

IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2020] SGCA 45

Criminal Appeal No 9 of 2018

Between

Mohammad Rizwan bin Akbar
Husain

... Appellant

And

Public Prosecutor

... Respondent

Criminal Appeal No 13 of 2018

Between

Saminathan Selvaraju

... Appellant

And

Public Prosecutor

... Respondent

Criminal Motion No 4 of 2019

Between

Saminathan Selvaraju

... Applicant

And

Public Prosecutor

... *Respondent*

Criminal Motion No 11 of 2019

Between

Mohammad Rizwan bin Akbar
Husain

... *Applicant*

And

Public Prosecutor

... *Respondent*

In the matter of Criminal Case 43 of 2016

Between

Public Prosecutor

And

- (1) Zulkarnain bin Kemat
- (2) Mohammad Rizwan bin Akbar
Husain
- (3) Saminathan Selvaraju

JUDGMENT

[Criminal Law] — [Statutory offences] — [Misuse of Drugs Act]
[Criminal Procedure and Sentencing] — [Appeal] — [Adducing fresh
evidence]

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Mohammad Rizwan bin Akbar Husain
v
Public Prosecutor and another appeal and other matters

[2020] SGCA 45

Court of Appeal — Criminal Appeals Nos 9 and 13 of 2018, Criminal Motions Nos 4 and 11 of 2019

Judith Prakash JA, Tay Yong Kwang JA and Woo Bih Li J

22 November 2019, 15 January 2020

8 May 2020

Judgment reserved.

Tay Yong Kwang JA (delivering the judgment of the court):

Introduction

1 The appellants, Mohammad Rizwan bin Akbar Husain (“Rizwan”) and Saminathan Selvaraju (“Saminathan”), were tried jointly in the High Court with a third co-accused person, Zulkarnain bin Kemat (“Zulkarnain”). Rizwan faced one charge of abetting by instigating Zulkarnain to be in possession of not less than 301.6g of diamorphine for the purpose of trafficking, an offence under s 5(1)(a) read with s 5(2) and s 12 of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) (“the MDA”). Saminathan faced one charge of trafficking in not less than 301.6g of diamorphine by delivering the drugs to Zulkarnain, an offence under s 5(1)(a) of the MDA.

2 The charge against Rizwan reads:

That you, MOHAMMAD RIZWAN BIN AKBAR HUSAIN, on the 20th day of November 2013, in Singapore, did abet one Zulkarnain bin Kemat (bearing NRIC no: ...) to traffic in a controlled drug listed in Class A of the First Schedule to the Misuse of Drugs Act (Cap 185, 2008 Rev Ed), to wit, by instigating the said Zulkarnain Bin Kemat to be in possession for the purpose of trafficking thirty-five (35) bundles of granular/powdery substance which was analysed and found to contain a total of not less than 301.6 grammes of diamorphine, without authorisation under the said Act or the Regulations made thereunder, when you instructed him to collect and transport the said drug, which he did on the 20th day of November 2013 at or about 10:00 pm at Quality Road, Singapore, and you have thereby committed an offence under section 5(1)(a) read with section 5(2) and section 12 of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) and punishable under section 33(1) of the said Act, and further, upon your conviction under section 5(1)(a) read with section 5(2) and section 12 of the said Act, you may alternatively be liable to be punished under section 33B of the said Act.

3 The charge against Saminathan reads:

That you, SAMINATHAN SELVARAJU, on the 20th day of November 2013, at or about 10:00 pm, at Quality Road, Singapore, did traffic in a controlled drug listed in Class A of the First Schedule to the Misuse of Drugs Act (Cap 185, 2008 Rev Ed), to wit, by delivering thirty-five (35) bundles of granular/powdery substance which was analysed and found to contain a total of not less than 301.6 grammes of diamorphine to one Zulkarnain bin Kemat (bearing NRIC no: ...) without authorisation under the said Act or the Regulations made thereunder, and you have thereby committed an offence under section 5(1)(a) of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) and punishable under section 33(1) of the said Act, and further, upon your conviction under section 5(1)(a) of the said Act, you may alternatively be liable to be punished under section 33B of the said Act.

4 Zulkarnain was charged with trafficking in that he had in his possession for the purpose of trafficking the said 35 bundles of drugs delivered to him by Saminathan. The High Court judge (“the Judge”) convicted Zulkarnain, Rizwan and Saminathan on their respective charges. The Judge found Zulkarnain to be a courier within the meaning of s 33B(2)(a) of the MDA. As the Public

Prosecutor had issued a certificate of substantive assistance to Zulkarnain, the Judge exercised her discretion and decided not to impose the death penalty. Instead, she sentenced Zulkarnain to life imprisonment with effect from the date of his arrest. As Zulkarnain was more than 50 years old at the time of sentencing, he was exempted from the minimum 15 strokes of the cane. He did not appeal against the Judge's decision.

5 The Judge found that Rizwan was not a courier but held that Saminathan was a courier. However, as neither of them was issued a certificate of substantive assistance under s 33B(2)(b) of the MDA by the Public Prosecutor, the Judge imposed the mandatory death sentence on both Rizwan and Saminathan: see *Public Prosecutor v Zulkarnain bin Kemat and others* [2018] SGHC 161 ("the GD"). Both Rizwan and Saminathan appealed against their conviction. Their cases are unusual in that they were not arrested at the scene of the drug transaction but only subsequently. Rizwan was arrested about eight days later while Saminathan was arrested about four months later.

