

IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2019] SGHC 162

Criminal Case No 32 of 2018

Between

Public Prosecutor

And

- (1) Mohd Zaini Bin Zainutdin
- (2) Mohd Noor Bin Ismail
- (3) Abdoll Mutaleb Bin Raffik

GROUND OF DECISION

[Criminal Law] — [Statutory offences] — [Misuse of Drugs Act]

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Public Prosecutor
v
Mohd Zaini Bin Zainutdin and others

[2019] SGHC 162

High Court — Criminal Case No 32 of 2018

Aedit Abdullah J

23–25 October; 20–22, 27 November 2018; 28 January; 8, 21 March; 9 April 2019

9 July 2019

Aedit Abdullah J:

Introduction

1 This was a joint trial involving three co-accused persons: Mohd Zaini Bin Zainutdin (“Zaini”), Mohd Noor Bin Ismail (“Noor”) and Abdoll Mutaleb Bin Raffik (“Mutaleb”). The three were charged for their involvement in the importation of 12 bundles of drugs (“the drugs”) that contained not less than 212.57g of diamorphine.

2 Zaini and Noor each faced a charge of importation of drugs with common intention, under s 7 of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) (“the MDA”) read with s 34 of the Penal Code (Cap 224, 2008 Rev Ed) (“the Penal Code”), punishable under ss 33(1) or 33B of the MDA. They did not challenge the charges against them and I convicted them of their respective charges accordingly.

3 The alternative sentencing regime under s 33B of the MDA gave me the discretion to impose life imprisonment and 15 strokes of the cane on Zaini, as he satisfied the conditions under s 33B(2)(a)(i) and the Prosecution certified that he had substantively assisted the Central Narcotics Bureau (“CNB”) in disrupting drug trafficking activities within or outside Singapore under s 33B(2)(b). The issue of Noor’s sentencing has been adjourned to a later date, pending other matters.

4 Mutaleb faced the different charge of abetment by conspiracy to import drugs into Singapore, under s 7 read with s 12 of the MDA and punishable under ss 33(1) or 33B of the MDA. The charge read as follows:

That you ... between 10 September 2015 and 11 September 2015, in Singapore, did abet by engaging in a conspiracy with one Mohd Zaini bin Zainutdin (FIN: [xxx]), one Mohd Noor Bin Ismail (FIN: [xxx]), one male known as “Apoi”, and others, to do a certain thing, *to wit*, to import into Singapore a Class A controlled drug listed in the First Schedule to the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) (“MDA”), and in pursuance of that conspiracy and in order to the doing of that thing, on 11 September 2015 at about 10.54am at Tuas Checkpoint, Singapore, the said Mohd Zaini bin Zainutdin and Mohd Noor Bin Ismail did import into Singapore **not less than twelve (12) bundles containing 5,520.4 grams of granular/powdery substance which was analysed and found to contain not less than 212.57 grams of diamorphine**, 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 of the MDA, punishable under Section 33(1) of the MDA, or you may alternatively be liable to be punished under Section 33B of the MDA. [emphasis in original]

I convicted him of the charge after trial. As his actions were not limited to the transportation of drugs, he did not qualify for the alternative sentencing regime under s 33B of the MDA. I thus imposed the mandatory sentence of death on him.

5 These grounds of decision will primarily consider the Prosecution’s case against Mutaleb. The evidence against Zaini and Noor will not be examined in detail as they do not touch upon Mutaleb’s conviction. References to “the Defence” should therefore be generally taken to refer to Mutaleb’s case at trial.

Facts

6 It appeared from Zaini’s account that on 10 September 2015, Zaini, Noor and a man known as “Apoi” packed 14 bundles of diamorphine into Zaini’s car in Malaysia. Zaini and Noor drove into Singapore on 11 September 2015 and were arrested at Tuas Checkpoint. Their car was found to be carrying 13 bundles of drugs, which had been placed in hidden compartments. The 14th bundle was recovered on 21 September 2015. These bundles were found to contain 6,434.8g of a granular or powdery substance, which on analysis was found to contain not less than 249.63g of diamorphine.

7 When questioned by CNB officers after his arrest, Zaini gave information about what he was supposed to do with the drugs. What was disputed was whether Zaini did inform the CNB officers that he was to deliver the drugs to Mutaleb at Chai Chee. In any event, a number of monitored telephone calls were made to Mutaleb by Zaini in the presence of CNB officers.

8 Two CNB officers then took the car and drove to Chai Chee. There, mock drugs were supposedly handed over to Mutaleb, although the precise circumstances in which this occurred were disputed. What was not in issue was that Mutaleb dropped the bundles and was subsequently arrested.

The charges against Zaini and Noor

9 Zaini and Noor both faced charges under s 7 of the MDA read with s 34 of the Penal Code. They indicated at trial that they wished to plead guilty to the charges against them.¹ However, as required under s 227(3) of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) (“the CPC”), no plea of guilt was recorded as the Prosecution had not led evidence to prove its case. In the course of the trial, Zaini gave evidence to the effect that his involvement in the offence was restricted to the transportation of the drugs.² Noor did not give evidence, electing instead to remain silent when called to give evidence in his defence.³

10 The elements of the offence of importation under s 7 of the MDA have been set out by the Court of Appeal in *Adili Chibuike Ejike v Public Prosecutor* [2019] SGCA 38 at [27]. The Prosecution must prove that: (a) the accused person was in possession of the drugs; (b) the accused person had knowledge of the nature of the drugs; and (c) the drugs were intentionally brought into Singapore without prior authorisation.

The parties’ cases in relation to Mutaleb***The Prosecution’s case***

11 The Prosecution case was that the evidence, particularly Zaini’s, showed that Mutaleb engaged in a conspiracy with Zaini, Noor, a man named “Apoi” and others to import drugs. Zaini gave a statement describing a conversation

¹ Notes of Evidence (“NEs”) (23 October 2018) at p 2 ln 23–24; p 4 ln 1–2.

² NEs (21 November 2018) at p 31 ln 16 – p 33 ln 2.

³ NEs (27 November 2018) at p 2 ln 3–8.

that he had overheard between Apoi and Mutaleb on the night of 10 September 2015. Apoi had instructed Zaini to bring the drugs into Singapore, and was next to Zaini when he discussed the delivery with Mutaleb over the telephone. Telephone recordings and text messages also showed Mutaleb's knowledge that Zaini would be meeting him to deliver 13 packets of drugs and that he was to pay \$39,000 for the drugs.⁴ When the delivery was made by undercover CNB officers in place of Zaini and Noor, Mutaleb had \$38,600 in his possession and collected a bag purportedly containing drugs from the undercover CNB officer. He only dropped the bag containing the drugs when he noticed CNB officers in the vicinity moving in on him.⁵

The Defence's case

12 While the Defence took issue with the form of the charge against Mutaleb and the amendments that were made to the charge,⁶ the focus of its arguments was on the evidence relied upon by the Prosecution, primarily that of Zaini. It was denied that Mutaleb took part in any conspiracy; Zaini's evidence against Mutaleb could not be relied upon as Zaini changed his evidence at trial several times, particularly as regards what he supposedly overheard.⁷ The doubts about Zaini's evidence went to the issue, among others, of whether Mutaleb was really the intended recipient of the drugs that Zaini was instructed to deliver.⁸ Alternatively, any conspiracy that involved Mutaleb had

⁴ Prosecution's close of trial submissions ("PCS") at paras 41–47.

⁵ PCS at paras 56–62.

⁶ Mutaleb's submissions dated 25 February 2019 ("DCS") at paras 9–26.

⁷ DCS at paras 27–31 and 39–47.

⁸ DCS at paras 76–99.

been abandoned as new instructions had been given to Zaini for the drugs to be delivered to another person other than Mutaleb.⁹

My decision

13 Having considered the evidence and submissions, I convicted the three accused persons before me of their respective charges.

14 The elements of s 7 of the MDA were made out in relation to Zaini and Noor. Zaini's evidence was consistent across his statements and oral testimony that Apoi had passed him the 13 bundles of drugs that were recovered from his car and that he knew that the bundles contained heroin.¹⁰ As for Noor's refusal to give evidence in his own defence, I was entitled to draw an adverse inference against him from his decision to remain silent: s 291(3)(b) of the CPC. In any event, I was also satisfied that the relevant presumptions under ss 21 and 18(2) of the MDA operated against each of them, such that their possession of the bundles of drugs in Zaini's car and their knowledge of the nature of the drugs were presumed. No attempt was made to rebut these presumptions. I therefore convicted both accused persons of the charges accordingly.

