Public Prosecutor *v* Mas Swan bin Adnan and another appeal
[2012] SGCA 29

Case Number	: Criminal Appeals Nos 7 and 8 of 2011
Decision Date	: 14 May 2012
Tribunal/Court	: Court of Appeal
Coram	: Chan Sek Keong CJ; Andrew Phang Boon Leong JA; V K Rajah JA
Counsel Name(s)	: Hay Hung Chun and Sharmila Sripathy-Shanaz (Attorney-General's Chambers) for the appellant in Criminal Appeal No 7 of 2011 and the respondent in Criminal Appeal No 8 of 2011; N Kanagavijayan (Kana & Co) and Ranadhir Gupta (A Zamzam & Co) for the respondent in Criminal Appeal No 7 of 2011; Mohamed Muzammil bin Mohamed (Muzammil & Company) and Gloria James (Civetta & Co) for the appellant in Criminal Appeal No 8 of 2011.
Parties	: Public Prosecutor — Mas Swan bin Adnan

Criminal Law – Statutory Offences – Misuse of Drugs Act

[LawNet Editorial Note: This was an appeal from the decision of the High Court in [2011] SGHC 107.]

14 May 2012 Judgment reserved.

Chan Sek Keong CJ (delivering the judgment of the court):

Introduction

1 These appeals arise out of the decision of the High Court judge ("the Judge") in *Public Prosecutor v Mas Swan bin Adnan and another* [2011] SGHC 107 ("the Judgment"), which involved a joint trial of two persons, Mas Swan bin Adnan ("Mas Swan") and Roshamima binti Roslan ("Roshamima"), who were jointly charged with the following charge ("the joint charge"): [note: 1]

> … that you on the 6 May 2009, at or about 9.56 p.m. in a Malaysian registered motor car bearing registration number JHA 7781, at Woodlands Immigration Checkpoint, Singapore together with [Roshamima in the Prosecution's case against Mas Swan and Mas Swan in the Prosecution's case against Roshamima], in furtherance of the common intention of you both, did import into Singapore a controlled drug specified in Class A of the First Schedule to the Misuse of Drugs Act, Chapter 185, to wit, **one hundred and twenty-three (123) packets of substances containing not less than 21.48 grams of diamorphine**, without any authorization under the said Act or the Regulations made thereunder, and you have thereby committed an offence under Section 7 of the Misuse of Drugs Act (Chapter 185) read with Section 34 of the Penal Code (Chapter 224) and punishable under Section 33 of the Misuse of Drugs Act. [emphasis in bold in original]

2 The Judge acquitted Mas Swan of the joint charge and convicted Roshamima of the following amended charge ("the amended charge"):

> … that you, on 6 May 2009, at or about 9.56 p.m. in a Malaysian registered motor car bearing registration number JHA 7781, at Woodlands Checkpoint, Singapore, did import into Singapore a controlled drug specified in Class A of the First Schedule of the [Misuse of Drugs Act (Cap 185,

2008 Rev Ed) ("the MDA")], Chapter 185, to wit, one hundred and twenty-three (123) packets of substances containing not less than 21.48 grams of diamorphine, without any authorization under the said Act or the Regulations made thereunder, and you have thereby committed an offence under section 7 of the [MDA] and punishable under section 33 of the [MDA].

The amendment was to remove the reference in the joint charge to Mas Swan in the light of his acquittal of that charge.

3 Criminal Appeal No 7 of 2011 ("CCA 7/2011") is the Prosecution's limited appeal against the Judge's acquittal of Mas Swan. [note: 2] The Prosecution seeks to have Mas Swan convicted of an amended charge of *attempting to* import an unspecified quantity of a controlled drug commonly known as "ecstasy". [note: 3] Criminal Appeal No 8 of 2011 ("CCA 8/2011") is Roshamima's appeal against her conviction on the amended charge.

Background

4 As the background facts of these appeals have been set out in considerable detail in the Judgment (at [4]–[31]), we will only highlight the salient facts germane to the present appeals.

The relationship between Mas Swan and Roshamima

5 Mas Swan and Roshamima are both Malaysians. Mas Swan was 27 years old at the time of his arrest. He was unemployed. Roshamima was 24 years old at the time of her arrest. She was working as a recovery officer for a bank in Malaysia.

6 Mas Swan and Roshamima were due to be engaged on 6 June 2009 and to get married the following day. They were living together in Johor Bahru before their arrest. [note: 4]

Background to the arrests

7 At about 9.56pm on 6 May 2009, Mas Swan and Roshamima arrived at Woodlands Checkpoint from Malaysia in a vehicle bearing the registration number JHA 7781 ("JHA 7781"). The Judge made no finding on who drove the car. As Mas Swan's passport was blacklisted, JHA 7781 was searched. Although a manual search did not discover anything incriminating, an X-ray backscatter scan detected three dark spots in the front left door panel of JHA 7781. However, dogs from the Police K-9 unit were not able to detect the presence of any controlled drugs.

8 A more thorough inspection was then carried out, resulting in the discovery of two green bundles and one black bundle (wrapped in tape of the respective colours) ("the three bundles") hidden inside the front left door panel of JHA 7781. One of the green bundles was cut open and was found to contain brown granular substance. Mas Swan and Roshamima were accordingly placed under arrest.

Mas Swan's defence

9 Mas Swan's defence was that he knew that the three bundles in JHA 7781 contained controlled drugs. He claimed that he was delivering those drugs on behalf of one "Mickey", who (according to Mas Swan) was a friend of one "Murie", who, in turn, was a friend of Roshamima. Mas Swan further admitted that he had made a total of four successful drug deliveries for Mickey before his arrest on 6 May 2009. Mas Swan claimed that he believed that the three bundles in JHA 7781 contained ecstasy pills and not diamorphine because Roshamima had told him that those bundles contained the

former.

Roshamima's defence

10 Roshamima's defence was that she did not know that the three bundles were concealed in the front left door panel of JHA 7781 when she entered Singapore with Mas Swan on 6 May 2009. She claimed that the purpose of her entry into Singapore on 6 May 2009 was not to deliver controlled drugs, but to obtain items for the planned engagement and wedding of Mas Swan and herself.

The decision below

11 The Judge acquitted Mas Swan of the charge of importing diamorphine (*viz*, the joint charge mentioned at [1] above) as he was satisfied that Mas Swan had rebutted the presumption under s 18(2) of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) ("the MDA") that he knew that the three bundles contained diamorphine. He gave the following reasons for his finding:

(a) Mas Swan's consistent evidence in both his statements and his oral testimony in court was that he believed that the three bundles that he was delivering for Mickey contained ecstasy pills.

(b) The Judge preferred Mas Swan's evidence to Roshamima's evidence because his evidence was more consistent than hers and was also self-incriminating.

(c) It was Roshamima who had inducted Mas Swan into the drug delivery racket. She had been delivering bundles before Mas Swan. Mas Swan was therefore aware that Roshamima had knowledge of the drug deliveries.

(d) Mas Swan's role in and knowledge of the drug deliveries was limited. The Judge observed that Mas Swan was "mild-mannered and somewhat timid", whereas Roshamima had "an assertive and dominant personality". Mas Swan's role was simply to accompany Roshamima. The Judge also noted that when Mas Swan and Roshamima were detained at Woodlands Checkpoint, all calls from Murie and Mickey were made to Roshamima's mobile phone, indicating that Mas Swan's role and knowledge was limited. On every occasion involving the delivery of bundles, it was usually Roshamima who would inform Mas Swan of the availability of a "*segmen*", *ie*, the availability of ecstasy pills for delivery to Singapore.

(e) Mas Swan had no reason to disbelieve Roshamima's information that the three bundles contained ecstasy pills. He was to be engaged to marry Roshamima, and would have had no reason to disbelieve what she told him.

(f) The Prosecution did not challenge the veracity of Mas Swan's statements or his oral evidence that he believed that the three bundles contained ecstasy pills. In fact, it appeared from the Prosecution's questions during cross-examination that the Prosecution accepted Mas Swan's testimony that he believed that the three bundles contained ecstasy. From the manner in which the Prosecution conducted its case, it appeared to the Judge that the Prosecution was not challenging Mas Swan's belief, but rather, was attempting to persuade the court that the presumption under s 18(2) of the MDA ("the s 18(2) presumption") was not rebutted because Mas Swan was wilfully blind to the nature of the controlled drugs in the three bundles.

(g) Mas Swan was not wilfully blind to the nature of the controlled drugs in the three bundles. Although Mas Swan had testified that the nature of the controlled drugs did not matter to him, he had consistently maintained that he honestly believed that the three bundles contained

ecstasy pills. The fact that Mas Swan had opportunities to inspect the three bundles was not sufficient to prove wilful blindness.

12 In contrast, the Judge found on the evidence that Roshamima knew that the three bundles were hidden in the front left door panel of JHA 7781 and contained controlled drugs. He gave the following reasons for this finding:

(a) Mas Swan's evidence, which the Judge believed in preference to Roshamima's evidence, was that Roshamima and Mas Swan were delivering controlled drugs.

(b) Roshamima's evidence on the purpose of her visit to Singapore was fabricated to conceal the fact that the true purpose of the visit was to deliver controlled drugs to Singapore.

(c) Although the Judge considered that it was not strictly necessary to rely on Mas Swan's and Roshamima's evidence of prior deliveries, he found that the "highly similar circumstances" of the prior deliveries showed that it was "very likely" that Roshamima was aware that they were delivering controlled drugs on 6 May 2009.

13 This finding triggered the operation of the s 18(2) presumption that Roshamima knew the nature of the controlled drugs in the three bundles. The Judge then found that Roshamima had failed to discharge this presumption as she had relied on an "all or nothing" defence and had not led any evidence to show that she was not aware of the true nature of the controlled drugs in the three bundles. Her "all or nothing" defence had been pitched at the threshold level that she did not know that the three bundles were concealed in the front left door panel of JHA 7781.