6 In the period leading up to the present appeals, Rizwan and Saminathan filed two separate criminal motions, viz, Criminal Motion No 11 of 2019 ("CM 11/2019") and Criminal Motion No 4 of 2019 ("CM 4/2019"). CM 11/2019 was an application by Rizwan for leave to adduce alibi evidence in the form of testimony from Mohammed Farhan bin Baharudin ("Farhan"). CM 4/2019 was an application by Saminathan for leave to adduce three categories of evidence. These were (a) alibi evidence in the form of testimony from his mother, Mdm Mahalatchmay a/l N Chella Permal ("Mdm Mahalatchmay") and sister, Selvakumari a/l Selvaraju ("Ms Selvakumari"); (b) statements made by him to the police during investigations and other documents which were not tendered as evidence at the trial; and (c) communications between his counsel at the

appeal and an expert witness engaged for Saminathan’s defence during the trial. We heard both applications on 22 November 2019 and dismissed them. We indicated then we would give our reasons after we had heard the substantive appeals. We do so towards the end of this judgment.

Background

The arrests

7 On the night of 20 November 2013, at or about 8.15pm, officers from the Central Narcotics Bureau (“CNB”) placed Zulkarnain under surveillance and tailed him from his residence at Spooner Road until he eventually reached Chin Bee Drive at about 9.13pm. At this time, Zulkarnain was driving a black Honda car.

8 At about 9.55pm, Zulkarnain was observed positioning his car close to the junction of Chin Bee Drive and Quality Road. A black Mitsubishi Lancer car bearing registration number SGC4606C (“the Black Mitsubishi”) was parked in front of Zulkarnain’s car. The driver was observed to be plump and to be wearing a cap. The Black Mitsubishi was registered in Rizwan’s name.

9 Subsequently, both these cars moved from Chin Bee Drive into Quality Road. The cars drove past a stationary trailer with Malaysian registration number WER 2508 (“the Trailer”) which was parked along Quality Road in the direction of Chin Bee Drive. The Trailer had its hazard lights turned on. The Black Mitsubishi stopped further down along Quality Road in the direction of International Road. Meanwhile, Zulkarnain’s car made a U-turn and parked in front of the Trailer. The driver of the Trailer, a male Indian, alighted and placed some items in Zulkarnain’s car through the left rear passenger side. He then

returned to the Trailer. After this, all three vehicles left Quality Road and each was separately tailed by CNB officers.

10 Zulkarnain’s car was followed to Tagore Industrial Avenue where it was stopped by CNB officers who arrested him. A search conducted in Zulkarnain’s car found two red plastic bags on the floor mat of the rear of the car. The first (marked “A1”) contained 15 black-taped bundles (marked “A1A” collectively and “A1A1” to “A1A15” individually), while the second (marked “B1”) contained 20 black-taped bundles (marked “B1A” collectively and “B1A1” to “B1A20” individually). These 35 bundles formed the subject of the above mentioned charges.

11 CNB officers tailed the Black Mitsubishi to Tampines Avenue 7. At about 10.40pm, the Black Mitsubishi made a sudden U-turn and sped away. The CNB officers lost sight of the car.¹

12 The Trailer was tailed by CNB officers from Quality Road to Tuas Checkpoint. It passed through the Immigration and Checkpoints Authority (“ICA”) gantry at about 10.15pm and departed for Malaysia.²

13 On 25 November 2013, five days after the incidents described above, Rizwan left Singapore and entered Malaysia by hiding in the boot of a car. He was eventually apprehended on 28 November 2013 by the Malaysian authorities

¹ SI Andy Goh’s conditioned statement, Record of Proceedings (“ROP”) Vol 2 at p 171 (see para 11).

² Notes of Evidence (“NE”) (02/09/2016), p 80 (lines 17 –31) to p 81 (lines 1 – 7).

at a casino in Genting Highlands.³ On 29 November 2013, he was brought back to Singapore and was placed under arrest at Woodlands Checkpoint that night.⁴

14 Saminathan was identified as the driver of the Trailer on the night of 20 November 2013 from the ICA’s records. He was arrested on 25 March 2014 at the Woodlands Checkpoint when he entered Singapore and was handed over to the CNB that same day.⁵

The seized exhibits

15 The 35 black-taped bundles (see [10] above) seized from Zulkarnain’s car were sent to the Health Sciences Authority (“HSA”) for analysis. They were found to contain a total of 11,419g (or some 25 pounds) of granular substance.⁶ After analysis, the granular substance was found to contain not less than 301.6g of diamorphine (“the drugs”).

16 A number of other objects were also recovered from Zulkarnain, including a walkie-talkie (marked “ZK-WT”), a blue Nokia handphone (marked “ZK-HP3”) and a black Nokia handphone (“ZK-HP4”).⁷

The statements

³ Rizwan’s Statement of 30 November 2013, ROP Vol 2A at p 760 (see para 24).

⁴ Prosecution’s Opening Statement at para 13, ROP Vol 2 at p 414.

⁵ ROP Vol 2 pp 294 – 296.

⁶ See Conditioned Statement of Hu Yiling Charmaine, ROP Vol 2 at pp 83–88.

