IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2018] SGCA 59

Criminal Appeal No 17 of 2017

Between

MUI JIA JUN

… *Appellant*

And

PUBLIC PROSECUTOR

… *Respondent*

In the matter of Criminal Case No 1 of 2017

Between

PUBLIC PROSECUTOR

And

TAN KAH HO
MUI JIA JUN

GROUNDS OF DECISION

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

[Criminal Procedure and Sentencing] — [Charge] — [Particulars]

[Evidence] — [Proof of evidence] — [Onus of proof]

Mui Jia Jun
v
Public Prosecutor

[2018] SGCA 59

Court of Appeal — Criminal Appeal No 17 of 2017
Sundaresh Menon CJ, Tay Yong Kwang JA and Steven Chong JA
30 November 2017; 1 August 2018

3 October 2018

Sundaresh Menon CJ (delivering the grounds of decision of the court):

Introduction

1 It is a fundamental principle of our criminal law that an accused person should know with certainty, and thus have a full opportunity to meet, the case advanced against him by the Prosecution. This principle can be traced back to the Straits Settlements case of *Lim Beh v Opium Farmer* (1842) 3 Ky 10, where Norris R observed at 12 that if there was "one principle of criminal law and justice clearer and more obvious than all others", it was that the charge must be framed "so that the accused may *certainly know with what he is charged, and be prepared to answer the charge as he best may*" [emphasis added]. Our courts have repeatedly reaffirmed the rule that a charge must be stated clearly and with sufficient particulars, and the broader principle of fairness to the accused which underlies that rule: see, for example, *Viswanathan Ramachandran v Public*

Prosecutor [2003] 3 SLR(R) 435 at [24] and *Low Chai Ling v Singapore Medical Council* [2013] 1 SLR 83 at [29].

2 This was of central importance in this appeal. The appellant, Mui Jia Jun ("the Appellant"), was tried with one Tan Kah Ho ("Tan") in the court below on two counts of trafficking in controlled drugs in furtherance of their common intention. The High Court judge ("the Judge") convicted the Appellant and Tan of both charges. He sentenced Tan, whom he found to be a courier and in respect of whom the Public Prosecutor had issued a certificate of substantive assistance, to life imprisonment and 15 strokes of the cane, and the Appellant, to the mandatory death penalty. The Appellant then appealed against his conviction and sentence.

3 At the trial, the Prosecution's case against the Appellant comprised a single narrative with two intertwined facets. At the first hearing of this appeal, the Prosecution sought to uphold both facets of the case that had been presented at the trial. But, in response to queries that we raised after that hearing, the Prosecution rightly accepted that there was a reasonable doubt as to whether the first facet of its case was established. There then arose the issue of whether the Appellant's conviction could be upheld based only on the evidence supporting the second facet of the Prosecution's case. After reviewing the further submissions that were filed and hearing the parties again, we were satisfied that the proper course, in the light of the principle of fairness referred to at [1] above, was to order a retrial of the matter before another High Court judge, and we so ordered. We now set out the detailed grounds of our decision.

The charges and the Prosecution's opening statement at the trial

4 We begin with the charges. The Prosecution preferred three charges each against the Appellant and Tan. It proceeded on the first two charges against both of the accused persons, and stood down the third. Where the Appellant was concerned, the two proceeded charges read as follows:

> That you, **MUI JIA JUN**
>
> **1ST CHARGE**: on the 21st day of February 2014, at about 6.50 a.m., in the vicinity of City Plaza, located at 810 Geylang Road, Singapore, together with one Tan Kah Ho, in furtherance of the common intention of both of you, did traffic in a 'Class A' controlled drug listed in the First Schedule to the Misuse of Drugs Act (Cap 185), to wit, ***by Tan Kah Ho delivering to one Low Johnnie***, ***three bundles containing not less than 447.7g of granular / powdery substance***, which was analysed and found to contain not less than 21.74g of diamorphine, without authorisation under the said Act or the Regulations made thereunder, and you have thereby committed an offence under section 5(1)(a) of the Misuse of Drugs Act (Cap 185) read with section 34 of the Penal Code (Cap 224) …
>
> **2ND CHARGE**: on the 21st day of February 2014, at about 6.50 a.m., in the vicinity of City Plaza, located at 810 Geylang Road, Singapore, together with one Tan Kah Ho, in furtherance of the common intention of both of you, did traffic in a 'Class A' controlled drug listed in the First Schedule to the Misuse of Drugs Act (Cap 185), to wit, ***by Tan Kah Ho having in his possession for the purposes of trafficking, three bundles containing not less than 488.7g of crystalline substance***, which was analysed and found to contain not less than 323.7g of methamphetamine, without authorisation under the said Act or the Regulations made thereunder, and you have thereby committed an offence under section 5(1)(a) read with section 5(2) of the Misuse of Drugs Act (Cap 185) and section 34 of the Penal Code (Cap 224) …
>
> [emphasis added in bold italics]

5 These two charges, which were for trafficking in controlled drugs in furtherance of a common intention, would only have been made out if the Appellant had participated in "any of the diverse acts which altogether formed

the unity of criminal behaviour resulting in the offence charged": see *Muhammad Ridzuan bin Md Ali v Public Prosecutor and other matters* [2014] 3 SLR 721 at [36]. Notably, however, both charges were completely silent on *the manner in which the Appellant had allegedly participated in the offences* which he was accused of committing. They referred only to acts of *Tan* that constituted acts of trafficking, these being, respectively, Tan's delivery of diamorphine and his possession of methamphetamine for the purposes of trafficking. The charges were devoid of any particulars of one critical and legally necessary aspect of the Prosecution's case against the Appellant, namely, how *the Appellant* had been involved in the offences concerned. In fairness to the Prosecution, however, we note that at the trial, the Appellant's counsel did not raise any objections as to the adequacy of the particulars in the charges.

6 Although the particulars of the Appellant's alleged involvement in the offences concerned were not stated in the two charges that were proceeded with, they were provided in the Prosecution's opening address at the trial ("the Opening Address"). This was filed on 9 January 2017, and days later, when the trial began, it was read out in court by the Prosecution. It was, however, unclear whether the Appellant was aware of the contents of the Opening Address before it was read out at the trial.

7 The Opening Address set out two main ways in which the Appellant had allegedly participated in the offences concerned. First, on the morning of Tan's arrest, he had allegedly handed Tan a "Jorano" bag which contained the drugs that formed the subject matter of the charges brought by the Prosecution ("the Jorano bag of drugs"). Second, he had allegedly sent Tan text messages which contained instructions regarding the delivery of the drugs ("the Delivery

Messages"). Critically, the Opening Address did not suggest that these two aspects of the Prosecution's case were *independent* bases upon which the Prosecution could seek or was seeking the Appellant's conviction. More specifically, the Opening Address did not state that even if the Appellant had not given Tan the Jorano bag of drugs, he should be convicted on the sole basis that he had sent Tan the Delivery Messages ("the Alternative Case"). Instead, it made clear that the Prosecution's case was a composite case comprising *both* elements referred to above. This point was critical in this appeal, and we expand on it below. We now set out the key facts.

The key facts

The Appellant and Tan

8 The Appellant, a 29-year-old male, and Tan, a 34-year-old male, are both Malaysian nationals. It was undisputed that they were acquainted with each other prior to the events that gave rise to the charges against them. It appeared to be common ground that they came to know one another through a mutual friend known as "Shao Yang" or "Ah Yang". At the material time, both Tan and the Appellant resided in Malaysia.

9 As will become evident from the narration of the facts, the case against the Appellant was somewhat unusual. The Appellant was not found in possession of the drugs which he was accused of trafficking. Hence, the presumptions in ss 17 and 18 of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) ("the MDA") as to possession, the purpose of possession and knowledge of the nature of the drugs did not apply. The Prosecution's case against the Appellant at the trial was largely based on Tan's testimony that he had taken delivery of the drugs from the Appellant, who had also directed him on the

persons to whom and the sequence in which he was to deliver the drugs. In addition, the Prosecution relied on DNA evidence retrieved from strips of tape that were used to cover the bundles of drugs, as well as forensic evidence recovered from the handphones of the Appellant and Tan ("the Handphone Evidence"). Having outlined the case against the Appellant, we now fill in the details with the material facts.

