**IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE**

**[2020] SGCA 39**

Criminal Appeal No 1 of 2019

Between

Mohammad Azli bin
Mohammad Salleh

… *Appellant*

And

Public Prosecutor

… *Respondent*

Criminal Motion No 16 of 2019

Between

Mohammad Azli bin
Mohammad Salleh

… *Applicant*

And

Public Prosecutor

… *Respondent*

Criminal Appeal No 2 of 2019

Between

Roszaidi bin Osman

… *Appellant*

And

Public Prosecutor

… *Respondent*

Criminal Motion No 17 of 2019

Between

Roszaidi bin Osman

… *Applicant*

And

Public Prosecutor

… *Respondent*

In the matter of Criminal Case No 11 of 2018

Between

Public Prosecutor

And

(1) Aishamudin bin Jamaludin
(2) Mohammad Azli bin Mohammad Salleh
(3) Roszaidi bin Osman

# JUDGMENT

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

# Mohammad Azli bin Mohammad Salleh
# v
# Public Prosecutor and another appeal and other matters

**[2020] SGCA 39**

Court of Appeal — Criminal Appeal Nos 1 and 2 of 2019 and Criminal Motion Nos 16 and 17 of 2019
Sundaresh Menon CJ, Andrew Phang Boon Leong JA, Judith Prakash JA, Tay Yong Kwang JA and Steven Chong JA
17 February 2020

23 April 2020 Judgment reserved.

**Sundaresh Menon CJ (delivering the judgment of the court):**

1 On the night of 6 October 2015, Mohammad Azli bin Mohammad Salleh ("Azli") drove Roszaidi bin Osman ("Roszaidi") to Bulim Avenue in his rented car. There, Roszaidi collected a red plastic bag from Aishamudin bin Jamaludin ("Aishamudin") and Suhaizam bin Khariri ("Suhaizam"), who were in the cabin of a trailer truck. The red plastic bag contained two packets of diamorphine, which is commonly referred to as "heroin", as well as three packets of methamphetamine, which is commonly referred to as "ice". Azli then drove Roszaidi to the vicinity of his residence in Jurong West, where Roszaidi handed a "Starmart" plastic bag containing the two packets of diamorphine and two of the packets of methamphetamine from the red plastic bag to his wife, Azidah binti Zainal ("Azidah"). The two packets of diamorphine, which we will refer to as "the Drugs", contained a total of not less than 32.54g of diamorphine. This

formed the subject matter of the charges under the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) ("MDA") against Azli, Roszaidi and Aishamudin, who were tried jointly for their role in trafficking the Drugs.

(a) Roszaidi was charged under s 5(1)(*a*) of the MDA for trafficking by giving the Drugs to Azidah.

(b) Azli was charged under s 5(1)(*a*) read with s 12 of the MDA for abetting Roszaidi to traffic in the Drugs by intentionally aiding him – namely, by driving him to Bulim Avenue to collect the Drugs, and then to Jurong West to deliver the Drugs to Azidah.

(c) Aishamudin was charged under s 5(1)(*a*) of the MDA read with s 34 of the Penal Code (Cap 224, 2008 Rev Ed) for delivering the Drugs to Roszaidi in furtherance of a common intention with Suhaizam.

2 At the end of the trial, the High Court Judge ("the Judge") convicted Azli and Roszaidi on their respective charges. The Judge amended the charge against Aishamudin to a non-capital charge, and convicted him of the amended charge.

3 In CA/CCA 1 & 2/2019, Azli and Roszaidi respectively appeal against their conviction and sentence. Azli also filed CA/CM 16/2019 ("CM 16/2019"), and Roszaidi filed CA/CM 17/2019 ("CM 17/2019"), both seeking leave to rely on additional grounds of appeal. In CA/CCA 4/2019, the Prosecution appeals against the Judge's amendment and reduction of the charge against Aishamudin. We heard these appeals and applications together. At the end of the hearing, we indicated to Roszaidi that we would dismiss his appeal against conviction, and remit the issue of whether he qualified for the alternative sentencing regime under s 33B(3) of the MDA to the Judge for additional psychiatric evidence to

be taken under s 392(1) of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) ("CPC"). In doing so, we also allowed CM 17/2019. We reserved judgment for the appeals in relation to Azli and Aishamudin. In this judgment, we provide our reasons for our decision in relation to Roszaidi's appeal and his application in CM 17/2019, and give our decision in relation to Azli's appeal and his application in CM 16/2019. We will address the Prosecution's appeal in respect of Aishamudin in a separate judgment which we will deliver at a later date.

**Facts**

4 On 6 October 2015, Aishamudin and Suhaizam drove into Singapore in a trailer truck. They had with them a red plastic bag. At trial, Aishamudin contended that the red plastic bag contained only methamphetamine. However, before us he did not contest the Judge's finding that it also contained the Drugs (*Public Prosecutor v Aishamudin bin Jamaludin and others* [2019] SGHC 8 ("GD") at [30]). For the purposes of the present judgment, we do not go further into the facts relating to Aishamudin's involvement, except to the extent that they are relevant to Azli and Roszaidi.

5 Sometime after 9 pm that day, Aishamudin and Suhaizam drove the trailer truck into Bulim Avenue and parked it along the road. Unknown to them, officers from the Central Narcotics Bureau ("CNB") were tailing the truck. A car driven by Azli also turned into Bulim Avenue. Roszaidi was in the rear passenger seat along with Muhammad Mirwazy bin Adam ("Mirwazy"). Azli parked the car near the truck. Roszaidi alighted from the car and collected the red plastic bag from Aishamudin before returning to the car. At around 9.50pm, both vehicles left Bulim Avenue, tailed by CNB officers.

6 Azli dropped Mirwazy off first. Mirwazy was arrested shortly thereafter (GD at [4]). Azli then drove to Jurong West Street 91, where Azidah was waiting along the side of the road with a yellow paper bag. Roszaidi had placed the Drugs and two of the packets of methamphetamine into a "Starmart" plastic bag. He took the yellow paper bag from Azidah, placed the "Starmart" plastic bag inside it, and handed it back to Azidah. He asked her to bring the bag up to their apartment. Azli then drove off with Roszaidi. Azidah was arrested shortly afterwards by CNB officers. The Drugs and the two packets of methamphetamine were found in her possession.

7 Roszaidi later alighted from Azli's car, after which they were each arrested at different locations (GD at [5]). Upon Azli's arrest, the car was searched by CNB officers, resulting in the seizure of a number of items found to contain methamphetamine. A digital weighing scale as well as some empty paper and plastic packets ("the drug paraphernalia") were also seized from a compartment located on the driver's door of the car.

8 The other persons involved in these events were dealt with separately:

(a) Suhaizam pleaded guilty to a charge of trafficking in not less than 14.99g of diamorphine by delivering the Drugs to Roszaidi in furtherance of a common intention with Aishamudin. He was sentenced to 25 years' imprisonment and 15 strokes of the cane, and his appeal against sentence was dismissed by the High Court.

(b) Azidah pleaded guilty to one charge of having in her possession not less than 14.99g of diamorphine for the purpose of trafficking, and one charge of consumption of methamphetamine. She was sentenced to a total of 25 years' imprisonment.

(c) Mirwazy pleaded guilty to a charge of drug possession, amongst other offences, and was sentenced to a total of three years and six months' imprisonment.

**The decision below**

9 The Judge found that Roszaidi had collected the Drugs from Aishamudin, and had placed them in the "Starmart" plastic bag in the car before handing them to Azidah (GD at [21]). Roszaidi's defence at trial was a denial of knowledge of what the Drugs in fact were. Since Roszaidi was in possession of the Drugs, the presumption of knowledge under s 18(2) of the MDA was engaged. The Judge found Roszaidi's denial of knowledge to be inconsistent with his own investigative statements, as well as the evidence given by others, including Aishamudin and Mirwazy, against him. The Judge therefore held that Roszaidi had failed to rebut the s 18(2) presumption. The Judge accordingly convicted Roszaidi of the charge against him and sentenced him to the death penalty. The question of alternative sentencing under s 33B of the MDA does not appear to have been considered or addressed.

10 The Prosecution's case against Azli was that he abetted Roszaidi pursuant to an agreement to drive Roszaidi around that night knowing that Roszaidi was going to collect and/or deliver diamorphine (GD at [12]). Azli's primary defence was that he knew nothing about Roszaidi's drug activities. The Judge found, however, that Azli knew that Roszaidi would be transporting drugs that night, and had consented to Roszaidi bringing into the car drugs of any nature (GD at [18]). The Judge rejected Azli's assertion in his cautioned statement that he thought Roszaidi was collecting methamphetamine, finding it to be unsupported (GD at [19]). The Judge therefore found Azli to be in joint possession of the Drugs with Roszaidi under s 18(4) of the MDA. The Judge

further found that the presumption of knowledge under s 18(2) of the MDA applied against Azli, and that Azli could not rebut this presumption. Finally, the Judge found that Azli had the opportunity to enquire about the nature of the drugs Roszaidi was dealing with that night, but deliberately declined to do so. The Judge therefore convicted Azli of the charge and sentenced him to the death penalty (GD at [20]). Again, the question of alternative sentencing under s 33B of the MDA does not appear to have been considered or addressed.

**Roszaidi's appeal against conviction**

11 On appeal, Roszaidi submitted that he did not have the intention to traffic the Drugs to Azidah. Instead, his intention was for Azidah to keep the Drugs safely and subsequently to return them to him, and his own intention upon reclaiming the Drugs was to return them to the trafficker who had originally arranged for him to collect the Drugs, known to him as "Is Cangeh". Roszaidi submitted that his evidence as to this intention was unchallenged. Roszaidi relied on our decision in *Ramesh a/l Perumal v Public Prosecutor and another appeal* [2019] 1 SLR 1003 ("*Ramesh a/l Perumal*"), where we held (at [110] and [125]) that an offender acting with such an intent might well not fall within the scope of the offence of trafficking. In essence, as Roszaidi's counsel, Mr Eugene Thuraisingam ("Mr Thuraisingam"), put his case at the hearing before us, Roszaidi had resiled from his original intention to traffic in the Drugs. In the alternative, Roszaidi submitted that his intentions in relation to the Drugs at the time of his arrest were inchoate, as he had yet to receive instructions from Is Cangeh as to what to do with them. Roszaidi further submitted that he did not intend to possess or traffic in a capital quantity of drugs.

12 The main difficulty with Roszaidi's claim to have resiled from his original intention to traffic in the Drugs was that he never in fact stated that this

had happened until late in the trial – while he was being cross-examined. Instead, the consistent thread across Roszaidi's investigative statements was that he had been waiting all along for Is Cangeh to give him instructions as to the onward delivery of the Drugs.

