R v Oakes* [1986] 1 SCR 103 ("*Oakes*") in support of this argument.[5]

---

3 CWS at paras 15–19.

4 CWS at paras 15–19.

5 CWS at paras 20–24.

9 The claimants also highlight the severity of the offence of drug trafficking, and argue that this means the presumption of innocence should be given added weight when interpreting ss 18(1) and 18(2). This is because the courts should be slower to derogate from an individual's constitutional rights when the penalties are severe.[6]

10 The claimants conclude that the solution is to interpret ss 18(1) and 18(2) such that they do not interfere with the constitutional rights of accused persons more than necessary. Their proposal is to read the provisions such that the presumptions may be rebutted where the accused raises a reasonable doubt. The claimants submit that this is consistent with the parliamentary intention in relation to ss 18(1) and 18(2); and contend that Parliament did not intend to seriously infringe the presumption of innocence.

Defendant's arguments

11 The AG raises various procedural and preliminary issues, as follows:

(a) An application for judicial review pursuant to O 24 r 5 of the ROC is the wrong procedure for the relief sought by the claimants. The claimants should have commenced proceedings under s 394H of the Criminal Procedure Code 2010 (2020 Rev Ed) ("CPC") instead, which would entail an application to the Court of Appeal for permission to do so.[7]

(b) The claimants do not have standing. Jumaat does not have sufficient interest in the matter because the Court of Appeal dismissed the appeal against his conviction without relying on

6 CWS at paras 25–27.

7 Defendant's Written Submissions ("DWS") at paras 5–13.

the relevant presumptions. For Lingkesvaran, Datchinamurthy and Saminathan, they have not shown how the burden of proof and stacking arguments would have had any impact on their convictions.[8]

(c) The application is time-barred, given that more than three months have passed since the final determinations of the claimants' respective criminal proceedings.[9]

12 In respect of the substantive issue, the defendant does not dispute that ss 18(1) and 18(2) of the MDA place a legal burden of proof on accused persons to rebut the presumptions on a balance of probabilities and that the presumptions may operate together.[10] The AG argued that the presumptions under ss 18(1) and 18(2), being presumptions of fact, do not detract from the need for prosecution to prove its case beyond reasonable doubt, and do not contravene Arts 9(1) or 12 of the Constitution. While the presumption of innocence is a bedrock principle of the criminal justice system, Parliament may still legislate statutory provisions which shift the burden of proof to the accused in certain circumstances. This is settled law from *Ong Ah Chuan and another v Public Prosecutor* [1979–1980] SLR(R) 710 ("*Ong Ah Chuan*").[11]

13 The AG contends that the foreign cases cited by the claimants are unhelpful because they were decided in different constitutional contexts. In

---

8 DWS paras 17–23.

9 DWS paras 24–27.

10 CWS paras 16–17; DWS paras 29–33.

11 DWS paras 39–44.

particular, the UK and Hong Kong courts were subject to specific legislation that curtailed the effect of the presumptions contained in their drug legislation.[12]

Issues

14 Order 24 r 5(1)(*b*) of the ROC provides that no application for a prohibiting order must be made unless permission to make the application has been granted. Order 24 r 5(1)(*a*) provides that the application may include an application for a declaration that is consequential upon or ancillary to that prohibiting order. The requirement for permission applies to a claimant seeking both orders: see *Vellama d/o Marie Muthu v Attorney-General* [2013] 4 SLR 1 at [53], in the context of the requirement for leave under O 53 r 1 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("ROC 2014").

15 In *Gobi a/l Avedian and another v Attorney-General and another appeal* [2020] 2 SLR 883 ("*Gobi*"), the Court of Appeal set out the following requirements for leave to commence judicial review proceedings (at [44]):

(a) The subject matter of the complaint is susceptible to judicial review.

(b) The claimant has sufficient interest or *locus standi* in the subject matter.

(c) The materials before the court disclose an arguable or *prima facie* case of reasonable suspicion in favour of granting the remedies sought by the claimant.

---

12 DWS paras 46–47.

16 The various arguments and objections in this application may be neatly organised under the three requirements for ease of analysis. The defendant's objections to the timing and mode of the application relate to the first criterion, its objections that relate to standing are relevant to the second criterion, and its arguments on the substantive application pertain to the third criterion. I therefore frame my analysis with reference to the three requirements of *Gobi*:

(a) Is the matter susceptible to judicial review?

(b) Do the claimants have sufficient interest?

(c) Is there an arguable or *prima facie* case of reasonable suspicion?

Is the matter susceptible to judicial review?

Is the application brought timely?

17 Under O 24 r 5(2) of the ROC, an application for permission to apply for a mandatory, prohibiting or quashing order must be made within three months after the date of the omission, judgment, order, conviction or proceedings which gave rise to the application. As detailed at [3] above, more than three months have passed since the final judicial determinations in all of the claimants criminal cases.

18 The 3-month requirement is a procedural requirement mandated by the ROC. Under O 3 r 2(1) and (4) of the ROC, the court has the general power to waive the non-compliance in the interests of justice. I do not do so because there is no merit in the application for permission, for the reasons I explain below.

Is judicial review appropriate?

19 In the present case, the claimants seek a prohibiting order against the execution of their death sentences which were meted out in respect of drug offences for which they were convicted. This would require analysis of the facts substantiating their convictions and sentences. The declaratory reliefs sought rest on the argument that they were convicted using an interpretation of the MDA provisions that offends the Constitution. This would involve revisiting the interpretation of the MDA provisions undergirding their convictions. Despite the claimants' assertion that they seek only to examine the Constitution, the true subject matter of the present application is the propriety of the claimants' convictions, which were the remit of their respective cases in the High Court and Court of Appeal. This application for permission amounts to a collateral attack on the earlier criminal decisions.