⁷ Zulkarnain’s Long Statement 26 November 2013 1.40pm, ROP Vol 2A at pp 695–702 (see para 9).

Zulkarnain's statements

17 Zulkarnain gave a total of 12 statements to the CNB which were admitted into evidence without objection. These statements consisted of:

- (a) two contemporaneous statements recorded under s 22 of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) (“CPC”) on 20 November 2013 at 11.26pm and 21 November 2013 at 2.15am;
- (b) a cautioned statement recorded under s 23 of the CPC on 21 November 2013; and
- (c) nine long statements recorded under s 22 of the CPC on various dates from 21 November 2013 to 6 May 2014.

18 In these statements, Zulkarnain gave a fairly consistent account of the events leading up to the drug transaction on the night of 20 November 2013. In essence, Zulkarnain stated that he acted at the behest of a person whom he knew by various names including “Bos”, “Boss” and “Batman”. This person, whom we shall refer to as “Boss”, had called Zulkarnain at about 5pm to inform him that there was work that night.⁸ Boss called Zulkarnain again at about 8pm⁹ and told him to go to Chin Bee Drive. Zulkarnain left his house in Bukit Panjang and drove to Chin Bee Drive. He arrived at around 10pm and parked at a parking

⁸ Zulkarnain’s Long Statement 24 November 2013 3.29pm, ROP Vol 2A at p 683 (see para 10).

⁹ Zulkarnain’s Long Statement 24 November 2013 3.29pm, ROP Vol 2A at p 683 (see para 11).

lot at the side of the road.¹⁰ Boss then called Zulkarnain on a blue Nokia phone (*ie*, ZK-HP3) and told him to switch off all his handphones and to communicate instead over a walkie-talkie (*ie*, ZK-WT). Both the blue Nokia phone and walkie-talkie were given by Boss to Zulkarnain.¹¹ Boss arrived soon after in the Black Mitsubishi which had a tinted body and windows.¹² Boss spoke with Zulkarnain over the walkie-talkie and instructed Zulkarnain to follow him. Zulkarnain did so and drove to the junction of Quality Road and Chin Bee Drive. “Boss” told Zulkarnain that once he turned left from Chin Bee Drive into Quality Road, he would see a trailer with blinking lights. Zulkarnain was to stop there.¹³

19 Zulkarnain did as instructed. He saw the Trailer with blinking lights and stopped in front of it. From the rear-view mirror of his car, Zulkarnain saw an Indian man alight from the Trailer.¹⁴ The Indian man walked to Zulkarnain’s car. It was dark and Zulkarnain could not see the man clearly.¹⁵ Zulkarnain had been instructed not to communicate with this man and was only to look forward

¹⁰ Zulkarnain’s Long Statement 24 November 2013 3.29pm, ROP Vol 2A at p 684 (see para 13).

¹¹ Zulkarnain’s Long Statement 24 November 2013 3.29pm, ROP Vol 2A at p 683 (see para 11); Zulkarnain’s Long Statement 25 November 2013 7.48pm, ROP Vol 2A at p 691.

¹² Zulkarnain’s Long Statement 24 November 2013 3.29pm, ROP Vol 2A at p 684 (see para 14).

¹³ Zulkarnain’s Long Statement 24 November 2013 3.29pm, ROP Vol 2A at p 684 (para 14).

¹⁴ Zulkarnain’s Long Statement 24 November 2013 3.29pm, ROP Vol 2A at p 685 (para 15).

¹⁵ Zulkarnain’s Long Statement 24 November 2013 3.29pm, ROP Vol 2A at p 685 (para 15).

and not turn around to look at the man.¹⁶ The Indian man opened the left rear door of Zulkarnain's car, placed some things in the car and then left. Zulkarnain spoke to "Boss" over the walkie-talkie and was told to go to the "same place".¹⁷ Zulkarnain understood "same place" to mean Tagore Lane. Zulkarnain drove to Tagore Lane as instructed. He was arrested there by the CNB.

20 In the course of having his statements recorded, Zulkarnain picked out Rizwan's photograph from a set of nine photographs, identified Rizwan as "Boss" and stated that he lived in Bukit Panjang. This identification was first made in Zulkarnain's long statement recorded on 21 November 2013.¹⁸ At the taking of a further statement on 4 December 2013, Zulkarnain identified Rizwan as "my boss" when shown a photograph of Rizwan.¹⁹ Zulkarnain stated that he had worked for Rizwan on previous occasions. Each time, he would be instructed to travel to a particular location in a rented car where items would be placed into the car by a man in a trailer. He would then meet Rizwan at Tagore Lane where Rizwan would collect the items from him. Zulkarnain would meet Rizwan subsequently to collect payment.²⁰

¹⁶ Zulkarnain's Long Statement 24 November 2013 3.29pm, ROP Vol 2A at p 685 (para 15).

¹⁷ Zulkarnain's Long Statement 24 November 2013 3.29pm, ROP Vol 2A at p 685 (para 16).

¹⁸ Zulkarnain's Long Statement 21 November 2013 7.08pm, ROP Vol 2A at p 679 (paras 5, 8), p 681.

¹⁹ Zulkarnain's Long Statement 4 December 2013 4.18pm, ROP Vol 2 at p 372 (para 41).