13 In Roszaidi's cautioned statement recorded under s 23 of the CPC, he said:

> The thing is not mine. I received instructions from a Malaysian person … I have helped him several times and on that day I told him that I do not want but he forced me, he said *the thing is already in Singapore cannot bring it back in*. I was confused and scared I will be framed, *at last I helped him*. My friend that drove the car is only a driver. … Before I was arrested, in the car, *[Is Cangeh] did call me and say somebody will call me and take the thing from me*. Azidah do not know anything. I only asked her to take the thing and keep it for a[ ]while for me. [emphasis added]

It was clear from this statement that Roszaidi ultimately intended to do as Is Cangeh instructed. It was also clear that Roszaidi had no basis to think that this would result in the Drugs being returned to Is Cangeh, since in the statement he said Is Cangeh had informed him that the Drugs could not be brought back out of Singapore.

14 In his first long statement recorded under s 22 of the CPC on 14 October 2015, Roszaidi said that he had called Is Cangeh upon receiving the Drugs to ask him why there was "so many". Is Cangeh told him to "just hold" the Drugs for a while until someone called him, and Roszaidi said "okay". This part of the statement was read out to Roszaidi at trial in his examination-in-chief, and he confirmed that it was accurate. Before us, Mr Thuraisingam sought to rely on an earlier part of the same statement, in which Roszaidi said that he "wanted to finish the job quickly" because he felt that the Drugs were "a lot". Roszaidi had also explained in his evidence-in-chief that he did not throw the Drugs away

because he was "in a panic[ked] state" and had also made the "assumption" that Is Cangeh would ask his gang to beat him up if he did so.

15 As we pointed out to Mr Thuraisingam, it was not sufficient for Roszaidi to say that he was scared and that he found the quantity of the Drugs to be excessive. This did not amount to resiling from an intention to traffic in the Drugs. In fact, Roszaidi's evidence up to that point suggested that his intention was to the opposite effect – he instead wanted to fulfil his role in trafficking the Drugs as quickly as possible. Similarly, it was immaterial that Roszaidi passed the Drugs on to Azidah for safekeeping if he did not further explain what purpose he hoped this would achieve or what he would do with the Drugs after he reclaimed them from her. This is clear from our decision in *Ramesh a/l Perumal* ([11] *supra*) at [125].

16 It was only in cross-examination that Roszaidi stated for the first time that his intention in calling Is Cangeh was to return to the Drugs to him. This was an extremely belated change of position. Mr Thuraisingam suggested to us that this came about because Roszaidi was in an impaired state when he gave his investigative statements. But this suggestion was not tenable. Although Roszaidi was in fact assessed to have "moderately severe to severe opioid drug withdrawal" on 10 October 2015, he was subsequently warded in Changi General Hospital from 10 to 13 October 2015 and discharged with no complaints. At that point, he exhibited no drug withdrawal symptoms. Mr Thuraisingam therefore rightly conceded that there was nothing before us to suggest that Roszaidi was still in an impaired state on 14 October 2015, when he gave his first long statement. Nor was any explanation forthcoming for Roszaidi's continued failure to state this defence in his remaining investigative statements, or during his examination-in-chief at the trial. We therefore rejected Roszaidi's defence as an afterthought.

17 For the same reasons, it was also clear to us that Roszaidi's alternative submission, that his intentions in relation to the Drugs were inchoate, cannot succeed. Roszaidi's understanding of his role was clearly that he would be delivering the Drugs to other persons. The only thing that had yet to be specified was the specific persons to whom the Drugs were to be delivered. This did not detract from Roszaidi's intention to traffic in the Drugs.

18 Roszaidi further submitted, invoking the rule in *Browne v Dunn* (1893) 6 R 67, that the Prosecution failed to adequately challenge his testimony that he had had a change of heart because it was not put directly to Roszaidi that his claim was a lie. We disagreed. In response to Roszaidi's evidence, the Prosecution had put to him that he had agreed to deliver the Drugs to third parties and "complete the job". This made it sufficiently clear to Roszaidi what the case was that he had to meet.

19 At the hearing before us, Roszaidi's counsel did not seriously pursue the argument that Roszaidi had no intention to deal in a capital quantity of drugs. In any case, it was clear to us that there would have been little basis for such a contention. Roszaidi has never articulated any reason for believing that Is Cangeh would not send him a quantity of drugs that was over the capital threshold, even if Is Cangeh had given him assurances when he first recruited Roszaidi that the amount of drugs involved "would not be so much [as] to get [the] death penalty". As we have explained at [14] above, Roszaidi's evidence was that on 6 October 2015 he came to the realisation that the Drugs were "a lot", but decided to complete the job anyway. In fact, Roszaidi claimed that there was a prior occasion on which Is Cangeh had sent him a large amount of drugs, and Roszaidi threw the drugs away because he felt "cheated" by Is Cangeh after having been assured that he would not be dealing in capital quantities of drugs. This would only further undermine any basis for Roszaidi's

belief that the Drugs did not exceed the threshold for the death penalty on this occasion.

20 As we saw no reason to doubt that Roszaidi knowingly possessed the Drugs and had trafficked in them by delivering them to Azidah, we affirmed his conviction and dismissed this part of his appeal.

**Roszaidi's appeal against sentence**

21 By CM 17/2019, Roszaidi sought leave to rely on a further ground of appeal, namely, that he was eligible for the alternative sentencing regime under s 33B(3) of the MDA, and should therefore have been sentenced to life imprisonment under s 33B(1)(*b*) of the MDA.

22 Section 33B(3) of the MDA provides:

> (3) The requirements referred to in subsection (1)(*b*) are that the person convicted proves, on a balance of probabilities, that —
>
> (*a*) his involvement in the offence under section 5(1) or 7 was restricted —
>
> (i) to transporting, sending or delivering a controlled drug;
>
> (ii) to offering to transport, send or deliver a controlled drug;
>
> (iii) to doing or offering to do any act preparatory to or for the purpose of his transporting, sending or delivering a controlled drug; or
>
> (iv) to any combination of activities in sub-paragraphs (i), (ii) and (iii); and
>
> (*b*) he was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts and omissions in relation to the offence under section 5(1) or 7.

23 To fall within the scope of s 33B(3) of the MDA, Roszaidi would therefore have to prove, on the balance of probabilities, that:

(a) his involvement in the offence was restricted to the acts enumerated in s 33B(3)(*a*), which we will refer to for convenience as acting as a "mere courier"; and

(b) he satisfied the three cumulative requirements under s 33B(3)(*b*) of the MDA (see *Nagaenthran a/l K Dharmalingam v Public Prosecutor and another appeal* [2019] 2 SLR 216 ("*Nagaenthran*") at [21]):

(i) he was suffering from an abnormality of mind ("the first limb");

(ii) the abnormality of mind: (a) arose from a condition of arrested or retarded development of mind; (b) arose from any inherent causes; or (c) was induced by disease or injury ("the second limb"); and

(iii) the abnormality of mind substantially impaired his mental responsibility for his acts and omissions in relation to his offence ("the third limb").

24 Roszaidi contended that his mental responsibility for the offence was substantially impaired by his (i) substance dependence, (ii) major depressive disorder, and/or (iii) moderately severe to severe opioid drug withdrawal. However, in his submissions, Roszaidi relied only on his substance dependence for the purposes of this ground of appeal.

25 It appeared from the record of the proceedings below that the issue of the alternative sentencing regime under s 33B of the MDA was never canvassed.

Roszaidi was represented by different counsel at the trial, and the possibility that he might fall within the scope of s 33B(3) did not appear to have been raised by his then-counsel, the Prosecution, or the Judge. We will return to this point at [34] below. Unsurprisingly as a result, the evidence that would have been relevant for the consideration of the issues under s 33B(3) – particularly, the psychiatric evidence which would be crucial under s 33B(3)(*b*) – was uneven to say the least. We therefore proceeded under s 392(1) of the CPC to admit additional evidence in relation to Roszaidi's psychiatric conditions prior to hearing the appeal. After considering the additional evidence and the parties' submissions at the hearing of the appeals, we decided to remit the case to the Judge under s 392(1) of the CPC for further psychiatric evidence to be taken.

***The evidence below***

26 We begin with the evidence adduced at the trial. In our judgment, that evidence established that Roszaidi was a mere courier within the meaning of s 33B(3)(*a*) of the MDA, and provided a sufficient basis to think that Roszaidi could come within the ambit of s 33B(3)(*b*) of the MDA, so as to justify taking additional evidence.

27 At the outset, we observe that s 33B(3)(*a*) of the MDA speaks in terms of the accused person's "involvement *in the offence*" [emphasis added]. Since the sole charge against Roszaidi relates only to the Drugs (meaning the two packets of diamorphine), and not to the bundles of methamphetamine which he also received from Aishamudin, the s 33B(3)(*a*) analysis was confined to Roszaidi's actions in relation to the Drugs only.

28 As set out at [5]–[6] above, Roszaidi's actions in relation to the Drugs involved collecting them (in the red plastic bag) from Aishamudin, placing the

Drugs into a "Starmart" plastic bag, and handing them to Azidah in the yellow paper bag. Although the Judge referred to Roszaidi's act of transferring the Drugs from the red plastic bag to the "Starmart" plastic bag as "repack[ing]" (GD at [8]), it was clear to us that this was an act purely preparatory to or facilitative of the delivery of the Drugs, and fell within the ambit of s 33B(3)(*a*) (see *Zainudin bin Mohamed v Public Prosecutor* [2018] 1 SLR 449 at [82]). Roszaidi's intentions were confined to delivering the Drugs to an unidentified person on the arrangement of Is Cangeh. Roszaidi was therefore clearly able to prove on a balance of probabilities that he was a mere courier within the meaning of s 33B(3)(*a*) of the MDA.

29 For the purposes of CM 17/2019, Roszaidi relied on a psychiatric report dated 13 November 2015 prepared by Dr Bharat Saluja ("Dr Saluja") of the Institute of Mental Health ("Dr Saluja's Original Report") as evidence that he was suffering from an abnormality of mind at the material time. Dr Saluja had diagnosed Roszaidi with (a) "mental and behavioural disorder due to dependence o[n] multiple substances" (which we refer to as "substance dependence") and (b) major depressive disorder. Whether these conditions, or a combination of them, amounted to an abnormality of mind within the prescribed causes under the second limb is a question that turns primarily on psychiatric evidence, which was largely missing from the evidence below.