20 The AG makes a further point that the proper forum for any reconsideration of their convictions would be a review application under ss 394F to 394K of the CPC and the proper mode for the remedies sought by the claimants should be a review application under s 394H of the CPC. I agree with the AG's submission that *if* proper reason exists to reconsider their convictions, the proper mode for such reconsideration would be a review application.

21 Notwithstanding, having regard to the issues raised in this application, the claimants would not have been able to meet the requirements for the Court of Appeal to exercise its power of review under s 394H of the CPC. In order for the Court of Appeal to exercise its power of review under Division 1B of the CPC, the claimants would have to show that there is sufficient material on which the court may conclude that there has been a miscarriage of justice in their

respective criminal matters in which the earlier decision was made (s 394J(2) of the CPC). For any material consisting of legal argument to be sufficient, ss 394J(3) and (4) mandate the following cumulative requirements. The material:

(a) must not have been canvassed at any stage of the proceedings in the criminal matter in respect of which the earlier decision was made;

(b) could not have been adduced in court earlier, even with reasonable diligence;

(c) must be compelling, in that the material is reliable, substantial, powerfully probative, and capable of showing almost conclusively that there has been a miscarriage of justice in the criminal matter in respect of which the earlier decision was made; and

(d) must, in addition to satisfying all of the requirements above, be based on a change in the law that arose from any decision made by a court after the conclusion of all proceedings relating to the criminal matter in respect of which the earlier decision was made.

22 In the present case, none of the above criteria are met.

Do the claimants have sufficient interest?

23 The AG makes various arguments about the standing of the claimants. First, for Jumaat, it contends that the Court of Appeal did not rely on the presumptions in their oral reasons given at the dismissal of the appeal.[13] For the

[13] Defendant's Bundle of Authorities (Volume 2) filed on 10 October 2022 at p 1606.

other claimants, the AG argues these claimants have not shown how the burden of proof and stacking arguments would have had any impact on their convictions.

24 In the present case, the claimants contend that they were convicted and sentenced pursuant to a statute that was interpreted in a manner that is inconsistent with the Constitution. This would, if established, constitute a violation of their constitutional rights. For Jumaat, while the Court of Appeal upheld Jumaat's conviction without relying on the presumptions that are now being challenged, the High Court did come to its decision by using the presumptions (*Jumaat* at [82]). In *Tan Eng Hong v Attorney-General* [2012] 4 SLR 476 at [115], the Court of Appeal held that sufficiency of interest is *prima facie* made out once there is a violation of constitutional rights. There is no need for a subsisting prosecution under an allegedly unconstitutional law for this *prima facie* sufficiency of interest to arise (at [110]):

> At the same time, and for the avoidance of doubt, we state conclusively that we also reject the proposition that a subsisting prosecution under an allegedly unconstitutional law must be demonstrated in every case before a violation of constitutional rights can be shown. A law is either constitutional or it is not. The effects of a law can be felt without a prosecution, and to insist that an applicant needs to face a prosecution under the law in question before he can challenge its constitutionality could have the perverse effect of encouraging criminal behaviour to test constitutional issues. Even though a violation of constitutional rights may be most clearly shown where there is a subsisting prosecution under an allegedly unconstitutional law, we find that a violation may also be established in the absence of a subsisting prosecution. In certain cases, the very existence of an allegedly unconstitutional law in the statute books may suffice to show a violation of an applicant's constitutional rights.

25 In my judgment, the claimants possess sufficient interest in the subject matter for the purposes of obtaining permission for judicial review. The difficulties with their application lie elsewhere.

Is there an arguable or *prima facie* case of reasonable suspicion?

26 The claimants' arguments involve three related concepts: the presumptions under s 18 of the MDA, Arts 9 and 12 of the Constitution, and the presumption of innocence. These concepts may be analysed through the lens of the following three issues:

(a) the effect and ambit of the s 18 MDA presumptions;

(b) their relationship with Arts 2, 9 and 12 of the Constitution; and

(c) how the presumption of innocence interacts with the provisions above.

Effect and ambit of the s 18 MDA presumptions

27 Section 18(1) of the MDA provides:

> **18.**—(1) Any person who is proved to have had in his or her possession or custody or under his or her control —
>
> (*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.

28 Section 18(2) provides that:

> (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. [emphasis added]

29 It is not disputed that these presumptions impose a legal burden of proof on the defendant once the facts triggering them have been proved by the prosecution. As the Court of Appeal explained in *Obeng Comfort v Public Prosecutor* [2017] 1 SLR 633 ("*Obeng Comfort*") at [34], s 18(1) lists certain things which, if the accused is proved to be in possession, control or custody of them, give rise to a presumption that he was in possession of a controlled drug. This is a presumption of fact. The accused, by virtue of his possession of that thing, is presumed to have in his possession the drugs which are contained in or related to that thing. To rebut this presumption, the accused has to prove, on a balance of probabilities, that he did not have the controlled drug within his possession.

30 Where the accused has either been proven to have the controlled drug in his possession, or been presumed under s 18(1) to have had the controlled drug in his possession and such presumption not been rebutted, s 18(2) contains a presumption that he had knowledge of the nature of the drug. In the same vein as the presumption under s 18(1), the accused must prove on a balance of probabilities that he did not have knowledge of the nature of the controlled drug in order to rebut this presumption: *Obeng Comfort* at [36].