The appeals

CCA 7/2011

14 In CCA 7/2011, the Prosecution argues that on the evidence, this court is justified in exercising, and should exercise, its power under s 163(1) of the Criminal Procedure Code (Cap 68, 1985 Rev Ed) read with s 54(2) of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) to convict Mas Swan of the following altered charge: [note: 5]

> You, [Mas Swan], on the 6th day of May 2009, at or about 9.56 p.m. in a Malaysian registered motor car JHA 7781, at Woodlands Checkpoint Singapore, **did attempt to import into Singapore, N, α-dimethyl-3, 4-(methylenedioxy) phenethylamine ("ecstasy") which is a Class A controlled drug, and which is specified in the First Schedule to the [MDA]**, to wit, by bringing into Singapore in the said JHA 7781, one hundred and twenty-three (123) packets of substances containing not less than 21.48 grams of diamorphine, **which you believed to be ecstasy**, without any authorisation under the [MDA] or the regulations made thereunder, and you have thereby committed an offence under Section 7 read with Section 12, and punishable under Section 33 of the [MDA]. [emphasis in bold in original]

15 The Prosecution argues that since Mas Swan believed that he was importing ecstasy into Singapore when he brought the three bundles to Singapore, even though he was attempting to do an act that was factually impossible at that time (in so far as the three bundles contained diamorphine and not ecstasy), this was sufficient to constitute the offence of attempting to import ecstasy under s 7 read with s 12 of the MDA. In response, Mas Swan contends that since the Prosecution did not submit at the trial that the joint charge should be amended in so far as it related to him, the Prosecution should not be allowed a "second bite at the cherry" in this appeal (*viz*, CCA 7/2011).

[note: 6] He also argues that during cross-examination, he had replied that he did not know that it was illegal to import controlled drugs such as ecstasy into Singapore. [note: 7]

CCA 8/2011

16 In CCA 8/2011, Roshamima challenges the Judge's finding that she knew that controlled drugs were hidden in the front left door panel of JHA 7781. She repeats her version of the material events [note: 8] and argues that the Judge erred in failing to accept her evidence as to the purpose of her visit to Singapore on 6 May 2009. [note: 9] She also argues that the Judge erred in admitting Mas Swan's testimony about the prior drug deliveries as there were material dissimilarities between those prior drug deliveries and the events of 6 May 2009. [note: 10]

Email from one "Noname Hawermann"

17 Prior to the hearing of this appeal, one "Noname Hawermann" sent the following email on 7 November 2011 ("the Anonymous Email") to some lawyers in the firm of Patrick Tan LLC: [note: 11]

> Dear Madam,
>
> I have tried to approach the CNB [Central Narcotics Bureau] in Singapore at [*sic*] a number of times – by email and by phone – but never managed to follow through til [*sic*] the end of the line, mostly due to lack of bravery.
>
> I have also been looking back on [t]he Singapore Law Watch [website] to find back [*sic*] to the full sentence I read there earlier this summer, the Public Prosecutor v Roshamima Roslan, citizen of Malaysia, who got a death sentence on 30th April of this year for trafficking. Unfortunately that sentence is no longer on the site, but replaced by others, and the lawyer's name is nowhere else to be found.
>
> The matter: I may be considered partly responsible for the Malaysian woman's predicament. Part of the merchandise which her car was prepared with when passing the Woodlands station was on my behalf, and it was placed there without her knowledge. She may or may not have stated this during interrogations. According to her sentence she did not mention this in court.
>
> I wonder if it would be possible to make some kind of statement about this in front of Singaporean legal authorities, or if I will thereby be accused of the same crime and facing [*sic*] punishment.
>
> I have earlier brought in illegal substances both through the Changi Airport and Woodlands, but I have retired from that trade. I now wish to know whether I am on some kind of record at the CNB or if I could freely travel to Singapore again.
>
> I am willing to face consequences for my actions in earlier years.
>
> Best regards,

The Anonymous Email was forwarded to Roshamima's counsel.

18 At the first hearing of CCA 8/2011, Roshamima's counsel informed us that Roshamima did not know of anyone by the name of "Noname Hawermann". [note: 12] Roshamima's counsel took the

position that the relevant authorities should investigate the Anonymous Email. [note: 13] We indicated to Roshamima's counsel that he also owed a duty to his client to undertake his own inquiries in connection with the Anonymous Email. [note: 14] We accordingly adjourned the hearing of the appeal for both the Prosecution and Roshamima's counsel to file affidavits detailing the steps taken in relation to the Anonymous Email. [note: 15]

19 Both the investigating officer in charge of Roshamima's case ("the IO") and Roshamima's counsel subsequently filed affidavits detailing the steps that they took in response to the aforesaid email.

20 The IO deposed that he took the following steps:

(a) On 24 November 2011, the IO sent an email to the email address of "Noname Hawermann". In that email, the IO stated that he was the Central Narcotics Bureau ("CNB") officer in charge of Roshamima's case. The IO requested "Noname Hawermann" to go to the CNB headquarters to provide a statement. [note: 16]

(b) On the same day, "Noname Hawermann" wrote to the IO to seek clarification on the possible consequences if he or she went to Singapore. "Noname Hawermann" also expressed shock at receiving an email from the IO instead of the law firm to whom he or she had sent the Anonymous Email. "Noname Hawermann" suggested that the email was protected by solicitor-client privilege. [note: 17]

(c) On the same day, "Noname Hawermann" sent another email essentially repeating his or her request for clarification. [note: 18]

(d) As the IO was on leave from 26 November 2011 to 29 November 2011, his colleague was instructed to respond on his behalf to the second email from "Noname Hawermann". In his response on 29 November 2011, the IO's colleague invited "Noname Hawermann" to go to the CNB headquarters to volunteer a statement. The email also stated that the CNB was not able to provide blanket immunity from prosecution or advise on any consequences if "Noname Hawermann" were indeed to volunteer a statement. [note: 19]

(e) On 28 November 2011, "Noname Hawermann" sent an email posing more queries on the consequences of his or her volunteering a statement. [note: 20]

(f) On 1 December 2011, the IO received an email from his colleague enclosing an email reply from "Noname Hawermann" in response to the email sent earlier by the colleague on 29 November 2011 (see sub-para (d) above). [note: 21]

The IO stated that there were no further investigations on "Noname Hawermann" or further email correspondence with him or her via email after 1 December 2011. The IO also deposed that his "preliminary checks" with the Technology Crime Investigation Branch of the Criminal Investigation Department had tracked the Internet Protocol address of the emails from "Noname Hawermann" to Sweden. [note: 22]

21 Roshamima's counsel filed an affidavit exhibiting various email exchanges with "Noname Hawermann". As with the responses given to the CNB, "Noname Hawermann" focused his or her replies to Roshamima's counsel on the potential consequences for him or her if he or she were to volunteer a

statement to the CNB and on the need for him or her to get impartial advice. Roshamima's counsel confirmed that as at the date of his affidavit, there was no response from "Noname Hawermann" after his final email to him or her on 6 December 2011.

The issues

22 The issues arising in CCA 7/2011 are as follows:

(a) Should Mas Swan be convicted of an amended charge of attempted importation of ecstasy?

(b) If so, what sentence should Mas Swan receive?

23 As for CCA 8/2011, the sole issue raised by counsel for Roshamima is whether the Judge erred in fact in finding that Roshamima knew of the presence of the three bundles containing controlled drugs in JHA 7781. At the trial, counsel agreed with the Judge's reasoning that if Roshamima were found to have knowledge of the controlled drugs hidden in JHA 7781, she would not have rebutted the s 18(2) presumption that she knew the nature of those controlled drugs (*ie*, that they were diamorphine) since she had adopted an "all or nothing" defence. Nevertheless, at the hearing before us, we questioned the Judge's omission to consider the possibility that Roshamima might also have believed that the three bundles contained ecstasy – since this was what she had told Mas Swan. Accordingly, a secondary issue arises in this appeal as to whether, in the circumstances of this case, the Judge should have given consideration to this alternative defence ("the Alternative Defence"), namely, that Roshamima likewise believed that the controlled drugs contained in the three bundles were ecstasy and thus did not know that those drugs were actually diamorphine instead. Although Roshamima's counsel referred to the Alternative Defence in answering the Judge's questions, he failed to advance it in a more dogged manner. Counsel appeared to have retreated from pursuing this defence after persistent questioning by the Judge regarding the logic of his position in the light of Roshamima's "all or nothing" defence.

Our decision

CCA 7/2011

Whether Mas Swan should be convicted of attempted importation of ecstasy

(1) The law on attempts to commit offences under the MDA

24 In *Khor Soon Lee v Public Prosecutor* [2011] 3 SLR 201 ("*Khor Soon Lee*"), this court convicted the appellant of an amended charge of attempting to import Class A controlled drugs (other than diamorphine) in contravention of s 7 read with s 12 of the MDA after acquitting him of a capital charge of importing not less than 27.86g of diamorphine (see the Editorial Note to *Khor Soon Lee*). The Prosecution initially relied only on *Khor Soon Lee* in support of its submission that Mas Swan should be convicted of a similar amended charge. [note: 23] At the first hearing of this appeal, we asked the Prosecution to address us on the issue from first principles as this court in *Khor Soon Lee* did not issue written grounds for its decision to convict the appellant in that case of attempted importation (*Khor Soon Lee* dealt only with this court's reasons for acquitting the appellant of the capital charge of importing diamorphine).

(A) Section 12 of the MDA

25 Section 12 of the MDA criminalises, *inter alia*, attempts to commit offences under the MDA:

> **Abetments and attempts punishable as offences**
>
> **12**. Any person who abets the commission of or who attempts to commit or does any act preparatory to, or in furtherance of, the commission of any offence under this Act shall be guilty of that offence and shall be liable on conviction to the punishment provided for that offence.

26 A brief history of the provision is apposite. Section 12 has been present in the MDA since the enactment in 1973 of one of its predecessor Acts, namely, the Misuse of Drugs Act (Act 5 of 1973) ("the 1973 Act"). The Explanatory Statement accompanying the Bill which introduced the 1973 Act (*viz*, the Misuse of Drugs Bill (Bill 46 of 1972) ("the 1972 Bill")) and the Parliamentary debates at the second reading of the 1972 Bill do not shed light on the origins of s 12 of the MDA and the intention underlying the provision. A provision similar to s 12 of the MDA may, however, be found in s 33 of the Dangerous Drugs Ordinance (Ordinance 7 of 1951) ("the 1951 Ordinance"). Section 33 of the 1951 Ordinance was later replaced by s 35 of the Dangerous Drugs Act (Cap 151, 1970 Rev Ed) ("the DDA"). In this regard, it should be noted that the 1973 Act was a consolidation of the DDA and the Drugs (Prevention of Misuse) Act (Cap 154, 1970 Rev Ed) (see *Singapore Parliamentary Debates*, *Official Report* (16 February 1973) vol 32 at col 414 *per* Mr Chua Sian Chin, Acting Minister for Health and Home Affairs). Section 35 of the DDA, which is identical to s 12 of the MDA apart from some minor drafting changes, reads as follows:

> **Abetments and attempts punishable as offences**
>
> **35**. Any person who abets the commission of or who attempts to commit or does any act preparatory to or in furtherance of the commission of any offence under this Act shall be guilty of such offence and liable to the punishment provided for such offence.