Tan's arrest

10 On 21 February 2014 at about 5.58am, Tan drove into Singapore through Tuas Checkpoint.

11 Later that day, at about 6.45am, Tan delivered a blue bag containing three bundles of drugs ("the Blue Bag") to one Low Johnnie ("Low") at City Plaza, a shopping mall located at 810 Geylang Road. Shortly thereafter, officers from the Central Narcotics Bureau ("CNB") arrested Tan and Low.

12 The CNB officers seized the Blue Bag, which was later marked "B", and the three bundles of drugs in it. During the investigations, the three bundles of drugs were cut open, and each bundle was found to contain a Ziploc bag of powdery substance. Each Ziploc bag was covered with cling wrap, with several layers of black tape applied over the whole of the cling wrap. The cling wrap and black tape used to cover the three bundles were marked "B1", "B2" and "B3" respectively, and the corresponding Ziploc bags beneath the cling wrap and black tape were marked "B1A", "B2A" and "B3A" respectively. B1A, B2A and B3A were submitted to the Illicit Drugs Laboratory of the Health Sciences Authority ("the HSA") for analysis and were found to contain a total of not less than 21.74g of diamorphine. These drugs formed the subject matter of the first charge against the Appellant.

13 After arresting Tan, the CNB officers searched his car and recovered a white plastic bag containing seven bundles of drugs. This white plastic bag was the Jorano bag of drugs, which the Prosecution claimed the Appellant had handed to Tan (see [7] above). It was later marked "A1". The seven bundles of drugs in it were cut open during the investigations and were found to contain the following:

(a) Three of the bundles of drugs were each found to contain a Ziploc bag of crystalline substance. Like the Ziploc bags referred to in the preceding paragraph, the Ziploc bag in each of these three bundles was covered with cling wrap, with several layers of black tape applied over the whole of the cling wrap. The cling wrap and black tape coverings of these three bundles were marked "A1A", "A1B" and "A1C" respectively, and the corresponding Ziploc bags beneath the coverings were marked "A1A1", "A1B1" and "A1C1" in turn. Upon analysis by the HSA, A1A1, A1B1 and A1C1 were found to contain a total of not less than 323.7g of methamphetamine. These drugs formed the subject matter of the second charge against the Appellant.

(b) The remaining four bundles of drugs were each found to contain a packet of tablets. As in the case of the Ziploc bags mentioned at [12] and [13(a)] above, each packet of tablets was covered with cling wrap and black tape. The coverings of the four packets of tablets were marked "A1D", "A1E", "A1F" and "A1G" respectively, and a separate piece of cling wrap found in the bundle covered by A1D was marked "A1D1". The corresponding packets of tablets in the four bundles were marked "A1D1A", "A1E1", "A1F1" and "A1G1" respectively. Upon analysis by the HSA, the tablets were found to contain nimetazepam. These drugs

formed the subject matter of the third charge against the Appellant, which the Prosecution did not proceed with at the trial (see [4] above).

14 In the course of Tan's arrest, the CNB officers also seized three handphones from him: a Sony Ericsson handphone ("TKH-HP1"), a Nokia handphone ("TKH-HP2") and a Samsung handphone ("TKH-HP3").

The investigations following Tan's arrest

Tan's contemporaneous and cautioned statements

15 On 21 February 2014, a contemporaneous statement and three cautioned statements were recorded from Tan. In these statements, Tan denied knowing what the contents of the ten bundles of drugs recovered in the course of his arrest ("the Ten Bundles") (see [12]–[13] above) were.

Tan's first three long statements

16 On 24 February 2014, Tan provided a long statement to the CNB in which he stated the following:

(a) On 20 February 2014 at around 7.00pm, he received a call on TKH-HP3 from the number +601 46125901 ("the Untraced Number"), which belonged to one "Ah Jun". Ah Jun told Tan that there was a job for him the next day. The job was to deliver drugs to persons in Singapore. Tan, who had been delivering drugs to recipients in Singapore since September 2013, agreed to carry out the job as outlined by Ah Jun.

(b) Later that evening at around 9.00pm, Tan called a Chinese man. According to Tan, Ah Jun and this Chinese man were the coordinators

of the operation: they would pack the drugs and then direct him to deliver the bundles of drugs to the intended recipients. The Chinese man told Tan that he was to deliver three bundles each of "Shao Shui" and "Bing" and four bundles of "Yu Ruo". These were the bundles of diamorphine, methamphetamine and nimetazepam respectively.

(c) At around 4.00am on 21 February 2014, Tan drove to Ah Jun's home to collect the drugs. According to Tan, "Ah Jun then passed [him] the drugs in 1 white plastic bag". This white plastic bag was the Jorano bag of drugs. It contained the Blue Bag and the Ten Bundles. Importantly, on Tan's account, *the Ten Bundles had all been pre-packed and he had not been involved in packing any of them.*

(d) Tan put the Jorano bag of drugs into his car and drove to Singapore. After arriving in Singapore, he received text messages sent by Ah Jun using the Untraced Number. These were the Delivery Messages, which, according to the Prosecution, were sent by the Appellant (see [7] above). In the messages, Ah Jun gave Tan the contact numbers of the two persons to whom he was to deliver the drugs. Ah Jun also informed Tan of the sequence in which he was to deliver the drugs and which packets of drugs were to be delivered to each of the two recipients. Tan then separated the Ten Bundles for the two intended recipients based on labels marked "A", "B" and "C" respectively which were pasted on the bundles. Significantly, on Tan's account, this was the extent to which he handled the Ten Bundles.

(e) Thereafter, Tan called the intended recipients of the drugs and told them to meet him at City Plaza. Upon arriving at City Plaza, he met

Low, the first intended recipient, and delivered the three bundles of diamorphine to him. Tan and Low were then arrested by CNB officers.

17 On 25 and 26 February 2014, Tan provided two further long statements to the CNB. In these statements, he identified some of the drug exhibits and spoke of his family and personal circumstances.

The Appellant's arrest

18 Several weeks later, on 1 April 2014, after follow-up investigations subsequent to a separate arrest, officers from the CNB arrested the Appellant on the suspicion that he was involved in drug activities. Three handphones were seized in the course of the Appellant's arrest: a Nokia handphone, which was later marked "JJ-HP1", and two Samsung handphones, which were later marked "JJ-HP2" and "JJ-HP3" respectively.

The investigations following the Appellant's arrest

Tan's fourth long statement

19 Some eight months after the Appellant's arrest, on 5 December 2014, Tan provided a further long statement to the CNB. In this statement, Tan reiterated that on the morning of his arrest, Ah Jun had given him the drugs referred to at [12]–[13] above in Malaysia. A single photograph of the Appellant was then shown to Tan, who proceeded to identify the Appellant as Ah Jun. It was not evident, from the materials before us, whether the Appellant had been questioned in connection with this matter at that time.

The Appellant's statements

20 On 6 February 2015, the first statement by the Appellant in connection with this matter was recorded by the CNB. Notably, the recording of this statement was done more than ten months after the Appellant's arrest on 1 April 2014 (see [18] above). In this statement, the Appellant stated the following:

(a) He knew Tan by the name of "Ah Hao". He used to work at an Internet cafe which Tan patronised, and became acquainted with Tan through Shao Yang (see [8] above), another patron of that cafe. Both Tan and Shao Yang worked for a man whom he knew as "Xiao Hu". He came to know Xiao Hu about six months after meeting Tan.

(b) Xiao Hu had previously loaned him RM800. He felt indebted to Xiao Hu even after repaying the loan, and had therefore performed errands for Xiao Hu, including purchasing paper boxes, cartons of black sticky tape and Ziploc bags. He had also helped Xiao Hu to pack pills and white substances. He had been told that these were sexual enhancement pills and solidified fragrance oils, but he suspected that they were drugs.

(c) He had previously seen the Jorano bag of drugs at Xiao Hu's home. However, in relation to the drug exhibits found inside that bag, he stated:

> … I had never seen or touched them before. I am also sure that these items were not wrapped by me. I am also sure that I was not the one who asked [Tan] to deliver these items …

Similarly, in relation to the Blue Bag and its contents, he said that he had "never seen nor touch[ed] them before …".

(d) He had previously seen bundles similar to the seized drug exhibits at Xiao Hu's residence, but Xiao Hu had told him not to touch them.

21 On 9 October 2015, the Appellant provided three cautioned statements to the CNB. In these statements, he denied the charges against him. He said that he had nothing to do with the drugs in the Ten Bundles, although he knew Tan as a friend.