²⁰ Zulkarnain's Long Statement 25 November 2013 7.48pm, ROP Vol 2A at p 691 (para 30).

Rizwan's Statements

21 A total of four long statements and one cautioned statement recorded from Rizwan were produced at trial. In these statements, Rizwan denied having any involvement in the transaction which took place on 20 November 2013. In his cautioned statement recorded on 29 November 2013, the day of his arrest, he denied having asked Zulkarnain to collect the drugs or to go to Tagore Lane. He stated in his final sentence that “I’m also following instructions from ‘Uncle’”.²¹ In his other statements, Rizwan stated that he could not recall what he had done on the night of 20 November 2013 as he was on medication. He was also initially unable to provide details about his whereabouts in the following days, save that he remembered leaving Singapore for Malaysia in the boot of a car on 25 November 2013.²² Subsequently, he mentioned that he spent the night of 21 November 2013 with his friend, Farhan, and Farhan’s girlfriend in a room in the Siloso Beach Resort in Sentosa. Sometime late that night or in the early hours of the next day, Rizwan left the room. Somehow, someone whom he had never met before drove him in Farhan’s car out of Sentosa back to the mainland. Rizwan asked that person to drop him off near Scotts Road. Rizwan did not know why he asked that person to take him there. It was still dark when he arrived there. Rizwan walked around in the Orchard Road area. When it was daylight, “Uncle” called Rizwan and told him to go to Yishun. He then took a taxi to Yishun.²³

²¹ Rizwan’s Cautioned Statement 29 November 2013 8.53pm, ROP Vol 2B at pp 843–846.

²² Rizwan’s Long Statement 30 November 2013 1.58pm, ROP Vol 2A at pp 757–759 (paras 18–21).

²³ Rizwan’s Long Statement 10 December 2013 5.36pm, ROP Vol 2B at pp 847–849 (paras 84–89).

Saminathan's statements

22 Two long statements recorded from Saminathan were admitted into evidence at the trial. The first was recorded from Saminathan on 28 March 2014. In it, Saminathan stated that he had worked as a delivery driver for a company known as MKG Logistics (“MKG”). His boss at MKG was Mr Murugan a/l Silvarajoo (“Murugan”). Saminathan would drive into Singapore four to six times a week. He drove the Trailer at all times save for one occasion when he drove a different lorry. His work involved primarily the delivery of goods from Malaysia to Singapore although he had on occasions transported clay from a location in Shipyard Crescent to Malaysia.²⁴

23 The second statement was recorded from Saminathan on 31 March 2014. In it, Saminathan was informed by the recorder of the statement that he had come into Singapore alone twice on 20 November 2013. The first occasion was from 8.24am to 10.32am and the second was from 6.40pm to 10.18pm. Saminathan posited that he “probably came into Singapore for work purposes” that day. While he could not remember why he had entered Singapore that evening, three possible reasons were given by him: (a) first, to deliver goods such as cement; (b) second, to load clay at Shipyard Crescent; and (c) third, to load a consignment of goods, though he might have left Singapore with an empty lorry due to unforeseen circumstances.²⁵

The parties' cases at trial

²⁴ Saminathan's Long Statement 28 March 2014 3.25pm, ROP Vol 2A, pp 711–713 (paras 9–15).

²⁵ Saminathan's Long Statement 31 March 2014 4.04pm, ROP Vol 2A, pp 775–776 (paras 17–18).

The Prosecution's case

24 The Prosecution's case was that Rizwan had instigated Zulkarnain to be in possession of the drugs on 20 November 2013 for the purpose of trafficking. The circumstances led to the irresistible inference that Rizwan knew that the drugs were diamorphine and that he intended to traffic in them. In the alternative, the Prosecution submitted that knowledge of the nature of the drugs could be proved by applying s 18(4) of the MDA such that Rizwan would be deemed to be in joint possession of the diamorphine with Zulkarnain. This would then trigger the presumption of knowledge in s 18(2) of the MDA, with the result that Rizwan would be presumed to have known that the drugs were diamorphine.²⁶

25 To prove its case, the Prosecution relied heavily on evidence given by Zulkarnain identifying Rizwan as Boss. Zulkarnain's testimony at the trial was essentially the same as that in his statements (see [17]–[20] above). Zulkarnain also testified that he was sure that he was communicating with Rizwan as he could see Rizwan's body from the back of the car while parked behind the Black Mitsubishi and he was also able to recognise Rizwan's voice when they talked using the walkie-talkie.²⁷ The Prosecution also adduced several strands of evidence to corroborate Zulkarnain's account:²⁸

- (a) First, Zulkarnain was arrested with a number of handphones and a walkie-talkie (see [16] above). A translated text message forensically

²⁶ Prosecution's further submissions in CC 43/2016 dated 12 January 2018 at paras 32–38.

²⁷ NE (16/09/16), ROP Vol 1A at p 524 (lines 15 – 31).