15 Of the three accused persons, Zaini and Noor qualified for alternative sentencing under s 33B as I found that they were only couriers involved in the transportation of the drugs in question. A certificate of substantive assistance was granted in respect of Zaini; he was sentenced to life imprisonment and 15

⁹ DCS at paras 100–110.

¹⁰ NEs (21 November 2018) at p 25 ln 2–7, p 31 ln 16–20.

strokes of the cane.¹¹ Noor's sentencing was adjourned pending the resolution of other matters. As Mutaleb was not involved merely in the transportation of the drugs but had taken steps to purchase the drugs, the prescribed mandatory sentence applied; accordingly, he was sentenced to death.

The applicable law on abetment by conspiracy

16 The charge against Mutaleb was for abetting the importation of controlled drugs into Singapore, contravening s 7 read with s 12 of the MDA. The focus of the trial was on his involvement in a conspiracy between Zaini, Noor and others to import the drugs into Singapore. I set out the applicable law.

17 Section 12 of the MDA reads:

Any person who abets the commission of or who attempts 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.

18 Abetment is not otherwise defined in the MDA. But the general understanding is that s 12 of the MDA imports the definition under the Penal Code. Section 2 of the Interpretation Act (Cap 1, 2002 Rev Ed) provides that, unless expressly specified, the word "abet" has the same meaning as in the Penal Code: see also *Govindarajulu Murali and another v Public Prosecutor* [1994] 2 SLR(R) 398 at [43] and [44].

19 Section 107 of the Penal Code defines abetment. The subsection invoked was that of abetment by conspiracy, as defined in s 107(b):

¹¹ NEs (21 March 2019) at p 10 ln 14-16.

A person abets the doing of a thing who ... engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; ...

20 Making out abetment of conspiracy required the Prosecution to prove the following (*Chai Chien Wei Kelvin v Public Prosecutor* [1998] 3 SLR(R) 619 (“*Kelvin Chai*”) at [76]):

- (a) the person abetting must engage, with one or more other persons in a conspiracy;
- (b) the conspiracy must be for the doing of the thing abetted; and
- (c) an act or illegal omission must take place in pursuance of the conspiracy in order to the doing of that thing.

Unlike criminal conspiracy, abetment by conspiracy requires some further act to be done pursuant to the conspiracy. There is, however, no need for the actual offence to be committed: *Chua Kian Kok v Public Prosecutor* [1999] 1 SLR(R) 826 (“*Chua Kian Kok*”) at [51]. I note that the definition of the elements set out in *Chua Kian Kok* at [48] differed slightly from that in *Kelvin Chai*, but I did not consider the differences material.

21 As regards the element of conspiracy, what must be shown is agreement between the parties: *Chua Kian Kok* at [48], citing *Public Prosecutor v Yeo Choon Poh* [1993] 3 SLR(R) 302 at [19]–[20]. As noted in various cases, direct evidence of the existence of a conspiracy will rarely be available. Usually, what evidence there is would be used to show that the words and actions of the parties indicate their concert in the pursuit of a common object or design, giving rise to the inference that their actions must have been co-ordinated by arrangement

beforehand: see *Chua Kian Kok* at [48]; *Kelvin Chai* at [77], citing *Lai Kam Loy v Public Prosecutor* [1993] 3 SLR(R) 143 at [31].

The issue to be determined

22 Here, the illegal act in question (see [20(c)] above) was that controlled drugs were imported as a result of the conspiracy. No issue was taken with the framing of this element by the accused persons: Mutaleb did not dispute that Zaini and Noor had indeed brought drugs into Singapore in contravention of s 7 of the MDA and were arrested for it. No significant issue also arose as to the common intention to commit importation as between Zaini and Noor.

23 What was, however, in issue was whether Mutaleb had knowledge of and participated in a conspiracy with Zaini, Noor, Apoi and others to have the drugs imported into Singapore. This the Prosecution had to prove beyond a reasonable doubt; no presumptions under the MDA were applicable against Mutaleb.

Decision on conviction

24 The evidence relied upon by the Prosecution pointed to discussions having taken place about the delivery of the bundles of drugs between Mutaleb, Zaini and Apoi. The Prosecution sought to make out a conspiracy based on Zaini's evidence, the telephone records and text messages and other circumstantial evidence. For his part, Mutaleb denied that he was to receive the drugs in that particular transaction, but accepted at least in a statement recorded under s 22 of the CPC (marked "P207") that he had previously dealt in drugs.¹²

¹² P207, Prosecution's Bundle ("PB") at pp 644–645.

Mutaleb's statements and the admissibility of P207 was disputed at trial, and will be discussed further below at [76] to [81].

25 The specific evidence which the Prosecution relied upon was in the form of:

- (a) a conversation between Mutaleb and Apoi about the delivery of drugs to Mutaleb, which Zaini overheard;
- (b) Mutaleb's knowledge that Zaini was coming into Singapore to deliver drugs to him, as established by telephone records showing communications between them and the contents thereof; and
- (c) the fact that at the time of his arrest, Mutaleb possessed a sum of money that closely matched the amount he was alleged to have agreed to pay Zaini for the drugs.

26 Before considering the circumstantial evidence in turn, I deal with the Defence's arguments relating to the charge against Mutaleb, as framed by the Prosecution.

The form of the charge

27 As reproduced above at [4], the charge against Mutaleb referred not only to his conspiring with Zaini, Noor and Apoi, but also the involvement of several unknown "others". The Defence took issue with this, arguing that the charge against Mutaleb had to be proven in its entirety, and that unless evidence of

“others” being involved in the conspiracy was led, Mutaleb should be acquitted.¹³

28 No authority was cited for the Defence’s proposition that the charge as framed would lead to any embarrassment in Mutaleb’s defence. What was necessary was that the charge contain all the essential ingredients of the alleged offence so as to give the accused person notice and a chance to defend himself: *Li Weiming v Public Prosecutor and other matters* [2013] 2 SLR 1227 at [32], citing *Assathamby s/o Karupiah v Public Prosecutor* [1998] 1 SLR(R) 1030 at [9]. I found that the framed charge put Mutaleb on notice that the crime that the Prosecution alleged he committed involved Zaini, Noor, Apoi and others. Either Mutaleb was involved in a conspiracy or he was not, such conspiracy being concerned with the importation into Singapore of drugs by Zaini and Noor. Any defence which raised a reasonable doubt that there was any conspiracy with either of them or with Apoi would successfully defeat the charge, even if nothing was shown that Mutaleb did not conspire with anyone else. It was not his defence that there was any conspiracy with anyone else to do anything: his defence was a straight denial.

29 As for the Defence’s argument that the Prosecution did not lead evidence about others involved the conspiracy, I considered that the allegation in the charge was only that the conspiracy involving Mutaleb may encompass persons other than those specifically named. I would not see it as more than a matter that leaves open the possibility of others being involved, but which causes Mutaleb no prejudice. As provided for in s 123(5) of the CPC, the fact that the charge is

¹³ DCS at paras 16–26.

made is equivalent to a statement that the Prosecution's case fulfils every legal condition required by law to constitute the offence charged; the contents of the charge do not go further than that. In any event, the Prosecution submitted orally that there was the possible involvement of another person, namely one "Erry" who was apparently involved in the packing of the drugs in Zaini's car, according to a further statement recorded from Zaini.¹⁴ I found that Erry's possible involvement was sufficient to bring into play the possibility that the conspiracy was indeed wider than the three named persons and Mutaleb; but whether Erry or any others were so involved or not did not absolve Mutaleb of any guilt in the matter.

30 The Defence also took issue with the fact that the charges against Zaini and Noor did not allege any conspiracy between them to import drugs into Singapore.¹⁵ This was not at all fatal: the charge against each of them was for importation with common intention. The charges were not incompatible or inconsistent with the charge against Mutaleb of conspiring with them and others. Again, no authority was cited for the proposition that this difference between the charges raised a viable objection.

31 I am buttressed in my conclusions here by the approach taken in Singapore generally in relation to abetment; namely, that an accessory's liability is not derivative upon the principal's, as codified in the Penal Code: see Yong Pung How CJ's discussion in *Chua Kian Kok* at [51]–[62]. To this end, an accessory may be liable even if the principal offence is not committed (at [58]) and may be convicted of an offence different from the offence for which the

¹⁴ NEs (8 March 2019) at p 10, ln 11 – p 11 ln 16; P201, PB at p 583 at para 31.

¹⁵ DCS at paras 9–11.

principal was convicted (at [62]). It was therefore not critical to the Prosecution's case against Mutaleb that the charge preferred against him was different from the charges against Zaini and Noor.