The DNA evidence

22 The DNA Profiling Laboratory of the HSA ("the Laboratory") analysed, among other items, A1, A1A, A1B, A1C, A1D, A1D1, A1E, A1F, A1G, B, B1, B2 and B3. These were the Jorano bag of drugs (A1), the Blue Bag (B), the cling wrap-cum-black tape coverings of the Ten Bundles (A1A, A1B, A1C, A1D, A1E, A1F, A1G, B1, B2 and B3) and the separate piece of cling wrap found in the bundle covered by A1D (A1D1). The findings of this analysis were set out in two reports dated 9 September 2014 and 13 November 2014 respectively ("the DNA Reports").

23 The DNA Reports indicate that the Laboratory took swabs of various surfaces of the drug exhibits, extracted DNA from the swabs and then amplified the extracted DNA to obtain DNA profiles. These DNA profiles were then compared with DNA profiles obtained from blood specimens taken from the Appellant and Tan to ascertain whether their DNA was found on the drug exhibits.

24 Before we set out the findings in the DNA Reports, we briefly describe how the cling wrap and black tape used to cover each bundle of drugs were

applied. The cling wrap was first used to cover each Ziploc bag or packet of drugs. The black tape was then applied continuously over the cling wrap several times, thus forming layers of tape. Only the *non-adhesive* side of the outermost layer of tape would have been exposed to contact with any person handling the Ten Bundles after they had been wrapped as aforesaid.

25 The Laboratory took swabs of five areas of the materials used to cover each bundle of drugs:

(a) Area 1 – This was the exterior surface of each bundle before it was dismantled; in other words, it was the *non-adhesive* side of only the outermost layer of tape around each bundle.

(b) Area 2 – This was the innermost surface of the covering of each bundle, that is, the side of the cling wrap that was in contact with the Ziploc bag or packet of drugs contained within the bundle.

(c) Area 3 – This was the *adhesive* side of the entirety of the tape used to cover the cling wrap around each bundle. By definition, this area was different and distinct from the *non-adhesive* side of the outermost layer of tape around each bundle (Area 1). However, it included the *adhesive* side of the strips of tape constituting Area 1.

(d) Area 4 – This was the *non-adhesive* side of the entirety of the tape used to cover the cling wrap around each bundle. In short, this was the back of Area 3 and it therefore included Area 1.

(e) Area 5 – This was the entirety of the cling wrap around each bundle. It comprised both the side of the cling wrap that was in contact

with the Ziploc bag or packet of drugs contained within each bundle (Area 2), as well as the side that was not in contact.

26 Significantly, Ms Tang Sheau Wei June ("Ms Tang"), the HSA analyst who prepared the DNA Reports, testified that for each bundle of drugs, the Laboratory swabbed at the same time the entire area of tape constituting Area 3 (and the entire area of tape constituting Area 4). Hence, where DNA was found on Area 3 on a particular bundle of drugs, there was no further evidence as to where exactly on Area 3 the DNA was found. The evidence did not indicate whether the DNA was found on Area 3 of the outermost layer of tape around that bundle, or on Area 3 of the layers of tape beneath that.

27 Tan's DNA was found at the following points on the Ten Bundles:

(a) Area 1 – Tan's DNA was found on Area 1 on nine of the bundles, namely, the bundles covered by A1A, A1B, A1C, A1D, A1E, A1F, A1G, B1 and B3.

(b) Area 3 – Tan's DNA was found on Area 3 on five of the bundles, namely, the bundles covered by A1A, A1D, A1E, A1G and B1.

(c) Area 4 – Tan's DNA was found on Area 4 on eight of the bundles, namely, the bundles covered by A1A, A1B, A1C, A1D, A1E, A1G, B1 and B2.

Tan's DNA was not found on either Area 2 or Area 5 on any of the Ten Bundles. In addition, his DNA was found on the exterior surfaces, interior surfaces and handles of the Jorano bag of drugs, but not on the Blue Bag.

28 The Appellant's DNA was found on three of the Ten Bundles, namely, the bundle covered by A1F (Area 3), the bundle covered by A1G (Areas 2, 4 and 5) and the bundle covered by B3 (Area 4). The Appellant's DNA was not found on the Jorano bag of drugs at all, nor was it found on the Blue Bag.

The Handphone Evidence

29 For the purposes of these grounds of decision, it will suffice for us to set out in brief the following aspects of the Handphone Evidence. We deliberately refrain from saying more about this evidence since it will likely feature prominently at the retrial of this matter.

30 First, on 21 February 2014 between 6.08am and 6.10am, three messages were sent from the Untraced Number to TKH-HP2. These were the Delivery Messages. The Untraced Number was saved in TKH-HP2 under the contact name "Ah Jun" (in Mandarin). The relevant translated portions of the Delivery Messages read as follows:

(a) "A = 98944027";

(b) "83046830, collect whatever amount given";

(c) "Do a's first".

It was undisputed that the handphone number "98944027" belonged to Low.

31 Second, the Untraced Number was saved in JJ-HP1, the Appellant's Nokia handphone. The contact name assigned to the Untraced Number was the Chinese character "我", which means "I (or Me)". According to the Appellant,

the Untraced Number belonged to Xiao Hu, and it was Xiao Hu who had saved the number in JJ-HP1 under the Chinese character for "I (or Me)".

32 Third, the Untraced Number was found in JJ-HP3, one of the Appellant's Samsung handphones, where it was reflected as belonging to a Facebook contact named "Akira Akimoto". Five Facebook Messenger messages were received on JJ-HP3 from "Akira Akimoto" on 25 March 2014. Notably, these five messages ("the Akira Akimoto Messages") were not translated. The Appellant testified that they were sent by Xiao Hu in a group conversation on Facebook. The Prosecution did not cross-examine the Appellant on these messages in the proceedings below.

33 Fourth, the number of JJ-HP1, +601 67604280, was saved in TKH-HP1 and TKH-HP3 under the contact names "Ah Jun" and "Ah Jun 1" (in Mandarin) respectively.

34 Fifth, on 20 and 21 February 2014, calls were made from TKH-HP3 to the Untraced Number, as well as from the Untraced Number to TKH-HP3.

The proceedings below

The parties' cases

35 The Prosecution's case at the trial was as follows:

(a) On 20 February 2014, the Appellant and Tan hatched a plan for Tan to deliver drugs in Singapore the next day.

(b) Pursuant to this plan, on the morning of 21 February 2014, the Appellant handed Tan the Jorano bag of drugs with the Ten Bundles

inside. The Ten Bundles had all been pre-packed, and Tan had not been involved in the packing of any of these bundles.

(c) After Tan entered Singapore, the Appellant sent him the Delivery Messages to inform him of the contact details of the intended recipients of the drugs and the sequence in which he was to deliver the drugs. Tan then separated the Ten Bundles and prepared them for delivery pursuant to the Appellant's instructions.

(d) Subsequently, Tan delivered the bundles of diamorphine to Low; he was also in possession of the bundles of methamphetamine for the purposes of trafficking. All this was done in furtherance of the common intention of both the Appellant and Tan.

36 We make two observations about the Prosecution's case:

(a) First, we initially found it unclear what the exact scope of the Prosecution's case against the Appellant at the trial was. At the first hearing of this appeal, we asked Deputy Public Prosecutor Mr Mark Tay ("Mr Tay") whether he accepted that: (i) the Prosecution's case stood or fell on whether, as Tan claimed, the Appellant had given Tan the Jorano bag of drugs; and (ii) the Appellant's burden was only to raise a reasonable doubt on that issue. Mr Tay replied in the affirmative. On this basis, the proper order would have been to acquit the Appellant given our analysis below. However, Mr Tay's answer was inconsistent with the materials before us. We thus decided to seek clarification from the Prosecution; we directed queries to the parties and invited them to make submissions in response to our queries. The Prosecution then clarified, in its first set of further submissions in response to our queries, that its

reply at the first hearing of this appeal "was incorrect, and, to that extent, inappropriate". Reference was made to the Opening Address, which laid out the two facets of the Prosecution's case against the Appellant mentioned at [7] above, namely: (i) that he had given Tan the Jorano bag of drugs; and (ii) that he had sent Tan the Delivery Messages. The Defence did not deny in its submissions that the Prosecution's case at the trial comprised these two facets. We were therefore satisfied that the Prosecution's case did consist of these two elements.