31 With the reversal of the burden of proof, where the presumptions operate, it is not sufficient for the accused to raise a reasonable doubt: *Masoud Rahimi bin Mehrzad v Public Prosecutor and another appeal* [2017] 1 SLR 257 ("*Masoud Rahimi*") at [42]. It does not suffice to simply deny knowledge or by suggest that one was indifferent as to the nature of the drugs: *Munusamy Ramarmurth v Public Prosecutor* [2022] SGCA 70 at [43]–[44]. The Court of Appeal explained the practical effect of the presumptions as follows in *Public*

Prosecutor v Ilechukwu Uchechukwu Chukwudi [2015] SGCA 33 ("*Ilechukwu*") at [32]:

> Since s 18(2) of the MDA has been triggered, the legal burden has shifted to the Respondent. It is not sufficient for the Respondent to merely raise a "reasonable doubt" *vis-à-vis* the issue of knowledge (see *eg*, *Iwuchukwu Amara Tochi v PP* [2006] 2 SLR(R) 503 at [9]). Further, as Chan Sek Keong CJ pointed out in *Nagaenthran a/l K Dharmalingam v Public Prosecutor* [2011] 4 SLR 1156 (at [23]), "[t]he material issue in s18(2) of the MDA is *not* the *existence* of the accused's knowledge of the controlled drug, *but* the *non-existence* of such knowledge on his part" (emphasis in original).

32 In context, the court is cognisant of the inherent difficulties that the accused faces in having to prove a negative, and has made clear that "the burden on an accused person to rebut a presumption which operates against him should not be so onerous that it becomes virtually impossible to discharge": *Muhammad Nabill bin Mohd Fuad v Public Prosecutor* [2020] 1 SLR 984 ("*Nabill*") at [92], citing *Gopu Jaya Raman v Public Prosecutor* [2018] 1 SLR 499 at [2] and [24]. In respect of s 18(1), the presumption could be rebutted by showing that the accused did not know that the thing in issue (such as the premises or the container) contained the drugs: *Obeng Comfort* at [35]. In the case of s 18(2), the presumption could be rebutted by an accused proving that he genuinely believed he was carrying something innocuous, or that he was carrying a different controlled drug: *Masoud Rahimi* at [55].

33 In *Zainal bin Hamad v Public Prosecutor and another appeal* [2018] 2 SLR 1119 ("*Zainal*") at [46], the Court of Appeal emphasised that s 18(2) operates as an ancillary provision to s 18(1), in that the prosecution may rely on s 18 to invoke presumptions of both possession and knowledge of what the accused is in possession of:

> 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.

The express words of s 18(2) allow for what the claimants describe as the stacking of presumption upon presumption, and that Parliamentary intention was recognised in *Zainal*.

34 Therefore, the effect of the presumptions, as set out in the claimants' submissions, is not controversial. In particular, the presumptions in ss 18(1) and (2) may be used together; they impose a legal burden on the defence; and this could result in a conviction where reasonable doubt arises on specific elements that are the subject of the presumptions. To obtain the relief they seek, the claimants must show that this is impermissible under Arts 9 and 12 of the Constitution.

Ambit of Articles 2, 9 and 12 of the Constitution

35 The claimants rely on Arts 2, 9 and 12 of the Constitution. Arts 9 and 12 both make references to "law". I first deal with Art 2 which reads:

> "law" includes written law and any legislation of the United Kingdom or other enactment or instrument whatsoever which is in operation in Singapore and the common law in so far as it is in operation in Singapore and any custom or usage having the force of law in Singapore;

36 While the definition of "law" in Art 2 refers to UK legislation and common law, it only includes UK legislation or common law which is in

operation in Singapore. The only UK law that is in operation in Singapore is the common law of England in so far as it was a part of Singapore law before 12 November 1993 by virtue of s 3(1) of the Application of English Law Act 1993 (2020 Rev Ed). *Lambert*, which the claimants rely on, was decided in 2002 and does not fall within Art 2.

37 I turn then to Arts 9 and 12.

38 Art 9(1) of the Constitution provides:

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

The words "in accordance with law" have been interpreted to go beyond the formal validity of a statute. In *Tan Seng Kee v Attorney–General and other appeals* [2022] 1 SLR 1347 ("*Tan Seng Kee*"), the Court of Appeal summarised the requirements from various cases as the following (at [254]):

(a) A statute must comply with the fundamental rules of natural justice which are procedural rights aimed at securing a fair trial.

(b) A statute cannot be colourable legislation, such as legislation directed at securing the conviction of particular individuals.

(c) A statute cannot be absurd or arbitrary.

(d) A statute cannot be contrary to the rule of law.

Art 12(1) provides that:

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

39 The claimants have not suggested that the MDA provisions are absurd or arbitrary. Nor are they saying that the provisions are directed at securing the

conviction of particular individuals. Instead, the claimants focus on the presumption of innocence as a rule of natural justice, and make the argument that the presumptions in the MDA derogate from the right to a fair trial.[14] The question is therefore whether ss 18(1) and (2) offend any fundamental rule of natural justice.

40 In this regard, I note that the claimants' reliance on Art 12(1) is therefore misplaced. Although Art 12 was raised in *Ong Ah Chuan* (see [21], *Ong Ah Chuan*), it was explained more recently by the High Court in *Tan Eng Hong v Attorney-General* [2013] 4 SLR 1059 at [28], that it is not correct to import into the word "law" in Art 12(1) the requirement that law is in accordance with the fundamental rules of natural justice. The relevant test for contravention of Art 12(1) is the "reasonable classification" test, and this test is only engaged if an impugned statute is discriminatory in the first place: *Lim Meng Suang and another v Attorney-General and another appeal and another matter* [2015] 1 SLR 26 at [57]. The claimants have not suggested that ss 18(1) and 18(2) of the MDA are discriminatory and their case is focused solely on the fundamental rules of natural justice. I therefore do not consider Art 12(1) further.