30 As for the third limb under s 33B(3)(*b*), Roszaidi submitted that his substance dependence substantially impaired his mental responsibility because he needed to continue trafficking in heroin (which, as noted above, is the common name for diamorphine) so that he could continue consuming heroin himself from the bundles that he would traffic. We could see some support for this contention from Dr Saluja's clinical notes, which had been admitted at trial, and in Roszaidi's testimony. Dr Saluja had recorded that Roszaidi "never

bought heroin" because he "never had money", and that he could consume heroin and methamphetamine with "no limit" on the day he trafficked in the Drugs because he could just "steal from the packet". This was also reflected in Roszaidi's oral testimony, and, interestingly, the case put to him by the Prosecution in cross-examination:

> Q … For every job that you did for [Is Cangeh], you informed CNB officers, you did not ask him of the quantity of heroin and Ice that you were going to collect from the other person. Isn't that correct?
>
> A Yes. It's true. Because I trust him. Moreover, he's my friend. And also *I need the supply of drugs from him to satisfy my drug addiction*. This is not a matter of lying. I really regret what I had did---had done because of my stupid act. Because of my stupidity, my---Azli and my wife are involved in this case. …
>
> …
>
> Q Now, you were willing to take the risk of collecting drugs from strangers *because you wanted to be paid for each job and you wanted to be able to consume a portion of the drugs that you collected*. Isn't that so? *That is the reason why you did it*. Isn't that correct?
>
> …
>
> A (In English) Okay, correct.
>
> [emphasis added]

31 In *Nagaenthran*, we recognised that "what in fact amounts to a substantial impairment of mental responsibility is largely a question of commonsense to be decided by the trial judge as the finder of fact" (at [33]). The impairment must be "real and material", and must have had an "influence" on the offender's actions, although it need not be the "cause" of the offending (*Nagaenthran* at [33]).

32 In the absence of an adequate ventilation of these issues at the trial, the issue for us was whether there was sufficient basis to justify having additional

evidence taken in order to supplement these gaps. We found some assistance in *Phua Han Chuan Jeffery v Public Prosecutor* [2016] 3 SLR 706 ("*Jeffery Phua*"). In *Jeffrey Phua*, the High Court held that it was possible for someone who was mentally impaired to seem normal in outward appearance and be capable of carrying out a wide range of activities (at [9]–[11]). The Court found that even if the offender knew what he was doing was wrong and risky, he may have lacked the will to resist committing the offence. As a result of the offender's condition, he "focused on getting his immediate needs met, while disregarding future consequences of his actions" (at [15]). This contrasted with the findings in cases like *Nagaenthran* and *Rosman bin Abdullah v Public Prosecutor* [2017] 1 SLR 10 ("*Rosman*"), in which the offender simply made a conscious and informed, albeit risky, decision to commit the offence (see *Nagaenthran* at [40]–[41]; *Rosman* at [54]–[56]). This comparison demonstrated that it was *plausible* that Roszaidi's circumstances in the present case may satisfy s 33B(3)(*b*) of the MDA. In the absence of detailed and targeted psychiatric evidence on Roszaidi's mental state at the time of the offence, it is impossible to reach any definite conclusion. There was therefore good reason to take additional psychiatric evidence on these issues.

33 However, we must also address the related and equally important question of the conduct of Roszaidi's case. In *Rosman* at [6], we cautioned against the "drip-feeding" of applications under the s 33B alternative sentencing regime, and observed that this Court would not hesitate to reject such applications made for the first time on appeal. In this context, we think it important to explain why the particular circumstances of the present case do not warrant such a step. First, the offender in *Rosman* was convicted, and his conviction upheld on appeal, before s 33B of the MDA was enacted. He applied for re-sentencing under s 33B following its enactment, but in the High Court,

he relied *solely* on s 33B(2) for this purpose (see *Rosman* at [2]). It was only in his submissions before the Court of Appeal that he sought to rely on s 33B(3) for the first time. That attempt was therefore particularly and inexcusably belated. Second, and more importantly, unlike in *Rosman*, where the existing psychiatric evidence suggested the *absence* of any mental disorder (see *Rosman* at [7]), the evidence in Roszaidi's case clearly pointed towards the existence of mental disorders which could potentially have had an effect on his offending behaviour. With respect, it seems to have been a misjudgement or oversight on the part of Roszaidi's counsel below not to have pursued this aspect of the evidence. Finally, we also considered the fact that after Mr Thuraisingam took over the conduct of Roszaidi's case on appeal, he was able to file CM 17/2019 well before the originally scheduled hearing date of the appeal. We were therefore satisfied that CM 17/2019 was filed in good faith and not in abuse of process.

34 Indeed, as we mentioned at [9], [10] and [25] above, the applicability of s 33B of the MDA as a whole in relation to either Roszaidi or Azli appeared not to have been raised before the Judge at all following their conviction on their respective capital charges. We take this opportunity to highlight the importance of ensuring that the alternative sentencing regime under ss 33B(2) and 33B(3) of the MDA is specifically canvassed in *every* trial involving a capital charge under the MDA. It is the duty of defence counsel to consider, at the earliest stage, whether their clients have a viable case under either s 33B(2) or s 33B(3), so that the necessary evidence may be adduced during the trial. If the accused person is convicted of the capital charge, the Defence, the Prosecution and the trial judge are each responsible for considering the applicability of ss 33B(2) and 33B(3) prior to sentencing. This extends to the Prosecution intimating its

position, in relevant cases, on whether it intends to issue the offender with a certificate of substantive assistance under s 33B(2)(*b*).

***The additional evidence on appeal***

35 As a result of this evidentiary gap, prior to the hearing of the appeals, we directed the parties to adduce additional evidence in the form of psychiatric reports (based only on the existing evidence and medical notes), addressing the following questions:

(a) Whether Roszaidi's substance dependence or major depressive disorder, or a combination of both conditions, amounted to an abnormality of mind (that is, the first limb);

(b) If so, whether any such abnormality of mind: (i) arose from a condition of arrested or retarded development of mind; (ii) arose from any inherent causes; or (iii) was induced by disease or injury (that is, the second limb); and

(c) If so, whether this abnormality of mind substantially impaired his mental responsibility in relation to his offence in the present case (that is, the third limb).

36 Dr Saluja produced a number of psychiatric reports to address these questions.

(a) In a report dated 10 October 2019, Dr Saluja stated that substance dependence is a "classifiable mental disorder", but does not arise from a condition of arrested or retarded development of mind, or from any inherent cause, or by disease or injury.

(b) In a report dated 1 November 2019, Dr Saluja stated that Roszaidi's major depressive disorder amounted to an abnormality of mind, and went on to say that Roszaidi's "mental disorder" arose from an inherent cause. However, he concluded that Roszaidi's mental disorders did not substantially impair his mental responsibility for the offence.

(c) In a report dated 19 November 2019, Dr Saluja stated that Roszaidi's mental disorders did not substantially impair his mental responsibility because they "did not substantially impair his capacity to understand the nature of his acts" and Roszaidi "knew that his acts were contrary to the law".

37 We also gave Roszaidi leave to tender an expert report in reply prepared on the same basis. Roszaidi tendered a report prepared by Dr Jacob Rajesh ("Dr Rajesh") on 16 December 2019 ("Dr Rajesh's Report"), which stated that:

(a) Dr Rajesh agreed with Dr Saluja's diagnosis of major depressive disorder and substance dependence, and agreed that Roszaidi's major depressive disorder arose from an inherent cause.

(b) Dr Rajesh opined that Roszaidi was suffering from an abnormality of mind as a result of the combination of his major depressive disorder and substance dependence. The latter was exacerbated by the former in the months leading to the offence, as Roszaidi consumed drugs to self-medicate for his depression. This was described as a "dual diagnosis".

(c) In Dr Rajesh's view, as a result of the combination of Roszaidi's major depressive disorder and substance dependence, he focused on the

> "immediate short-term benefits" rather than the long-term consequences of drug trafficking at the time of the offence, so as to satisfy his drug addiction. Dr Rajesh therefore disagreed with Dr Saluja that Roszaidi's mental disorders did not substantially impair his mental responsibility.

38 In a reply report dated 14 January 2020, Dr Saluja said that Dr Rajesh's views on the impact of major depressive disorder and substance dependence were true in general, but that they were not substantiated in Roszaidi's particular case. Instead, Dr Saluja found from his interviews with Roszaidi that he knew he was transporting an illegal substance and that this was wrong, and when he thought he was being pursued, he handed the drugs to his wife. Dr Saluja concluded upon these facts that Roszaidi's mental responsibility for his acts and omissions in relation to the offence was not substantially impaired.

39 At the hearing of the appeals, it appeared to be common ground between the Prosecution and the Defence that the potentially relevant psychiatric conditions in respect of Roszaidi were major depressive disorder and substance dependence, or a combination of the two. Beyond this, the additional psychiatric reports filed by the Prosecution and the Defence seemed to raise as many questions as they answered. The reports of Dr Saluja and Dr Rajesh showed that there was a disagreement between them as to whether and how the second and third limbs would be satisfied. In the circumstances, it would not have been satisfactory for us to have decided this aspect of Roszaidi's appeal given the state of the evidence before us. The Deputy Public Prosecutor, Mr Hay Hung Chun ("Mr Hay"), also fairly accepted that it would be prudent for the issues under s 33B(3)(*b*) of the MDA to be remitted to the Judge.

***Our directions***

40 We therefore allowed CM 17/2019 and remitted the following questions to the Judge for additional evidence to be taken pursuant to s 392(1) of the CPC:

(a) What precisely were the abnormalities of mind that Roszaidi was suffering from at the material time?

(b) Do the relevant abnormalities arise from a condition of arrested or retarded development of mind, or any inherent causes, and/or are they induced by disease or injury?

(c) Did the relevant abnormalities substantially impair Roszaidi's mental responsibility for his acts and omissions?

41 In Dr Rajesh's Report, he stated that he had interviewed Roszaidi on three occasions, but, in accordance with the court's directions, did not take the interviews into account when producing the report. Mr Thuraisingam indicated that he intended to ask Dr Rajesh to comment on his findings from these interviews before the Judge. We shared the Prosecution's concerns that this could lead to a proliferation of unhelpful evidence, especially when these interviews would have been conducted many years after the relevant events. Nevertheless, we directed Roszaidi's counsel to procure copies of Dr Rajesh's notes from his interviews and to send them to the Prosecution, so that Dr Saluja could consider whether he needed to interview Roszaidi again on behalf of the Prosecution. For purely administrative reasons, we also acceded to Mr Thuraisingam's request that we direct the Defence to obtain a further report from Dr Rajesh taking into account his interviews with Roszaidi. Although we had some reservations about the relevance of these interviews, it is ultimately

for the Judge to consider what manner of evidence he should allow in his determination of the remitted issues.