(b) However, and critically, it was clear from the Opening Address and the record of proceedings that at the trial, the Prosecution *never* advanced the two individual facets of its case as *independent* bases for convicting the Appellant. More specifically, the Prosecution did not advance the Alternative Case as we have defined it (see [7] above). Rather, as the Prosecution put it in its second set of further submissions in response to our queries, its case against the Appellant "comprised of [*sic*] a singular narrative". The two components of that narrative were never distinguished and put forward to be assessed *standing on their own*. This aspect of the Prosecution's case flowed from its unyielding position at the trial that Tan was an entirely credible witness. Given that firm position, the Prosecution could not have advanced the Alternative Case, which proceeded on the premise that, *contrary to Tan's evidence*, the Appellant had not given Tan the Jorano bag of drugs with the Ten Bundles already inside and pre-packed.

37 We now turn to the Appellant's case at the trial. In brief, the Appellant's defence was that he had not entered into a plan with Tan for the latter to deliver the drugs in the Ten Bundles. It was Xiao Hu, to whom the Untraced Number

belonged, who had made such a plan with Tan. The principal line of attack that the Appellant deployed against the Prosecution's case was to challenge Tan's evidence that the Appellant had handed him the Jorano bag of drugs on the morning of 21 February 2014. In this regard, the Appellant argued that Tan's evidence was completely inconsistent with the DNA evidence and should therefore be rejected.

The Judge's decision

38 The Judge's reasons for convicting the Appellant (as well as Tan) are found in *Public Prosecutor v Tan Kah Ho and another* [2017] SGHC 61 ("the Judgment").

39 As we have noted, the Appellant and Tan were tried together in a joint trial (see [2] above). The Judge first dealt with the charges against Tan. Tan's defence was that he had not known the quantity of drugs he was carrying or the penalties for drug trafficking (see [9] of the Judgment). The Judge rejected this defence, relying on, among other things, Tan's admissions in his statements to the CNB and the presumption of knowledge under s 18(2) of the MDA (see [10]–[11] of the Judgment).

40 The Judge then found that Tan's role had been limited to that of transporting, sending or delivering the drugs within the meaning of s 33B(2)(*a*)(i) of the MDA (see [12] of the Judgment), and rejected the Appellant's central contention that the DNA evidence showed that Tan had been intimately involved in packing the drugs. In coming to this conclusion, the Judge analysed the DNA evidence in the following way:

(a) First, Tan said that he had handled the Ten Bundles in separating them for the two intended recipients (see [16(d)] above). This was consistent with his DNA being found on the exterior surfaces of some of the bundles.

(b) Second, the Judge noted that Tan's DNA had been found on Area 3, the adhesive side of the entirety of the tape used to cover the cling wrap around each bundle (see [25(c)] above), on the bundle covered by A1A and the bundle covered by B1. He observed from the photographs of these two bundles that they "[did] not appear to have been packed very tidily, with the edges of the bundle[s] not entirely sealed up" (see [12] of the Judgment). He gave Tan the benefit of the doubt that his DNA "may have been left on the adhesive side of the black tapes [*sic*] at the ends of the bundle[s] when he was handling them for delivery".

41 The Judge then considered the Appellant's principal defence that he had not handed Tan the Jorano bag of drugs on the morning of Tan's arrest. He observed that the probative value of the DNA evidence had to be examined against the rest of the evidence (see [15] of the Judgment), and noted the following points:

(a) Tan had identified the Appellant without hesitation or qualification as the "Ah Jun" who had handed him the Jorano bag of drugs (see [15] of the Judgment).

(b) The evidence from Tan's handphones corroborated his account. The calls from the Untraced Number to TKH-HP3 and vice versa on 20 and 21 February 2014 (see [34] above) showed that Tan had been in

"constant communication" with the Appellant on those two days (see [15] of the Judgment). In this regard, the Judge accepted Tan's evidence that the Untraced Number was the Appellant's number. Further, the Delivery Messages (see [30] above) corroborated Tan's evidence on the instructions which he had received from the Appellant after arriving in Singapore (see [16] of the Judgment).

(c) The number of the Appellant's Nokia handphone, JJ-HP1, was saved in two of Tan's handphones as "Ah Jun" and "Ah Jun 1" respectively (see [33] above). This showed that Tan knew the Appellant as Ah Jun (see [17] of the Judgment).

(d) The Untraced Number was saved in JJ-HP1 as a contact, and the contact name assigned to it was a Chinese character meaning "I (or Me)" (see [31] above). The "clear inference" from this was that the Untraced Number belonged to the Appellant. The Judge accepted the Prosecution's contention that the Appellant had saved the Untraced Number in JJ-HP1 because he had at least three handphones and had to remind himself of what these handphones' numbers were. He rejected as "patently absurd" the Appellant's contention that it was Xiao Hu, to whom the Untraced Number allegedly belonged, who had saved that number in JJ-HP1 under the contact name "I (or Me)" (see [18] of the Judgment).

(e) The Untraced Number was saved in one of the Appellant's Samsung handphones, JJ-HP3, as belonging to one "Akira Akimoto", and Facebook Messenger messages (that is, the Akira Akimoto Messages) had been received on JJ-HP3 from that number (see [32]

above). These messages were, however, "of little assistance" to the Appellant as they had not been translated (see [19] of the Judgment).

42 In the round, the Judge rejected the Appellant's defence and found that the Prosecution had proved its case against him beyond reasonable doubt.

The parties' submissions on appeal

43 We now set out the parties' submissions on appeal, which developed in response to the queries that we directed to them.

The submissions at the first hearing

44 At the first hearing of this appeal, the Appellant's main submission was that the Judge had not given due weight to the DNA evidence. He emphasised that his DNA had not been found on the Jorano bag of drugs nor on the covering materials of most of the Ten Bundles in that bag, whereas Tan's DNA had been found on numerous parts of the *inner* surfaces of the materials covering those bundles. This showed that Tan must have packed most or all of the Ten Bundles. Hence, Tan's account that: (a) on the morning of his arrest, the Appellant had given him the Jorano bag of drugs with the Ten Bundles already inside and pre-packed; and (b) he (Tan) had not been involved in packing those bundles could not be correct. The Judge had thus erred in accepting Tan's evidence.

45 The Appellant also argued that the Judge had erred in reasoning that Tan's DNA had been found on Area 3 on the bundles covered by A1A and B1 because Tan might have touched the adhesive side of the tape at the edges of those bundles when he was handling them for delivery (see [40(b)] above). The Appellant submitted that this conclusion was not supported by Ms Tang's evidence.

46 In addition, the Appellant contended that the Handphone Evidence could not sustain his conviction on the charges proceeded with. This was because the Prosecution's case rested on the credibility of Tan's evidence, and the Handphone Evidence was adduced only to corroborate Tan's account. Once Tan's account was impugned by the DNA evidence, it fell away and there was nothing left for the Handphone Evidence to corroborate.

47 As for the Prosecution, its position at the first hearing of this appeal was that Tan's evidence implicating the Appellant was not only credible in *all* respects, but also internally and externally consistent, and the court should therefore affirm the Appellant's conviction on the charges proceeded with. In particular, the Prosecution sought to uphold the Judge's finding that Tan's DNA had been detected on Area 3 on the bundles covered by A1A and B1 because Tan might have touched the adhesive side of the tape at the edges of those bundles while he was handling them for delivery.

The first set of further submissions

48 As alluded to at [36(a)] above, after the first hearing of this appeal, we directed the parties to make submissions on whether the Appellant's conviction could be upheld on the basis that he had sent Tan the Delivery Messages, even if there was a reasonable doubt as to whether he had given Tan the Jorano bag of drugs.

49 The Appellant submitted that there was insufficient evidence to uphold his conviction merely on the basis that he had sent Tan the Delivery Messages. He reiterated that the Prosecution's case against him "rested entirely on the credibility of its main witness Tan", such that once Tan's credibility was undercut, the evidence against him could not support a conviction. The

Appellant stressed two points in particular. First, Tan claimed that the person who had handed him the Jorano bag of drugs was the very same person who had sent him the Delivery Messages. Hence, once a reasonable doubt arose over whether the Appellant had given Tan the Jorano bag of drugs, this affected not just that component of the Prosecution's case, but also the facet of the Prosecution's case which rested on the Appellant's alleged sending of the Delivery Messages to Tan. Second, the Akira Akimoto Messages, which the Appellant had received on JJ-HP3 from "Akira Akimoto" (the contact name for the Untraced Number on JJ-HP3 (see [32] above)), indicated that the Untraced Number did not belong to the Appellant, because if that number did belong to him, it would mean that he had been talking to himself in a Facebook group chat. Although this was not impossible, it was "highly unlikely".