Zaini's evidence against Mutaleb

32 A significant part of the evidence against Mutaleb came from Zaini. The nature of his evidence as well as his credibility had to be carefully scrutinised. I was, however, satisfied that despite the variation in the evidence that he gave, the portions relied upon by the Prosecution stood and implicated Mutaleb.

The conversation that Zaini overheard

33 The Prosecution relied on Zaini's description of a telephone conversation between Apoi and Mutaleb, as recounted in two statements recorded from Zaini under s 22 of the CPC on 19¹⁶ and 21 September 2015¹⁷ (respectively, the "19 September statement" and "21 September statement"). The Prosecution admitted these statements, among others, pursuant to s 258(1) of the CPC. The Defence did not object to their admissibility.¹⁸

34 This telephone call allegedly took place on 10 September 2015, when Zaini, Noor and Apoi were packing drugs for importation into Singapore. Zaini had largely heard what Apoi said but not what Mutaleb said. The Prosecution contended that Zaini was nevertheless clear in his statements that Mutaleb (whom he referred to as "Rafi") was at the other end of the line, as he could

¹⁶ P200, PB at pp 576–581.

¹⁷ P201, PB at pp 582–594.

¹⁸ NEs (23 October 2018) at p 7 ln 15–24.

recognise his voice. What was said in para 21 of the 19 September statement was:¹⁹

Later that night [on 10 September 2015], at about 9 plus at night, I was sitting next to Apoi when Apoi received a call on his phone. It was a Singapore number. Apoi picked up and addressed the person on the phone as 'Abang.' There is only one person who [*sic*] Apoi calls Abang from Singapore, and that is the old man that stays at Chai Chee. I also know him as Rafi. I know this man because I have delivered drugs to him with Erry and have brought him to Malaysia before. I am now shown a photo of a man in a yellow t-shirt. [Zaini is shown a photograph of Mutaleb.] This is Rafi, and the guy Apoi calls 'Abang'. ... I also recognised Rafi's voice over the phone. I heard Apoi telling Rafi that the things will be delivered tomorrow morning, but did not say what time or anything about money. While he was still on the line with Rafi, Apoi turned to me and told me 'Zaini, tomorrow around 7plus okay?' I said okay. ...

To my mind, Zaini's description was definitive that Mutaleb was at the other end of the telephone call with Apoi; he identified Mutaleb as "Abang" and also implicated him as being the recipient of the bundles of drugs that were to be delivered on 11 September 2015.

35 Zaini confirmed this description as accurate in the 21 September statement.²⁰ At paras 33 and 34 of this statement, he added:

... Apoi received a call on his phone. ... As I stated in paragraph 21 of my [19 September] statement, it was Rafi that called. Apoi picked up and addressed the person on the phone as 'Abang.' There is only one person who [*sic*] Apoi calls Abang from Singapore, and that is the old man that stays at Chai Chee. I also know him as Rafi. I know this man because I have delivered both heroin and ice to him and have even brought him into Johor before. ...

¹⁹ P200, PB at p 577 at para 21.

²⁰ P201, PB at pp 583 and 584 at paras 33 and 34.

Everything about paragraph 21 was true except for the timing of the call from Rafi. Apoi put the call from Rafi on loudspeaker so I could hear everything. Apoi was the one who called Rafi. Apoi then said the consignment will confirm be sent tomorrow [sic]. Rafi then said 'Didn't I already send an SMS to Zaini? There is some trouble here.' Apoi then said the 'things' have already been taken, and cannot be returned. When he said 'things', he meant drug bundles. Rafi then asked 'How much?' Apoi replied 'More than 10.' Rafi then asked 'How much more than 10?' Apoi replied 'About 12.' Rafi said 'I might not have enough money.' Apoi said 'Whatever you have, just give first.' ... I didn't hear him mention the exact time [of the delivery]. But it was understood that we would reach around 7 or 8 plus in the morning instead. After this, they started discussing about money. ...

Zaini maintained in the 21 September statement that he was supposed to deliver the drugs to Mutaleb at Chai Chee: Apoi had told him to go directly to the location in Chai Chee where he had previously delivered drugs. There, Zaini was to call Mutaleb, who was supposed to meet him.²¹

36 The Defence argued that there was no support for Zaini's contention that there was indeed such a telephone call between Apoi and Mutaleb. Zaini's evidence about the telephone call was conflicting and Noor's statements did not disclose him hearing any similar telephone call. No record of the conversation existed.²²

37 I discuss the Defence's arguments as regards Zaini's credibility as a witness and how he was able to identify Mutaleb below, at [51]–[54]. As for the argument that objective evidence was lacking, it was true that there was no record of any conversation between Mutaleb and a telephone number that could

²¹ P201, PB at p 585 at para 43.

²² DCS at paras 38–75.

have been Apoi's. However, the Prosecution and Zaini pointed to Apoi's possible use of one of Zaini's mobile phones, as the forensic records showed that a telephone conversation lasting two minutes and 37 seconds took place between Mutaleb's and one of Zaini's mobile phone numbers on 10 September 2015 at 10.37pm.²³ While this was not wholly consistent with Zaini's account in his statements that Apoi's mobile phone had been used, I could not conclude that any reasonable doubt had been raised such as to undermine the Prosecution's case against Mutaleb. Its case rested on the contents of the exchange as described in Zaini's statements. Mutaleb's defence that no telephone call had been made as described and that he did not know anyone named Apoi did not undermine the Prosecution's case on this score. Mutaleb's account of this telephone call was also unconvincing, as will be elaborated upon below at [65].

The recorded telephone conversations

38 After Zaini was arrested on 11 September 2015, CNB officers monitored his mobile phone for incoming calls and recorded calls between Zaini and Apoi. It was submitted by the Defence that Zaini's evidence at trial was that he asked Apoi to meet him in these calls, and that Apoi ultimately did not do so.²⁴ Eventually, SSSgt Ika Zahary bin Kasmari ("SSSgt Ika"), who was recording Zaini's telephone conversations at the time, instructed Zaini to make an outgoing call to Mutaleb.²⁵ Three calls were made to Mutaleb in total.²⁶ At

²³ PCS at para 41 fn 28; Zaini's submissions dated 30 January 2019 ("1DCS") at para 11; P183, PB at p 320 at line 10; P135, PB at p 122 at S/N 22.

²⁴ NEs (21 November 2018) at p 52 ln 30 – p 54 ln 11.

²⁵ PS31, PB at pp 356 and 357; NEs (23 October 2018) at p 37 and p 38 ln 1–11.

²⁶ NEs (21 November 2018) at p 73 ln 7–10.

one point in the first telephone call, the following exchange transpired, as translated from Malay into English:²⁷

Mutaleb: Who is that?
Zaini: Who is this? Zaini, Zaini.
Mutaleb: Oh Zaini. ... Hey, where are you?
Zaini: I'm here at the casino.
Mutaleb: Ah? At the casino, ... Oh Allah, I thought you were here or what. I went back home straight yesterday, I haven't slept, my friend said oh my gosh.
Zaini: Is it? Now waiting for Apoi.
Mutaleb: Hah?
Zaini: Been here waiting for Apoi then he didn't come you know.
Mutaleb: Apoi?
...
Mutaleb: Which Apoi?
Zaini: Apoi, Apoi , Apoi
Mutaleb: Aah
Zaini: Ok now Apoi didn't come.
Mutaleb: What is it?
Zaini: Are we going to meet Apoi straight away now or what?
Mutaleb: Zai, didn't you say the other day that my waiting is complete, right?
Zaini: Yes, ok
Mutaleb: Today morning can't make it, what about tomorrow morning then?

²⁷ P185 (transcript of call), PB at pp 468–469 at S/N 6–24; NEs (21 November 2018) at p 73 ln 21–29.

Zaini: Now how?
Mutaleb: Hah?
Zaini: Now can?
Mutaleb: Now?
Zaini: Yes
...
Mutaleb: Where are you now?
Zaini: I'm here at the casino.
...
Mutaleb: Ok ok ok I'll wait for you now, [h]ow many are there altogether?
...
Zaini: There are thirteen, right?
Mutaleb: Thirteen?
Zaini: Ha
Mutaleb: Ok you go and eat at the same place the other day. Now I come, I will go up, when I reach there, I will call, ok.
Zaini: Ok, (inaudible) ok ok.
Mutaleb: I'll pass you the full amount. I don't want to owe any money, that will be troublesome.