27 Although the proceedings at the second and third readings of the Bill which introduced the 1951 Ordinance (*ie*, the Dangerous Drugs Bill 1950 ("the 1950 Bill") (published in GN No S505/1950)) are not useful in determining the origins of s 33 of that Ordinance and, in turn, the origins of s 35 of the DDA, the Statement of Objects and Reasons accompanying the 1950 Bill is helpful. It states, *inter alia*, that the 1950 Bill would not alter the existing law (*ie*, the Deleterious Drugs Ordinance (Ordinance 7 of 1927) ("the DDO") and the Opium and Chandu Proclamation (BMA Proclamation No 43, 1948) ("the 1948 Proclamation")), and that the clauses that were new were "mainly concerned with administrative detail". Significantly, the clause which introduced s 33 of the 1951 Ordinance (*ie*, the predecessor of s 35 of the DDA, which is, in turn, the predecessor of s 12 of the MDA) was a *new provision* (see the Comparative Table attached to the Statement of Objects and Reasons accompanying the 1950 Bill).

28 Although the 1950 Bill describes s 33 of the 1951 Ordinance as a new provision, an equivalent provision can be found in the 1948 Proclamation as follows:

> **Attempts and abetment.**
>
> **15**. Whoever attempts to commit any offence punishable under this Proclamation or abets the commission of such offence shall be liable to the punishment provided for such offence.

Section 13 of the DDO also made it an offence "to take any steps preparatory to importing" deleterious drugs, although no mention was made of attempts to import such drugs. This particular provision was introduced in 1927, apparently to enact the provisions of the International Opium Convention 1925 in so far as they were applicable to the law in the Straits Settlements relating to

deleterious drugs (see the Statement of Objects and Reasons accompanying the Deleterious Drugs Bill 1927, which was the Bill that introduced s 13 of the DDO).

(B) Case law on s 12 of the MDA

29 None of the local cases concerning the offence under s 12 of the MDA of attempting to commit offences under the MDA has expounded on the elements of that offence of attempt: see *Public Prosecutor v Goh Ah Lim* [1989] 2 SLR(R) 217 (attempt to export diamorphine; the accused was arrested at Changi Airport while waiting to board a flight for Australia), *Public Prosecutor v Ho So Mui* [1993] 1 SLR(R) 57 (attempt to export diamorphine in furtherance of a common intention with another; the accused was arrested in the aircraft), *Goh Joon Tong and another v Public Prosecutor* [1995] 3 SLR(R) 90 (abetting an attempt to export diamorphine) and *Public Prosecutor v Bryan Yeo Sin Rong and others* [1998] SGHC 266 (attempt to export controlled drugs; the accused was arrested at the boarding gate at Changi Airport).

(C) The elements of the general offence of attempt under s 511 of the Penal Code

30 In contrast, the concept of an attempt to commit an offence has been discussed by our courts in relation to s 511 of the Penal Code (Cap 224, 2008 Rev Ed) ("the Penal Code"), which provides as follow:

> **Punishment for attempting to commit offences**
>
> **511.**—(1) Subject to subsection (2), whoever attempts to commit an offence punishable by this Code or by any other written law with imprisonment or fine or with a combination of such punishments, or attempts to cause such an offence to be committed, and in such attempt does any act towards the commission of the offence, shall, where no express provision is made by this Code or by such other written law, as the case may be, for the punishment of such attempt, be punished with such punishment as is provided for the offence.
>
> (2) The longest term of imprisonment that may be imposed under subsection (1) shall not exceed —
>
> (*a*) 15 years where such attempt is in relation to an offence punishable with imprisonment for life; or
>
> (*b*) one-half of the longest term provided for the offence in any other case.
>
> ***Illustrations***
>
> (*a*) *A* makes an attempt to steal some jewels by breaking open a box, and finds after so opening the box that there is no jewel in it. He has done an act towards the commission of theft, and therefore is guilty under this section.
>
> (*b*) *A* makes an attempt to pick the pocket of *Z* by thrusting his hand into *Z*'s pocket. *A* fails in the attempt in consequence of *Z*'s having nothing in his pocket. *A* is guilty under this section.

31 Section 511 of the Penal Code, like s 12 of the MDA, does not specify the test for determining whether the elements of the general offence of attempt have been made out. There is, however, case law considering the elements of this offence.

(I) The mens rea

32 The High Court in *Chua Kian Kok v Public Prosecutor* [1999] 1 SLR(R) 826 ("*Chua Kian Kok*") held that the *mens rea* for the general offence of attempt under the then equivalent of s 511 of the Penal Code (*viz*, s 511 of the Penal Code (Cap 224, 1985 Rev Ed)) was the intention to commit the primary offence (see *Chua Kian Kok* at [27]–[28]). The High Court refused to follow English Court of Appeal decisions which held that the *mens rea* for the general offence of attempt was the same as the *mens rea* for the primary offence. The High Court gave two reasons for its decision (see *Chua Kian Kok* at [27]–[28]). First, it took the view that an attempted offence resulted in a lower degree of public harm than a completed offence and, thus, the mental element for the attempted offence should be more stringent (see *Chua Kian Kok* at [30]–[31]). Second, the High Court was not convinced by the reasoning in the English Court of Appeal decisions because the corresponding English provision (*viz*, s 1(1) of the Criminal Attempts Act 1981 (c 47) (UK) ("the UK Criminal Attempts Act 1981")) seemed to provide that the mental element for the general offence of attempt was, instead, an intent to commit the primary offence (see *Chua Kian Kok* at [32]).

33 We agree that the *mens rea* for the general offence of attempt under s 511 of the Penal Code is the intention to commit the primary offence. As was held in *Chua Kian Kok*, it would not be appropriate to hold that the *mens rea* of the primary offence is the required mental element. A more stringent requirement should be imposed for inchoate offences. It should be noted that the Indian courts also take the view that the mental element for the general offence of attempt is the intention to commit the primary offence (see *Ratanlal & Dhirajlal's The Indian Penal Code* (LexisNexis Butterworths Wadhwa Nagpur, 33rd Ed, 2010) at pp 1076 and 1079).

(II) The actus reus

34 The High Court in *Chua Kian Kok* took the view that the *actus reus* for the general offence of attempt was that the accused must have "embarked on the crime proper" (see *Chua Kian Kok* at [36]). The High Court preferred this rather vague formulation because it did not think it was desirable to provide a precise definition. The court felt that the precise point at which an act became an attempt was ultimately a question of fact (see *Chua Kian Kok* at [36]).

35 The authors of a local textbook on criminal law have explained that a number of other approaches may be taken (see Stanley Yeo, Neil Morgan & Chan Wing Cheong, *Criminal Law in Malaysia and Singapore* (LexisNexis, 2nd Ed, 2012) ("*Yeo*") at paras 36.14–36.24). The authors explain that it is clear that merely preparatory acts should not be sufficient (see *Yeo* at para 36.16). Beyond merely preparatory acts, various tests are possible:

(a) One possibility is that only "acts immediately connected" with the commission of the primary offence constitute attempts (see *Yeo* at para 36.17 citing *R v Eagleton* (1855) Dears 376; 169 ER 766).

(b) Another possibility is the "last act test". This test provides that the accused must have done all that he believes to be necessary for the commission of the primary offence (see *Yeo* at para 36.19).

(c) Yet another test is that the accused's conduct must have been such as to "clearly and unequivocally indicate in itself the intention to commit the offence" (see *Yeo* at para 36.20).

(d) A fourth possibility is the "substantial step" test, which requires the accused to have "progressed a substantial way towards the completion of the offence" (see *Yeo* at para 36.21). Interestingly, the authors point out that this test is embodied in the attempt provisions in two

local statutes (see *Yeo* at para 36.21, referring to s 54(1) of the Civil Defence Act (Cap 42, 2001 Rev Ed) and s 38(1) of the Police Force Act (Cap 235, 2006 Rev Ed)). The authors prefer this fourth possibility (see *Yeo* at para 36.24).

36 For the purposes of CCA 7/2011, it is not necessary for us to reach a conclusive view on the appropriate test to be adopted in the Singapore context. This is because on any view, Mas Swan had done everything he possibly could to commit the primary offence of importing ecstasy. He had actually brought controlled drugs physically into Singapore. The only reason why he could not complete committing the aforesaid primary offence was that he was factually mistaken as to the nature of the controlled drugs in the three bundles – he thought those controlled drugs were ecstasy when they were actually diamorphine.

(D) Is it appropriate to apply the elements of the general offence of attempt to s 12 of the MDA?

37 In our view, the elements of the general offence of attempt under s 511 of the Penal Code should be adopted in the context of s 12 of the MDA for two reasons. First, there is nothing in the words of s 12 of the MDA which suggests that a different approach should be taken. Both provisions do not define what is meant by "attempts". Second, there is nothing in the origins of s 12 of the MDA which suggests that the provision should be interpreted in a different manner from s 511 of the Penal Code.

(E) Does s 12 of the MDA contemplate impossible attempts?

38 It is clear that some types of impossible attempts are punishable under s 511 of the Penal Code. The High Court in *Chua Kian Kok* explained that there are four kinds of impossibility *vis-à-vis* impossible attempts (see *Chua Kian Kok* at [43]–[44]): (a) physical impossibility; (b) impossibility by reason of the non-criminality of the attempted primary "offence"; (c) legal impossibility (*eg*, a person taking his own umbrella with an intent to steal it); and (d) impossibility by reason of the accused's ineptitude (*eg*, attempting to break into a safe with a tool that is not suitable for breaking into the safe).

39 Only the first category (physical impossibility) is relevant in the present appeal. Mas Swan intended to import controlled drugs of a kind different from the kind he was actually carrying. The Prosecution has suggested that the present appeal also involves legal impossibility because Mas Swan was mistaken as to the legal status of the object that he possessed. [note: 24] We disagree. Mas Swan was not mistaken as to the *legal* status of the object that he possessed. The object that he intended to possess and the object that he actually possessed were both controlled drugs. He was, instead, mistaken as to the physical quality of the object.