41 Coming then to Art 9 and the requirement that a statute must comply with the fundamental rules of natural justice. *Ong Ah Chuan* is on point.

42 In *Ong Ah Chuan*, the Privy Council considered the previous iteration of s 17 of the MDA, which provided that an accused person would be presumed to have had controlled drugs in his possession for the purpose of trafficking if it was proven that he was in possession of more than a specified quantity of

[14] CWS at paras 15 and 32.

controlled drugs. The appellants' arguments closely resembled those of the claimants in the present case (at [21]):

> The appellants' argument may be stated shortly. This statutory presumption, it is said, is in conflict with what their counsel termed the "presumption of innocence"; this is a fundamental human right protected by the Constitution and cannot be limited or diminished by any Act of Parliament which has not been passed by the majority of votes necessary under Art 5 for an amendment to the Constitution. The "presumption of innocence", it is contended, although nowhere expressly referred to in the Constitution, is imported into it by Art 9(1) which provides:
>
> > No person shall be deprived of his life or personal liberty save in accordance with law.
>
> and by Art 12(1) …

43 The Privy Council first concluded (at [26]) that "the law" in Art 9(1) referred 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 …

44 Lord Diplock dealt with the presumption of innocence at [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…

Remarking that the technical rules of evidence and permitted modes of proof of facts as they stood in England at the time the Constitution may be inappropriate

in Singapore, Lord Diplock's conclusion on the fundamental rules of natural justice was as follows:

> … 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.

45 In the context of the equivalent of s 17 of the MDA, Lord Diplock stated at [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.* [emphasis added]

46 To summarise, then, the Privy Council in *Ong Ah Chuan* held that the equivalent of s 17 of the MDA, being a statutory presumption which, upon proof of certain facts, shifted the burden of proof to the accused and could be rebutted on a balance of probabilities, was not contrary to Art 9(1) of the Constitution. What the Constitution requires is that a person should not be punished for an offence until it has been established to the satisfaction of an independent and unbiased tribunal that he committed an offence, and that there is material before the tribunal that is logically probative of facts sufficient to constitute the offence.

47 The claimants have not suggested that there is any difference between the presumption held to be constitutionally valid in *Ong Ah Chuan* and the presumptions which are the subject of this application. As is clear from the discussion on ss 18(1) and 18(2) at [29]–[30] above, the presumptions only operate when there is material logically probative of either possession or knowledge before the court. This material would be the evidence produced by the prosecution to prove, beyond reasonable doubt, the fact giving rise to the presumption, such as the fact that the accused was in possession of a container which contained controlled drugs. Sections 18(1) and 18(2) therefore comply with the rule stated in *Ong Ah Chuan*. It is also important that the Privy Council expressly considered the fact that the relevant presumption could only be rebutted on the balance of probabilities (at [28]). In this context, while the claimants emphasise caution in the cumulative use of ss 18(1) and (2), stacked one atop the other as the claimants put it, the Court of Appeal in *Zainal* expressly sanctioned this at [46], referencing Parliamentary intent. While *Zainal* did not consider the express question of Art 9, testing the use of the two complementary presumptions against the tests propounded in *Ong Ah Chuan* or in the more recent case of *Tan Seng Kee* at [254] (see [38] above) does not impose any difficulty.

The presumption of innocence

48 Therefore, what the claimants seek to do by the declarations pursued, is to seek leave to return to the argument in *Ong Ah Chuan*, which Lord Diplock summarised at [21] (see [42] above) and framed as misleading at [27] (see [44] above). The fundamental rules of natural justice are "an evolving concept" (see *Tan Eng Hong v AG* [2013] 4 SLR 133 at [32]; *Haw Tua Tau v PP* [1981] – [1982] SLR(R) 133 at [26]). The claimants seek now to raise the argument that

the presumption of innocence is a fundamental rule of natural justice, premised on various local and foreign cases decided after *Ong Ah Chuan*.

49 The claimants' case centres on the proposition that the presumption of innocence requires the prosecution to prove beyond reasonable doubt each element of an offence. Therefore, it is violated so long as an accused can be convicted despite the existence of a reasonable doubt. They rely on *Oakes*, where Dickson CJ held at [57] that:

> … a provision which requires an accused to disprove on a balance of probabilities the existence of a presumed fact, which is an important element of the offence in question, violates the presumption of innocence … If an accused bears the burden of disproving on a balance of probabilities an essential element of an offence, it would be possible for a conviction to occur despite the existence of a reasonable doubt. This would arise if the accused adduced sufficient evidence to raise a reasonable doubt as to his or her innocence but did not convince the jury on a balance of probabilities that the presumed fact was untrue.

50 In this context, the AG's answer to the issue is that the presumptions are only presumptions of fact, and it remains the prosecution's burden to prove the case, as a whole, beyond a reasonable doubt. In my view, this contention does not engage with the specific argument raised by the claimants, which is that the existence of a legal burden on an accused makes it possible for a conviction to occur despite the existence of a reasonable doubt on an element of the offence. The fact being presumed under s 18(1) is possession of a controlled drug, and the fact being presumed under s 18(2) is knowledge of the nature of a controlled drug. These facts are essential elements pertaining to the *mens rea* of the offence of drug trafficking.