50 As noted at [36(a)] above, the Prosecution clarified, in its first set of further submissions in response to our queries, that its case against the Appellant comprised two facets. Notably, the Prosecution then accepted that there was a reasonable doubt as to whether the Appellant had given Tan the Jorano bag of drugs, which was the first facet of its case. This was a departure from its stance at the first hearing of this appeal (see [47] above), and for the reasons given below, this concession was, in our judgment, well founded. Having made this concession, however, the Prosecution then submitted that the evidence established beyond reasonable doubt that the Appellant had Tan sent the Delivery Messages, and the Appellant's conviction should be affirmed on this basis.

The second set of further submissions

51 It appeared from the last-mentioned submission by the Prosecution that, having conceded that there was a reasonable doubt as to whether the first facet

of its case was made out, it was advancing the Alternative Case (as we have defined it at [7] above) to uphold the Appellant's conviction. We were troubled by this because it was unclear from the record of proceedings that the Prosecution had clearly set out the Alternative Case at the trial, and it was thus also unclear whether the Defence knew that it would have to confront that case at the trial. Moreover, it appeared to us that if the Prosecution had put forth the Alternative Case in the court below, the evidence – and, in particular, the cross-examination of Tan – might well have unfolded differently. We therefore sought clarification from the parties as to: (a) whether the Prosecution had advanced the Alternative Case at the trial; (b) whether the Defence had known at the trial that it was facing that case; and (c) in view of the Prosecution's concession that there was a reasonable doubt as to whether the Appellant had given Tan the Jorano bag of drugs, whether the Defence might now have lines of cross-examination open to it that it would not have had or might not reasonably have pursued at the trial.

52 In reply, the Appellant maintained that the Prosecution's case against him was founded on Tan's credibility, and submitted that since it was plain that Tan was not a witness of credit, even if additional lines of cross-examination were now open to him, he would decline to cross-examine Tan "on the issue of whether he [had] dealt with more than one 'Ah Jun' for the purpose of his drug trafficking activities". The Appellant also appeared to acknowledge at one point that the Alternative Case "was … implied based on the manner in which [the Prosecution] cross-examined the Appellant" at the trial.

53 As we have noted, the Prosecution took the position, in its reply to our queries, that it had advanced a single composite case against the Appellant at the trial (see [36(b)] above). It was implicit in this that the Prosecution had not

put forth the Alternative Case at the trial. The Prosecution contended that it could not be said to be running an alternative case against the Appellant on appeal because it had always been part of its case that the Appellant had Tan sent the Delivery Messages, and the Appellant had been aware of this. Accordingly, the Appellant could not have been taken by surprise by the Prosecution's reliance on this facet of its case as a basis for upholding his conviction on appeal.

54 Having reviewed the parties' further submissions, we decided to hold a second hearing of this appeal to clarify two issues:

(a) First, did the Defence know that it was facing and was it ready to meet the Alternative Case at the trial? Although the Appellant appeared to acknowledge at one point that he had known that he was facing the Alternative Case at the trial (see [52] above), we struggled to accept this because the Prosecution's further submissions in reply to our queries revealed that it had *not* advanced the Alternative Case in the court below (see [36(b)] and [53] above).

(b) Second, would the Defence have cross-examined Tan any differently at the trial if it had known that it would be facing the Alternative Case? As noted at [52] above, the Appellant stated that even if there were now new lines of cross-examination open to him, he would decline to cross-examine Tan on the specific issue of whether the latter had dealt with more than one "Ah Jun" for the purposes of his drug trafficking activities. It was unclear from this whether the Appellant meant that he also did not wish to cross-examine Tan further on any aspect of the Alternative Case.

The submissions at the second hearing

55 At the second hearing before us, counsel for the Appellant, Mr Chua Eng Hui ("Mr Chua"), clarified that the Defence had not known that it was facing, nor had it been prepared to meet, the Alternative Case at the trial. He also stated that if he had known that the Prosecution would be advancing the Alternative Case, this would have affected his cross-examination of Tan in relation to the Delivery Messages.

56 Mr Tay – who, we note, was not the Deputy Public Prosecutor who had conduct of the Prosecution's case at the trial – sought initially to persuade us that the Defence could not have been taken by surprise by the Prosecution's reliance on the Alternative Case on appeal. Nevertheless, he then accepted very fairly that Mr Chua had said that he would have cross-examined Tan very differently if he had known that the Prosecution would be pursuing the Alternative Case, and that Mr Chua's position was not so unreasonable that we could reject it out of hand.

The issues for determination

57 There were ultimately two main issues in this appeal:

(a) First, was there a reasonable doubt as to whether the Prosecution had established the first component of its case against the Appellant, namely, that the Appellant had given Tan the Jorano bag of drugs ("Issue 1")?

(b) Second, in view of the answer to Issue 1, what was the appropriate outcome in this appeal ("Issue 2")?

Issue 1: Did the Appellant give Tan the Jorano bag of drugs?

58 As we noted earlier, the Prosecution itself accepted that a reasonable doubt had arisen as to whether the Appellant had given Tan the Jorano bag of drugs as Tan claimed (see [50] above). This concession was eminently justified because the presence of Tan's DNA on Area 3 on five of the Ten Bundles (see [27(b)] above) raised serious doubts over Tan's account of how he came into possession of the drugs. We will elaborate.

59 To recapitulate, Area 3 consisted of the *adhesive* side of the entirety of the tape covering the cling wrap around each bundle of drugs (see [25(c)] above). Area 3 was distinct from the exterior surface of each bundle, which was made up of the *non-adhesive* side of only the outermost layer of tape, that is, Area 1 (see [25(a)] above). Hence, a courier who merely handled the Ten Bundles in the course of separating them for their intended recipients – which was the extent to which Tan claimed he had handled the bundles (see [16(d)] above) – would not and, on the basis of the evidence before the court, could not have touched Area 3, the adhesive side of the tape. It bears repeating that such a courier would only have touched the *non-adhesive* side of the tape. Accordingly, the courier's DNA would only have been found on Area 1 and, conceivably, Area 4, which included Area 1 (see [25(d)] above), where the same portions of tape that constituted Area 1 were picked up by the Laboratory again when it took swabs of Area 4 for DNA testing (see [26] above). The courier's DNA would not and could not have been found on Area 3, which, by definition, was beneath the exterior surface of each bundle of drugs.

60 However, as we have just highlighted (see [58] above), Tan's DNA was found on Area 3 on *five* of the Ten Bundles (see [27(b)] above). Notably, the Judge concentrated on the fact that Tan's DNA was found on Area 3 on the

bundle covered by A1A and the bundle covered by B1 (see [40(b)] above). It seemed that he did not find it material that Tan's DNA was found on Area 3 on three other bundles of drugs, namely, the bundles covered by A1D, A1E and A1G (see [27(b)] above), because the charges which the Prosecution proceeded with at the trial did not involve the drugs in those bundles (see [2] of the Judgment). But, with respect, this missed a critical point raised by the Defence. Tan did not say that he *had* been involved in packing the bundles covered by A1D, A1E and A1G. Instead, he claimed that he had *not* packed *any* of the Ten Bundles. The evidence that his DNA was found on Area 3 on the bundles covered by A1D, A1E and A1G was directly relevant to and, indeed, undermined the credibility of that assertion, and his testimony should have been assessed in the light of that evidence as well.

61 In our judgment, in the absence of some reasonable explanation as to why Tan's DNA was found on Area 3 on five of the Ten Bundles, that DNA evidence strongly suggested that Tan had been more intimately involved in the preparation of the Ten Bundles than he claimed at the trial. This was because in the absence of such an explanation, the only plausible reason for the presence of Tan's DNA on Area 3 – which, we reiterate, was *beneath* the exterior surface of each bundle of drugs – on any of the Ten Bundles was that he had actually been involved in preparing or packing at least some of these bundles.