40 According to the High Court, attempting the physically impossible is an offence under s 511 of the Penal Code (see *Chua Kian Kok* at [43]). This is because it is clear from Illustration (*b*) to s 511 of the Penal Code (see [30] above) that the provision is intended to cover physically impossible attempts (see *Chua Kian Kok* at [43]).

41 In our view, a similar view should be taken *vis-à-vis* s 12 of the MDA. Factually impossible attempts to commit offences were crimes under English law until the decision of the House of Lords in *Haughton v Smith* [1975] AC 476 ("*Haughton*") (see the United Kingdom Law Commission, *Criminal Law: Attempt and Impossibility in relation to Attempt, Conspiracy and Incitement* (Law Com No 102, 1980) ("the *1980 Report*") at para 2.58). In *Haughton*, the House of Lords held (at 497, 500, 502 and 506) that a person who dishonestly handled goods believing them to be stolen (but which were not stolen because they had been returned to lawful custody due to police interception) was not guilty of

attempting to handle stolen goods. *Haughton* has been criticised (see, for example, H L A Hart, "The House of Lords on Attempting the Impossible" (1981) OJLS 149 ("*Hart*"), especially at pp 165–166, and the *1980 Report* at paras 2.95–2.97). From the perspective of the rationale for punishing attempts (*viz*, deterrence and retribution), a person who sets out to commit an offence and does everything possible to commit the offence, but who is (perhaps fortuitously) prevented from committing the offence due to some external circumstance is as culpable as a person who is interrupted from completing the offence (see *Hart* at p 165 and the *1980 Report* at para 2.96). *Haughton* has since been legislatively overruled (see s 1(2) of the UK Criminal Attempts Act 1981). The current position in England is that factually impossible attempts are offences (see *Regina v Shivpuri* [1987] 1 AC 1). In our view, when Parliament enacted s 12 of the MDA, it must be presumed, in the absence of contrary indication, to have intended to follow the existing common law position on factually impossible attempts. There is nothing in the text or the origins of s 12 of the MDA which suggests that a different approach should be taken in interpreting s 12 (see [25]–[29] above).

42 We also note that *Chua Kian Kok* was applied by the court of three judges in *Law Society of Singapore v Bay Puay Joo Lilian* [2008] 2 SLR(R) 316 ("*Bay Puay Joo Lilian*"). *Bay Puay Joo Lilian* was part of a line of disciplinary cases involving the entrapment of solicitors involved in touting for conveyancing work. Counsel for the respondent solicitor in that case sought to argue that due cause could not be shown under s 83(2)(*e*) of the Legal Profession Act (Cap 161, 2001 Rev Ed) for attempting to procure employment if the employment attempted to be procured was fictitious (see *Bay Puay Joo Lilian* at [43]). The court of three judges rejected this argument by referring to s 511 of the Penal Code (Cap 224, 1985 Rev Ed) and *Chua Kian Kok* (see *Bay Puay Joo Lilian* at [44]).

(2) Application to the facts

43 Mas Swan's own evidence is that he thought he and Roshamima were transporting ecstasy because Roshamima had told him so. [note: 25] The Judge accepted Mas Swan's testimony that he believed Roshamima's information that the three bundles contained ecstasy pills (see the Judgment at sub-para (a) of [87]). Hence, the *mens rea* for the offence of attempt under s 12 of the MDA is made out: Mas Swan intended to commit the primary offence of importing ecstasy.

44 The *actus reus* of the offence of attempt under s 12 of the MDA is also made out on any view of the test for such *actus reus*. Mas Swan had done everything possible to complete the offence of importing ecstasy; the only circumstance that prevented him from actually importing ecstasy was that the three bundles did not in fact contain ecstasy.

45 We accordingly hold that on these facts, Mas Swan has committed the offence of attempting to import ecstasy into Singapore under s 7 read with s 12 of the MDA and convict him of the amended charge proposed by the Prosecution (see [14] above).

The appropriate sentence to impose on Mas Swan

46 In its written submissions, the Prosecution submitted that Mas Swan should be sentenced to 18 years' imprisonment and should receive eight strokes of the cane. [note: 26] This was the sentence imposed by this court on the appellant in *Khor Soon Lee* (see the Editorial Note to *Khor Soon Lee*). The Prosecution, however, subsequently revised its stance on sentencing in its oral submissions before this court (see [51] below).

47 When questioned on the considerations for sentencing in cases of attempted importation of ecstasy where the substance actually imported was not ecstasy, the Prosecution submitted that it was relevant to consider the number of ecstasy pills that *would have been imported* if a consignment

of the weight of the substance *actually imported* had indeed contained ecstasy. [note: 27] In the present appeal, the three bundles had a gross weight of approximately 1.3kg (the exact weight was 1,352.7g). [note: 28] The Prosecution informed the court that according to the Health Sciences Authority ("the HSA"), a consignment of 1.3kg of ecstasy would typically contain between 3,800 and 4,500 pills. [note: 29]

48 In response to our request for sentencing precedents, the Prosecution provided us with precedents relating to the importation (as opposed to the *attempted* importation) of, *inter alia*, ecstasy. In its written submissions on these sentencing precedents, the Prosecution revised its estimate of the number of ecstasy pills that would have been present in a consignment having the weight of the three bundles, and indicated that the three bundles "could have yielded between 4,509 and 3,382 'ecstasy' tablets on the assumption that each tablet weighs [between] 0.3 grams and 0.4 grams respectively". [note: 30]

(1) The Prosecution's sentencing precedents

49 The Prosecution's sentencing precedents consist of *Khor Soon Lee* and several unreported District Court decisions on sentencing for the offence of importing either ecstasy or "Yaba" (Yaba is the street name of a methamphetamine-based drug). [note: 31] These cases are, in brief, as follows: [note: 32]

(a) *Public Prosecutor v Chew Wee Kiat* District Arrest Case No 2443 of 2001 and Magistrate's Appeal No 175 of 2001 ("*Chew Wee Kiat*"): The accused was arrested at Woodlands Checkpoint with 1,399 ecstasy tablets. The net weight of N, α-dimethyl-3,4-(methylenedioxy) phenethylamine ("MDMA") in the consignment was 194.63g. The accused was convicted after a trial and was sentenced to ten years' imprisonment and eight strokes of the cane. He was a first offender. The accused filed a notice of appeal, but subsequently withdrew it.

(b) *Public Prosecutor v Teo Leong Huat* District Arrest Case No 35110 of 2001 ("*Teo Leong Huat*"): The accused arrived in Singapore on a flight from Brussels. Officers from the CNB kept him under surveillance and subsequently arrested him. A black bag was recovered from him. The bag contained 15,070 ecstasy tablets, which, upon analysis, were found to contain 2,129.2g of MDMA. The accused pleaded guilty to a charge of importing the ecstasy tablets and was sentenced to seven years' imprisonment and ten strokes of the cane for that charge.

(c) *Public Prosecutor v Robin Unggul Suryono* District Arrest Case No 3409 of 2011 ("*Robin Unggul Suryono*"): The accused was arrested at Woodlands Checkpoint with 3,061 ecstasy tablets and two small sachets of powder in his possession. The tablets and the sachets were analysed and were found to contain 190.45g of MDMA. The accused claimed that he was bringing the drugs from Malaysia through Singapore en route to Indonesia, and that the proceeds from his drug activities would go towards helping the poor in Indonesia. He pleaded guilty and was sentenced to seven years' imprisonment and six strokes of the cane.

(d) *Khor Soon Lee*: On appeal to this court, the appellant in this case was acquitted of the capital charge of importing not less than 27.86g of diamorphine and convicted of an amended charge of attempting to import Class A controlled drugs other than diamorphine (see [24] above). A review of the facts set out in *Khor Soon Lee* (which, as mentioned earlier, dealt only with this court's reasons for acquitting the appellant of the capital charge of importing diamorphine) suggests that the particular controlled drugs that the appellant thought he was importing were ketamine, ecstasy, "Ice" (*ie*, methamphetamine) and "Erimin" (*ie*, nimetazepam, a Class C

controlled drug) (see *Khor Soon Lee* at sub-para (a) of [21] for the court's definition of the term "Controlled Drugs"). The appellant was sentenced to 18 years' imprisonment and eight strokes of the cane for the offence of attempted importation. No written grounds were issued by the court *vis-à-vis* its decision to convict the appellant of that offence and to impose the aforesaid sentence on him.

(e) *Public Prosecutor v Somsak Srihanon* District Arrest Case No 27723 of 2000: The accused arrived by plane from Bangkok, Thailand and was arrested "pursuant to intelligence" [note: 33] with 3,835 Yaba tablets in his possession. The tablets were found to contain 53.79g of methamphetamine. He was sentenced to nine years' imprisonment and nine strokes of the cane after he pleaded guilty.

(f) *Public Prosecutor v Thuma London* District Arrest Case No 50012 of 2001: The accused arrived by plane from Bangkok. He was arrested after a routine check at the exit channel led to the discovery of 4,030 Yaba tablets in his luggage. The tablets were found to contain 66.04g of methamphetamine. The accused was sentenced to seven and a half years' imprisonment and ten strokes of the cane after he pleaded guilty.

(g) *Public Prosecutor v Ketmala Phumin* District Arrest Case No 22028 of 2002 ("*Ketmala Phumin*"): The accused arrived by plane from Bangkok and was arrested after a search discovered 5,897 Yaba tablets in his shoes. The tablets were found to contain 116.37g of methamphetamine. The accused was sentenced to five years' imprisonment and five strokes of the cane after he pleaded guilty.

(h) *Public Prosecutor v Jiabo Sangwan* District Arrest Case No 36103 of 2003 ("DAC 36103/2003") and *Public Prosecutor v Wonglar Thitiphon* District Arrest Case No 36099 of 2003 ("DAC 36099/2003"): The accused in DAC 36099/2003 was arrested "pursuant to intelligence" [note: 34] upon her arrival at Changi Airport from Bangkok. She was found with 3,943 Yaba tablets, which contained a total of 82.26g of methamphetamine, hidden in her shoes. She was sentenced to ten years' imprisonment with no caning because she was a female. The accused in DAC 36103/2003 was to collect the Yaba tablets from the accused in DAC 36099/2003. He cooperated with the CNB and arranged with the accused in DAC 36099/2003 to make the delivery, which had previously been arranged. He pleaded guilty and was sentenced to 13 years' imprisonment and 12 strokes of the cane.