39 SSSgt Ika then asked Zaini where the drug delivery was to take place, and Zaini informed him that it was to be at the car park at Blk 2 Chai Chee Road. According to Zaini's 15 and 21 September statements, he knew where the delivery location was to be as he had previously delivered drugs to Mutaleb at the same location.²⁸ Two CNB officers drove Zaini's car to the delivery location

²⁸ P200, PB at pp 578 and 579 at para 25; P201, PB at p 585 at para 43.

to meet Mutaleb, posing as Zaini and Noor.²⁹ When they arrived at the car park, Zaini called Mutaleb a second time, informing him that he had arrived:³⁰

Mutaleb: ... Zai, where are you?
 Zaini: At the carpark, carpark.
 ...
 Mutaleb: Have you reached or not?
 ...
 Zaini: I've arrived.
 Mutaleb: Ok, give me around fifteen minutes I'll be there.

40 Mutaleb then reiterated in the third and final telephone call that he would pay \$39,000 in full, as he did not want to pay Zaini in instalments. This call was made at around 9.36pm, after Mutaleb failed to arrive at the car park:³¹

Mutaleb: Hey, yours don't bring up here. ... Tomorrow morning, tomorrow send it back, can?
 [Continued conversation, with some inaudible portions]
 Mutaleb: ... [R]ight now I'm at, you know, Chai Chee Avenue. I'll go up first, I'll meet you, collect all the stuff, come down in a while, so that's all. How many are there, is it thirteen?
 ...
 Zaini: Yes, yes.
 Mutaleb: Ok thirteen. The cost I will pay a total of thirty nine thousand.
 Zaini: Ah
 Mutaleb: I think I will pay in full, I don't want to pay in installment [*sic*] ah Zai, it would be troublesome.

²⁹ PS31, PB at p 357 at para 8; NEs (23 October 2018) at p 40 ln 24 – p 41 ln 2.

³⁰ P185 (transcript of call), PB at p 470 at S/N 4–11.

³¹ P185 (transcript of call), PB at p 470 at S/N 14, p 471 at S/N 18–26.

...

Mutaleb: Can or not Zai?

Zaini: Can, can, can

41 I did note that portions of the transcripts of the recorded telephone calls indicated that there were points at which Mutaleb and Zaini did not seem to speak audibly to each other, but I did not take any of this mean that there was any miscommunication between them. In fact, it was clear from the transcript that their conversations were conducted against a shared understanding that Zaini would be meeting Mutaleb to deliver 13 bundles of drugs in exchange for \$39,000, even though Mutaleb appeared at one point to be reluctant to accept them, asking Zaini to “send it back”. Although there was no specific mention of drugs and no explanation of what “thirteen” referred to, this figure matched the number of bundles of drugs initially found in Zaini’s car. Mutaleb also understood, unprompted, that he was to pay \$39,000 for these items. These factors implicated Mutaleb and pointed towards his being privy to a prior agreement to receive the drugs that Zaini had brought into Singapore.

Zaini’s ss 22 and 23 CPC statements and their admissibility

42 Zaini claimed under cross-examination that various statements recorded from him under ss 22 and 23 of the CPC were recorded after a CNB officer promised him a certificate of substantive assistance under s 33B(2)(b) of the MDA if he “cooperate[d]”.³² I understood Zaini to be referring to the CNB officer’s administration of the “mandatory death penalty notification”, which is administered as a matter of practice and which puts the accused on notice that

³² NEs (21 November 2018) at p 61 ln 3 – p 62 ln 6, p 63 ln 4 – p 64 ln 9.

if he wishes to obtain a certificate of substantive assistance, he has a duty to give evidence to the CNB to assist in disrupting drug trafficking activities: see *Muhammad bin Abdullah v Public Prosecutor and another appeal* [2017] 1 SLR 427 at [54].

43 This issue was not raised at the time when the statements were first admitted at trial. In any event, as argued by the Prosecution,³³ any reference that might have been made by the CNB officers to the alternative sentencing regime would not have rendered these statements inadmissible. Explanation 2(aa) to s 258 of the CPC provides that an otherwise-admissible statement is not rendered inadmissible because it was made after the mandatory death penalty notification was given:

Explanation 2 — If a statement is otherwise admissible, it will not be rendered inadmissible merely because it was made in any of the following circumstances:

(aa) where the accused is informed in writing by a person in authority of the circumstances in section 33B of the Misuse of Drugs Act (Cap. 185) under which life imprisonment may be imposed in lieu of death;

44 As it was, no ancillary hearing was held as I was satisfied that no question of admissibility arose. Zaini’s allegations that he had been asked to “cooperate” did not affect the voluntariness of his statements, but rather raised the possibility that he had been incentivised to give evidence that would implicate Mutaleb in order to obtain a certificate of substantive assistance.

45 To this end, the Defence submitted that the CNB officers’ requests that Zaini “cooperate” with them to avoid the death penalty placed pressure on him

³³ PCS at para 50.

to identify Mutaleb as the intended recipient of the drugs. At trial, Zaini resiled from the account in his statements and gave evidence that he did not know whom the ultimate recipient of the drugs was to be. He claimed that he was supposed to wait for further instructions from Apoi; however, when Apoi did not appear in Singapore, Zaini informed the CNB that “Abang” was supposed to receive the drugs, and later identified “Abang” as Mutaleb, even though he knew that Mutaleb was not supposed to receive the drugs.³⁴

46 I first considered the law relating to the use of Zaini’s statements as against Mutaleb. Such use was governed by s 258(5) of the CPC and informed by the law in relation to s 30 of the Evidence Act (Cap 97, 1990 Rev Ed), which was *in pari materia* with s 258(5) of the CPC: *Ramesh a/l Perumal v Public Prosecutor and another appeal* [2019] 1 SLR 1003 (“*Ramesh a/l Perumal*”) at [62]. Although s 258(5) has been amended with effect from 31 October 2018, the amended provision did not apply in the present case as investigations had begun before 31 October 2018: Criminal Justice Reform (Saving and Transitional Provisions) (No. 2) Regulations 2018 (GN No S 728/2018) reg 4(2). Section 258(5) of the CPC, as applied in this case, provided as follows:

When more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the court may take into consideration the confession as against the other person as well as against the person who makes the confession.

47 In considering the confession by a co-accused person being tried jointly, the assessment of the weight to be given to the statements against another co-accused person will need to take into account the various circumstances of the

³⁴ Mutaleb’s submissions dated 4 March 2019 (“DRS”) at paras 23–24; DCS at paras 76–79 and 83; NEs (21 November 2018) at p 54 ln 3 – p 55 ln 14, p 58 ln 5–27.

recording of the statement and the charge. Of relevance would be the statement-maker's state of mind and the incentive he might have in giving evidence against the other co-accused person. Where it is alleged that the statement-maker had a motive to frame the co-accused person, this must be proved as a fact: *Norasharee bin Gous v Public Prosecutor and another appeal and another matter* [2017] 1 SLR 820 (“*Norasharee*”) at [59].

48 No submissions were addressed specifically on the application of s 258(5), but I was satisfied that Zaini's 19 and 21 September statements, which described the manner he imported the drugs into Singapore, constituted confessions within the meaning of s 258(7) of the CPC. As Mutaleb was charged with abetting Zaini and Noor in their commission of the offences of importation for which they were charged, s 258(5) of the CPC applied to the use of Zaini's statements against him: *Ramesh a/l Perumal* at [61]–[62], approving the High Court's decision in *Public Prosecutor v Ramesh a/l Perumal and another* [2017] SGHC 290 at [46]–[48].

49 Even considering the allusion that Zaini's implication of Mutaleb was motivated the former's desire to obtain a certificate of substantive assistance under s 33B(2)(b) of the MDA, I was, in the end, satisfied that Zaini's statements could be considered as against Mutaleb and given full weight. As recognised in *Norasharee* at [59], a statement-maker may well be truthful despite having an incentive to lie. Even if Zaini had an incentive to cooperate with the CNB, there was nothing that raised any concerns as to the truthfulness of his statements. This was not a cutthroat zero-sum situation where Zaini's innocence would depend on Mutaleb's guilt, nor did it appear that Zaini's statements were made to downplay his own culpability. Furthermore, as will be addressed next, the internal consistency of Zaini's statements was not

undermined by his inconsistent testimony, especially given that they were corroborated by the objective evidence against Mutaleb.

Zaini's credibility as a witness

50 The Defence argued in relation to Zaini's recorded statements that Zaini's credibility was doubtful, given that his evidence was riddled with inconsistencies and discrepancies as to the conversation that he overheard, his instructions upon entering Singapore and how Mutaleb was identified. The Prosecution, however, maintained that Zaini's statements were credible and should be taken as reflecting the truth. Having considered the evidence, I accepted that Zaini's account in his statements was credible and truthful. The various points raised by the Defence will be taken in turn.