62 Admittedly, Tan's DNA was not found on Areas 2 and 5 on any of the Ten Bundles (see [27] above). However, as we noted in *Gopu Jaya Raman v Public Prosecutor* [2018] 1 SLR 499 at [82], there could be many reasons for the absence of a subject's DNA from an exhibit, including the degradation of DNA samples by intentional or unintentional means. It therefore could not be concluded, merely from the absence of Tan's DNA on Areas 2 and 5 on the Ten

Bundles, that Tan had not been involved in preparing the bundles at all. Unlike the absence of DNA evidence, which is neither conclusive nor even necessarily probative, the presence of DNA is generally probative because it tends to establish that the subject did in fact come into contact with the surface or point where his DNA was found. In this case, the presence of Tan's DNA on Area 3 on five of the Ten Bundles strongly suggested that he had been involved in packing or preparing at least some of these bundles.

63 The critical point was that this evidence had an important bearing on the first element of the Prosecution's case as it cast serious doubt on Tan's assertion that on the morning of his arrest, the Appellant had given him the Jorano bag of drugs with the Ten Bundles already inside and pre-packed (see [16(c)] and [35(b)] above). It seemed, on the contrary, that Tan had been involved in preparing some or all of the Ten Bundles prior to his arrest on 21 February 2014, and might even have had some or all of these bundles in his possession before that. In our judgment, this was a real possibility that could not be discounted. Hence, without any reasonable explanation of why Tan's DNA was found on Area 3 on five of the Ten Bundles, the presence of his DNA there created a reasonable doubt over his account that on the morning of his arrest, the Appellant had given him the Jorano bag of drugs, which drugs he had not previously handled or packed.

64 The Judge did not overlook the fact that Tan's DNA was found on Area 3 on five of the Ten Bundles. He dealt with this evidence, however, by noting that there could be an explanation for the presence of Tan's DNA on the two bundles of drugs to which he applied his mind, these being the bundles covered by A1A and B1. He observed that it appeared from the photographs of these two bundles that there were edges of tape sticking out of the ends of these

bundles, and thought that Tan might have left his DNA on the adhesive side of those edges of tape while he was handling these bundles for delivery (see [40(b)] above).

65 With respect to the Judge, his reasoning on this point was flawed for two reasons. The first was one of evidence. Although Tan stated in his long statement of 24 February 2014 that he had handled the Ten Bundles in separating them for their intended recipients (see [16(d)] above), at the trial, no evidence was elicited from him as to how exactly he had handled these bundles, and, in particular, whether he had touched the adhesive side (that is, Area 3) of any edges of tape sticking out of the ends of the bundles covered by A1A and B1. More importantly, there was not a shred of evidence that Tan's DNA was found specifically and exclusively at those particular parts of Area 3 on these two bundles. The evidence was simply that Tan's DNA was found on Area 3 on the bundles covered by A1A and B1 (as well as on the bundles covered by A1D, A1E and A1G). We reiterate that Area 3 comprised the adhesive side of the entire portion of tape used to cover the cling wrap around each bundle of drugs (see [25(c)] above); and where DNA was found on Area 3 on a particular bundle of drugs, there was no further evidence as to where exactly on Area 3 the DNA was found (see [26] above).

66 To put it another way, the Judge's explanation for the presence of Tan's DNA on the bundles covered by A1A and B1 rested on three findings:

(a) there were edges of tape sticking out of the ends of these two bundles (we note here that the Judge made this finding even though he was not in a position to physically examine these bundles and was deducing this from the photographs of these bundles);

(b) Tan's DNA was found only on Area 3 of those particular edges of tape, and not anywhere else on Area 3 on these two bundles; and

(c) Tan's DNA was found on Area 3 of the aforesaid edges of tape because he might have touched that adhesive surface while he was handling these two bundles for delivery.

There was, however, no sufficient evidence for *any* of these findings.

67 In view of this, it was plain that there was simply no adequate evidential basis to support the way in which the Judge reconciled the presence of Tan's DNA on Area 3 on the bundles covered by A1A and B1 with Tan's evidence as to how he had come into possession of the drugs in the Ten Bundles. In these circumstances, there was at least some doubt as to how Tan had come into contact with the adhesive side of the tape around the bundles covered by A1A and B1. The Judge justified his analysis on the basis that he was giving the benefit of the doubt to Tan; but his approach in fact implicitly gave the benefit of that doubt to the Prosecution for the purposes of its case against *the Appellant*. We could not accept this for two reasons:

(a) First, in our judgment, once it was established that Tan's DNA was found on Area 3 on five of the Ten Bundles, the evidential burden shifted to the Prosecution to explain this. If the Prosecution failed to discharge this burden, any doubt arising from this evidence should have been resolved in favour of the Appellant. Yet, in this case, the Prosecution, with respect, did *nothing* to address this point beyond associating itself, at the first hearing of this appeal, with the speculative explanation that the Judge had arrived at. And, as we noted at [50] above, the Prosecution eventually conceded that that explanation could

not stand and accepted that there was a reasonable doubt as to whether the Appellant had handed Tan the Jorano bag of drugs.

(b) Second, the Appellant had absolutely no control over how the DNA evidence was obtained and presented at the trial. It was wholly outside his power to establish where exactly on the Ten Bundles Tan's DNA was found. It was not even possible for him to have arranged for his own DNA analysis, even assuming he had the means to do so. By contrast, the Prosecution had control over the investigations. We imagine that it could have directed the DNA analysis to be carried out in such a way that would have enabled the court to identify, in respect of any bundle of drugs where Tan's DNA was found on Area 3, where exactly on Area 3 the DNA was found. And if that were not in fact possible, the Prosecution should have faced up to the limitations of the evidence. To be clear, we accept that gathering DNA evidence in such a precise manner might have been logistically difficult. We also appreciate that the exact location of a subject's DNA on an exhibit may not be material in many cases; and in cases where it is material, the Prosecution may not appreciate its relevance until after the evidence has been gathered, at which point it may be too late to undertake the necessary investigations. Notwithstanding that, it is wrong, in our judgment, to resolve any doubt in such circumstances in the Prosecution's favour, and all the more so when the accused has no control at all over the conduct of the investigations.

68 In fairness to the Judge, we should say that he might not have appreciated the full implications of how he accounted for the presence of Tan's DNA on Area 3 on the bundles covered by A1A and B1 for the following

reason. He dealt with this particular piece of evidence in coming to his conclusion that Tan had acted only as a courier (see [12] of the Judgment). As we noted above, the language which he used in that context was that of giving *Tan*, and not the Prosecution, the benefit of the doubt. That was understandable in the context of a finding as between the Prosecution and Tan that on the balance of probabilities, Tan had merely acted as a courier.

69 But the presence of Tan's DNA on Area 3 on the bundles covered by A1A and B1 was relevant in a second way. It also undercut the Prosecution's case against *the Appellant* because it went to the credibility of Tan's evidence that on the morning of his arrest, the Appellant had given him the Jorano bag of drugs with the Ten Bundles already inside and pre-packed (see [63] above). It is clear from the Judge's summary of the Appellant's defence that he understood this aspect of the Appellant's case (see [13] of the Judgment). However, it seemed to us that, with respect, he failed to see that where the Prosecution's case against the Appellant was concerned, to reason as he did was to give the *Prosecution* the benefit of the doubt arising from the presence of Tan's DNA on Area 3 on the bundles covered by A1A and B1.

70 This flaw in the Judge's reasoning illustrates a more general point that we wish to emphasise. In joint trials, especially those involving accused persons charged with capital offences under the MDA, findings in favour of one accused person may implicitly amount to findings in favour of the Prosecution where its case against the other accused person(s) is concerned. Trial courts must exercise great care in making such findings. It should always be borne in mind that the Prosecution bears the burden of proving the guilt of *each* accused person beyond reasonable doubt.

71 We now come to the second difficulty with the Judge's reasoning, which is related to but distinct from the first. During the trial, the Prosecution did not seek to advance any explanation as to why Tan's DNA was found on Area 3 on five of the Ten Bundles. For the reasons given at [60]–[63] above, this was a serious gap in the Prosecution's case against the Appellant. In these circumstances, we did not think the Judge was entitled to fill in this significant lacuna in the Prosecution's case *even assuming there was some evidential basis for him to do so*.

72 We accept that a trial court may draw inferences from the evidence on its own motion. A factual finding is not open to challenge merely because it is in favour of a party who did not submit that such a finding should be made. However, in our judgment, in the context of a criminal trial, *a trial court should generally not make a finding that resolves against the accused what would otherwise amount to a vital weakness in the Prosecution's case when the Prosecution itself has not sought to address that weakness by leading evidence and making submissions to support such a finding*. This is so for two reasons.