(i) *Public Prosecutor v Kasem Nonchan* District Arrest Case No 48602 of 2003 ("*Kasem Nonchan*"): The accused arrived by plane from Bangkok with a female accomplice. He was arrested after his female accomplice was found with 3,915 Yaba tablets containing a total of 56.33g of methamphetamine. He pleaded guilty and was sentenced to five years' imprisonment and five strokes of the cane. His female accomplice was sentenced to five years' imprisonment.

50 The Prosecution submits that those of the above precedents which involve the importation of Yaba are relevant to the present case for two reasons, even though the amended charge against Mas Swan (as set out at [14] above) concerns the attempted importation of ecstasy. First, the United Nations Office on Drugs and Crime treats ecstasy and Yaba as belonging to the category of "Amphetamine-type stimulants" for the purpose of research and management. [note: 35] Second, according to the Prosecution, the HSA has noted that whereas ecstasy in the past meant tablets containing MDMA, "clandestine laboratories are now known to substitute or mix MDMA [a Class A controlled drug] with other drugs", causing ecstasy to take on a "broader meaning". [note: 36] The Prosecution points out that the HSA has noted that the ecstasy tablets that it tested in the past

would normally contain MDMA, MDA (*ie*, α-Methyl-3,4-(methylenedioxy) phenethylamine, a Class A controlled drug), methamphetamine and ketamine, whereas some ecstasy tablets tested recently were found to also contain methylmethcathinone (commonly known as mephedrone, a Class A controlled drug). [note: 37]

51 The Prosecution's final oral submission on sentencing is that in the light of the above precedents, Mas Swan should be sentenced to between ten and 15 years' imprisonment [note: 38] (*cf* the Prosecution's written submissions on sentencing as set out at [46] above). In its oral submissions, the Prosecution did not refer to the number of strokes of the cane which the court should impose.

(2) Mas Swan's mitigation

52 Mas Swan's mitigation is that his role in the offence was minor as he was there merely to accompany Roshamima. [note: 39] He claims that he was not aware that Roshamima was doing anything illegal in importing ecstasy. [note: 40]

53 Counsel for Mas Swan has also referred to *Public Prosecutor v Phuthita Somchit and another* [2011] 3 SLR 719, where the accused, who was acquitted of conspiring to traffic in diamorphine but convicted of attempting to traffic in a Class C controlled drug (the charge was framed in this manner because the accused had intended to traffic in a "not serious drug", which, in the High Court judge's view, meant that she must have intended to traffic in a Class C controlled drug at the very least), was sentenced to nine years' imprisonment. [note: 41] The accused received this sentence even though she knew that trafficking in the type of controlled drugs she was dealing with carried severe penalties. She had also been involved in the packing of the controlled drugs and had received money from her co-accused. [note: 42] In contrast, as counsel for Mas Swan has pointed out, Mas Swan did not handle or see the controlled drugs in the three bundles and thought that those drugs were ecstasy. [note: 43]

54 For these reasons, counsel for Mas Swan has also urged this court to consider the lower end of the sentencing precedents in *Teo Leong Huat* (seven years' imprisonment and ten strokes of the cane for importing 15,070 ecstasy tablets), *Robin Unggul Suryono* (seven years' imprisonment and six strokes of the cane for importing 3,061 ecstasy tablets and two small sachets of powder), *Ketmala Phumin* (five years' imprisonment and five strokes of the case for importing 5,897 Yaba tablets) and *Kasem Nonchan* (five years' imprisonment and five strokes of the cane for importing 3,915 Yaba tablets), and has submitted that Mas Swan should be sentenced to the minimum mandatory sentence of five years' imprisonment and five strokes of the cane.

(3) The relevant sentencing considerations

55 Section 12 of the MDA provides that the punishment for attempts to commit offences under the MDA is the punishment provided for the primary offence in question. The Second Schedule to the MDA tabulates the punishment for importation of controlled drugs. If the hypothetical ecstasy tablets in the present case are considered to contain MDMA, then the sentencing range is as follows:

(a) a *minimum* of five years' imprisonment and five strokes of the cane; and

(b) a *maximum* of 30 years' imprisonment and 15 strokes of the cane.

56 The High Court in *Jeffery bin Abdullah v Public Prosecutor* [2009] 3 SLR(R) 414 (*per* Chan Sek

Keong CJ) held (at [7]) that it was relevant to consider the following factors when determining the sentence for drug trafficking (citing *Sentencing Practice in the Subordinate Courts* (LexisNexis, 2nd Ed, 2003) at pp 638–639):

(a) the *quantity* of the drug in the possession of the offender;

(b) the *type* of drug [involved];

(c) the *duration and sophistication in planning and carrying out the offence*; and

(d) the *relative levels of participation* in relation to the accomplices.

[emphasis added]

57 In our view, these considerations are applicable to the present case in determining the appropriate sentence to be imposed on Mas Swan. The quantity of controlled drugs involved in the importation is a material consideration in determining the potential harm to society. In the present case, the actual amount of ecstasy that Mas Swan was found to have *attempted* to import into Singapore cannot be determined at all because what was actually imported was diamorphine. It is therefore necessary for the court to formulate an acceptable means of calculating the notional quantity of ecstasy attempted to be imported for the purpose of sentencing him. The quantity has to be notional because, as we have just pointed out, the actual quantity cannot be determined. This situation is not common, but it is not without precedent in other jurisdictions. For instance, in *Regina v Tomasz Szmyt* [2010] 1 Cr App R (S) 69 ("*Tomasz Szmyt*"), the appellant was found to have in his possession, *inter alia*, what he thought were 1,998 ecstasy tablets, but which were in fact harmless tablets. The English Court of Appeal held that the proper way to assess the sentence for the offence was to consider what would have been an appropriate sentence if that quantity of ecstasy had been imported, and then to scale it down to account for the fact that although the appellant was guilty of attempting to import ecstasy, what was imported was actually a harmless substance (see *Tomasz Szmyt* at [12]). Similarly, in *R v Magdalen Genevieve Wolin* [2006] 1 Cr App R (S) 133 ("*R v Wolin*"), the appellant thought she was importing cocaine, but what was actually imported was lignocaine, which was *not* a prohibited drug under the relevant statute. She was convicted of being knowingly concerned in the attempted importation of a prohibited drug of a particular class. The court reduced the sentence because it felt that a further discount was warranted to account for: (a) the fact that the appellant was charged with an attempt and not a completed offence; and (b) the fact that the substance which the appellant carried was not a prohibited substance (see *R v Wolin* at [6]–[7]).

(4) Our decision on sentencing

58 The Prosecution has suggested in its oral submissions before this court that the proper sentence to impose on Mas Swan would be a term of imprisonment of between ten and 15 years (see [51] above). However, the majority of the Prosecution's sentencing precedents on the importation of ecstasy show that the range of imprisonment for this offence is between seven and ten years' imprisonment instead. If the Prosecution's sentencing precedents on the importation of Yaba are also considered material, the sentencing range will be between five and 13 years' imprisonment. It should be noted, however, that apart from *Khor Soon Lee*, the sentencing precedents relied on by the Prosecution are District Court cases. Further, it is not possible to ascertain what factors were taken into account in these District Court cases as they are unreported and the Prosecution has not provided their factual background. These decisions are also difficult to reconcile. For example, the sentence in *Chew Wee Kiat* was ten years' imprisonment and eight strokes of the cane for importing 1,399 ecstasy tablets. In contrast, the sentence in *Teo Leong Huat* for importing 15,070 ecstasy

tablets was only seven years' imprisonment and ten strokes of the cane. The apparent disparity is not justifiable even if we take into account the fact that the accused in *Chew Wee Kiat* claimed trial. It may well be that the facts in *Chew Wee Kiat* were particularly aggravated, but we do not know.

59 In our view, the sentencing range in cases of importation of either ecstasy or Yaba should not be used to determine the sentencing range in the present case because although what was attempted to be imported here was ecstasy, what was in fact imported was diamorphine, a much more serious Class A controlled drug, the importation and attempted importation of which are both punishable by a death sentence if the quantity of diamorphine involved exceeds 15g. A closer case is *Khor Soon Lee*, where the capital charge of importing not less than 27.86g of diamorphine was reduced to attempted importation of Class A controlled drugs other than diamorphine, and where this court sentenced the offender to 18 years' imprisonment and eight strokes of the cane. Further, unlike the English cases of *Tomasz Szmyt* and *R v Wolin*, no discount should be given in the present case on the basis that the offence was one of attempting to import ecstasy rather than the substantive offence of actually importing ecstasy. The reason is that in the two aforesaid English cases, non-prohibited substances were ultimately imported, whereas in the present case, a much more serious Class A controlled drug (*viz*, diamorphine) was actually imported. For these reasons, we think that an appropriate sentence for Mas Swan would be 15 years' imprisonment and eight strokes of the cane, having regard to the fact that he was complicit in transporting diamorphine to Singapore.

CCA 8/2011

60 As noted above, two issues arise in relation to CCA 8/2011:

(a) whether the Judge erred in rejecting Roshamima's evidence that she did not know of the presence of the three bundles in JHA 7781 ("the first issue"); and

(b) whether the Judge erred in finding that Roshamima had not rebutted the s 18(2) presumption that she knew the nature of the controlled drugs in the three bundles ("the second issue").

The first issue

61 The first issue may be disposed of briefly. Counsel for Roshamima has not persuaded us that the Judge's finding was wrong. We place no credibility whatever on the Anonymous Email and the subsequent correspondence with "Noname Hawermann" as a basis for casting any reasonable doubt on the finding of the Judge. Given that "Noname Hawermann" is not prepared to identify himself or herself even though he or she is outside the jurisdiction of the law enforcement agencies in Singapore, no court would be justified in giving any credence to his or her assertions.