(1) Inconsistencies as to the overheard telephone call

51 Zaini's recounting did vary.³⁵ He gave multiple accounts of the conversation which he overheard, as to who called whom and whether he could hear the conversation. In his 19 September statement, Zaini claimed that it was Mutaleb who called Apoi and that he could hear the conversation and recognised Mutaleb's voice.³⁶ But in his 21 September statement, Zaini stated that it was Rafi who had called, before clarifying that Apoi had initiated the call and that he overheard it as the conversation was on loudspeaker.³⁷ On the stand, however, Zaini first claimed that he could not hear the conversation at all and that he only heard Mutaleb's voice over the telephone. Under cross-

³⁵ DCS at paras 42–46.

³⁶ P200, PB at p 577 at para 21.

³⁷ P201, PB at p 583 at paras 33 and 34.

examination, he explained that this was because he could not hear “all the conversation”, but agreed that the conversation had been placed on loudspeaker.³⁸

52 Zaini was also unable to point clearly to the mobile phone that was used to contact Apoi: he first said that one of his mobile phones (“Z-HP3”) had been used to make the call, but at a later point agreed that another of his mobile phones (“Z-HP2”) had been used instead.³⁹ (The use of Z-HP2 tallied with the phone records.)⁴⁰ The Defence also submitted that in explaining why Apoi did not save Mutaleb’s contact details on his own mobile phone, he made the “absurd” claim that Apoi would only contact Mutaleb when Zaini was present.⁴¹

53 The Defence submitted that the evidence showed that Mutaleb did not know Apoi, and that there could not have been a conspiracy between them.⁴² At trial, Mutaleb denied knowing Apoi.⁴³ In the first telephone call that was recorded by the CNB, Mutaleb replied “Apoi?” when Zaini told him that he was waiting for Apoi (see above at [38]). SSSgt Ika accepted at trial that Mutaleb may not have known Apoi, given what was recorded of his conversation with Zaini.⁴⁴ The Defence concluded that Mutaleb only came to hear of Apoi after his arrest, given that he did not have Apoi’s number saved on his mobile phone

³⁸ NEs (21 November 2018) at p 29 ln 30 – p 30 ln 15, p 50 ln 1–18, *cf* p 67 ln 4–19.

³⁹ NEs (21 November 2018) at p 45 ln 15–17 *cf* p 46 ln 13–14.

⁴⁰ PCS at para 41 fn 28; 1DCS at para 11; P183, PB at p 320 at line 10; P135, PB at p 122 at S/N 22.

⁴¹ DCS at paras 54–56; NEs (21 November 2018) at p 46 ln 10–20.

⁴² DCS at paras 48–52.

⁴³ NEs (27 November 2018) at p 5 ln 13–19.

⁴⁴ NEs (23 October 2018) at p 51 ln 13 – p 52 ln 4.

and there were no records of communications made between Apoi's and Mutaleb's mobile phones.

54 It did appear that Zaini's evidence was inconsistent across the trial, and no real explanation was proffered by him for his changes. As argued by the Prosecution, the inference to be drawn was that Zaini desired, for whatever reason, to downplay his prior incrimination of Mutaleb.⁴⁵ But Zaini's inconsistencies did not ultimately undermine the aspect of the Prosecution's case that Mutaleb knew Apoi and that a telephone call took place between them on 10 September 2015. The inconsistencies as to which mobile phone Apoi used to call Mutaleb were not critical, given the objective evidence showing that a telephone call had been made at the relevant time (see above at [37]). Furthermore, the fact that SSSgt Ika accepted the possibility that Mutaleb did not know Apoi was neither here nor there: in my view, SSSgt Ika was just trying to be fair about the extent of the evidence that he was presented with and the possible inferences that could be drawn. While Mutaleb denied knowing Apoi, this denial had to be weighed against the contrary position taken by Zaini, whose evidence was detailed and unshaken that Apoi and Mutaleb knew each other.⁴⁶

(2) Zaini's instructions on entering Singapore

55 The Defence argued that Zaini's evidence was inconsistent on whether the drugs were to be delivered to Mutaleb.⁴⁷

⁴⁵ PCS at para 52.

⁴⁶ *Eg*, P189, PB at p 359; P201, PB at p 583 at para 33; NEs (21 November 2018) at p 15 ln 4–20, p 48 ln 7–24.

⁴⁷ DCS at paras 67–74.

(a) In his first contemporaneous statement dated 11 September 2015, Zaini explained that after he entered Singapore, his instructions were to wait at the Marina Bay Sands for further instructions from Apoi, who was to meet him at the casino.⁴⁸

(b) In his 19 September statement, he said that Apoi's instructions to him were to call him for further instructions after he reached the car park at the Marina Bay Sands.⁴⁹

(c) In his 21 September statement, he stated that his instructions had been to proceed directly to Chai Chee to deliver the drugs to Mutaleb.⁵⁰

(d) At trial, he reverted to his initial position: upon arriving in Singapore, he was to wait for Apoi's call; it was only then that Apoi would specify who was to receive the drugs. He elaborated that he had no instructions to deliver drugs to Mutaleb; he only named Mutaleb as the intended recipient of the drugs because he felt compelled to cooperate with the CNB.⁵¹

56 The Prosecution argued that Zaini's evidence in his statements should be preferred as the statements were consistent and supported by the objective evidence, including the CNB-recorded telephone calls between Zaini and Mutaleb that pointed towards a prior arrangement to deliver drugs to Mutaleb and Mutaleb's possession of \$38,600 at the time of his arrest. Zaini's oral

⁴⁸ P188, PB at p 352-1 at Q7 and A7.

⁴⁹ P200, PB at p 577 at para 20.

⁵⁰ P201, PB at p 585 at para 43.

⁵¹ NEs (21 November 2018) at p 31 ln 21 – p 32 ln 12; p 58 ln 5–27.

testimony could not be safely relied upon due to his vacillations; under cross-examination, he accepted that Mutaleb was initially supposed to receive 12 bundles of drugs, but then said that he did not know who was to ultimately receive the drugs as the final delivery was for 14 bundles instead of the agreed-upon 12.⁵²

57 I accepted the Prosecution's argument that the plan was for Zaini to deliver the drugs to Mutaleb. There was no explanation from Zaini as to why he would change his evidence from what was in his statements, nor was there any allegation that these statements were fabricated in any way. As noted above at [49], what Zaini raised was that he had given the statements in the hope of obtaining a certificate of substantive assistance under s 33B(2)(b) of the MDA. This did not render the statements inadmissible, and it did not appear that his otherwise-admissible statements were rendered unreliable simply because of what was allegedly promised.

58 The Defence also argued that there was support for Zaini's final version of events, namely, that Apoi had not told him to deliver the drugs to Mutaleb, that Mutaleb was not the intended recipient of the drugs, and that Mutaleb was only named as the recipient because Zaini was under pressure by the CNB to cooperate, particularly after Apoi did not show up in Singapore as intended. Two arguments were made:⁵³

- (a) First, none of the CNB officers could give satisfactory evidence that explained how Mutaleb was identified as the recipient of the drugs.

⁵² PCS at paras 43–47; NEs (21 November 2018) at p 51 ln 1–13.

⁵³ DCS at paras 71–83.

On 11 September 2015, SSSgt Ika showed Zaini a copy of Mutaleb's photograph after Zaini described the recipient of the drugs to be one "Boy Amy" living at Chai Chee Road.⁵⁴ Although SSSgt Ika gave evidence that the Immigration and Checkpoints Authority ("ICA") ascertained Mutaleb to be "Boy Amy", he could not recall exactly how this information was conveyed to him.⁵⁵

(b) Second, Mutaleb was never specifically named in the CNB-recorded calls between Apoi and Zaini. The evidence of one of the CNB officers, SSgt Muhammad Nur bin Rahmat, was that he had heard Zaini being instructed over the telephone to "wait for further call", with no mention of Mutaleb.⁵⁶

59 This latter piece of evidence was insufficient to assist Mutaleb, as any failure to name Mutaleb was entirely ambiguous as to whether he was the recipient. As for the Defence's argument that there was insufficient evidence that Mutaleb was the recipient of the drugs, this had to be weighed against the other evidence that implicated Mutaleb, as will be elaborated on below.