²⁸ See Prosecution's submissions in CC 43/2016 dated 3 October 2017 at paras 26–33.

extracted from the blue Nokia handphone (*ie*, ZK-HP3) from one of two numbers identified by Zulkarnain as belonging to Rizwan sent at 9.24pm on 20 November 2013 stated “All hp turn off/close all k.. 10min I reach”.²⁹ Shortly thereafter, the Black Mitsubishi was observed parked in front of Zulkarnain’s car at 9.55pm along Chin Bee Drive close to the junction of Chin Bee Drive and Quality Road.³⁰

(b) Second, the Black Mitsubishi was registered in Rizwan’s name. A CNB officer, SSgt Azhari bin Rohman, also observed that the driver of the Black Mitsubishi was plump and wearing a cap at the time. This was an accurate description of Rizwan’s build and attire at the time as he was captured on CCTV leaving his residence at 9.20pm on 20 November 2013.³¹

26 Apart from the supporting evidence, the Prosecution’s position was that Rizwan’s defence (see [29]–[33] below) lacked credibility as it was illogical, was inconsistent with the evidence at trial and was only raised at a late stage.³² Rizwan’s acts following 20 November 2013 were also indicative of his guilt. Rizwan had fled Singapore illegally in the boot of a car on 25 November 2013. There was no reason for him to have done so if he were innocent.³³

²⁹ Exhibit P122, ROP Vol 2A at p 555.

³⁰ See statement of SSgt Azhari Bin Rohman, ROP Vol 2B, p 945 (para 12);

³¹ NE (08/09/16), ROP Vol 1 at p 352 (lines 10–12).

³² See Prosecution’s submissions in CC 43/2016 dated 3 October 2017 at paras 33–37.

³³ See Prosecution’s submissions in CC 43/2016 dated 3 October 2017 at paras 38–40.

27 As for Saminathan, the Prosecution submitted that the charge against him was made out as he was the driver of the Trailer and was the one who delivered the diamorphine to Zulkarnain. The evidence relied on primarily by the Prosecution can be summarised as follows:

(a) First, the ICA records showed that Saminathan entered and left Singapore twice using his passport on 20 November 2013.³⁴ The entry of note was the one at 6.40pm, with exit at 10.18pm from Tuas Checkpoint. The Trailer used by Saminathan to enter Singapore was occupied by only one person at the time.³⁵ An image of the completed disembarkation card was also produced which showed Saminathan's name and signature, the vehicle's registration number as "WER2508" and the address in Singapore as "SHIPYArD Rd".³⁶ The Prosecution's handwriting expert, Dr Nellie Cheng ("Dr Cheng"), testified that the possibility of Saminathan having written the words "SHIPYArD Rd" "cannot be ruled out".³⁷

(b) Second, the testimony of ICA officer Staff Sergeant Goh Cheow Siang ("SSgt Goh"), who was the officer responsible for processing the exit of the Trailer from Singapore on the night of 20 November 2013. SSgt Goh testified as to the verification protocol that he would have applied, including how he would have paid attention to outstanding

³⁴ ROP Vol 2A p 750

³⁵ ROP Vol 2A p 755.

³⁶ ROP Vol 2A p 753.

³⁷ ROP Vol 2A p 830.

facial features.³⁸ There was nothing suspicious about the person whom SSgt Goh cleared that day.³⁹

(c) Third, a conditioned statement by Saminathan's former employer, Murugan, which was admitted by consent under s 32(1)(k) of the Evidence Act (Cap 97, 1997 Rev Ed) ("the EA"). According to Murugan, each driver working for MKG was assigned a specific trailer which he would be responsible for and which he could park near his home. The Trailer was assigned to Saminathan exclusively. On 20 November 2013, the only job Saminathan was assigned was to deliver mineral water from Malaysia to Chin Bee Drive in the morning. The following day, Murugan contacted Saminathan to assign him a delivery but discovered that Saminathan had returned to his hometown with the keys to the Trailer. Saminathan was away from work until 27 November 2013 and the keys to the Trailer were with him.⁴⁰

(d) Fourth, DNA analysis conducted by the HSA showed that Saminathan's DNA was found on two of the 35 bundles containing the drugs, namely bundles "A1A9" and "B1A6". The evidence of Ms Tang Sheau Wei June ("Ms Tang"), the HSA analyst having charge of the DNA analysis, was that Saminathan's DNA was found on the non-adhesive side of the strips of black tape used to wrap the bundles at three areas:⁴¹

³⁸ NE (13/09/16), ROP Vol 1A at p 472 (lines 30 – 31) to p 473 (lines 1 – 6).

³⁹ NE (13/09/16), ROP Vol 1A at p 483 (lines 8 – 11).

⁴⁰ ROP Vol 2A pp 739–742.

⁴¹ ROP Vol 2 at pp 95–130.

- (i) the exterior of the fully wrapped bundle B1A6 (“AREA 1”) but not on bundle A1A9;
- (ii) the interior part of B1A6 on the non-adhesive sides of the black tape after the strips had been removed one by one and swabbed,⁴² (“AREA 4”) (*ie*, the DNA was found on those parts of the black tape that were covered by other pieces of black tape); and
- (iii) AREA 4 of A1A9.

28 The Prosecution also submitted that Saminathan’s defence of impersonation of his identity by some unknown person ought not to be believed. It was not raised at the time the case for the Defence was filed and was inconsistent with the evidence adduced at trial.⁴³

Rizwan’s defence

29 At the trial, Rizwan’s case was that he was not involved in the drug transaction at all. He claimed that on 20 November 2013, he lent his car to one “Uncle”, a person he got to know in September 2013.⁴⁴ He was at home when “Uncle” called to inform him that something had happened to his car. He left home after 9pm after receiving this call because “Uncle” told him to leave his home.⁴⁵ He then took a taxi to Raffles Place and proceeded to a pub at Boat

⁴² NE (07/09/16), ROP Vol 1 at pp 255 (lines 17 – 29) and 257 (lines 1 – 10).