42 This disposes of Roszaidi's appeal. In sum, we dismissed his appeal against conviction and remitted the issue of sentence to the Judge to receive evidence on the matters set out at [40] above and then to consider whether the alternative sentencing regime avails Roszaidi.

**Azli's appeal**

43 We turn to Azli's appeal. In his appeal, Azli submits that there was no agreement between him and Roszaidi to collect and deliver drugs in Singapore, and that he did not harbour any suspicion that Roszaidi had set out to collect drugs on the night of 6 October 2015. As such, Azli argues that he neither knew of nor consented to Roszaidi bringing drugs of any nature into his car. Further, even if Azli did suspect that Roszaidi was collecting drugs, this would not be sufficient to amount to knowledge and consent for the purposes of finding that he was jointly in possession of the Drugs pursuant to s 18(4) of the MDA. Azli further contends that he did not know that Roszaidi would be delivering the Drugs to Azidah.

44 Azli also filed CM 16/2019, seeking leave to argue in addition that s 18(4) of the MDA could only apply in respect of persons who were part of a group, the members of which were arrested together, and provided further that the drugs were in the possession of a member of that group at the time of arrest.

45 The charge against Azli is one of abetment by intentionally aiding Roszaidi to traffic in the Drugs. To make good that charge, the Prosecution must prove that (a) the abettor did something which facilitated the commission of the primary offence; and (b) the abettor did so intentionally, with knowledge of the

circumstances constituting the offence. It is well-established that these are the elements of abetment by intentionally aiding under s 107 of the Penal Code (see *Public Prosecutor v Koh Peng Kiat* [2016] 1 SLR 753 at [24]). It is also well-established that abetment under s 12 of the MDA carries the same meaning as in s 107 of the Penal Code (*Chan Heng Kong and another v Public Prosecutor* [2012] SGCA 18 at [33]).

46 In the context of intentionally aiding the commission of the offence of trafficking under s 5(1)(*a*) of the MDA, knowledge of the circumstances constituting the offence requires knowledge: (i) that the primary offender had possession of the thing which turns out to be the drug ("the element of possession"); (ii) of the nature of the drug in the primary offender's possession ("the element of knowledge"); and (iii) that the primary offender intended to traffic in the drug.

47 A key question in the present appeal is whether Azli knew the nature of the Drugs. This includes the broader question of what exactly he had knowledge of on the day in question. Did he know that controlled drugs in general were involved? If so, was he in fact indifferent to Roszaidi collecting drugs of *whatever* nature (as the Judge had found – see [10] above)? The Prosecution has not sought to prove the fact of Azli's knowledge by successively invoking the presumptions under ss 18(1) and 18(2) of the MDA, since it is undisputed that at all relevant times the Drugs were in Roszaidi's possession, not Azli's. Instead, the Prosecution seeks to prove Azli's knowledge of the nature of the Drugs by two alternative routes: (i) proof of his actual knowledge beyond a reasonable doubt; and (ii) reliance on the presumption of knowledge under s 18(2) of the MDA by establishing Azli's joint possession of the Drugs under s 18(4) of the MDA.

48 We will first consider the second route, which requires examining the nature of the deeming provision under s 18(4) of the MDA and its relationship with the elements of the offence of trafficking, and with the presumption of knowledge under s 18(2).

***Joint possession under s 18(4) of the MDA***

49 Section 18 of the MDA reads:

> **Presumption of possession and knowledge of controlled drugs**
>
> **18.**—(1) Any person who is proved to have had in his possession or custody or under his control —
>
> (*a*) anything containing a controlled drug;
>
> (*b*) the keys of anything containing a controlled drug;
>
> (*c*) the keys of any place or premises or any part thereof in which a controlled drug is found; or
>
> (*d*) a document of title relating to a controlled drug or any other document intended for the delivery of a controlled drug,
>
> shall, until the contrary is proved, be presumed to have had that drug in his possession.
>
> (2) Any person who is proved or presumed to have had a controlled drug in his possession shall, until the contrary is proved, be presumed to have known the nature of that drug.
>
> (3) The presumptions provided for in this section shall not be rebutted by proof that the accused never had physical possession of the controlled drug.
>
> (4) Where one of 2 or more persons with the knowledge and consent of the rest has any controlled drug in his possession, it shall be deemed to be in the possession of each and all of them.

50 As we explained in *Adili Chibuike Ejike v Public Prosecutor* [2019] 2 SLR 254 ("*Adili*") at [40], the element of possession requires establishing that "the accused person knew that he had physical possession, custody or control of the thing that later turned out to be a drug" – we will call this "actual

possession". This may be established by proving it beyond reasonable doubt, or it may in the appropriate circumstances be presumed pursuant to s 18(1) of the MDA. Section 18(1) is a presumption of actual possession based on what has been referred to as secondary possession (*Obeng Comfort v Public Prosecutor* [2017] 1 SLR 633 at [34]): under ss 18(1)(*a*)–(*c*), the accused person is presumed to have physical possession or custody of or control over all the *contents* of a container or premises, if he is proved to have physical possession or custody of or control over that container or premises. Similarly, under s 18(1)(*d*), the accused person is presumed to have such possession, custody or control over a controlled drug in respect of which he has a document of title or of delivery.

51 The effect of s 18(4) of the MDA is to supplement the means by which the element of possession may be established by enacting a definition of joint possession pursuant to which all those who are found to be in joint possession of the drug are each held to be in actual possession of it. Section 18(4) is a deeming provision because an accused person who falls within its scope is, by virtue of s 18(4), treated in the eyes of the law as being in the same position as if he were in actual possession of the drug, even if that person did not, strictly speaking, have physical possession, custody or control of that drug. Unlike s 18(4), s 18(1) bridges an *evidential* gap by presuming that the accused person is in actual possession of the controlled drug based on the fact of secondary possession (namely, that he comes within one of the scenarios in ss 18(1)(*a*)–(*d*)). This is evident when we consider how the s 18(1) presumption is usually rebutted – by the accused person showing that, despite proof of secondary possession, he was never in fact aware of the existence of the thing that turned out to be the controlled drug itself. The prerequisite for engaging s 18(4), on the other hand, is proof that the accused person *knew of and consented to* another

person being in actual possession of the thing which turned out to be the controlled drug. This is then treated as the legal equivalent of actual possession on the part of the accused person himself. Section 18(4) is therefore not a rebuttable presumption at all, but is instead a definitional provision.

52 We turn then to the content of s 18(4) of the MDA. The local jurisprudence on the requirement of "knowledge and consent" for the purposes of s 18(4) has hitherto focused on the element of *consent*. Thus, in *Muhammad Ridzuan bin Md Ali v Public Prosecutor and other matters* [2014] 3 SLR 721 ("*Ridzuan*"), this court held that "consent" required a degree of "power or authority" [emphasis in original omitted] over the object in question (at [63]). Mere acquiescence or condonation would not suffice; rather, there had to be "some dealing between the parties in relation to the drug, such as an agreement to buy it or help in concealing it" (*Ridzuan* at [64], citing *Public Prosecutor v Lim Ah Poh* [1991] 2 SLR(R) 307 at [71]). As such, a minimal or distant role in the drug transaction would not amount to "consent" under s 18(4) (see *Moad Fadzir bin Mustaffa v Public Prosecutor and other appeals* [2019] SGCA 73 ("*Moad Fadzir*") at [97]–[98]).

*Knowledge under s 18(4) of the MDA*

53 The occasion has not previously arisen for a closer consideration of the element of *knowledge* in s 18(4) of the MDA – which we will refer to as "s 18(4) knowledge", to avoid confusion with the element of knowledge in the offence of trafficking itself. The obvious question is what relationship s 18(4) knowledge bears with the element of knowledge in the offence itself. Two possibilities are immediately apparent: The first is that s 18(4) knowledge is the *same* as the element of knowledge for trafficking, meaning knowledge of the nature of the drug. We refer to this as the "broad conception" of s 18(4)

knowledge. The second is that s 18(4) knowledge does not require knowledge of the nature of the drug, but only knowledge of the existence of the thing that turns out to be the drug – this is equivalent to the knowledge which is embedded within the element of *possession* (see *Adili* at [40]). We refer to this as the "narrow conception".

54 If the broad conception were adopted, then once joint possession under s 18(4) of the MDA has been established, it would mean that the elements of both possession and knowledge in the offence of trafficking would have been established. This is because although joint possession seems primarily to be concerned with the element of possession, on the broad conception referred to above, to be treated as being in joint possession one would also have to be shown to know the nature of the drug, and will therefore have satisfied the element of knowledge as well. On the other hand, if the narrow conception were adopted, joint possession under s 18(4) would match and be concerned only with the element of possession in the offence of trafficking.

55 There is, however, also a third plausible interpretation of s 18(4) which does not track the elements of the offence of trafficking, but which becomes apparent upon a closer look at the language of the provision. Section 18(4) refers to a person ("the actual possessor") having a *controlled drug* in his possession, with the knowledge and consent of other persons ("the joint possessors"). On a plain parsing of the words of s 18(4), what it seems to require is that the joint possessors *know* that the actual possessor has *a controlled drug* in his possession, and that they also *consent* to the actual possessor having that controlled drug in his possession. This would suggest that s 18(4) knowledge refers to knowledge that the object in the actual possessor's possession is *a* controlled drug (as opposed to any specific controlled drug). We will refer to

this as the "intermediate conception" of s 18(4) knowledge. As we will explain below, we consider this to be the correct conception of s 18(4) knowledge.

56 As we have explained at [51] above, once joint possession is shown, then by virtue of s 18(4) of the MDA, this is treated as the legal equivalent of actual possession. It follows from this that if joint possession is established, the prerequisite for invoking the presumption of knowledge under s 18(2) would have been met – that prerequisite being that possession be proved or presumed. However, this would be irrelevant if the *broad* conception were adopted. This is because under the broad conception, the same element of knowledge that is encompassed by the presumption under s 18(2) would already have had to be established in order to invoke the deeming provision in s 18(4) in relation to joint possession. On this footing, there would never be a situation under the broad conception where s 18(4) and the s 18(2) presumption would operate cumulatively. It would follow from this that to the extent case law has applied these two provisions cumulatively, it might be seen as weighing *against* the broad conception.