73 First, this conclusion follows from the requirement that the Prosecution must prove the guilt of the accused beyond reasonable doubt. This point was made by V K Rajah J (as he then was) in *Jagatheesan s/o Krishnasamy v Public Prosecutor* [2006] 4 SLR(R) 45 ("*Jagatheesan*"), the facts of which are somewhat similar to those in this appeal. In *Jagatheesan*, the CNB arrested a suspected supplier of drugs ("Guna") who implicated the appellant as his own drug supplier. The appellant was subsequently charged with two counts of trafficking in controlled drugs. The Prosecution's case against the appellant at the trial rested solely on Guna's testimony: see *Jagatheesan* at [27]. The trial judge found that Guna was a forthright witness and convicted the appellant, but

his decision was overturned on appeal. In brief, the High Court found that Guna was not a credible witness. His evidence was thus not sufficiently compelling to prove the appellant's guilt beyond reasonable doubt. What is pertinent for present purposes is Rajah J's discussion of the principle that the Prosecution must prove its case against an accused person beyond reasonable doubt. Having observed that this principle embodies the presumption of innocence, Rajah J stated at [59]:

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

74 The proposition that a trial court may not fill in gaps in the Prosecution's case was reaffirmed a year later by the High Court in *Sakthivel Punithavathi v Public Prosecutor* [2007] 2 SLR(R) 983 ("*Sakthivel*"). The appellant in that case was convicted of one count of voluntarily causing hurt to her domestic maid after a trial which had essentially turned on her word against that of her domestic maid (see *Sakthivel* at [55]) In considering the appellant's appeal against her conviction and sentence, V K Rajah JA made the following pertinent observations at [81]:

> … [I]t is a matter of considerable significance, in a case such as this, *to emphasise and ensure that the criterion of proof of guilt beyond reasonable doubt prohibits the trial judge from filling in the gaps in the Prosecution's case on her own initiative and through conjecture or supposition* … [emphasis added]

75 Rajah JA allowed the appellant's appeal for the following reasons (see *Sakthivel* at [104]):

> The Prosecution has failed to appropriately and adequately dispel the many doubts clouding and confounding its case theory. Further, *there are serious gaps in the Prosecution's case, which the trial judge should not have sought to supplement by resorting to and relying on unverifiable inferences and suppositions. Findings on these issues should be supported and substantiated by wholly verifiable facts and inferences, rather than conjecture, and are fundamental in assessing whether the Prosecution's burden of proof has been properly discharged. …* [emphasis added]

76 We agree with and endorse the sentiments expressed in *Jagatheesan* and *Sakthivel*. The principle that the Prosecution must prove the guilt of the accused beyond reasonable doubt is a cornerstone of our criminal law. That principle implies that it is incumbent on the Prosecution, and not the court, to address any weakness in the evidence that the Prosecution adduces, failing which the Prosecution must accept the consequences that follow for its case against the accused.

77 In our judgment, there is also a second reason for this conclusion. Fairness to the accused demands that he should have the opportunity to address every vital aspect of the factual basis on which he is convicted. This follows from the more general principle referred to at [1] above that the accused should know with certainty, and thus be in a position to meet, the Prosecution's case against him. Where there is what seems to be an important weakness in the Prosecution's case which the Prosecution does not address, it would generally be unfair to the accused for a court to make a finding that is adverse to the accused in respect of that weakness if the case in favour of such a finding has not been presented at the trial. In such a situation, the accused would not have had the opportunity to challenge the basis of the adverse finding in cross-

examination. Adopting a case theory that the accused did not have the chance to rebut would be fundamentally unfair to him. This unfairness is compounded if there are reasons why the Prosecution has chosen not to advance a particular case theory that might seem attractive to a trial judge. The court might not appreciate those reasons since it does not have access to all the information gleaned in the course of the investigations. There is therefore a real danger that a court might unknowingly be adopting a case theory that may not in fact be factually sound and perhaps was not pursued by the Prosecution for that reason.

78 For these reasons, in our judgment, it was not appropriate for the Judge to account for the presence of Tan's DNA on Area 3 on the bundles covered by A1A and B1 in the way that he did.

79 No other explanation was offered by the Prosecution as to why Tan's DNA was found on Area 3 on the two aforesaid bundles (as well as on the bundles covered by A1D, A1E and A1G). In these circumstances, the presence of Tan's DNA on Area 3 on these five bundles gave rise to a reasonable doubt as to whether the Appellant had given Tan the Jorano bag of drugs on 21 February 2014 as Tan claimed (see [63] above). In the end, the Prosecution conceded this. For the reasons that we have set out above, the Prosecution was, in our judgment, entirely right to concede the point, even if it did so belatedly.

Issue 2: The appropriate outcome in this appeal

80 The issue that then arose was whether we should examine the evidence to determine whether it had been established beyond reasonable doubt that the Appellant had sent Tan the Delivery Messages. As we have noted, the Prosecution submitted that the Appellant's conviction should be upheld on this basis (see [50] above).

81 Having carefully considered the point, we decided not to go on to assess whether, on the evidence before us, the Prosecution had proved beyond reasonable doubt that the Appellant had sent Tan the Delivery Messages. In seeking to uphold the Appellant's conviction on this basis, the Prosecution was relying on the Alternative Case (as we have defined it at [7] above). In our judgment, it would have been wrong in principle for us to affirm the Appellant's conviction on that basis in the light of the following two considerations:

(a) First, the Prosecution did not clearly advance the Alternative Case at the trial.

(b) Second, if the Prosecution had clearly advanced the Alternative Case in the court below, the evidence might well have unfolded differently.

82 We elaborate on these points in turn below.

The Prosecution did not clearly advance the Alternative Case at the trial

83 First, the Prosecution never *expressly* sought a conviction of the Appellant on the basis that even if he had not given Tan the Jorano bag of drugs, he was liable to be convicted on the *stand-alone* basis that he had sent Tan the Delivery Messages. As we have noted, the charges that were proceeded with did not even set out the way in which the Prosecution claimed the Appellant had participated in the alleged offences (see [5] above). Further, although the Opening Address provided such particulars, it did not expressly state that the two facets of the Prosecution's case against the Appellant were *independent* bases upon which the Prosecution was seeking a conviction (see [7] above). Nor

was there any other document brought to our attention which showed that the Prosecution expressly advanced the Alternative Case at the trial.

84 The Prosecution's position appeared to be that the Alternative Case was clearly *implicit* in its case against the Appellant at the trial. As we have noted, the Prosecution submitted that the Alternative Case was in fact not an alternative case at all (see [53] above). It emphasised that there had always been two facets of its case against the Appellant, and pointed out that it was simply relying on the second facet – namely, the Appellant's alleged sending of the Delivery Messages to Tan – to uphold his conviction.

85 We recognise that where the Prosecution advances a composite case comprising several factual bases, any one of which may in law found a conviction of the accused, it may be that it would be sufficiently clear to the accused in some, possibly many, cases that the Prosecution is also seeking a conviction on any one of those factual bases even if the Prosecution does not expressly state this. For example, if an accused person is charged with one count of theft pertaining to several items, it might be obvious that the Prosecution is seeking a conviction based on the theft of any one item alone.

86 However, each and every case turns on its facts. In the present case, the Prosecution took the *uncompromising* stance at the trial as well as at the first hearing of this appeal that Tan's entire account of the material events was true (see [36(b)] and [47] above). It never brooked the possibility that Tan's account of how he came into possession of the drugs in the Ten Bundles might be untrue. Moreover, and this is vital, the Prosecution's case against the Appellant, at least in relation to the allegation that the Appellant had handed Tan the Jorano bag of drugs, was largely based on Tan's evidence (see [9] above). Against that

backdrop, one had to ask: how would the Defence have reasonably understood the case that it had to meet? Was a theory of guilt which the Prosecution did not expressly articulate (namely, the Alternative Case) – and which it would only need to rely on if its principal witness, Tan, was not believed on one fundamental plank of his evidence – reasonably clear to the Defence? Was it plain to the Defence that the Handphone Evidence – which was contained in several voluminous forensic reports, and which would have to be sifted through and analysed with even greater care if a conviction were sought based on the Alternative Case – was of central importance? In our judgment, the answer to these questions was "no". It was thus unsurprising that Mr Chua submitted that the Defence had not known that it was facing the Alternative Case at the trial (see [55] above), and we accepted that submission.