The second issue

62 The second issue raises an interesting point on the role of logic in criminal law.

(1) The Judge's approach

63 The Judge essentially adopted an approach based on pure logic to determine whether Roshamima had rebutted the s 18(2) presumption that she knew the nature of the controlled drugs in the three bundles. He held that she had failed to rebut this presumption because she had not adduced any evidence to show that she did not know and had no reason to know the nature of the controlled drugs in the three bundles. The Judge's reasons are set out in the following paragraphs of

the Judgment:

> 90 Roshamima's defence, as mentioned above, was that she had *no knowledge whatsoever* that the bundles were concealed or existed in the door panel. If, however, the Prosecution was able to persuade me that Roshamima was aware of the concealed bundles and knew that they contained controlled drugs, the statutory presumption under s 18(2) of the MDA would, accordingly, become operative and it would then be for Roshamima to rebut it, failing which the Charge against her [*ie*, the joint charge mentioned at [1] above] would be made out.
>
> 91 In this connection, it is pertinent to highlight that Roshamima did not lead any positive evidence to prove that she was not aware of the true nature of the controlled drugs. This must be so since she chose to defend the Charge at the threshold level that she had no knowledge of the existence of the bundles that were concealed in the door panel of JHA 7781 and was accordingly not in *legal possession* of the controlled drugs. It therefore follows that if the Prosecution was able to prove that Roshamima was aware that bundles containing controlled drugs were concealed in the car door panel, the presumption under s 18(2) of the MDA would operate against her, and because she has not adduced any evidence to rebut that presumption, the Charge against her would, without more, indubitably be made out. This logical sequence and its inevitable outcome were eventually conceded by Mr Muzammil [counsel for Roshamima] during oral submissions, though I would like to add that I am relying on what I understand to be the legal position, and not on his concession, in making such a finding.
>
> …
>
> 130 As Roshamima did not adduce any evidence that she believed that the bundles contained controlled drugs other than diamorphine, the presumption under s 18(2) of the MDA remains unrebutted.
>
> [emphasis in original]

64 Was the Judge's reasoning in the above passages correct in law? It appears to be implicit in the Judge's reasoning that the only way Roshamima could have rebutted the s 18(2) presumption was for *her* to adduce credible evidence to support her claim that she did not know and had no reason to know that the controlled drugs in the three bundles were diamorphine.

65 In our view, the Judge's approach, while logically defensible, is not necessarily legally correct in the context of a criminal trial on the evidence before him. With respect, the Judge's approach was overly narrow in the context of a criminal trial. Before we elaborate on this point, it should be noted that Roshamima's counsel did try, albeit in a rather clumsy and confusing manner, to advance the Alternative Defence (as set out at [23] above) for his client, but his attempt failed to make any headway with the Judge, and he eventually conceded the Judge's inexorable conclusion. This in turn led the Judge to comment that Roshamima's counsel had accepted "[t]his logical sequence and its inevitable outcome" that if Roshamima's primary defence failed, the s 18(2) presumption against her (*ie*, the presumption that she knew the nature of the controlled drugs in the three bundles) would stand unrebutted (see [91] of the Judgment, which is reproduced at [63] above).

66 The following exchanges during defence counsel's closing submissions at the trial show how counsel lost his way in the course of attempting to advance the Alternative Defence: [note: 44]

Muzammil: … [Roshamima's] defence is centralised on two issues, your Honour. Number 1 is, she did not know that the three bundles were in the car. And number 2, her purpose of coming into Singapore was a lawful purpose, that was to meet up with Murie's auntie at Rochor that evening on the 6th of May 2009.

Court: *And do you have a fallback position if these two points are not accepted?*

…

Court: But let's say she – let – let's – do you have an *alternative submission*? You've picked [*sic*] your case at the highest?

Muzammil: Yes, your Honour.

Court: You don't have an alternative submission?

Muzammil: *No, your Honour*. …

…

Court: And you have no fallback position. Let's say the Court accepts – prefers Mas Swan's evidence over Roshamima, as far as the knowledge of the contents, that the bundles were hidden in the door panel.

Muzammil: Your Honour, in the event, your Honour, in the event if what – if we go on the basis of Ro – of Mas Swan's evidence, then your Honour, at best, *she would only be charged for possession – for – for importing Ecstasy*, which is not subject of the charge, your Honour. The charge is for importing diamorphine.

Court: Yes. But she has no grounds for belief. She – she never said, "I thought it was Ecstasy". Her position is, "I didn't even know the bundles were in there".

Muzammil: Yes. Your Honour, so in the – since she say that she – number one, she did not know that there was bundle – there was a bundle; number two is, if you follow – if you accept Mas Swan's version that it was all the time Ecstasy, which she claimed he had said, then at best is importation of Ecstasy, your Honour, which is not subject of the charge, which is diamorphine. And she cannot be – if you go by the case, it says that you cannot be – if you strongly believe that it is Ecstasy, you can be – you cannot be found guilty of a charge for importing diamorphine …

If she strongly – if your Honour accepts – we go on the – worse scenario that your Honour accepts Mas Swan's version that she say that they were Ecstasy pills –

…

Court: So how does one rebut a presumption when one's case is an absolute denial?

…

Court: How does one rebut that presumption when the evidence of the – the accused is, "I didn't even not [*sic*] – know that the bundles were in the car"?

Muzammil: Yes. Your Honour, this is a situation – her defence is, she did not know.

Court: Yes.

Muzammil: It cannot be a situation that – where she says that "Even if I knew, it would – I think it is Ecstasy".

Court: Yes.

Muzammil: Here is a – here is a situation where she says, "I did not know". It is a – a – a situation of either yes or no. It's just like an alibi, your Honour. Alibi is a – a – accused says that he was at a particular place –

Court: Yes.

Muzammil: – at a particular time, at the time of the offence. Now, if he fails in convincing the Court that he was with evidence – to evidence that he was there at that time of the offence alleged, then if he's – the Court doesn't – means that his defence fails, it – he falls with – he – he – he falls – the whole thing falls your Honour –

Court: Yes.

Muzammil: – the whole defence falls.

…

Court: So now if you fail to prove that she did not know –

Muzammil: Yes.

Court: – that the three bundles were concealed in the car, does your defence fail?

Muzammil: I would – I humbly submit, yes, your Honour, because it's either you –

Court: Okay, this is different from what you just told me 5 minutes ago.

Muzammil: Yes, your Honour. Because that is on the basis if – on the basis if you accept Mas Swan's version that it was she who said – based on the basis that –

Court: So if –

Muzammil: If the Court accepts –

Court: – the Court accepts Mas Swan's evidence –

Muzammil: – Mas Swan's version that it was she who said there were three bundles of Ecstasy hidden behind the door, then, your Honour, *it must have been that she had knowledge that the contents of the bundle[s] were Ecstasy and not diamorphine*. If she – I mean, taking – taking –

Court: I am absolutely confused by your submission.

Muzammil: No, your Honour. Your Honour, your – your –your –

Court: Do I accept – do I understand your submission, if you fail in your primary case –

Muzammil: Yes.

Court: *i.e. that – that she did not know that the three bundles were concealed in the car, the defence for this charge fails completely?*

Muzammil: *I would think so*.

…

Court: Okay. So I want now, the third time, Mr Muzammil, I want some clarity: *If you fail in that defence, i.e. the Court makes a finding that she knew that three bundles were concealed in the door panel, does the defence to the charge before me fail?*

Muzammil: I humbly submit, no, your Honour, because the prosecution would still have to – would still have to prove that she knew that the – the – the bundles contained diamorphine, your Honour.

Court: All right. You already change[d] your submissions three times, you know?

…

Court: They are relying also on the presumption. How does the accused rebut the presumption when her case is, I don't know –

Muzammil: Yes.

Court: – that is inside –

Muzammil: Yes.

Court: – that there are three bundles –

Muzammil: Yes.

Court: – in the – in the – the door panel. …

…

Court: You have to rebut. It's a – it's a positive duty to rebut.

…

Court: How does one rebut the presumption when one's factual case which the Court, assuming it doesn't accept is "I didn't know –

Muzammil: Yes.

Court: – the bundles were in the door panel"?

…

Muzammil: She has not rebutted the presumption because I … I submit that she has not – *she has not rebutted presumption if your Honour takes into – if your Honour is – if the Court finds that she was in possession*.

Court: All right.

[emphasis added]

67 The above exchanges show that even though Roshamima's counsel eventually agreed with the Judge that Roshamima did not have a fallback defence (in the form of the Alternative Defence), he also contended that if the Judge were to find that Mas Swan believed what he alleged Roshamima had told him, then "*it must have been that she had knowledge that the contents of the [three] bundle[s] were Ecstasy and not diamorphine*" [emphasis added]. However, the Judge was of the view that if he were to reject Roshamima's primary defence that she did not know of the presence of the three bundles in JHA 7781, she would not, *ipso facto*, be able to rebut the s 18(2) presumption. The Judge was not disposed to consider counsel's attempt to argue that if he (the Judge) believed Mas Swan's defence, then he should also consider whether Roshamima had likewise believed that the three bundles contained ecstasy pills. In the Judge's view, such belief would be inconsistent with Roshamima's primary defence that she had no knowledge of the presence of the three bundles in JHA 7781.

(2) Inconsistent defences in a criminal trial

68 In our view, the Judge, in accepting Mas Swan's defence, which was based on what Roshamima had told Mas Swan (*viz*, that the three bundles contained ecstasy), and in holding that Roshamima had failed to discharge the burden of proving the contrary of the s 18(2) presumption (*viz*, the presumption that she knew the nature of the controlled drugs in the three bundles) because she had led no evidence to rebut the presumption, erred in law in not addressing the possibility that Roshamima might also have believed that the three bundles contained ecstasy since this was what she had told Mas Swan. The fact that Roshamima adopted an "all or nothing" defence should not have deprived her of any other available defence that could reasonably be made out on the evidence. It was not unreasonable of Roshamima not to rely on the Alternative Defence at the trial because relying on that defence would inevitably have impacted on the cogency or strength of her primary defence, which, if accepted by the Judge, would have resulted in her being acquitted of the capital charge faced by her (*viz*, the joint charge set out at [1] above). The Judge's approach is, with respect, inconsistent with the established practice of criminal courts in such situations. In a jury trial, the established practice in such situations is that the trial judge must put to the jury all defences that can reasonably be made out on the evidence, and the trial judge should not withhold or withdraw any alternative defences that may reasonably be made out on the evidence. It is for the jury to decide whether any alternative defence is credible, and not for the trial judge to make this decision by withholding or withdrawing an alternative defence from the jury. In a bench trial, the same practice should apply, and this means that the trial judge should not shut his mind to any alternative defence that is reasonably available on the evidence even though it may be inconsistent with the accused's primary defence. In the present case, the Judge should have asked himself whether it was possible that Roshamima might have believed what she had told Mas Swan, *viz*, that the three bundles contained ecstasy. In not asking this question, there is a disconnect between his believing Mas Swan's defence and his failure to give any consideration to Roshamima's alternative defence (*viz*, the Alternative Defence). The disconnect is that since the Judge made no finding that Roshamima had lied to Mas Swan when she said that the three bundles contained ecstasy (which information formed the basis of Mas Swan's defence), then it was possible that Roshamima might genuinely have believed that the three bundles contained ecstasy, and that was why she had told Mas Swan so.