51 The possibility that a reasonable doubt may exist on an element of an offence where a statutory presumption was applicable in securing a conviction was explicitly accepted in the Court of Appeal decisions of *Masoud Rahimi* and

Ilechukwu: see [31] above. Illustration may be made by reference to *Ramesh a/l Perumal v Public Prosecutor and another appeal* [2019] 1 SLR 1003 ("*Ramesh*"), where the accused ("Ramesh"), was arrested while in possession of a bag containing diamorphine ("D1") which he had received from someone else ("Chander"). Ramesh argued that he did not know the contents of D1. He claimed he thought D1 contained office documents, passed to him for safekeeping, and that he was to return to Chander later that day. Chander, on the other hand, gave evidence that Ramesh was to deliver the bundles within D1 to a recipient in Bedok. On appeal, Ramesh admitted to opening D1 and handling one of the four bundles inside, although he was unsure of what was inside the bundles. The Prosecution relied on the presumption under s 18(2) of the MDA to establish that Ramesh had knowledge of the nature of the drugs that were in D1. On the evidence, the Court of Appeal accepted that it was reasonably plausible that Ramesh did not know the precise contents of the bundles, and that therefore it was not proven beyond reasonable doubt that he had knowledge of the nature of the drugs. However, because Ramesh's explanation that he thought D1 contained office documents was wholly unsustainable in light of his admission that he had opened D1 and saw that it contained four bundles, he was unable to rebut the s 18(2) presumption and the element of knowledge was still made out (at [69]–[70]).

52 In none of these cases was Art 9 explicitly raised or considered. The point that the claimants introduce in this case is that of the relationship between the presumption of innocence and Art 9. I first analyse the presumption of innocence, how it is conceptualised in Singapore and elsewhere, before dealing with it in the context of Art 9.

Local cases on the presumption of innocence

53 The claimants contend, and it is not disputed, that the presumption of innocence is fundamental to the criminal justice system in Singapore. In *AOF v Public Prosecutor* [2002] 3 SLR 34, the Court of Appeal held at [314] that:

> 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 (and, to the best of our knowledge, all other criminal justice systems as well).

The Court of Appeal then went on to cite V K Rajah J's (as he then was) remarks in *Jagatheesan s/o Krishnasamy v Public Prosecutor* [2006] 4 SLR(R) 45 ("*Jagatheesan*") at [58]–[60]. Rajah J described the presumption of innocence as "a central and fundamental moral assumption in criminal law" and explained at [59] that:

> *That threshold below which society will not condone a conviction or allow for the presumption of innocence to be displaced is the line between reasonable doubt and mere doubt. Adherence to this presumption also means that the trial judge should not supplement gaps in the Prosecution's case.* If indeed *gaps in the evidence* should prevail so that the trial judge feels it is necessary to fill them to satisfy himself that the Prosecution's burden of proof has been met, then the accused simply cannot be found legally guilty. In short, the presumption of innocence has not been displaced. [emphasis added]

54 At issue is the relationship between statutory presumptions relating to the factual elements of an offence and the presumption of innocence. Of relevance is that Rajah J in the extract above pinpointed "gaps" in the prosecution's case; statutory presumptions, on the other hand, operate to obviate such gaps. Statutory presumptions were also an assumed component of the landscape in Rajah JA's remarks in *XP v Public Prosecutor* [2008] 4 SLR(R) 686 at [90], where he described the presumption of innocence as "the

cornerstone of the criminal justice system and the bedrock of the law of evidence". At [91], citing the English Court of Criminal Appeal in *R v Dennis Patrick Murtagh and Kenneth Kennedy* (1955) 39 Cr App R 72 at 83, when he stated that it is "not for the accused to establish their innocence" he added: "*save of course in certain special circumstances expressly mandated by Parliament*" [emphasis added].

55 *Public Prosecutor v GCK and another matter* [2020] 1 SLR 486 ("*GCK"*) is especially instructive. There, the Court of Appeal described the presumption of innocence as "the very foundation of criminal law" (at [126]). At [129], it stated the general rule:

> The principle of proof beyond a reasonable doubt is simply that upon a consideration of all the evidence presented by the Prosecution and/or the Defence, the evidence must be sufficient to establish beyond a reasonable doubt *each and every element of the offence with which the accused person is charged*: see *Jagatheesan* at [48]. [emphasis added]

56 After stating this general premise, the judgment discusses legal and evidential burdens. It does not discuss the situation where a legal burden may be placed on the accused. Notwithstanding this, at [134] and [135], Sundaresh Menon CJ discusses how reasonable doubt may arise:

> 134 In our judgment, the principle of proof beyond a reasonable doubt can also be usefully conceptualised in two ways. First, a reasonable doubt may arise from *within the case mounted by the Prosecution*. To be clear, the term "within the case mounted by the Prosecution" should not be confused with the term "at the close of the Prosecution's case". The latter was articulated by the Privy Counsel in *Haw Tua Tau and others v Public Prosecutor* [1981–1982] SLR(R) 133 ("*Haw Tua Tau*"), and is now statutorily codified in s 230(1)(*j*) of the CPC. It involves the *procedural* task of calling upon the accused person to give his defence. This takes place when the court is satisfied that there is some evidence which is not inherently incredible that satisfies every element of the charge. On the other hand, the former term proof beyond a reasonable doubt "within the case

> mounted by the Prosecution" denotes the *evaluative* task of considering *all of the evidence adduced by the Prosecution* at each stage of the proceedings.
>
> 135 Second, a reasonable doubt may arise on the *totality of the evidence*. As we shall explain further in this judgment, the totality of the evidence necessarily includes a holistic assessment of both the Prosecution's and the Defence's cases, and the interactions between the two …

57 *GCK* did not involve the use of any statutory presumptions. Nevertheless, the Court of Appeal's two conceptualisations implicitly allow for such presumptions to be accommodated within the analytical frame. As a logical matter, and as cases show, statutory presumptions may be used in tandem with the analysis elucidated in [134] and [135].