⁴³ Prosecutions submissions in CC 43/2016 dated 3 October 2017 at paras 52–70.

⁴⁴ NE (20/09/2016), ROP Vol 1A at p 578 (lines 13 – 19).

⁴⁵ NE (20/09/2016), ROP Vol 1A at p 582 (lines 13 – 22).

Quay.⁴⁶ Once there, he saw three people he recognised, Farhan, Khairul Famy bin Mohd Samsudin (“Khairul”) and one “Yan Kenet”. He remained at Boat Quay until the early hours of the morning. At about 3 to 4am, he received a call from “Uncle”. “Uncle” told Rizwan that some persons working for “Uncle” had been “arrested for drugs”.⁴⁷ Rizwan was shocked and told “Uncle” to settle the problem.⁴⁸

30 Over the next few days, Rizwan spent his nights at various locations. On 24 November 2013, he felt bored and went to Suntec City. When he was there, he called “Uncle”. “Uncle” told him that he should go to Malaysia.⁴⁹ “Uncle” also gave Rizwan a phone number of one “Bro” who would arrange transport for Rizwan to leave Singapore for Malaysia.⁵⁰ Rizwan spent the night of 24 November 2013 out at a bar.⁵¹ In the early hours of 25 November 2013, he took a taxi to Clementi Central where he met “Bro”.⁵² “Bro” drove him to Tuas.⁵³ At Tuas, “Bro” told Rizwan to get out of the front passenger seat and hide in the boot of the car. “Bro” then drove into Malaysia with Rizwan hidden in the boot of the car.⁵⁴

⁴⁶ NE (20/09/2016), ROP Vol 1A at p 583 (lines 11 – 19).

⁴⁷ NE (20/09/2016), ROP Vol 1A at p 584 (lines 11 – 21).

⁴⁸ NE (20/09/2016), ROP Vol 1A at p 584 (lines 20 – 23).

⁴⁹ NE (20/09/2016), ROP Vol 1A at p 586 (lines 3 – 14).

⁵⁰ NE (20/09/2016), ROP Vol 1A at p 586 (lines 15 – 17).

⁵¹ NE (20/09/2016), ROP Vol 1A at pp 621 (line 26) to 622 (line 9).

⁵² NE (20/09/2016), ROP Vol 1A at p 586 (lines 19 – 27).

⁵³ NE (20/09/2016), ROP Vol 1A at p 587 (lines 7 – 9).

⁵⁴ NE (20/09/2016), ROP Vol 1A at p 587 (lines 21 – 24).

31 In his statement, Rizwan said that before he went out of the car to hide in the boot, he left his passport at the centre console of the car. He did not know why he had to hide in the boot although he knew that it was illegal to leave Singapore that way. He did not know how his passport came to be stamped with a Malaysian entry stamp dated 25 November 2013. In Malaysia, Rizwan managed to contact and meet a friend in Johor. On 27 November 2013, he took a bus to Kuala Lumpur. On 28 November 2013, he went up to Genting Highlands. Later that day, he was arrested by the Malaysian authorities at a casino hotel in Genting Highlands.⁵⁵

32 Rizwan led alibi evidence in the form of testimony from Khairul. Khairul testified that he had met Rizwan at Boat Quay sometime in late 2013 from around 10pm to 3am but he could not be sure of the exact date.⁵⁶

33 As to why Zulkarnain would identify him as “Boss”, Rizwan denied knowing Zulkarnain and said that Zulkarnain must have been mistaken or was lying. Rizwan said that he went to Boat Quay regularly and would always drive when he did so.⁵⁷ He would usually park his car in front of a pub at Circular Road. He surmised that Zulkarnain could have seen him there. Therefore, when Zulkarnain saw his car at Quality Road on the night of 20 November 2013, Zulkarnain could have assumed wrongly that Rizwan was driving the car at that time. In relation to Zulkarnain’s testimony that he had heard his voice over the

⁵⁵ Rizwan’s Long Statement 30 November 2013 1.58pm, ROP Vol 2A at p 760 (see paras 21 to 24).

⁵⁶ NE (21/09/2016), ROP Vol 1A at pp 668–669.

⁵⁷ NE (20/09/2016), ROP Vol 1A at p 596 (lines 20 – 31).

walkie-talkie, Rizwan said that Zulkarnain must have been mistaken because he (Rizwan) was ill that day.⁵⁸

Saminathan's defence

34 Saminathan's defence was one of impersonation of his identity by some unknown person. He denied that he was at the scene when the drug transaction took place on 20 November 2013 and also denied being in Singapore at all that night.⁵⁹ He said that he could have been in his hometown in Tampin, Negeri Sembilan, Malaysia, that night. He alleged that someone had taken the Trailer which he had left parked at the MKG office premises and had then driven it from Malaysia to Singapore to carry out the drug transaction. That person could have impersonated him because it was his practice to leave his passport and some pre-filled disembarkation cards (with the destination address field left blank) in the Trailer.