(A) The relevant case law

69 We shall now examine the case law on inconsistent defences in criminal trials. In *Mancini v Director of Public Prosecutions* [1942] 1 AC 1 ("*Mancini*"), the appellant was found guilty by a jury of a charge of murder. The appellant's defence at the trial was that he had acted in self-defence. On appeal, it was contended that the trial judge erred in failing to adequately direct the jury on what would amount in law to provocation. If provocation had been found, the appellant would have been

liable for only the less serious offence of manslaughter. The House of Lords agreed that the trial judge had a duty to direct the jury to consider an alternative case even if counsel did not rely on such an alternative (see *Mancini* at 7–8):

> Although the appellant's case at the trial was in substance that he had been compelled to use his weapon in necessary self-defence – a defence which, if it had been accepted by the jury, would have resulted in his complete acquittal – it was undoubtedly the duty of the judge, in summing up to the jury, to deal adequately with any other view of the facts which might reasonably arise out of the evidence given, and which would reduce the crime from murder to manslaughter. *The fact that a defending counsel does not stress an alternative case before the jury (which he may well feel it difficult to do without prejudicing the main defence) does not relieve the judge from the duty of directing the jury to consider the alternative, if there is material before the jury which would justify a direction that they should consider it*. Thus, in *Rex v. Hopper* [[1915] 2 KB 431], at a trial for murder the prisoner's counsel relied substantially on the defence that the killing was accidental, but Lord Reading C.J., in delivering the judgment of the Court of Criminal Appeal, said: "We do not assent to the suggestion that as the defence throughout the trial was accident, the judge was justified in not putting the question as to manslaughter. Whatever the line of defence adopted by counsel at the trial of a prisoner, we are of opinion that it is for the judge to put such questions as appear to him properly to arise upon the evidence, even although counsel may not have raised some question himself. In this case it may be that the difficulty of presenting the alternative defences of accident and manslaughter may have actuated counsel in saying very little about manslaughter, but if we come to the conclusion, as we do, that there was some evidence – we say no more than that – upon which a question ought to have been left to the jury as to the crime being manslaughter only, we think that this verdict of murder cannot stand." [emphasis added]

On the facts, the House of Lords held that there was insufficient material on which to raise the question of provocation and thus rejected the appellant's contention that the trial judge had failed to direct the jury adequately on this defence.

70 A similar approach was approved by Barwick CJ in *Pemble v The Queen* (1971) 124 CLR 107 at 117–118:

> … There is no doubt that the course taken by counsel for the appellant at the trial contributed substantially to the form of the summing up. If the trial had been of a civil cause, it might properly be said that the trial judge had put to the jury the issues which had arisen between the parties. But this was not a civil trial. The decision of the House of Lords in *Mancini v. Director of Public Prosecutions* following Lord Reading's judgment in *R. v. Hopper* and its influence in the administration of the criminal law must ever be borne in mind (see *Kwaku Mensah v. The King*). *Whatever course counsel may see fit to take, no doubt bona fide but for tactical reasons in what he considers the best interest of his client, the trial judge must be astute to secure for the accused a fair trial according to law.* This involves, in my opinion, an adequate direction both as to the law and the possible use of the relevant facts upon any matter upon which the jury could in the circumstances of the case upon the material before them find or base a verdict in whole or in part.
>
> In *Mancini v. Director of Public Prosecutions* provocation was not relied upon by defending counsel. In *Kwaku Mensah v. The King*, provocation was not raised at the trial nor in the reasons in the appellant's case for the consideration of the Privy Council. But, there being material before the jury on which they could properly have found provocation so as to reduce the crime from murder to manslaughter, their Lordships considered the absence of any direction as to

provocation when that matter was raised by counsel in argument before them for the first time; and for lack of appropriate direction set aside a conviction for murder.

Here, counsel for the defence did not merely not rely on the matters now sought to be raised; he abandoned them and expressly confined the defence to the matters he did raise. However, in my opinion, this course did not relieve the trial judge of the duty to put to the jury with adequate assistance any matters on which the jury, upon the evidence, could find for the accused. …

[emphasis added]

71 In *Regina v Cambridge* [1994] 1 WLR 971 ("*R v Cambridge*"), the appellant was tried for murder for stabbing a man in a public house. The defence was that the appellant did not stab the deceased. Although there were witnesses who testified that provocative words had been spoken to the appellant, provocation was not raised on behalf of the Defence and counsel on both sides accepted that the jury's only possible verdicts were either not guilty of murder or guilty of murder. Accordingly, the trial judge did not leave the issue of provocation to the jury as an issue for their consideration under s 3 of the Homicide Act 1957 (c 11) (UK). The appellant was subsequently convicted of murder.

72 On appeal against conviction, a substantial ground of appeal was whether the conviction should be set aside on the basis that the trial judge should have left the issue of provocation to the jury to consider. The English Court of Appeal held (*per* Lord Taylor of Gosforth CJ) at 974–975:

We turn to the third and more substantial ground of appeal. Mr. Gray submits that the judge ought to have left provocation to the jury as an issue for their consideration. As already noted, provocation was not raised on behalf of the defence. Indeed, it would have been inconsistent with the appellant's contention that he was not the assailant. Notwithstanding this, Mr. Gray submits that a clear line of authority required the judge to leave provocation to the jury on the evidence in this case.

The line of authority goes back to *Rex v. Hopper* [1915] 2 K.B. 431, *Mancini v. Director of Public Prosecutions* [1942] A.C. 1 and *Bullard v. The Queen* [1957] A.C. 635.

In *Reg. v. Porritt* [1961] 1 W.L.R. 1372 , this court approved a passage from the opinion of the Privy Council in *Bullard v. The Queen* [1957] A.C. 635 delivered by Lord Tucker, at p. 642:

> "It has long been settled law that if on the evidence, whether of the prosecution or of the defence, there is any evidence of provocation fit to be left to a jury, and whether or not this issue has been specifically raised at the trial by counsel for the defence and whether or not the accused had said in terms that he was provoked, it is the duty of the judge, after a proper direction, to leave it open to the jury to return a verdict of manslaughter if they are not satisfied beyond reasonable doubt that the killing was unprovoked."

It is necessary to refer to only two other cases. In *Reg. v. Camplin* [1978] A.C. 705, Lord Diplock, having cited section 3 of the Homicide Act 1957, went on, at p. 716:

> "it makes it clear that if there was any evidence that the accused himself at the time of the act which caused the death in fact lost his self-control in consequence of some provocation however slight it might appear to the judge, he was bound to leave to the jury the question, which is one of opinion not of law: whether a reasonable man might have reacted to that provocation as the accused did."

In *Reg. v. Rossiter* [1994] 2 All E.R. 752, 758, Russell L.J. said:

> "We take the law to be that wherever there is material which is capable of amounting to provocation, however tenuous it may be, the jury must be given the privilege of ruling upon it."

For the Crown, Mr. Denyer sought to limit the situation in which a judge is required to leave provocation to the jury, although it has not been raised by the defence. He submits that in all the cases cited above, it was common ground that the defendant had caused the death. The issues before the jury were therefore concerned with the defendant's state of mind and in those circumstances, whether he was running [*sic*] accident, self-defence, no intent, or even diminished responsibility, it was appropriate, if any evidence of provocation existed, that the judge should also leave that issue to the jury. Where, however, the defendant's case is that he was not there or it was not his hand which killed the deceased, Mr. Denyer submits different considerations apply. There, if the defence did not rely upon provocation, the judge need not leave that issue to the jury.

We cannot agree. The authorities cited above [*viz*, *inter alia*, *Rex v Hopper* [1915] 2 KB 431, *Mancini v Director of Public Prosecutions* [1942] AC 1, *Bullard v The Queen* [1957] AC 635 and *Reg v Porritt* [1961] 1 WLR 1372] draw no such distinction. Moreover, by way of example, a defendant may rely on alibi whilst the prosecution witnesses identifying him as the killer may describe provocative acts or words followed by an apparent loss of self-control on the defendant's part. In such a case, it would manifestly be wrong, if the alibi were rejected, for the jury to convict of murder without considering provocation. So, even though the defence may prefer provocation not to be raised, in the fear that it may be a distraction offering the jury a possible compromise verdict, the judge must leave it to the jury if there is evidence.

73 It seems clear from the last quoted passage that the court will disregard the fact that an alternative defence available to an accused may be inconsistent with his primary defence, and will not hold it against him if he does not wish to raise the alternative defence. In the context of a jury trial, an accused may well decide not to advance an alternative defence because it may induce the jury to reach a compromise verdict. On the facts of *R v Cambridge*, since it was impossible to say what the outcome would have been if provocation had been left to the jury, the verdict of murder was quashed and a verdict of manslaughter was substituted for it (see *R v Cambridge* at 976E–F).

74 The rationale for this approach was explained clearly by Lord Bingham of Cornhill in *Regina v Coutts* [2006] 1 WLR 2154 at [12] as follows:

> 12 In any criminal prosecution for a serious offence there is an important public interest in the outcome: *R. v Fairbanks* [1986] 1 WLR 1202, 1206. The public interest is that, following a fairly conducted trial, defendants should be convicted of offences which they are proved to have committed and should not be convicted of offences which they are not proved to have committed. The interests of justice are not served if a defendant who has committed a lesser offence is either convicted of a greater offence, exposing him to greater punishment than his crime deserves, or acquitted altogether, enabling him to escape the measure of punishment which his crime deserves. The objective must be that defendants are neither over-convicted nor under-convicted, nor acquitted when they have committed a lesser offence of the type charged. The human instrument relied on to achieve this objective in cases of serious crime is of course the jury. But to achieve it in some cases the jury must be alerted to the options open to it. This is not ultimately the responsibility of the prosecutor, important though his role as a minister of justice undoubtedly is. Nor is it the responsibility of defence counsel, whose proper professional

> concern is to serve what he and his client judge to be the best interests of the client. It is the ultimate responsibility of the trial judge: *Von Starck v The Queen* [2000] 1 WLR 1270, 1275; *Hunter v The Queen* [2003] UKPC 69, para 27.