(3) Zaini's identification and implication of Mutaleb

60 The Defence argued that there was insufficient evidence to justify Zaini's identification of Mutaleb as the intended recipient of the drugs. Zaini's recounting of the telephone call between Apoi and Mutaleb had Apoi refer to Mutaleb as "Abang". However, "Abang", being the Malay word for "brother",

⁵⁴ PS31, PB at p 357 at paras 6 and 7.

⁵⁵ NEs (23 October 2018) at p 47 ln 29 – p 50 ln 27.

⁵⁶ NEs (23 October 2018) at p 28 ln 2–20.

is a common term or nickname that could have referred to anyone.⁵⁷ At trial, Zaini further claimed that he knew that Mutaleb was “Abang” because the number belonging to “Mai Bro” (his nickname for Mutaleb) had been displayed on Z-HP3, the mobile phone Apoi allegedly used to call Mutaleb.⁵⁸ The Defence contended that this had not been mentioned in Zaini’s recorded statements, and that it was Mutaleb’s evidence that he had conversed with Zaini on 10 September 2015, and not Apoi.⁵⁹ Moreover, even if Zaini had overheard a conversation between Apoi and “Abang”, Zaini’s identification of Mutaleb being at the other end of the line was unreliable.⁶⁰

61 I weighed the Defence’s arguments against Zaini’s positive and consistent identification of Mutaleb as “Abang”, as demonstrated by the following:

(a) In his 11 September contemporaneous statement, which was taken after his arrest, Zaini was shown Mutaleb’s photograph and identified him as “Abang”, “Bro Amy” and “Boy Amy”.⁶¹

(b) In his 19 and 21 September statements, he substantiated that “Abang” was known to him as one “Rafi” who lived at Chai Chee. His evidence in this regard was maintained at trial, where he referred to Mutaleb as “Abang” and “Rafi” interchangeably.⁶²

⁵⁷ P200, PB at p 577 at para 21; P201, PB at p 583 at para 33; DCS at para 84.

⁵⁸ NEs (21 November 2018) at p 45 ln 10–30.

⁵⁹ DCS at paras 58–66; NEs (27 November 2018) at p 15 ln 7–15.

⁶⁰ DCS at para 47.

⁶¹ P189, PB at p 359 at A1.

⁶² Eg, NEs (21 November 2018) at p 15 ln 10–14; p 29 ln 30 – p 30 ln 2.

(c) Finally, despite Zaini's misidentification of Z-HP3 as the mobile phone used in the overheard call, Zaini's oral testimony was otherwise externally consistent with the forensic records. The records showed that Mutaleb's number was saved as "My Bro" in Z-HP2, and that a call from Z-HP2 was made to this number on 10 September 2015 at 10.37pm.⁶³

Given the strength of Zaini's identification of Mutaleb in his statements and testimony, I could not see that there was any doubt concerning Zaini's evidence on this score. Furthermore, while the term "abang" does mean "brother" and could be used to refer to various individuals, I was satisfied that this term referred to Mutaleb in the context of Zaini's evidence. There was nothing at all in Zaini's evidence that left open any ambiguity.

62 For completeness, I considered the Defence's argument that Zaini only identified Mutaleb as "Abang" due to the "constant pressure" the CNB officers placed on him to cooperate with them. I did not accept the argument that Zaini only identified Mutaleb as "Abang" because he was under pressure to implicate someone to obtain a certificate of substantive assistance, or that a desire to assist the CNB rendered such identification unreliable. In the end, this inquiry into Zaini's motives was speculative and did not go towards the truthfulness or accuracy of his statements. What was more relevant was that Zaini's identification of Mutaleb was borne out by their subsequent conversation that confirmed that an arrangement for the delivery of drugs existed between them, and the other evidence against Mutaleb which I will now discuss.

⁶³ P135, PB at p 122 at S/N 22.

Other evidence implicating Mutaleb

63 Aside from Zaini’s evidence, there was other evidence incriminating Mutaleb as being aware of the conspiracy to import the drugs into Singapore.

Phone records showing Mutaleb’s knowledge of Zaini’s entry into Singapore

64 The Prosecution submitted that it was incriminating that Mutaleb knew that Zaini was coming into Singapore on 11 September 2015. It first argued that Zaini was known to Mutaleb, Zaini having brought Mutaleb to his home in Johor on 5 May 2015. This was corroborated by ICA records that showed that the pair had entered Malaysia at the same time on 5 May 2015 and re-entered Singapore the next day.⁶⁴ Mutaleb had also saved one of Zaini’s mobile phone numbers on his mobile phone, and two of Zaini’s mobile phone numbers were found written in a diary seized from Mutaleb’s flat.⁶⁵

65 Second, the telephone and text message records showed a considerable amount of communications between Zaini and Mutaleb.

(a) On 10 September 2015, Mutaleb sent Zaini a text at 11.23am, seeming to warn Zaini against coming to Singapore: “Bro this is Mah if possible this week you don’t come to r”.⁶⁶ Mutaleb explained under cross-examination that “Mah” referred to him, and that the message

⁶⁴ PCS at para 37; NEs (21 November 2018) at p 17 ln 26 – p 20 ln 16; P364A; P410.

⁶⁵ NEs (27 November 2018) at p 20 ln 2–16, p 22 ln 24–28, p 23 ln 13–17; P412; P413.

⁶⁶ P135, PB at p 137 at S/N 103, translation at PB at p 730 at S/N 103.

served as “advice from a friend” to warn Zaini not to come to Singapore.⁶⁷

(b) Later that night, Mutaleb sent another message to Zaini at 10.36pm, asking that Zaini “call [him] now”.⁶⁸ A minute later, Mutaleb received a call from Z-HP2 (as described above at [37] and [51]).⁶⁹ The Prosecution put to Mutaleb that this telephone call was the one between Apoi and Mutaleb that Zaini allegedly overheard. Mutaleb disagreed, claiming instead that the conversation was between him and Zaini, and that he wanted Zaini to call him so that he could warn Zaini that he should be careful entering Singapore the next day as 11 September was a polling day. This meant that “security might be tight at the Causeway”, and Zaini might be affected as he was going to the casino. Mutaleb further explained that he was worried that Zaini might “bring some illegal stuff into Singapore”.⁷⁰

66 The Prosecution argued that Mutaleb’s 11.23am text message was clearly intended to warn Zaini against delivering drugs to him. Zaini also understood this to be Mutaleb’s intention, and in his 21 September statement (excerpted above at [35]), he further recounted that Mutaleb had told Apoi over the telephone that he had earlier sent a message to Zaini to ask him not to come

⁶⁷ NEs (27 November 2018) at p 30 ln 9 – p 31 ln 11.

⁶⁸ P135, PB at p 137 at S/N 115, translation at PB at p 731 at S/N 115.

⁶⁹ NEs (27 November 2018) at p 32 ln 2–25; P183, PB at p 320 at line 10; P135, PB at p 122 at S/N 22.

⁷⁰ NEs (27 November 2018) at p 32 ln 13 – p 33 ln 29, p 66 ln 3–11.

to Singapore. Apoi had responded to say that the delivery had to proceed as the drugs could not be returned.⁷¹

67 Considering the inherent probabilities of the case, I could not accept Mutaleb's characterisations of his 11.23am text message and the 10.37pm telephone call. It was unlikely that Mutaleb had decided, apropos of nothing, to warn Zaini not to enter Singapore, and later to have asked him to call just to highlight that security would be tight when he entered Singapore due to ongoing elections. Mutaleb was unable to specify or elaborate on how the elections would affect Zaini's entry into Singapore. The most that could have been argued for was that Mutaleb had been concerned with the heightened security on that day, but such concerns would only have arisen if Zaini had something to hide from law enforcement. Indeed, the natural inference would have been that Zaini was intending to enter Singapore for an illegal purpose.

68 Furthermore, the messages exchanged between Mutaleb and Zaini on the morning of 11 September 2015 were in themselves incriminating, as they corroborated (a) Zaini's account that Apoi and Mutaleb had discussed the plan to deliver drugs the previous night and (b) Zaini's understanding in his 19 and 21 September statements (see above at [34] and [35]) that the delivery was to take place at 7am or 8am, which would have required him to set out from Johor at around 4am or 5am.⁷²

Timestamp	Sender	Text of message (as translated)
3.36am	Mutaleb	Bro.. remember ok, when driving ..be careful lah don't be negligent also don't be selfish.. other

⁷¹ PCS at paras 41 and 42; P201, PB at pp 583 and 585–586 at paras 33 and 44.