35 Saminathan testified that he would always park the Trailer at the MKG office premises if he was not tasked to drive it.⁶⁰ He would go to the office to collect the keys to the Trailer before starting the delivery job for the day.⁶¹ The keys to the Trailer would be with Murugan because he had been told to return them at the end of each job.⁶² The usual practice therefore was for him to collect the keys in the morning when he reported for work.⁶³ Similarly, he would return

⁵⁸ NE (20/09/2016), ROP Vol 1A at p 599 (lines 28 – 32).

⁵⁹ NE (21/09/16), ROP Vol 1A at p 696 (lines 2 – 4).

⁶⁰ NE (21/09/16), ROP Vol 1A at p 701 (lines 14 – 17), p 714 (lines 21 – 25).

⁶¹ NE (21/09/16), ROP Vol 1A at p 686 (lines 2 – 6).

⁶² NE (21/09/16), ROP Vol 1A at p 686 (lines 18 – 31).

⁶³ NE (21/09/16), ROP Vol 1A at p 686 (lines 18 – 31).

the keys to either Murugan or Murugan's wife when he completed his deliveries for the day.⁶⁴ Saminathan denied having driven the Trailer for purposes other than his work.⁶⁵ Although he conceded that he might have accidentally kept the keys to the Trailer on occasion,⁶⁶ he was adamant that he had never kept possession of the Trailer itself.⁶⁷ This was possible because Murugan had informed him that he had a spare key to the Trailer.⁶⁸ On the basis that he had never departed from this routine, Saminathan said that he could not have used the Trailer on the night of 20 November 2013.⁶⁹

36 Saminathan explained how an impersonator could have obtained access to his passport. According to him, his usual practice was to leave his passport in the Trailer because it would be troublesome if he misplaced his passport.⁷⁰ He would place his passport on the dashboard of the Trailer rather than lock it in a compartment because the Trailer could only be accessed with Murugan's permission.⁷¹

37 Saminathan testified as to how his DNA could have got onto two of the 35 bundles of drugs seized from Zulkarnain's car. He denied that he had seen

⁶⁴ NE (21/09/16), ROP Vol 1A at p 687 (lines 5 – 7).

⁶⁵ NE (21/09/16), ROP Vol 1A at p 687 (lines 16 – 21).

⁶⁶ NE (21/09/16), ROP Vol 1A at p 689 (lines 4 - 15).

⁶⁷ NE (21/09/16), ROP Vol 1A at p 689 (lines 21 – 28).

⁶⁸ NE (21/09/16), ROP Vol 1A at p 690 (lines 1 – 4).

⁶⁹ NE (21/09/16), ROP Vol 1A at p 688 (lines 1 – 3).

⁷⁰ NE (21/09/16), ROP Vol 1A at p 744 (lines 23 – 29).

⁷¹ NE (21/09/16), ROP Vol 1A at p 746 (lines 27 – 29).

or touched any of the bundles.⁷² He explained that he kept two or three rolls of black tape⁷³ in the Trailer to fix problems caused by some loose wiring. The black tape he kept looked similar to the black tape that was used to wrap the bundles of drugs.

38 On the question whether Saminathan was responsible for writing the words “SHIPYArD Rd” (“the destination words”) as the destination on the disembarkation card, he called Mr Pang Chan Kok William (“Mr Pang”) to give expert testimony on handwriting. Mr Pang prepared two handwriting reports. In his second report, one of Mr Pang’s “summary of findings” was that Saminathan “was not the writer of the handwriting entry...”.⁷⁴ However, during his examination-in-chief at the trial, he said that “this is not the conclusion but a summary of my findings and my observations. And to make it clear here, I would say that this expression here is similar to my earlier report of the 11th January. That, in fact, under the circumstances and I am lacking in the position to render a conclusion” due to the poor images of the specimen disembarkation card provided to him and also because he learnt from defence counsel that Saminathan was irritated, unhappy and angry and it would therefore be difficult for him to consider the handwriting samples as natural. Accordingly, “it was not possible, from the scientific angle, to render an opinion within our usual scale of conclusions”.⁷⁵

⁷² NE (21/09/16), ROP Vol 1A at pp 697 (line 26) to 698 (line 9).

⁷³ NE (21/09/16), ROP Vol 1A at p 700 (lines 8 – 10).

⁷⁴ ROP Vol 2B at p 859.

⁷⁵ NE (06/09/17), ROP Vol 1A at p 891(line 14) to p 892 (line 9).

39 Finally, Saminathan’s response to the Prosecution’s submission that he had only raised his impersonation defence belatedly was that while the thought had crossed his mind when he was being questioned by CNB, he had not mentioned it in his statements as the IO told him to answer the questions asked and that he could raise other matters in court.⁷⁶

Decision of the High Court

Rizwan

40 The Judge convicted Rizwan on his charge. The Judge found Zulkarnain’s evidence on Rizwan’s role in the drug transaction to be cogent, coherent and consistent. Zulkarnain was consistent and clear in his identification of Rizwan as his “Boss” from the time of his arrest (GD at [65]–[67]). Zulkarnain’s evidence was that he had previous dealings with “Boss” where he had met “Boss” in person or had communicated over the phone and walkie-talkie with “Boss”. He would therefore have known what “Boss” looked and sounded like (GD at [70]). The Judge also noted that Zulkarnain’s account of his past transactions with “Boss” was consistent throughout the statements up to trial (GD at [68]). Further, the text message sent at 9.24pm on the night of 20 November 2013 indicated that “Boss” would arrive shortly and Rizwan’s Black Mitsubishi did arrive at the scene shortly after that message, in accordance with the sequence of events observed by the CNB officers (GD at [69(b)]–[69(d)]).