57 In this context, it may be noted that the High Court has applied the s 18(2) presumption after finding joint possession under s 18(4) in a number of cases: see *Public Prosecutor v Zulkarnain bin Kemat and others* [2018] SGHC 161 at [84]; *Public Prosecutor v Suthakar J Raman and another* [2017] SGHC 142 at [16]; *Public Prosecutor v Abdul Haleem bin Abdul Karim and another* [2013] 3 SLR 734 ("*Abdul Haleem*") at [46]. However, in each of these cases, the High Court had made a finding of actual knowledge, and the reasoning involving ss 18(4) and 18(2) was in the alternative. These cases are therefore of limited value in terms of standing as authority *against* the broad conception.

58 On the other hand, some support *for* the broad conception may be found in the *obiter* comments of this court in *Ridzuan* ([52] *supra*). In *Ridzuan*, the two accused persons, Ridzuan and Abdul Haleem, were charged with trafficking in a capital quantity of heroin in furtherance of their common intention. Ridzuan had arranged for Abdul Haleem to collect drugs from a third person, and Abdul Haleem did so. On appeal, this court upheld the trial judge's primary finding that Ridzuan had actual knowledge of the nature of the drugs (*Ridzuan* at [52]). However, it went on to consider the alternative approach under s 18(4). Ridzuan's counsel contended that the "knowledge and consent" required thereunder extended to knowledge of both the *quantity* and *nature* of the drugs (see *Ridzuan* at [66]). The court accepted the premise of that argument (*Ridzuan* at [67]):

> Consider the hypothetical scenario where an accused knew that another person possessed a straw of heroin and agreed to purchase it from him. However, unbeknownst to the accused, that other person also had in his possession a crate of heroin. In the circumstances, it would seem highly artificial to impute the possession of this crate of heroin to the accused pursuant to s 18(4) of the MDA. Indeed, *it could not be said that the accused had by any means known of, and consented to, the other person's possession of the crate of heroin. A similar conclusion should, in our view, follow where it is the nature of the drug (as opposed to the quantity of the drug) which is at issue.* [emphasis added]

59 The view adopted in *Ridzuan* was therefore that an accused person cannot be said to have known of and consented to another person's possession of a thing if that thing was – whether in respect of quantity or nature – outside the scope of the accused person's contemplation. This suggests support for the broad conception, albeit in *obiter*. It is worth noting that *Ridzuan* was the appeal against the trial judge's decision in *Abdul Haleem*, which, as we have pointed out at [57] above, implicitly *rejected* the broad conception.

60 In the present case, the Judge invoked the s 18(2) presumption after finding Azli to be in joint possession of the Drugs by virtue of s 18(4) (GD at [19]). The basis for the Judge's finding that s 18(4) applied was that "the nature of the drugs did not matter to Azli" (GD at [18]). In contrast with the cases we referred to at [57] above, the Judge did not make a finding of actual knowledge on Azli's part, and therefore relied squarely on the cumulative application of ss 18(4) and 18(2) to convict Azli. Although it is clear that the Judge thereby rejected the broad conception, it is unclear whether the Judge did so preferring the narrow or the intermediate conception in its place: had the Judge adopted the intermediate conception, it would not have been strictly relevant to find that the nature of the drugs *did not matter* to Azli, since it would have sufficed for s 18(4) knowledge simply to find that he knew they were controlled drugs in general.

61 It is evident from the foregoing discussion that the primary point of contention in choosing between the various conceptions of s 18(4) knowledge is whether the deeming of joint possession requires as a prerequisite that the joint possessor must have actual knowledge of the nature of the drug, and how this impacts upon the relevance or otherwise of the presumption of knowledge under s 18(2). Under the broad conception, knowledge of the nature of the drug must be proven under s 18(4), therefore removing the possibility of or the need for invoking the s 18(2) presumption; under the narrow and intermediate conceptions, a lesser degree of knowledge would satisfy the prerequisites of s 18(4), and the s 18(2) presumption may remain relevant and be invoked to bridge the evidential gap in order to establish knowledge of the specific nature of the drug. The choice between the possible conceptions of s 18(4) knowledge therefore also determines *whether* and *how* the s 18(2) presumption may be

engaged in circumstances where the Prosecution relies on s 18(4) to establish the element of possession.

62 Given this premise, we have no hesitation in rejecting the narrow conception. The presumptions of possession and knowledge under ss 18(1) and 18(2) were enacted to mitigate the difficulty faced by the Prosecution in proving the elements of possession and knowledge: see *Tan Kiam Peng v Public Prosecutor* [2008] 1 SLR(R) 1 at [55]. These presumptions apply in a logical and sensible fashion, in that they operate upon proof of one or more of the *indicia* of possession and knowledge. In the natural course of things, possession, custody or control over a container or premises (meaning secondary possession) will tend also to entail an awareness of the existence of the things located within it (meaning actual possession). Likewise, it is reasonable to assume that a person who is in possession of a thing will usually be aware of its nature. Of course, this is not invariably the case, and the assumptions may at times prove to be false (such as where the thing is planted in a container without the accused person's knowledge). In such circumstances, the accused has the opportunity, albeit also the burden, to show that his is a case where the ss 18(1) and/or 18(2) presumptions should be displaced.

63 This just cannot be said of situations which would amount to joint possession under s 18(4) of the MDA were the *narrow* conception to be adopted. The touchstone of joint possession under s 18(4) is not a physical connection (involving physical possession, custody or control) between the accused person and the thing, but rather the accused person's *consent* to *another* person being in actual possession of the thing. As we have noted at [52] above, consent within the meaning of s 18(4) requires more than passive acceptance. However, the possession of a thing by *another* person can be an entirely innocuous fact, if all one knows of is its existence and not anything of its nature.

Without being put on notice as to its relevant properties – such as the fact that it is illegal – there would be no basis on which the putative joint possessor could meaningfully exercise the choice *not* to "consent" to the actual possessor's possession. In other words, a meaningful degree of consent beyond mere acquiescence would not be possible if the narrow conception of s 18(4) knowledge were adopted.

64 This can be illustrated based on the factual matrix of the present case. Suppose it were true that Azli was merely a driver for private hire, and had agreed to drive Roszaidi from point to point on Roszaidi's instructions. Under the narrow conception, any object on Roszaidi's person during this journey could potentially also be in Azli's joint possession under s 18(4) of the MDA (if it turned out to be a controlled drug). Section 18(4) knowledge would be satisfied as long as Azli had perceived the existence of that object. The "consent" element of s 18(4) would also be satisfied: Azli's agreement to convey Roszaidi around, together with any objects that Roszaidi may bring into the car, would amount to "dealing" in these objects by delivering them from one place to another. Azli would also have a degree of "power or authority" over these objects, as he could refuse Roszaidi permission to bring those objects into his car. Azli could therefore be said to have known of and consented to Roszaidi's being in possession of these objects within the narrow conception of s 18(4) knowledge (if they turned out to be controlled drugs). Further, the presumption of knowledge under s 18(2) would then apply. Azli would also be trafficking in those drugs, because he was intentionally conveying them from one point to another. These difficulties are exacerbated by the fact that, as we have noted at [51] above, because s 18(4) is not a presumption but a definitional provision, there would be no question of rebutting it.

65 It is no doubt true that it would be open to Azli in such a scenario to seek to rebut the s 18(2) presumption by showing that he had no knowledge of the nature of the drugs; and he might well succeed in this. However, he would bear the burden of proving this negative. In other words, as a result of the narrow conception, the Prosecution would be able to construct its entire case against Azli (in this scenario) on the basis of entirely innocuous facts – namely, that Azli had agreed to drive Roszaidi from point to point, and that he had known of the existence of the thing in Roszaidi's possession which turned out to be the drugs. On this interpretation of s 18(4), any driver who allowed a passenger to enter his car, visibly carrying an item or package which turned out to contain controlled drugs, would bear the burden of proving that he did *not* know that they were drugs in order to escape a trafficking charge. This plainly is untenable and leads us to the firm conclusion that the narrow conception cannot be the correct interpretation of s 18(4) knowledge.

66 The natural and intuitive answer to the scenario we have just outlined is that it is only meaningful to say that one knows of and consents to another being in possession of an object if one has at least some relevant knowledge of the nature of that object. What the relevant knowledge is depends on the basis upon which one could be said to exercise consent to another being in possession of that object. After all, knowledge is a prerequisite to consent since it is not possible to consent to something that one is unaware of. In our judgment, the aim of s 18(4) of the MDA is to fix with possession those who know of and consent to another person being in possession of controlled drugs, and therefore the relevant knowledge would be the fact that the object is a controlled drug. This corresponds to the intermediate conception. This must then be accompanied by "consent" in the sense that there is some dealing or participation in the manner described at [52] above.

67 For related reasons, we do not think that the broad conception should be adopted. First, possession of the drugs and knowledge of their nature are distinct elements when dealing with any offence under the MDA, and the jurisprudence of this court has emphasised the importance of not conflating them: see *Adili* ([50] *supra*) at [32], [35]. Significantly, s 18(4) of the MDA is concerned with the question of possession and not with the separate question of knowledge. Though we recognise that the concept of joint possession under s 18(4) is distinct from the core concept of possession which is centred on actual possession, we should be wary of expanding the concept of joint possession so broadly that it swallows up the element of knowledge altogether. It also seems to us to be unnecessary and inconsistent with the text of s 18(4) to hold that knowledge for the purpose of finding joint possession should extend to actual knowledge of the nature of the drugs. Instead, as we have explained at [55] above, the intermediate conception best accords with the plain meaning of s 18(4).

68 Further, as we have said at [51] above, joint possession is deemed to be legally equivalent to actual possession by virtue of s 18(4) of the MDA. The result of this equivalence is that all the usual consequences of a finding of actual possession would apply: principally, in the present context, that means the applicability of the presumption of knowledge under s 18(2). In our judgment, the intermediate conception brings the joint possessor under s 18(4) into (at least) a state of moral equivalence with an actual possessor. Indeed, the joint possessor who knows that the actual possessor is in possession of controlled drugs of some kind and consents to the same has plainly already been put on notice that he is getting involved in illicit drug activities by association with the actual possessor. This may be contrasted with the position of the actual possessor or a secondary possessor in respect of whom the s 18(1) presumption

applies, who is presumed to know of the nature of the drugs under s 18(2) merely on account of the fact of his possession. The concern expressed in *Ridzuan* (see [58] above) over an unduly narrow conception of knowledge would be adequately met, in our judgment, with the intermediate conception.