58 In particular, in *Nabill,* the Court of Appeal discussed *GCK* in the context of presumptions contained in ss 17 and 18(2) of the MDA. It held, at [69], that the specific facts of the case squarely engaged the Prosecution's evidential burden to adduce sufficient evidence to rebut a defence raised by the accused that had properly come into issue. In particular, in relation to the second charge concerning a trolley bag containing cannabis where the Prosecution relied on s 18(2) of the MDA to establish the accused's knowledge of the cannabis, the appellant contended that he had been told by the person who left the trolley bag in his storeroom that the bag contained cigarettes. The Court of Appeal found on the facts, at [146], that there was no reason to disbelieve Nabill's defence, and at [157], held that this shifted the evidential burden to the Prosecution. As no evidence had been led by the Prosecution to discharge that burden, the appellant was held to have rebutted the presumption. The appellant was acquitted of the second charge.

59 The Court of Appeal further reiterated in *Roshdi bin Abdullah Altway v Public Prosecutor and another matter* [2022] 1 SLR 535 ("*Roshdi*") that where

the legal burden is on the accused, as it was in *Nabill* in respect of knowledge, the accused's evidential burden is to point to evidence that is capable of proving the existence of the relevant facts on the balance of probabilities (at [79]–[80]), in line with principles that were "well settled and entirely in line with the established law set out in *GCK* at [129]–[149] (at [82]). The accused in *Nabill* succeeded in rebutting the presumption under s 18(2) of the MDA because his defence had properly come into issue, and on the totality of the evidence before the court, he had discharged his burden to the requisite standard of proof (see [86], *Roshdi*).

60 *Nabill* concerned s 18(2) of the MDA. *Public Prosecutor v Sugianto bin Pardi and another* [1994] 1 SLR(R) 865 ("*Sugianto*") discloses a similar factual scenario in relation to s 18(1) of the MDA. In this case, the trial judge accepted, on the balance of probabilities, the accused's explanation as to why he had no knowledge of drugs contained in a suitcase for which he was in legal possession.

61 Putting *Nabill, Sugianto* and *Ramesh* side by side with [134] and [135] of *GCK* explains how the presumption of innocence informs the concept of reasonable doubt where statutory presumptions are engaged. In *GCK* at [134], the Court of Appeal defined proof beyond a reasonable doubt "within the case mounted by the Prosecution" to denote "the evaluative task of considering all of the evidence adduced by the Prosecution at each stage of the proceedings". *GCK* at [135] concerned a holistic assessment of the prosecution and Defence's cases. Once the prosecution has proved the facts necessary to raise a presumption, if an accused raises a bare assertion or makes an unsustainable contention, such as Ramesh did in relation to D1, neither [134] nor [135] of *GCK* is engaged. The prosecution does not in such a case bear the legal burden on the issue of knowledge (and it has thus proved all it is required to prove in the *GCK* at [134] sense). Nor did Ramesh raise a doubt in relation to D1 on the

totality of the evidence in the *GCK* at [135] sense, because at that stage weaknesses in the defence may be considered (see *GCK* at [144]). Thus, at [70] of *Ramesh*, the Court of Appeal found the accused's case unsustainable. The onus is on the accused to explain and he has failed to do so. In contrast, in cases where the accused has raised an explanation acceptable to the court as to why he had no knowledge or possession (in *Sugianto*, for example), doubt arises in the *GCK* at [135] sense. In *Nabill*, the Prosecution failed to call material witnesses. There, the Prosecution proved what was within its legal burden to prove, but failed to meet its evidential burden on the particular defence raised in respect of the rebuttable presumption. Knowledge of the nature of the drugs was also incompatible with the accused's explanation as to his belief that the bag contained cigarettes. Reasonable doubt in both the ways described at [134] and [135] of *GCK* was present.

62 When analysed with granularity, therefore, the presumption of innocence is an encapsulation of guiding principle, which the Court of Appeal has shown to be consistent with the use of statutory presumptions. While stated as a presumption, it defines an approach, and this approach does not necessitate that the legal burden should be applied in a literal-minded manner to each element of an offence. Its various descriptions reflect its nature: "cornerstone … bedrock" (*XP* at [90]), "a *necessary* hallmark of any criminal justice system" (*AOF* at [315]), and "a central and fundamental moral assumption in criminal law" (*Jagatheesan* at [59]). In a common law jurisdiction where law evolves over time in a continued search for justice, such guiding principles are treasured directional markers. The common law and written law particular to the case must guide the specific steps to be taken. In the same way, it is the underlying approach of the common law that the prosecution must prove each and every element of the offence. This carries an assumption that *mens rea* must be proved

in each case. Nevertheless, this does not mean that, when Parliament defines an offence, it cannot expect an accused person, in specified circumstances, to explain how it is that he asserts he has no knowledge of what was found in his possession. The role of the courts, in this context, has been aptly delineated by the Court of Appeal in *Tan Seng Kee* at [11]:

> … It is incontrovertible that the doctrine of the separation of powers is part of the basic structure of the Westminster constitutional model that Singapore adopts. Constitutions based on the Westminster model incorporate this doctrine so as to diffuse state power amongst different organs of State (see *Mohammad Faizal bin Sabtu v Public Prosecutor* [2012] 4 SLR 947 … at [11]–[12]). It follows from this doctrine that the court must refrain from trespassing onto what is properly the territory of Parliament.