⁷² P135, PB at pp 130 and 131 at S/N 33–35 and S/N 1, translation at PB at pp 725–726.

		people are using too.. better late as long as safe.. ok ,eh.'
4.16am	Mutaleb	Bro you prioritise sleep only?
4.20am	Zaini	Yes Mah good morning I want to go to work now want to shower earn money want to propose to you
4.48am	Mutaleb	POOH'!! Wonderful,. Bro don't just play only ok you back out later Mah give it to the face until swollen

69 To my mind, this series of messages showed that Mutaleb was aware of Zaini's intention to enter Singapore that morning and was keeping track of Zaini's movements. Mutaleb explained that these messages were simply warnings to Zaini to take safety precautions while driving.⁷³ This explanation was not sufficient to render his knowledge of Zaini's movements as something innocent, as his knowledge was quite specific as to Zaini coming into Singapore.

Mutaleb's actions on the evening of 11 September

70 Mutaleb's actions on the night of 11 September were further indicative that he knew that there was a drug shipment coming in from Malaysia and that it was intended for him.

71 First, as discussed above at [38]–[41], Mutaleb's telephone calls with Zaini making arrangements to meet and for the payment of \$39,000 put paid to Mutaleb's defence that he was not involved in any conspiracy. No real rebuttal could come from the Defence on this score, nor were any explanations or submissions made as to what Mutaleb could have been referring to instead.

⁷³ NEs (27 November 2018) at p 35 – p 37 ln 10.

72 Second, Mutaleb explained at trial that he only went to the car park at Chai Chee Road on 11 September because Zaini had called him and asked to meet up “at the carpark”. Although Zaini never specified which car park he was referring to, Mutaleb understood it to be the one at Chai Chee. Upon reaching the car park, he recognised Zaini’s car and walked up to it. It was there that the CNB officer in Zaini’s car shoved a “thing” to Mutaleb, which he accepted.⁷⁴ While Mutaleb’s actions were not incriminating on their own, I observed that they were consistent with Zaini’s account in his statements that he had previously delivered drugs to Mutaleb at the same car park and was intending to do the same on 11 September.

The money found on Mutaleb

73 The Prosecution pointed to the fact that Mutaleb was found with \$1,600 on his person when he was arrested, and that \$37,000 was found in his flat.⁷⁵ Of the latter sum, (a) \$34,950 was found packaged in bundles and stored in pouches in a haversack, and (b) \$2,050 was found packaged in three bundles in the pockets of a pair of pants.⁷⁶

74 The amount of money in Mutaleb’s possession, *ie*, \$38,600, was substantial and closely corresponded to the amount that was due to be paid for the packets of drugs that Zaini was delivering. This was damning in the circumstances, especially given that the money was found neatly packaged and readily accessible in Mutaleb’s flat. Coincidences do happen, but the likelihood

⁷⁴ NEs (27 November 2018) at p 11 ln 4–13, p 40 ln 20 – p 45 ln 24.

⁷⁵ PCS at paras 56 and 57.

⁷⁶ PS62, PB at pp 534–537; P87; P88; P107; P411; NEs (24 October 2018) at p 24 ln 3 – p 25 ln 14.

of a sum of close to \$39,000 being in his possession for some reason other than payment for the drugs brought in by Zaini was low. Mutaleb was unable to proffer any real explanation for this correspondence, apart from emphasising that even though he had told Zaini that he was going to meet him and would be bringing \$39,000 with him, he did not “really” have the \$39,000 with him.⁷⁷

75 In my judgment, the fact that Mutaleb supposedly went to collect the drugs with only \$1,600 in hand did not raise any reasonable doubt on its own. It would have been expected that he would have had the sum of \$39,000 with him when he met Zaini, especially since he had told Zaini that he did not want to leave any money owing (see above at [38]). The amount seized was also not exactly what would have been due for the 13 packets, *ie*, \$39,000. But neither factor raised any reasonable doubt, given the other factors which pointed to Mutaleb’s guilt and his inability to provide any real explanation for the close correspondence in sums. In the end, how the money was actually to be transferred was a matter within the knowledge of Mutaleb himself.

Inculpatory portions of Mutaleb’s statements

76 The Prosecution submitted that Mutaleb’s inconsistent evidence demonstrated that he was not a credible witness, citing the five versions of events that he gave over the course of the investigations and at trial.⁷⁸ The Defence argued that Mutaleb’s statements were to be disregarded given that he

⁷⁷ NEs (27 November 2018) at p 53 ln 10–21; DRS at para 41.

⁷⁸ PCS at paras 63–68.

had demonstrated a willingness to lie to CNB officers in his statements, and that his evidence at trial was to be believed instead.⁷⁹

77 Weighing the evidence in the round, I considered it incriminating that material portions of Mutaleb’s statements corroborated the version that Zaini put forward in his statements.

78 First, Mutaleb’s contemporaneous statement recorded under s 22 of the CPC on 11 September 2015 disclosed that Zaini had called him to collect a “thing”, which was to be passed on to another person in return for a commission. Mutaleb claimed not to know what the “thing” was, and declined to disclose whom he was to pass it on to or how much commission he was to receive, but acknowledged that he had collected “things” from Zaini on two or three previous occasions.⁸⁰

79 In Mutaleb’s statement recorded under s 22 of the CPC on 17 September 2015, *ie*, P207, he stated that he had collected “heroin balls” from Zaini on two previous occasions. He also mentioned details that were consistent with Zaini’s 19 and 21 September statements and the objective evidence:⁸¹

(a) On 10 September 2015, he was given an assignment from one “Alex” to collect five “balls” of heroin that were coming in from Johor. He went to sleep “early” as he knew he would have to meet Zaini the next day to collect the “consignment”.

⁷⁹ DRS at paras 50–54.

⁸⁰ P191, PB at p 393-1.

⁸¹ P207, PB at pp 644–648 at paras 3–11.

(b) On 11 September 2015, at about 9am, “Ramesh”, the “money courier”, passed Mutaleb “a black bag with money inside”. Mutaleb assumed that this was the \$35,000 “for payment for the cosignment [sic]”. Mutaleb then proceeded to wait “a very long time” for Zaini’s call and became concerned as Zaini had “taken too long” to call.

(c) Zaini eventually called Mutaleb to inform him that he was at “the casino at Marina Bay”. Mutaleb’s explanation of this call was consistent with the transcript excerpted above at [38] and Zaini’s account that the initial arrangement was to deliver fewer than 13 units of drugs:

... I asked him how many he had, and he replied 13. When I asked how many he had, I was referring to how many balls of heroin he had. When he said 13, I was shocked. I did not expect to receive so many balls. But because I was given the money already, I just agreed to receive them. I wasn’t sure what the arrangement was between Alex and the Malaysian side. Alex only told me to receive 5 balls.

(d) Mutaleb also accurately recalled the numbers on the licence plate of Zaini’s car and that it was a red car, and identified Zaini and his car from photographs that were shown to him.

The Defence challenged the admissibility of P207 on the basis that Mutaleb refused to sign it after it was recorded, as he claimed that “he made up the story and [it was] not the truth”. The Defence submitted that this noncompliance with s 22(3)(d) of the CPC rendered P207 inadmissible. I did not find that Mutaleb’s failure to append a signature to P207 affected its admissibility. Section 22 of the CPC must be read subject to s 258, and the clear wording of s 258(1) of the CPC and Explanation 1 to s 258 indicates that questions of admissibility arise only where the voluntariness of the statement is affected, *eg*, where the making of a statement was obtained by way of a threat, inducement or promise. In this case,

the omission of Mutaleb's signature did not affect P207's admissibility, and no ancillary hearing was required.⁸²

80 For completeness, I note that Mutaleb also gave contrary accounts in the other statements recorded from him under ss 22 and 23 of the CPC.⁸³ At trial, he also disavowed the incriminating portions of his two statements.⁸⁴

81 Regardless, it was significant that the portions of Mutaleb's statements which inculpated him were externally consistent with Zaini's account of a prior arrangement for Mutaleb to receive drugs from Malaysia. They also served to explain certain aspects of the evidence, such as Mutaleb's responses in the CNB-recorded telephone call, his willingness to meet Zaini at his car at last-minute notice and his possession of \$35,000 which had been found bundled in a haversack. Mutaleb's knowledge that Zaini was involved in drug activities was also incriminating; while it would not be sufficient on its own to incriminate Mutaleb of the charge, it could be so incriminating when considered alongside other evidence. Finally, when asked which version of events the court should prefer, Mutaleb opted only to say that he would "leave it to [the court]".⁸⁵ This was a wholly unsatisfactory response given the fundamental unlikelihood that he would fabricate statements that inculpated him of such a serious charge.