69 For completeness, we acknowledge that s 18(4) of the MDA is in material terms similar to s 4(3)(b) of the Criminal Code of Canada, RSC 1985, c C–46 (Can), which provides a statutory definition of joint possession in the general criminal law. However, in Canadian criminal law, *all* forms of possession require knowledge of the nature of the thing: see *R v Thompson* [2010] OJ No 2266 at [9]–[10]; *R v Morelli* [2010] 1 SCR 253 at [15]–[17]. That is not a feature of our law in the context of our legislation dealing with drugs and as we have noted at [67] above, our jurisprudence has emphasised the importance of not conflating these concepts. Thus, the fact that joint possession in Canada effectively adopts the broad conception of knowledge does not affect our view of s 18(4) of the MDA.

70 In short, in our judgment, "knowledge" under s 18(4) of the MDA requires knowledge that the thing is a controlled drug (in general). Such knowledge on the part of the joint possessor, coupled with his consent, places him in circumstances where the s 18(2) presumption would then fairly be applicable.

*Whether s 18(4) of the MDA requires possession at the time of arrest*

71 We now turn briefly to CM 16/2019, in which Azli submits that since s 18(4) of the MDA is phrased in the present tense ("has … in his possession"), unlike s 18(1) of the MDA ("proved to have had in his possession"), it should be construed as being limited to cases where the drugs are still in the possession

of the actual possessor *at the time of arrest*. As Roszaidi was not in possession of the Drugs at the time of his arrest, and Azli was not with him at that point in any case, Azli submits that he cannot be said to be have been in joint possession under s 18(4).

72 This contention is easily answered by our earlier observation at [51] above that s 18(4) is a definitional provision, and not a rebuttable presumption. Section 18(1) deals with evidential matters at trial – namely, the question of proof. From that frame of reference, the matters that are being proven are necessarily events in the past. On the other hand, s 18(4) simply *defines* joint possession; it is not directly concerned with evidence or proof at trial. There is therefore no reason for the s 18(4) definition to be expressed in the past tense. In so far as Azli's submission rests on the tense used in these provisions, this is without merit and can be readily rejected.

73 In any case, Azli's submission cannot be correct. The question of joint possession is concerned with whether possession may be found to exist on the basis of one party's knowledge of and consent to possession by another. Seen in this light, there is simply no principled reason for construing s 18(4) in the way Azli suggests. If Azli knew of and consented to Roszaidi being in possession of certain drugs for them to be delivered to a third party, it cannot make a difference that Roszaidi had parted company with the drugs and with Azli by the time he was arrested.

74 We therefore dismiss CM 16/2019, because there is no merit to this ground of appeal even if we were to grant leave for Azli to raise it.

***Whether Azli was in joint possession of the Drugs***

75 We return to the facts of the present case to consider whether Azli was in joint possession of the Drugs with Roszaidi. It follows from what we have said at [52] and at [70] above that for us to find that Azli was in joint possession of the Drugs, we would have to be satisfied that Azli knew that Roszaidi wanted Azli to drive him to transport controlled drugs and that Azli consented to this.

76 We first consider the Prosecution's case on Azli's knowledge. The Prosecution submits that Azli knew that he was driving Roszaidi around on 6 October 2015 to enable the latter to collect and deliver heroin as well as methamphetamine. The Prosecution rests its case upon the following: (a) Azli's admissions of knowledge in his contemporaneous and cautioned statements; (b) Roszaidi's evidence in his investigative statements implicating Azli; (c) Azli having accepted a bundle of methamphetamine from Roszaidi, allegedly with instructions to deliver it to someone; (d) Azli having bought the drug paraphernalia for Roszaidi on the latter's instructions; and (e) the fact that Azli would have overheard from Roszaidi's conversations in his car that he was going to collect and deliver the Drugs.

77 The Prosecution first places heavy reliance upon Azli's purported admissions in the statements taken from him shortly after his arrest. In his contemporaneous statement recorded in the early hours of 7 October 2015, Azli said:

> …
>
> A4 I met 'Begok' under block 921.
>
> Q5 For what?
>
> A5 To take thing.
>
> Q6 What thing?

A6 *Sejuk and Panas*

Q7 What is sejuk?

A7 Drug meth

Q8 What is panas?

A8 I know drug but don't know what type. It's like sand.

Q9 Who wants to take the thing?

A9 'Begok'. He asked me for help because he knows I can drive and sometimes I got car that I rent from my cousin.

Q10 Did 'Begok' pay a reward to you when you help him?

A10 Yes. Range from $100 to $200.

Q11 How many times have you helped 'Begok'?

A11 Twice.

…

A20 'Begok' pass one plastic bag which I can't remember what is the colour to his wife at the roadside.

Q21 After that?

A21 We round the area one more time and 'Begok' alighted at the same place that we met his wife. But before drop 'Begok', *he has one more plastic bag to one of his customer at the temple*.

…

[emphasis added; emphasis is original omitted]

Azli identified Roszaidi as 'Begok'.

78 Azli further stated in his cautioned statement, which was recorded later that same day:

> … *[Roszaidi] did not tell me in advance about what he had plan yesterday*. I know he is involved in consuming drugs. I thought yesterday was just a quick meet-up with [Roszaidi's] friend *to collect ice* and then go back. I did not know he was dealing in a large amount of drugs. … [emphasis added]

79 These statements might appear to suggest that Azli did know beforehand that the venture with Roszaidi was to transport the Drugs. However, when Azli took the stand at the trial, he claimed, contrary to the impression one might glean from the statements, that he in fact had no knowledge at all at the material time that Roszaidi would be going to collect diamorphine or methamphetamine. Under cross-examination, Azli further denied having any knowledge that Roszaidi would be dealing in controlled drugs at all that day. Azli also contended that the contemporaneous statement was inaccurately recorded as far as his answer to Q6 (set out above at [77]) was concerned.

80 A key plank of Azli's explanation of these incriminating statements at the trial revolved around his story about a person he sometimes referred to as the "man in black". In his evidence-in-chief, Azli said that after Roszaidi had given the Drugs to Azidah that night, Roszaidi then asked him to drive to a Chinese temple. While the car was stopped next to the temple, a man wearing black entered the car and asked Roszaidi "where is Ice". According to Azli, this was the reason both for the account in his cautioned statement that he was driving Roszaidi that night "to collect ice", *and* for the reference in his contemporaneous statement to Roszaidi delivering "one more plastic bag to one of his customer [*sic*] at the temple". In short, if Azli's account of the "man in black" were true, this would suggest that he acquired the knowledge that Roszaidi was dealing in "ice" and delivering it to customers only *after* Roszaidi had given the Drugs to Azidah.

81 Problematically, however, Azli had not mentioned the existence of this "man in black" in any of his investigative statements. He first mentioned this fact in his interviews with an IMH psychiatrist which started on 23 October 2015. There is also no other evidence of the existence of this person, besides Roszaidi's belated corroboration of Azli's account at the trial itself, *after* Azli's

testimony. Since the role of the "man in black" is relevant to explaining Azli's admissions in his statements, we would expect this to have been mentioned earlier, if such a person existed at all. We therefore reject Azli's story about the "man in black" as an afterthought.

82 As far as Azli's cautioned statement is concerned, it is therefore clear to us that Azli had admitted there to knowing that he had agreed to drive Roszaidi to *collect* controlled drugs, and specifically "ice". There is no other plausible way to make sense of his reference in his cautioned statement to a "meet-up … to collect ice and then go back". This plainly renders his attempts to portray himself as an unwitting chauffeur untenable. We therefore reject Azli's denial at the trial of any knowledge whatsoever that Roszaidi was seeking his assistance in connection with drug-related activities, and fall back instead on what he said in his cautioned statement.

83 That Azli also apparently knew at some point that Roszaidi had *delivered* drugs that night is evidenced in his contemporaneous statement, albeit less directly, with the reference there that we have already referred to, of Roszaidi delivering "one more plastic bag to one of his customer [*sic*] at the temple". However, the context of this answer in the contemporaneous statement shows that the "customer at the temple" came into the picture only after the Drugs were delivered to Azidah (see [77] above, particularly A20 and Q21). The contemporaneous statement does not shed light on whether Azli knew about Roszaidi's drug deliveries beforehand, or was simply narrating what had happened earlier that night without in any way intimating that he had known before he agreed to assist Roszaidi that events would transpire in that way.

84 Our conclusion that Azli did know, when he set off to drive Roszaidi around, that the latter was going to be involved in drug-related activities is

further supported by the drug paraphernalia – a weighing scale and empty paper and plastic packets – which were found in Azli's car (see [7] above). In his investigative statements, Azli said that he had bought these items for Roszaidi on the latter's instructions. At trial, Azli changed his story and said that only the weighing scale was for Roszaidi; the remaining items were for his personal use. Even if this were to be believed, however, the weighing scale is still an incriminating piece of evidence because it is commonly used in drug-dealing activities. Azli denied that the weighing scale was meant for drug trafficking, but did not explain what else it could have been for, saying only that he did not know what Roszaidi intended to use it for. We find it incredible that Azli – who was himself an abuser of methamphetamine, and knew that Roszaidi consumed drugs – did not know that Roszaidi most probably wanted the weighing scale for use in connection with drug-related activities.

85 We conclude that Azli knew that the things Roszaidi brought into the car at Bulim Avenue on 6 October 2015 (which turned out to include the Drugs) were controlled drugs. The next question, then, is whether Azli had *consented* to Roszaidi's possession of controlled drugs. As we have pointed out at [52] above, a key facet of this analysis is the alleged joint possessor's degree of involvement in the actual possessor's possession.

86 Our recent decision in *Moad Fadzir* ([52] *supra*) is instructive. There, the first accused person, Moad Fadzir, had driven to a location to pay for and collect drugs, while the second accused person, Zuraimy, sat in the car next to him and liaised with the drug trafficker for directions. The evidence indicated that Moad Fadzir was the one with the plan to deal in drugs, while Zuraimy was just the middleman who would have had no part to play had Moad Fadzir been in direct contact with the trafficker (*Moad Fadzir* at [97]). For that reason, we upheld the trial judge's finding that Zuraimy did not consent to Moad Fadzir

being in possession of the drugs within the meaning of s 18(4) of the MDA, and therefore found Zuraimy not to be in joint possession of the drugs. That said, we expressed the view that Zuraimy's conduct failed only "marginally" to show such consent, especially since he *had* played a minor role in concealing the drugs in a bag (*Moad Fadzir* at [97]).