63 This position is not at all surprising nor is it autochthonous. Viscount Sankey's famous description in *Woolmington* rests on the same premise. At p 481, *he incorporates the statutory exception as a veritable part of the golden thread*, and highlights that reasonable doubt is to be considered at the end of and on a holistic assessment of the case:

> Throughout the web of 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, … 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 not attempt to whittle it down can be entertained … [emphasis added]

64 In *Sweet v Parsley* [1970] AC 132 ("*Sweet v Parsley*"), Lord Reid put the *Woolmington* perspective alongside the use of statutory presumptions in the following way at p 150:

> Parliament has not infrequently transferred the onus as regards mens rea to the accused, so that, once the necessary facts are proved, he must convince the jury that on balance of probabilities he is innocent of any criminal intention. *I find it a little surprising that more use has not been made of the method*: but one of the bad effects of the decision of this House in *Woolmington v Director of Public Prosecutions* [1935] A.C. 462 may have been to discourage its use. [emphasis added]

65 Professor Andrew Ashworth, in *Four Threats To The Presumption of Innocence*, (2006) IJEP 10 4 (241) states (at p 2), "[f]rom the fact that the presumption of innocence finds a place in every known human rights document, it may be assumed that it is one of the least controversial rights. Its scope and meaning are, however, eminently contestable". He posits (at p 5) that the presumption of innocence "is not a factual presumption", but rather, "a moral and political principle, based on a widely shared conception of how a free society (as distinct from an authoritarian society) should exercise the power to punish". It would follow, from this assertion, that each free society would choose the specific way to implement and protect the principle in keeping with its own social mores. It is in this context that the English, Hong Kong and Canadian cases which the claimants seek to rely upon should be examined.

Foreign cases cited by the claimants

66 The claimants rely on the Canadian case of *Oakes*, the English case of *Lambert*, and the Hong Kong case *Hung Chan Wa*. Each is best explained in accordance with its statutory framework. Each is also a useful illustration of Prof Ashworth's point (at p 9 of *Four Threats To The Presumption of Innocence*) that, "[i]n no system of human or constitutional rights is the presumption of innocence regarded as absolute".

67 The Canadian and English statutory frameworks impose a two-step test: (a) whether the presumption of innocence is derogated from; and (b) whether that derogation is permissible.

68 In *Oakes*, the Supreme Court of Canada found that s 8 of the Narcotic Control Act, a provision similar to s 17 of the MDA, constituted a "reverse onus" clause and held it to be unconstitutional because it violated the presumption of innocence entrenched in s 11(d) of the Canadian Charter of Rights and Freedoms (the "Canadian Charter"). Section 11(d) of the Canadian Charter provides that any person charged with an offence has the right:

> to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.

Section 1 of the Canadian Charter provides that:

> The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it *subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society*. [emphasis added]

69 Thus, the court in *Oakes* had to first determine whether s 8 of the Narcotics Control Act placed a "limit" on the right contained in s 11(d) of the Canadian Charter. It considered that s 11(d) "constitutionally entrenches the presumption of innocence as part of the supreme law of Canada" (at [27]), and that a provision which requires an accused to disprove on a balance of probabilities an element of an offence violates the presumption of innocence (at [57]). The court then went on to consider whether the limit placed by s 8 of the Narcotics Control Act on the presumption of innocence was "reasonable and demonstrably justified" within the meaning of s 1 of the Canadian Charter (at [62]–[79]). In *Lambert*, an appellant brought an appeal against his conviction, arguing that a presumption contained in the Misuse of Drugs Act 1971 ("UK

MDA"), that was similar to s 18 MDA, was contrary to s 3(1) of the Human Rights Act 1998 (the "HRA"), which imported Art 6(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the "Convention"). Section 3(1) of the HRA provides:

> So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.

Of relevance is the fact that one of the two grounds on which the appeal was dismissed (with Lord Steyn dissenting on this aspect) was that the appellant's conviction was secured before the date the HRA was in force. This illustrates how pivotal s 3(1) of the HRA was to the reasoning which the claimants rely on.

70 By virtue of s 3(1) of the HRA, the court is charged by statute to "read" and give effect to legislation in a manner consonant with the Convention. Article 6(2) of the Convention states:

> Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

71 In accordance with this mandate, Lord Steyn first considered that the relevant section of the UK MDA constituted a legislative interference with the presumption of innocence that was protected by Art 6(2) of the Convention (at [35]). At [34], Lord Steyn acknowledged that "in a constitutional democracy limited inroads on the presumption of innocence may be justified". In this regard, he adopted the approach of the European Court of Human Rights in *Salabiaku v France* (1988) 13 EHRR 379 ("*Salabiaku*"), where it held at [28]:

> Presumptions of fact or of law operate in every legal system. Clearly, the Convention does not prohibit such presumptions in principle. It does, however, require the contracting states to remain within certain limits in this respect as regards criminal law … Article 6(2) does not therefore regard presumptions of

> fact or of law provided for in the criminal law with indifference. It requires states to confine them within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence.

72 Lord Steyn went on to consider whether the UK MDA's interference with the presumption of innocence was justified and proportionate (at [36]–[41]) and ultimately concluded that the provision of the UK MDA had to be read as imposing only an evidential burden on the accused in order to be compatible with the Convention (at [41]). As the conviction would have been inevitable even if the judge had directed the jury accordingly, this formed an additional reason for the House of Lords to dismiss the appeal (at [43]).