⁸² NEs (25 October 2018) at p 61.

⁸³ P192, PB at p 396-1; P198, PB at p 565; P208, PB at pp 653–677; P209, PB at p 678.

⁸⁴ NEs (27 November 2018) at p 7 ln 3–17, p 8 ln 28 – p 9.

⁸⁵ NEs (27 November 2018) at p 51 ln 26 – p 52 ln 8.

Other points raised in Mutaleb's defence***Whether the conspiracy was abandoned***

82 Mutaleb argued in the alternative that even if a conspiracy between him, Zaini, Noor and Apoi to import drugs into Singapore did exist, the conspiracy was abandoned as the initial plan to deliver the drugs to Mutaleb was replaced by a new plan to deliver the drugs according to Apoi's later instructions.⁸⁶

83 No authority was cited for this proposition. In any case, this argument would not have succeeded. First, the Defence's position was based on Zaini's change in evidence, which I did not accept as being true. There was thus no abandonment of the original purpose on the facts. But even if there was in actual fact such a change in plans, the conspiracy would have been revived when the delivery was made to Mutaleb. The Defence did contend that the drugs were delivered to Mutaleb only as a result of pressure or encouragement from the CNB, but that has been dealt with above and, in any event, raised a different issue from the abandonment of the conspiracy.

The irrelevance of Mutaleb's reactions at the time of arrest

84 When Mutaleb saw CNB officers moving in on him, he dropped the bag containing the mock drugs. The Prosecution submitted that this was indicative of a "guilty mind".⁸⁷ I agreed with the Defence⁸⁸ that this was not sufficient evidence supporting a finding of guilt, even taken with the other evidence.

⁸⁶ DCS at paras 100–110.

⁸⁷ PCS at paras 58–62.

⁸⁸ DCS at paras 97 and 98; DRS at paras 42 and 43.

Miscellaneous matters***The discrepancy in the number of bundles allegedly delivered***

85 I note that there was some question about the number of bundles that were supposed to be delivered. In all, 14 bundles of drugs were found in Zaini's car. But as noted from Zaini's 21 September statement, Apoi had initially told Mutaleb that about 12 bundles of drugs would be delivered. As it was, the eventual arrangement was for Zaini to deliver 13 bundles to Mutaleb, and the CNB officers executing the mock delivery of the drugs handed over 11 bundles to Mutaleb, intending to hold back two bundles to delay the transaction and to facilitate Mutaleb's arrest.⁸⁹

86 In my view, these discrepancies were not ultimately material. This was not a situation in which Mutaleb rejected the delivery on the basis of the number of bundles he was to or did actually receive, nor would an additional bundle have made a difference as to whether the delivered drugs crossed the threshold for capital punishment. The vagueness on Apoi and Zaini's part about the number of bundles of drugs to be delivered (14, as compared to 12) was perhaps surprising, as was Apoi's apparent willingness to allow for payment for the drugs on an instalment basis, as implied by the recorded telephone calls between Zaini and Mutaleb (see above at [38] and [40]). But on the whole, I was convinced that the charge against Mutaleb, which related to a conspiracy to import 12 bundles of drugs, was made out. This figure matched the quantity that Apoi initially wanted Zaini to deliver to Mutaleb and also gave Mutaleb the

⁸⁹ P201, PB at p 585 at para 42; P185 (transcript of call), PB at p 469; PS39, PB at p 377 at para 8.

benefit of the doubt by excluding the weight of the drugs in the two heaviest bundles.⁹⁰

The efforts by Zaini's counsel to discharge themselves

87 The Defence pointed to the fact that Zaini's counsel sought at one point to discharge themselves because Zaini's evidence at trial was inconsistent with the instructions he had given them.⁹¹ In the event, I did not allow the discharge as I understood that the difficulties they faced were not in relation to Zaini's own defence, but in relation to Zaini's evidence as to Mutaleb's involvement in the alleged conspiracy. That did not to my mind go towards the question of the appropriateness of Zaini's counsel continuing to act for him. I did stipulate that I would bear in mind the difficulties counsel faced and would consider this matter in the round. I also asked that counsel check in on Zaini's instructions from time to time and emphasised that there would not be any finding that counsel for Zaini misled the court because of any such changes in his evidence.⁹² I found that the application by Zaini's counsel to discharge themselves did not discredit Zaini's evidence, especially as the actual reasons for their concerns could not be aired to me during the trial.

Evidence as to Mutaleb's psychiatric condition

88 Counsel for Mutaleb considered adducing psychiatric evidence to show that Mutaleb was affected by withdrawal symptoms at the time of his arrest. In the event, that evidence was not put forward, although opportunities were given

⁹⁰ Prosecution's opening statement at para 7.

⁹¹ DCS at paras 27–30; NEs (22 November 2018) at pp 2–4.

⁹² NEs (22 November 2018) at pp 5–8.

for this to be done. I could not in the absence of such evidence make any finding favourable to Mutaleb in this regard.

Conclusion on conviction

89 The inferences that I drew from the evidence were:

- (a) Mutaleb and Zaini were known to each other, both having stated in their statements that Zaini had previously delivered drugs to Mutaleb.
- (b) Zaini and Noor entered Singapore on 11 September 2015 with the intention of delivering at least 12 packets of drugs.
- (c) Mutaleb knew that Zaini was coming into Singapore for illegal purposes, as borne out by their text messages.
- (d) When Zaini called Mutaleb on 11 September, Mutaleb broached the issue of the delivery, asking Zaini, unprompted, about how many bundles were to be delivered; Zaini replied “thirteen”, and Mutaleb confirmed that he would pay \$39,000 in exchange.
- (e) Mutaleb intended to meet Zaini at the Chai Chee car park even though neither party specified in their telephone call where their exact meeting location was to be. Mutaleb had \$1,600 on his person when he arrived at the car park, and had \$37,000 stored in bundles in a haversack and a pair of pants in his flat.
- (f) The drug in question was diamorphine.

From the above, the conclusion that followed was that Mutaleb was party to an agreement or arrangement for at least 12 bundles of drugs to be brought into

Singapore to be transferred to him, in return for payment. The drugs were imported into Singapore pursuant to the conspiracy. The elements of the charge against him were thus fulfilled.

90 The case against Mutaleb was certainly not without difficulties and shortcomings. There were aspects of the Prosecution's case that were wanting: for instance, Zaini's evidence against Mutaleb vacillated at trial, Mutaleb did not have in hand the agreed payment sum of \$39,000 when he arrived at the car park, and there was some discrepancy as to the number of bundles to be delivered. There was also no direct evidence that a conspiracy to import drugs existed. In court, Zaini exonerated Mutaleb and retracted the parts in his statements that implicated Mutaleb. But on an overall assessment, none of these points were sufficient to raise any reasonable doubt, given the weight of the other evidence incriminating Mutaleb. The strength of the statements from Zaini, the telephone records and text messages, and Mutaleb's own conduct were of much greater significance than the discrepancy about the number of bundles to be delivered and the looseness of the payment arrangements, which could perhaps be explained by other reasons, including the close relationships between those involved. Whatever these other reasons may be, they did not put in doubt what was incriminatory.

91 For the reasons above, I was of the view that there was sufficient evidence to establish the Prosecution's case beyond a reasonable doubt. The Prosecution had proven that Mutaleb had engaged in a conspiracy for Zaini and Noor to import drugs into Singapore and that Zaini and Noor brought at least 12 bundles of drugs into Singapore pursuant to the conspiracy. Accordingly, I convicted him of the charge under s 7 read with s 12 of the MDA.

Decision on sentence

92 The prescribed punishment under s 33(1) read with the Second Schedule of the MDA is death. The alternative sentencing regime in s 33B of the MDA did not apply: being a purchaser, Mutaleb was not merely concerned with the transportation of the drugs, and the Defence did not argue that he was a courier. In any event, no certificate of substantive assistance under s 33B(2)(b) was granted, nor did any question that he was of unsound mind arise. I therefore imposed the mandatory sentence of death on him.

Conclusion

93 For the foregoing reasons, the accused persons were convicted of the respective charges against them. A certificate of substantive assistance was granted to Zaini, who was sentenced to life imprisonment and 15 strokes of the cane. Noor's sentencing has been adjourned, pending other matters. The mandatory sentence of death was passed in respect of Mutaleb, who has appealed against my decision.

Aedit Abdullah
Judge

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Hassan Esa Almenoar (R Ramason & Almenoar), Diana Foo (Tan
Swee Swan & Co) and Sheik Umar bin Mohamad Bagushair (Wong
& Leow LLC) for the third accused.