87 The present facts are somewhat different from those in *Moad Fadzir*. Our foregoing analysis of the evidence shows that it was at least with the *collection* of controlled drugs in mind that Roszaidi had engaged Azli's services that night, and Azli appreciated this when he agreed to drive Roszaidi around – at least to the extent that "ice" or methamphetamine was involved. In this case, the consignment that Roszaidi took delivery of included both the Drugs (meaning the heroin) and the methamphetamine. This was a consignment of controlled drugs. Azli knew and consented to Roszaidi being in possession of that consignment while he was being transported in Azli's car. Azli's acts were not the acts of a disinterested chauffeur or taxi driver who was indifferent to his passenger's plans or payload, and therefore whose involvement in the passenger's possession of any object collected during the journey could be said to be purely tangential. In these circumstances, we find that Azli was in joint possession of the consignment, which included the Drugs.

***Whether Azli knew the nature of the Drugs***

88 Having established that Azli was a joint possessor of the Drugs pursuant to s 18(4) of the MDA, we turn to consider whether he knew the nature of the Drugs. As will be recalled from the discussion at [47] above, this is the crux of the matter, because Azli's possession of the Drugs is not itself a basis for the abetment charge against him (see [45]–[46] above). Since the presumption of knowledge under s 18(2) of the MDA applies by virtue of Azli's possession of

the Drugs, Azli must rebut the presumption by showing that he did not have such knowledge.

89 We have outlined at [76] above the facts relied on by the Prosecution in support of its primary case, which was that Azli had actual knowledge that Roszaidi was in possession of *heroin* and *methamphetamine*. It relies on the same facts also to refute any attempt by Azli to rebut the s 18(2) presumption. In this connection, it places the heaviest reliance upon Azli's contemporaneous statement, where Azli could name the drugs Roszaidi collected as "Sejuk and Panas" (see [77] above) (referring to methamphetamine and heroin respectively). Azli testified that he knew about the methamphetamine because the "man in black" had asked Roszaidi for "Ice" (see [80] above). According to Azli, the recording officer then asked him, "How about with your friend?", to which Azli responded with a *question*: "Panas eh". It is not entirely clear to us what this was meant to signify. Azli contends that he had in fact asked a question but that this was recorded incorrectly, and as his *answer* rather than as a question. According to Azli, this was the only answer in his contemporaneous statement that was inaccurately recorded. Azli further testified that the first time that he knew heroin was involved was from a CNB officer at the scene of his arrest, whose identity Azli was unable to recall. According to Azli, in response to his denial of knowledge of the drugs, the CNB officer had said, "Don't pretend not to know, you help your friend to take heroin and Ice, right?"

90 We reject Azli's explanation that his answer was inaccurately recorded. We do not see how the question "How about with your friend?" would have induced Azli to say anything about "panas". The recording officer of the contemporaneous statement, SSgt Bukhari bin Ahmad, also testified that he had recorded Azli's answers "word-for-word". Furthermore, at the end of the

recording of the statement, it was read back to Azli, and Azli signed at the top and bottom of every page.

91 As for Azli's explanation of how the unidentified CNB officer had informed him that heroin was involved, we approach this with caution. The transcript of Azli's testimony records him recounting the CNB officer as having referred to "heroin". On the other hand, the word Azli was recorded as using in his contemporaneous statement is "panas". It would seem odd that Azli would volunteer a different name for the drug than what he had been told, given his self-professed lack of familiarity with heroin. However, we do not rely on this because Azli's testimony at trial was given through an interpreter, and we were not told the actual words Azli had used to describe what he had supposedly heard the unidentified CNB officer say. Moreover, this apparent inconsistency was never put to Azli in cross-examination.

92 However, although we reject Azli's contention that his contemporaneous statement was not recorded accurately, and also reject his contention at trial that he had *no knowledge at all* that Roszaidi would be engaged in drug-related activities when he agreed to drive him, it is nonetheless incumbent on us to examine whether Azli had other lines of defence open to him on the state of the evidence, such as it was. The fact that we have rejected his contention that he had no knowledge at all that controlled drugs were involved plainly does not, in and of itself, lead to the conclusion that Azli must therefore have known that the Drugs were heroin.

93 We digress here to touch on a point made by this court in *Public Prosecutor v Mas Swan bin Adnan and another appeal* [2012] 3 SLR 527 ("*Mas Swan*") at [68], that it remains incumbent upon the court to consider any available defence that could reasonably be made out on the evidence. There, a

couple, Mas Swan bin Adnan ("Mas Swan") and Roshamima binti Roslan ("Roshamima") were tried on a joint charge of importing 123 packets containing 21.48g of diamorphine into Singapore by car. These packets were packed in three bundles, which were hidden in the car. At trial, Mas Swan contended that he knew that the three bundles were in the car because Roshamima had told him so; but Mas Swan also claimed that Roshamima had told him the bundles contained only ecstasy pills. Roshamima on the other hand denied any such conversation having taken place between her and Mas Swan, and maintained that she was wholly unaware of the existence of the three bundles in the car. The High Court Judge accepted Mas Swan's evidence and acquitted him of the charge of importing diamorphine, and consequently convicted Roshamima because she had run a defence that admitted of only two possibilities: either she was ignorant of the existence of the bundles and should be acquitted, or she was lying and should be convicted. This was so on the facts because Roshamima had never advanced any other possible case (see *Mas Swan* at [63]).

94 This court reviewed a considerable body of case law and held that a trial judge should not shut his mind to the possibility of an alternative defence that might reasonably be available to the accused person even if that defence had never been put forward and even if it were seemingly inconsistent with the primary defence advanced. The court put it in these terms at [68]:

> … The fact that Roshamima adopted an "all or nothing" defence should not have deprived her of any other available defence that could reasonably be made out on the evidence. It was not unreasonable of Roshamima not to rely on the Alternative Defence at the trial because relying on that defence would inevitably have impacted on the cogency or strength of her primary defence, which, if accepted by the Judge, would have resulted in her being acquitted of the capital charge faced by her …

95 While we accept the correctness of the principle, with respect, we consider that there must be some limits to its application – a point that becomes clear when seen in the context of the particular facts of *Mas Swan*. It is true that by accepting Mas Swan's version of the events, the High Court Judge there had necessarily rejected Roshamima's contentions that (a) she was ignorant of the existence of the three bundles; and (b) she had never told Mas Swan that the bundles contained ecstasy pills. We further accept that the fact that Roshamima was lying on these points did not necessarily mean that she must have known therefore that the bundles contained diamorphine. The High Court Judge there was criticised for not having considered whether Roshamima had told Mas Swan that the bundles contained ecstasy pills because she genuinely believed that to be so (see *Mas Swan* at [78]). But, with respect, it seems to us that this overlooks the significance of the presumption under s 18(2) of the MDA and the fact that no evidence or submission was ever advanced by Roshamima to rebut it. To put it another way, her entire defence rested on her contention that she was not in *possession* of the bundles because she was allegedly ignorant of their existence. She never ran a case in respect of the separate element of *knowledge* and the specific issue of whether, if she were found to be in possession, she *knew* what it was that she was in possession of. Yet, once it was established that she was in *possession* of the bundles, then by virtue of s 18(2) she was presumed to *know* its contents. The court in *Mas Swan* said the following on this point at [77]:

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

96 With respect, while we accept that a trial judge should consider alternative defences that might reasonably be available to the accused person, even if these are inconsistent with the primary case run by the defence, *this must be constrained by reference to the available evidence*. We find it difficult to see how the trial judge in *Mas Swan* could possibly have considered Roshamima's knowledge of what was in the bundles given that she never ran any case on knowledge at all, and more importantly, given that there was no evidence at all on *her* state of knowledge. The only evidence that was before the court was the testimony of Mas Swan to the effect that Roshamima did know there were three bundles in the car and she had told Mas Swan that they contained ecstasy pills. Mas Swan did not even testify as to whether he had reason to believe that Roshamima believed that to be true, and she certainly ran no such case. Given the operation of the s 18(2) presumption, we find it difficult to see how the court could have found that the presumption had been rebutted in the absence of any evidence: see *Obeng Comfort v Public Prosecutor* [2017] 1 SLR 633 at [39]. With respect, in our judgment, had the court been troubled by this, as it evidently was, the more appropriate course would have been to remit the matter to the trial judge for any further evidence to be taken and tested. Finally, we note in passing that a similar need to qualify the seeming breadth of the holding in *Mas Swan* was also noted by this court in *Mohd Suief bin Ismail v Public Prosecutor* [2016] 2 SLR 893 at [30]–[32].

97 *Mas Swan* was concerned with a particular set of circumstances arising in a joint trial, where two (or conceivably more) co-accused persons give conflicting accounts on a particular issue, and the trial judge's resolution of that issue affects possible defences that might avail the co-accused persons. Although the principle is not limited to such circumstances, where a particular finding of fact may have a bearing on the defence, the trial judge would do well

to consider informing the parties and their counsel of the court's finding on the specific point and inviting each accused person affected by it to intimate whether he wishes to raise any other defences prior to concluding the matter.

98 In any event, this is not a difficulty we are faced with in this case. While we have rejected Azli's case that he had no knowledge at all of Roszaidi having any intention to collect controlled drugs on the day in question, we have done so based on Azli's own explicit reference to collecting "ice" in his cautioned statement as his reason for driving Roszaidi that night (see [78] above). This is indeed the evidentiary basis upon which we have found that Azli was in joint possession of the Drugs (see [82] above), and we cannot then ignore that evidence when considering whether he is able to rebut the presumption under s 18(2) of the MDA.

99 The crucial question, however, is whether Azli knew more than the fact that Roszaidi would transport controlled drugs; specifically, that the Drugs were *heroin*. We return here to Azli's answer in his contemporaneous statement, "Sejuk and Panas" (see [77] above), which is the *only* evidence from Azli capable of suggesting that he knew heroin was involved. In our judgment, this statement does not bear the clarity that the Prosecution hopes to distil from it. As we pointed out to Mr Hay in the course of the hearing, the question "What thing?" and Azli's answer "Sejuk and Panas" are silent as to the *time* at which Azli acquired the knowledge of the nature of the drugs. The only conclusion that can safely be drawn from this answer is that Azli knew this by the time his contemporaneous statement was recorded. Importantly, it is not possible to rule out the possibility that Azli acquired his knowledge about the heroin *after* the acts of trafficking had concluded.

100 The ambiguity of the contemporaneous statement is highlighted by the fact that later that same day, as we have already noted, Azli had positively stated his belief that Roszaidi was *only dealing in methamphetamine*, by saying in his cautioned statement that he thought the journey "was just a quick meet-up … to collect ice" (see [78] above). More importantly, Azli had also said in the cautioned statement that Roszaidi did not "tell [him] in advance … what he had plan[ned] yesterday". This was a clear disavowal of any interpretation of Azli's earlier contemporaneous statement that would attribute to Azli knowledge *at the time of the offence* that the Drugs were heroin. Instead, reading Azli's contemporaneous and cautioned statements together, the more plausible interpretation of the answer "Sejuk and Panas" is that it referred, at least in part, to Azli's knowledge at the time of the recording of the contemporaneous statement and not at the time when he was facilitating Roszaidi's actions.