73 Lord Hutton's dissenting judgment is pertinent. Contrary to the majority, Lord Hutton took the view that the imposition of a legal burden did not violate Art 6(2) of the Convention, and it was a proportionate means to an end. After citing the cases of *R v Warner* [1969] 2 AC 256 and *Sweet v Parsley*, Lord Hutton concluded at [197]–[198]:

> My Lords, when judges of such eminence considered that transferring the burden of proof in relation to knowledge would not result in an unfair trial to the defendant, I consider that 30 years later when the problem has not changed there is no reason for this House to take a different view. Section 2 of the 1998 Act now requires the House in determining a question which has arisen in connection with a Convention right to take into account judgments of the European Court and decisions of the European Commission, but in my opinion the judgments and decisions to which I have referred *provide no basis for the view that under the jurisprudence of the European Court the transfer of the onus of proof as to knowledge in drugs cases would constitute a violation of article 6(2).*
>
> Therefore my conclusion is that the difficulty in some cases of convicting those guilty of the crime of possession of a controlled drug with intent to supply, if the burden of proving knowledge beyond a reasonable doubt rests on the prosecution, is not resolved by placing an evidential burden on the defendant, and that it is necessary to impose a persuasive burden as section 28(2) and (3) does. I further consider that the transfer of the

> onus satisfies the test that it has a legitimate aim in the public interest and that there is a reasonable relationship of proportionality between the means employed and the aim sought to be realised. Accordingly I am of the opinion that sub-section 28(2) and (3) does *not* violate art 6(2) and I am in full agreement with the Court of Appeal on this issue.
>
> [emphasis added]

74 *Lambert* may therefore be summed up as follows. But for s 3(1) of the HRA, the majority would not have embarked on the inquiry. Further, in the context of considering Art 6(2) of the Convention, Lord Hutton was of the view that the legal burdens were consonant with the presumption of innocence.

75 In *Hung Chan Wa*, the Hong Kong Court of Final Appeal ("HKCFA") held that two provisions of the Dangerous Drugs Ordinance imposed only evidential burdens on accused persons. The accepted position prior to this decision was that the provisions imposed legal burdens. The two provisions in question are identical to ss 18(1) and 18(2) of the MDA. The HKCFA held that the presumptions "[derogated] from the presumption of innocence and consequently the right to the fair trial", applying the approach of *HKSAR v Lam Kwong Wai and another* [2006] HKCU 1465 ("*Lam Kwong Wai*"). The relevant constitutional provisions are set out in *Lam Kwong Wai* at [20]. Article 87(2) of the Basic Law provides that "[a]nyone who is lawfully arrested shall have the right to a fair trial by the judicial organs without delay and shall be presumed innocent until convicted by the judicial organs". Article 11(1) of the Hong Kong Bill of Rights provides that "[e]veryone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law". After concluding that reverse onus provisions derogate from the presumption of innocence and the right to a fair trial (at [74]), the Hong Kong Court of Final Appeal in *Hung Chan Wa* undertook an inquiry similar to that taken in *Lambert,* at [75]–[85]. This arose from the court's acknowledgement in *Lam Kwong Wai*

that, although the rights to a fair trial and to be presumed innocent until proven guilty were expressed in absolute terms and not subject to explicit exceptions or qualifications, *the presumption of innocence was not an absolute right and was capable of derogation where the derogation was justified* (at [21]).

76 What we see in these other approaches is that, where the relevant constitutional statute entrenches the presumption of innocence, it has furnished a balancing counterpoint within the remit of the courts. In Canada and England, that counterpoint is provided in the same statute that guarantees the presumption. The presumption of innocence cannot be applied in an unfiltered, literal-minded method. The legislature specifically granted the courts the power to articulate the balance. In Hong Kong, the presumption of innocence was entrenched in the Basic Law without a balancing measure, and the courts saw a need to read into the law such a measure. Art 9 contains neither, as in England and Canada, a statutory framework where the judiciary is specifically charged to maintain the balance, nor, as in Hong Kong, a provision whose width requires the intervention of the courts. These positions illustrate the points made at [62] and [65] above. The varied statutory interpretations in *Lambert* further reflect Professor Ashworth's view that no system of law regards the presumption of innocence "as absolute", its scope is "eminently contestable"; its interpretation reflects societal values.

77 In *GCK* the Court of Appeal explained how the presumption of innocence is interpreted through the concept of reasonable doubt. *Nabill* and *Roshdi* further illustrate how the legal burdens imposed on an accused by ss 18(1) and (2) of the MDA are rationalised within the context of reasonable doubt. The reversal of the legal burden of proof on specific factual elements of an offence – and accordingly, a conviction on the offence despite the existence of reasonable doubt on the specified factual elements – sits appropriately within

the Art 9 concept and system of "law" set out in *Ong Ah Chuan* and more recently summed up in *Tan Seng Kee*. This is because, as the "bedrock" and "cornerstone" of our criminal law, the presumption of innocence is not a mechanistic formula but a fundamental guiding principle that finds expression through technical rules. These technical rules are the rules pertaining to the legal and evidential burdens and the manner in which the prosecution proves a case beyond reasonable doubt. That the prosecution bears the burden of proving its case beyond reasonable doubt "provides concrete substance for the presumption of innocence": *Winship, In re* 397 US 578 at 363, referred to in *Jagatheesan* at [59]. The presumption of innocence, viewed in this light, is a hallowed thread that has been woven into the fabric of our laws.

Conclusion

78 I dismiss the application for permission. The application was filed outside of the requisite three-month period, it is a collateral attack on the claimants' criminal convictions, and there is no arguable case that Arts 9(1) and 12(1) of the Constitution have been infringed. Parties are to write in regarding the issue of costs within 14 days of today.

Valerie Thean
Judge of the High Court

The claimants in person;
Hay Hung Chun, Claire Poh, Theong Li Han and Chong Ee Hsiun
(Attorney-General's Chambers) for the defendant.