87 In sum, we concluded that the Prosecution did not clearly advance the Alternative Case at the trial. We then turned to consider whether the evidence might have unfolded differently if the Prosecution had expressly set out that case in the proceedings below.

The impact on the evidence

88 Mr Chua submitted that if he had known that the Prosecution would be advancing the Alternative Case, this would have affected his cross-examination of Tan in relation to the Delivery Messages (see [55] above). We accepted this submission. It suffices for us to note at least two ways in which the evidence might have emerged differently, and these correspond to the Appellant's arguments in respect of the Delivery Messages (see [49] above):

(a) First, the Appellant emphasised that on Tan's account, the person who had given him the Jorano bag of drugs was the very same

person who had sent him the Delivery Messages. The Alternative Case presupposed that Tan's evidence that the Appellant had given him the Jorano bag of drugs could not be sustained. In this light, we considered that if the Prosecution had clearly informed the Defence that it would be advancing the Alternative Case, this would likely have affected how Tan was cross-examined not just in relation to the Jorano bag of drugs, but also in relation to the Delivery Messages and who had sent them.

(b) Second, the Appellant argued that the Akira Akimoto Messages showed that the Untraced Number belonged to someone else. As we have noted, those messages were not translated and the Prosecution did not cross-examine the Appellant on them (see [32] above). It was difficult to imagine that if the Prosecution had clearly stated that it would be seeking the Appellant's conviction on the stand-alone basis that he had sent Tan the Delivery Messages, the Defence would not have at least translated the Akira Akimoto Messages; and if that had been done, the Prosecution might then have scrutinised these messages and cross-examined the Appellant on them accordingly.

The appropriate order

89 In the premises, we concluded that it would have been wrong in principle for us to turn to the evidence, which was gathered in a trial where the Alternative Case was *not* clearly advanced, to determine whether the Appellant's conviction could be upheld on the basis of the Alternative Case, when the evidence might well have unfolded differently if the Alternative Case had been clearly spelt out in the proceedings below. As we have emphasised, it is a fundamental principle of our criminal law that an accused person should know with certainty, and thus be prepared to meet, the Prosecution's case against him (see [1] above). In our

judgment, it would violate that principle if a court were to consider a basis for convicting an accused that he was not aware of and thus was not ready to meet at his trial, in circumstances where knowledge of that basis for conviction might have affected the evidence presented at the trial.

90 In arriving at this conclusion, we took guidance from the law governing the somewhat analogous issue of an appellate court's power to convict an accused person on an amended charge. Section 390(4) of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) provides that an appellate court may frame an amended charge against an accused person on appeal. Section 390(7)(*b*) further empowers the appellate court to convict the accused on the amended charge "after hearing submissions on questions of law and fact and if it is satisfied that … there is sufficient evidence to do so". Significantly, however, s 390(7)(*b*) also expressly provides that the appellate court has no power to convict the accused on the amended charge after merely hearing submissions where the amended charge attracts the death penalty. In such a case, a trial of the amended charge must be ordered: see *The Criminal Procedure Code of Singapore: Annotations and Commentary* (Jennifer Marie & Mohamed Faizal Mohamed Abdul Kadir gen eds) (Academy Publishing, 2012) at para 20.108.

91 In *Garmaz s/o Pakhar and another v Public Prosecutor* [1996] 1 SLR(R) 95 at [29], L P Thean JA, in delivering the judgment of this court, observed that an appellate court's power to amend a charge against an accused person with a view to convicting him on the amended charge thereafter "has to be exercised with great caution and not to the prejudice of the accused". The same view was expressed in *Public Prosecutor v Koon Seng Construction Pte*

Ltd [1996] 1 SLR(R) 112, a judgment released on the same day, in which Yong Pung How CJ set out the relevant principles as follows (at [21]):

> The power of amendment is clearly not unfettered. *It should be exercised sparingly, subject to careful observance of the safeguards against prejudice to the defence*, as laid down by Cussen J in [*Ng Ee v Public Prosecutor* [1941] MLJ 180] and subsequently endorsed by the Federal Court in [*Sivalingam v Public Prosecutor* [1982] 2 MLJ 172]. The court must be satisfied that *the proceedings below would have taken the same course, and the evidence recorded would have been the same. The primary consideration* is that the amendment will not cause any injustice, *or affect the presentation of the evidence, in particular, the accused's defence. These safeguards must be rigorously observed.* [emphasis added]

92 These cases support the proposition that an accused person is not liable to be convicted based on a case that was not clearly mounted against him at the trial in circumstances where the evidence – especially the defence – might well have unfolded differently if the Prosecution had clearly advanced that case. In this light, we decided that the Appellant's conviction should not be upheld based on the Alternative Case at this stage.

93 Nevertheless, we did not think that the proper order in the circumstances was to acquit the Appellant. Ultimately, the allegation that the Appellant had sent Tan the Delivery Messages *was* part of the composite case that the Prosecution had advanced in the proceedings below. Our concern was that this element had not been clearly articulated as a stand-alone basis for convicting the Appellant, with the result that the Appellant might have been prejudiced in his defence. Furthermore, we did *not* determine that as a matter of evidence, the Prosecution had failed to prove beyond reasonable doubt that the Appellant had sent Tan the Delivery Messages. Rather, we never embarked on considering that facet of the Prosecution's case for the reasons given above.

94 In the circumstances, we were satisfied that the appropriate order in respect of this appeal was a retrial of the matter before another High Court judge, where the Prosecution would be confined to mounting its case against the Appellant on the basis that he had sent Tan the Delivery Messages. The Defence would then have the opportunity to meet that clearly defined case.

95 In closing, we lay down guidance for the Prosecution. In cases such as the present where the Prosecution advances a composite case comprising several facets and it would not be reasonably clear to the accused, absent an express statement to this effect, that the Prosecution is seeking a conviction based on any individual facet of its case, it may be prudent for the Prosecution to make this explicit. We highlight two points in particular:

(a) First, the charge should, if practicable, clearly state the various facets of the Prosecution's case against the accused. In the present case, it seems to us that the acts of participation alleged against the Appellant – namely, his handing of the Jorano bag of drugs to Tan and his sending of the Delivery Messages to the latter – could and perhaps should have been included as particulars of the charges which the Prosecution proceeded with.

(b) Second, the Prosecution should make clear that it is seeking a conviction of the accused based on any one of the multiple facets of its case. If this cannot be done in the charge, it could be made clear in the opening address at the trial. There may also be other ways by which the Prosecution can clearly communicate to the accused that it is relying on the various components of its case as alternative stand-alone bases for securing a conviction; we do not mean to limit the ways in which the Prosecution may do so, save to note that whichever method is adopted

> should be in writing. Thus, where a Case for the Prosecution is served for the purposes of the criminal case disclosure regime prior to a trial in the State Courts, the Prosecution might clearly state therein that it is seeking a conviction of the accused based on any one of the alternative elements of its case.

96 We recognise that in some situations, there may be strategic disadvantages for the Prosecution in clearly articulating an alternative case which proceeds on the premise that its primary case against the accused may fail. Questions may arise as to why such an alternative case is being advanced at all, and the perceived strength of the primary case may be weakened by the articulation of the alternative case. Nonetheless, in our judgment, the Prosecution has to make a choice in such situations. It may choose not to clearly articulate its alternative case – but then, where the evidence supporting that case might have been different if that case had been made clear at the trial, it may not rely on that case to secure the accused's conviction or (as the case may be) uphold the accused's conviction on appeal. On the other hand, if the Prosecution wishes to rest assured that it will be able to rely on an alternative case in the event that its primary case fails, then it should give the Defence clear notice of the alternative case and take any consequences that follow for its primary case at the trial. In our judgment, this is what fairness in the conduct of criminal proceedings demands.

Conclusion

97 For the foregoing reasons, we allowed the appeal to the extent that we ordered the matter to be retried before another High Court judge. The Prosecution has accepted, and we have determined, that the first facet of its case – that the Appellant gave Tan the Jorano bag of drugs – is affected by reasonable

doubt. Accordingly, at the retrial, the Prosecution will be confined to mounting its case against the Appellant on the basis that he sent Tan the Delivery Messages, this being what we have defined (at [7] above) as the Alternative Case.

Sundaresh Menon Chief Justice	Tay Yong Kwang Judge of Appeal	Steven Chong Judge of Appeal

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