101 In our judgment, faced with these two statements, it was open to the investigating officers to have clarified any perceived discrepancy directly with Azli in the investigative statements that followed. Yet, in the four subsequent statements recorded from Azli which are in evidence, not once was Azli asked to clarify this point. We do not think this affords the court an acceptable basis for finding the requisite knowledge, especially when the case comes down in its essence to just these statements. Similarly, at trial, while the Prosecution put to Azli that the answers in his contemporaneous statement were recorded accurately, it did not challenge Azli on the correct interpretation of the answer "Sejuk and Panas", nor did it challenge Azli on his reference only to "ice" in his cautioned statement. The Prosecution in effect simply asks the court to interpret Azli's words in his contemporaneous and cautioned statements in a manner prejudicial to him. It is untenable for us to prefer such an interpretation when (a) these statements are seen as a whole; and (b) for whatever reason, the

investigating authorities saw fit not to clarify the evident discrepancy between what the Prosecution contends is the correct interpretation of Azli's contemporaneous statement and what Azli explicitly stated shortly thereafter in his cautioned statement. In these circumstances, if there is an ambiguity, it plainly has to be resolved in Azli's favour. That would lead us to the conclusion that what he said in his contemporaneous statement described his knowledge at the time that statement was recorded. This was not inconsistent with what he said in his cautioned statement which made it clear that he did not know beforehand what else Roszaidi was planning.

102 The Prosecution also relies on some other pieces of evidence that we have alluded to at [76] and [89] above. The first of these is *Roszaidi's* evidence in his statements to show that Azli knew that the Drugs were heroin. In the course of several investigative statements, Roszaidi said that there had been an arrangement between Azli and himself for Azli to drive him around to collect drugs. In his long statement recorded on 12 October 2015, Roszaidi said that he had told Azli in mid-2015 that he had a "job" to "collect 'obat' and give it to someone else", and asked Azli to drive him around. According to Roszaidi, Azli knew that "obat" referred to heroin because Azli himself was a heroin abuser. Azli then drove Roszaidi on these "jobs" on five or six occasions. Roszaidi subsequently clarified that the first time Azli did this for him was in July 2015, and on that occasion, he had collected "air-batu" (referring to methamphetamine) and "obat".

103 The difficulty with relying on Roszaidi's incrimination of Azli in these statements is that Roszaidi's position has taken two abrupt turns. In his cautioned statement recorded shortly after his arrest, Roszaidi had said, "My friend that drove the car is only a driver." (see [13] above). Although this is not strictly incompatible with the position that Azli knew the nature of the Drugs,

on its plain reading it strongly suggests that Azli did not fully know or appreciate the true nature of what was going on. After then giving the incriminating account outlined in the preceding paragraph, Roszaidi gave another investigative statement on 10 November 2016, in which he resiled from his incriminating statements against Azli. Instead, Roszaidi said that "my friend [Azli] do[es] not know anything about the case. My friend is just the driver." This also reinforces the likely meaning of Roszaidi's words in his cautioned statement. At trial, Roszaidi explained that he had falsely implicated Azli during the investigations because he was "stressed". The Judge rejected this explanation as a "belated attempt to absolve Azli of criminal liability" (GD at [16]), though it is unclear why Roszaidi would have done that if it were not true.

104 We also note that while Roszaidi's incriminating account was that Azli's involvement in drug trafficking began in July 2015, there is scant evidence to support this. There is no record of any communication between Azli and Roszaidi prior to 28 September 2015. This is in part because the phone records obtained from their respective telecommunications service providers only started from 6 September 2015, and it could therefore only really be suggested that there was no record of any communication between Azli and Roszaidi from 6 to 28 September 2015. Nevertheless, even this pointed to a lack of positive evidence to support Roszaidi's account. Further, Roszaidi's claim was that he knew that Azli understood what he meant when he said he was collecting "obat" *because* Azli himself was a heroin abuser (see [102] above). However, there is no evidence that Azli has ever abused heroin, as opposed to methamphetamine. Roszaidi's assertion that he had previously smoked heroin together with Azli was also withdrawn by him on the stand.

105 What is clear is that Roszaidi's evidence in the course of investigations has taken two abrupt and inexplicable turns: from absolving Azli of liability to

implicating him, and back to absolving him again. Although we certainly do not take Roszaidi's explanation of his conduct at face value, in our judgment the only safe conclusion to draw, whatever the reasons for these about-turns, is that Roszaidi's evidence against Azli is simply unreliable. To say that Roszaidi must have been telling the truth only when he was implicating Azli would be to assume what the Prosecution has to prove. Roszaidi's statements therefore cannot be used to establish that Azli knew the nature of the Drugs.

106 A further piece of evidence from Roszaidi's investigative statements that the Prosecution relies upon is his account of telling Mirwazy, while they were in the back seat of Azli's car on 6 October 2015, that he was going to collect methamphetamine and heroin. The Prosecution argues that since this conversation took place in the small confined space of the car, Azli must have overheard it. Although Roszaidi appeared to affirm his account at trial, his testimony was that he only told Mirwazy he was going to collect "drugs", and not that he mentioned any specific drugs. When Roszaidi's account was put to Azli in cross-examination, Azli said that he did not hear anything of the sort. When Mirwazy came on the stand, he also expressly denied that such a conversation had taken place. It would therefore be unsafe to conclude that Azli had overheard Roszaidi telling Mirwazy in the car that he was going to collect *heroin*, since it is unclear whether a conversation in these terms had even occurred in the first place.

107 As for the Prosecution's submissions regarding the methamphetamine and drug paraphernalia found in Azli's car, these pieces of evidence cannot help the Prosecution's case when the question is not whether Azli knew that Roszaidi was dealing in controlled drugs in general or methamphetamine in particular, but whether Azli knew that the Drugs were *heroin*.

108 On the foregoing evidence, we are satisfied that Azli has rebutted the presumption under s 18(2) that he knew, before or while he was engaged in the venture of transporting the Drugs with Roszaidi, that the Drugs were diamorphine. We rely on his cautioned statement as the evidence of what he did know at the material time, and in the absence of any countervailing evidence showing that he in fact knew that Roszaidi would be involved in collecting or delivering diamorphine, we find that he has rebutted the presumption under s 18(2). For the same reasons, we also find that the Prosecution has failed to prove that Azli had actual knowledge that the Drugs were heroin. On the evidence, the most that can be said is that he believed that Roszaidi was going to collect and transport methamphetamine on the night of the offence.

109 Finally, we return to the further basis on which the Judge had concluded that the element of knowledge was satisfied in relation to Azli: the Judge found that Azli had the opportunity to verify the nature of the Drugs, but deliberately declined to do so (see [10] above). This alludes to a finding that Azli was wilfully blind as to the nature of the Drugs (see *Adili* ([50] *supra*) at [51]). However, we have found on the evidence that Azli believed Roszaidi was dealing specifically in methamphetamine and there is simply no evidence to support a finding that Azli would have suspected that the Drugs, which at the material times were in Roszaidi's possession, were in fact heroin. Wilful blindness is not applicable on the present facts.

***Conclusion on Azli's appeal***

110 We have found that s 18(4) of the MDA is satisfied in relation to Azli, because he knew of and consented to Roszaidi bringing controlled drugs into his car and proceeded to transport Roszaidi on this basis. Azli is therefore presumed to know the nature of the Drugs pursuant to s 18(2) of the MDA.

However, we have found that Azli has rebutted the s 18(2) presumption. For the same reasons, there is no evidentiary basis for a finding that Azli had actual knowledge of or was wilfully blind to the nature of the Drugs.

111 As a result, the Prosecution has not established the element of knowledge against Azli. For the same reason, no lesser offence involving diamorphine, such as that of possession of a controlled drug, can be made out against him: see *Adili* at [35]. We therefore allow Azli's appeal and acquit him of the charge.

112 For completeness, we should also mention that there is one further element of the offence of abetment by intentionally aiding (set out at [46] above) which the Prosecution has also failed to satisfy. That is the need to establish, that beyond having knowledge of the nature of the Drugs, Azli was aware that *Roszaidi intended to traffic in diamorphine* (see also *Ramesh a/l Perumal* ([11] *supra*) at [115]). It should be noted that the case against Azli was one of purely accessorial liability. If Azli had failed to rebut the presumption of knowledge under s 18(2), he would have been liable for the offence of possession of a controlled drug, namely diamorphine. But to make him liable as an accessory to trafficking is a wholly different matter. It would have been necessary to show that Azli knew that Roszaidi was engaging him for assistance not only to collect diamorphine but that he was also doing this for the purpose of trafficking. The only piece of evidence that pointed directly to this conclusion was Roszaidi's account in his statements (see [102] above), which we have found to be unreliable (see [105] above). The remaining evidence demonstrates, at best, only that Azli knew of Roszaidi's involvement in drug trafficking in general, as opposed to his having known of and agreed to assist Roszaidi in trafficking in diamorphine at the material time of the offence. We refer here, for example, to the drug paraphernalia Azli had procured for Roszaidi (see [84] above), and

Azli's reference to Roszaidi's "customer" (see [77] above), the significance of which is in any case doubtful (see [83] above). As such, the Prosecution has failed to prove that Azli knew at the material times that Roszaidi intended to traffic in the Drugs. For this reason also, Azli's conviction cannot stand.

113 There is no charge before us concerning Azli's involvement with the methamphetamine. As there has therefore been no consideration of the facts pertaining to the methamphetamine, we do not think it appropriate to consider amending the charge against Azli. It is a matter for the Prosecution to consider whether it wishes to pursue any charge in that respect and we say nothing more on that.

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|---|---|---|
| Sundaresh Menon<br>Chief Justice | Andrew Phang Boon Leong<br>Judge of Appeal | Judith Prakash<br>Judge of Appeal |
| Tay Yong Kwang<br>Judge of Appeal | Steven Chong<br>Judge of Appeal | |

Cheong Jun Ming Mervyn (Advocatus Law LLP), Lau Kah Hee (Derrick Wong & Lim BC LLP) and Melvin Loh (Continental Law LLP) for the appellant in Criminal Appeal No 1 of 2019 and the applicant in Criminal Motion No 16 of 2019;
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