The same principle should apply in a bench trial, with the trial judge acting as the jury. The task of ensuring that offenders are "neither over-convicted nor under-convicted, nor acquitted when they have committed a lesser offence of the type charged" falls squarely on the trial judge. The trial judge cannot shirk the responsibility of considering any alternative defence reasonably available on the evidence before the court even if the Defence has not relied on that defence, or even if the Prosecution and the Defence have agreed not to raise it. In a criminal trial, the court's duty and function should not be constrained by any agreement between the Prosecution and the Defence not to raise a particular defence before the court.

75 This principle is well-illustrated by *Mohamed Kunjo v Public Prosecutor* [1977–1978] SLR(R) 211 ("*Mohamed Kunjo*"), a Privy Council decision on an appeal from Singapore. In that case, the appellant did not raise the defence of sudden fight to a charge of murder either at his trial or on appeal to the Court of Criminal Appeal. The question was whether the defence could be raised before the Privy Council for the first time. Consistent with the line of authorities which we referred to earlier, the Privy Council reasoned that in a jury trial, the trial judge must put to the jury all matters which might reasonably entitle the jury to return a lesser verdict (see *Mohamed Kunjo* at [19]). If the trial judge failed to do that, the Privy Council would intervene. The Prosecution in *Mohamed Kunjo* did not suggest that this principle was inapplicable where there was a bench trial or where the burden was on the accused to establish his defence (which was the position in *Mohamed Kunjo* by reason of the Evidence Act (Cap 5, 1970 Rev Ed)). The Privy Council also referred to an Indian decision involving a bench trial in which the Supreme Court of India substituted a verdict of culpable homicide for one of murder because it found that the special exception of sudden fight was made out notwithstanding that this special exception was not raised during the trial (see *Chamru Budhwa v State of Madhya Pradesh* AIR 1954 SC 652). On the facts of *Mohamed Kunjo*, the Privy Council considered that the evidence was such that the trial judges could not have reasonably concluded that the defence of sudden fight was made out. This was because the accused had taken undue advantage of the victim (see *Mohamed Kunjo* at [21]). Accordingly, the Privy Council held that the trial judges did not err in failing to refer to that defence in their judgment.

76 In *Mohamed Kunjo*, the Privy Council enunciated the following test for determining when it would intervene and consider a defence not raised in the proceedings below (at [20]):

> … In our judgment a defence based upon an exception which the defendant has to prove may be raised for the first time before the Board, if the Board considers that otherwise there would be a real risk of failure of justice. The test must be *whether there is sufficient evidence upon which a reasonable tribunal could find the defence made out*. If there be such evidence, the court of trial should have expressly dealt with it in its judgment and the Judicial Committee will deal with it on appeal, even though it has not been raised below. [emphasis added]

(B) Application to the facts

77 In the present case, the Judge accepted Mas Swan's defence that he believed what Roshamima had told him. That, in our view, would be evidence that Roshamima might have had the same belief, *ie*, that the three bundles contained ecstasy, which was what Mas Swan believed. In the light of this finding concerning Mas Swan's belief, it was necessary, in our view, for the Judge to go one step further and consider: (a) whether Roshamima had the same belief; and (b) if she had, whether such belief was sufficient to rebut the s 18(2) presumption against her.

78 Logically, the Judge would only be entitled to ignore the implication of his acceptance of Mas Swan's evidence by making *another* finding of fact, *ie*, that Roshamima knew that the three bundles contained diamorphine and had lied to Mas Swan in order to bring him on board. This would be the logical inference if the Judge were not to give any credence to the possibility that Roshamima had thought that the three bundles contained ecstasy. However, the Judge omitted to consider this aspect of the case against Roshamima, and that is what has troubled us in this appeal. Having regard to the close relationship between Roshamima and Mas Swan (they were due to get engaged to be married in June 2009), there was no reason why Roshamima would have put Mas Swan's life at risk by lying to him about *the nature of the controlled drugs they were going to deliver.* It would have taken an extremely callous woman to have done that. It was of course possible for Roshamima to have done so, but such a conclusion would have required the Judge to make other findings of fact, such as the finding that Mas Swan did not wish to be involved in the importation of diamorphine, and that telling him an untruth about the nature of the controlled drugs involved was the only way to get him to agree to join Roshamima in bringing *diamorphine* into Singapore. In our view, the intimate relationship between Roshamima and Mas Swan should have alerted the Judge to the implications of believing Mas Swan's evidence and the possibility that Roshamima might also have believed what she had told Mas Swan. The fact that she mounted an "all or nothing" defence should not, *ipso facto*, be a ground for not considering the other evidence on record that, as found by the Judge, she did tell Mas Swan that the three bundles contained ecstasy (see the passage from *R v Cambridge* reproduced at [72] above). In our view, the Judge's omission to consider the Alternative Defence *vis-à-vis* Roshamima is an error of law. As it is impossible to say what the Judge's decision in respect of Roshamima would have been if he had considered the Alternative Defence, we must give Roshamima the benefit of doubt arising from the Judge's omission to consider that defence.

79 For the above reasons, we do not consider it safe to let Roshamima's conviction on the amended charge, which is a capital charge of importing diamorphine (see [2] above), stand. Accordingly, we set aside her conviction of the amended charge, substitute the amended charge with the following charge and convict her of that charge instead:

> You, [Roshamima], on the 6th day of May 2009, at or about 9.56 p.m. in a Malaysian registered motor car JHA 7781, at Woodlands Checkpoint Singapore, did attempt to import into Singapore, N, α-dimethyl-3, 4-(methylenedioxy) phenethylamine ("ecstasy") which is a Class A controlled drug, and which is specified in the First Schedule to the [MDA], to wit, by bringing into Singapore in the said JHA 7781, one hundred and twenty-three (123) packets of substances containing not less than 21.48 grams of diamorphine, which you believed to be ecstasy, without any authorisation under the [MDA] or the regulations made thereunder, and you have thereby committed an offence under Section 7 read with Section 12, and punishable under Section 33 of the [MDA].

We will determine the appropriate sentence to impose on Roshamima after hearing the parties' submissions on sentencing.

Conclusion

80 For all the reasons above, we allow both the present appeals.

[note: 1] See Record of Proceedings ("ROP") Vol 4 at pp 1–2.

[note: 2] Petition of Appeal dated 22 September 2011 at para 3.

[note: 3] Petition of Appeal dated 22 September 2011 at para 3.1; Prosecution's submissions dated 21 November 2011 at para 59.

[note: 4] ROP Vol 2, Notes of Evidence ("NE") Day 5 at p 11, lines 22–23 and ROP Vol 3, NE Day 8 at p 41, lines 14–17.

[note: 5] Prosecution's Submissions dated 21 November 2011 at para 59.

[note: 6] Mas Swan's Skeletal Submissions dated 22 November 2011 at para 22.

[note: 7] Mas Swan's Skeletal Submissions dated 22 November 2011 at paras 26–27.

[note: 8] Roshamima's Written Submissions dated 22 November 2011 at paras 18–60 and paras 86–125.

[note: 9] Roshamima's Written Submissions dated 22 November 2011 at para 126.

[note: 10] Roshamima's Written Submissions dated 22 November 2011 at para 67.

[note: 11] Affidavit of Dinesh Kumar Rai dated 27 January 2012 at exhibit "DKR-1".

[note: 12] Certified Transcript of hearing on 28 November 2011 at p 4, lines 20–21.

[note: 13] Certified Transcript of hearing on 28 November 2011 at p 2, lines 3–10.

[note: 14] Certified Transcript of hearing on 28 November 2011 at pp 5–6 and 9.

[note: 15] Certified Transcript of hearing on 28 November 2011 at p 21, lines 2–5.

[note: 16] Affidavit of Dinesh Kumar Rai dated 27 January 2012 at para 4.

[note: 17] Affidavit of Dinesh Kumar Rai dated 27 January 2012 at para 5.

[note: 18] Affidavit of Dinesh Kumar Rai dated 27 January 2012 at para 6.

[note: 19] Affidavit of Dinesh Kumar Rai dated 27 January 2012 at para 7.

[note: 20] Affidavit of Dinesh Kumar Rai dated 27 January 2012 at para 8.

[note: 21] Affidavit of Dinesh Kumar Rai dated 27 January 2012 at para 10.

[note: 22] Affidavit of Dinesh Kumar Rai dated 27 January 2012 at para 11.

[note: 23] Prosecution's Submissions dated 24 November 2011 at paras 54–58.

[note: 24] Prosecution's Further Submissions dated 31 January 2012 at para 40.

[note: 25] ROP Vol 2, NE Day 6, at pp 23–24.

[note: 26] Prosecution's Submissions dated 24 November 2011 at para 71.

[note: 27] Certified Transcript of hearing on 8 February 2012 at p 19.

[note: 28] ROP Vol 4 at pp 19–21 (HSA Certificates).

[note: 29] Certified Transcript of hearing on 8 February 2012 at p 20, lines 5–18.

[note: 30] Prosecution's Written Submissions entitled "Sentencing Precedents" ("Prosecution's Sentencing Precedents") dated 23 February 2012 at para 1(ii).

[note: 31] Prosecution's Sentencing Precedents dated 23 February 2012 at p 1.

[note: 32] Tables A and B to Prosecution's Sentencing Precedents (at tabs 2–3).

[note: 33] Table B to Prosecution's Sentencing Precedents at tab 3, row 1.

[note: 34] Table B to Prosecution's Sentencing Precedents at tab 3, row 4.

[note: 35] Prosecution's Sentencing Precedents at p 1.

[note: 36] Prosecution's Sentencing Precedents at p 1.

[note: 37] Prosecution's Sentencing Precedents at p 1.

[note: 38] Certified Transcript of hearing on 8 February 2012 at p 27, lines 18–21.

[note: 39] Mas Swan's Mitigation Plea dated 13 March 2012 ("Mas Swan's Mitigation Plea") at paras 25–26.

[note: 40] Mas Swan's Mitigation Plea at para 18.

[note: 41] Mas Swan's Mitigation Plea at paras 19–24.

[note: 42] Mas Swan's Mitigation Plea at paras 22–24.

[note: 43] Mas Swan's Mitigation Plea at para 24.

[note: 44] ROP Vol 3, NE Day 12 at pp 16–25.