41 The Judge rejected Rizwan’s defence as being unbelievable. It made no sense that Rizwan would follow “Uncle’s” instructions so faithfully when he

⁷⁶ NE (21/09/16), ROP Vol 1A at p 707 (lines 23 – 29), p 708 (lines 1 – 13).

had met “Uncle” only in September 2013, merely two months before the transaction. Moreover, Rizwan knew hardly anything about “Uncle”. When Rizwan found out that his car was involved in a CNB operation, the logical thing for him to have done was to inform the authorities about this, not go into hiding and then leave Singapore by illegal means (GD at [72]). Rizwan’s account that he was told to leave his house at 9.20pm on 20 November 2013 because something had happened to his car also did not make sense because the drug transaction and the subsequent impoundment of his Black Mitsubishi only occurred after 10pm that night (GD at [73]). The Judge also found that Rizwan had been inconsistent in accounting for his movements on 20 November 2013 and the days after that. The account he gave in his statement recorded on 30 November 2013 was that he could not remember what had happened on those days. In particular, he stated that he could not recall what he did on 20 November 2013 because he had taken some medication (cough syrup and Panadol for his cough and flu) obtained from a clinic earlier that day. However, at the trial, he was able to give detailed evidence about the events that night leading to him fleeing Singapore (GD at [74]). The Judge did not accept Rizwan’s explanation that he was still in shock after his arrest when he gave his statements. Further, Rizwan’s conduct in fleeing Singapore surreptitiously also pointed towards his guilt (GD at [75]).

42 Rizwan also failed in his alibi defence because he did not mention in his statement recorded on 30 November 2013 that he was at Boat Quay on the night of 20 November 2013. Instead, he had stated that he could not remember what took place on 20 and 21 November 2013. Further, his alibi witness, Khairul, could not recall the exact date and time when he met Rizwan at Boat Quay (GD at [76]).

43 The Judge also examined the possibility that Zulkarnain framed Rizwan for the purposes of obtaining a certificate of substantive assistance from the Public Prosecutor. She noted that this was a belated allegation which arose only in the course of Rizwan’s testimony in court and which was then pursued in the closing submissions. The Judge dismissed this allegation because there was no reason why Zulkarnain would frame Rizwan instead of naming the real “Boss”. She also noted that Zulkarnain had identified Rizwan from the very day after the drug transaction when he was shown a number of photographs (GD at [77]).

44 The Judge held that Rizwan had the required *mens rea* for the offence. Rizwan knew that Zulkarnain would be taking possession of the 35 bundles and had intended that Zulkarnain would deliver those bundles to him at a different location thereafter (GD at [80]). The elaborate system devised to carry out the transaction and Rizwan’s careful actions designed to ensure the successful receipt of the 35 bundles by Zulkarnain showed that Rizwan knew the value of the substantial quantity of drugs (GD at [81]–[82]). Given the substantial role that Rizwan played in the drug deals, his appreciation of the value of the drugs and of the highly illegal nature of the drug transaction, the irresistible inference was that Rizwan knew that the 35 bundles contained diamorphine. In any event, the Judge also found that Rizwan was deemed, pursuant to s 18(4) of the MDA, to be in joint possession of the drugs together with Zulkarnain as Zulkarnain was in possession of the 35 bundles with Rizwan’s “knowledge and consent”. Consequently, the presumption of knowledge under s 18(2) of the MDA would apply and Rizwan was presumed to know the nature of the drug. Rizwan was unable to rebut this presumption (GD at [84]–[87]). As for whether Rizwan intended to traffic in the drugs, the Judge observed that the quantity of the drugs (301.6g of diamorphine) was far in excess of the quantity which would trigger the presumption of trafficking in s 17 of the MDA. She therefore agreed with

the Prosecution that the irresistible inference was that Rizwan intended to traffic in the drugs. Given the nature of Rizwan's defence, there was no evidence to rebut this. Specifically, Rizwan did not say that the drugs were for his own consumption (GD at [89]).

45 On the issue of sentence, the Judge held that Rizwan's role went beyond that of a courier. He got Zulkarnain to carry out the drug transaction and he also coordinated it. In any case, the Public Prosecutor did not issue a certificate of substantive assistance to Rizwan. The Judge therefore passed the mandatory death sentence on him (GD at [117]).

Saminathan

46 The Judge convicted Saminathan on his charge of trafficking by delivering the drugs to Zulkarnain. The Judge noted that there was no direct identification by any witness that Saminathan was the person who delivered the drugs to Zulkarnain as the Trailer was not stopped in time and it left Singapore (GD at [92]).

47 Nevertheless, the Judge was satisfied that it was Saminathan who delivered the drugs to Zulkarnain. The Judge relied on six pieces of evidence for this finding:

(a) First, ICA's travel records showed that the Trailer entered Singapore at 6.40pm, and left Singapore at 10.18pm on 20 November 2013 and that there was only one person in the Trailer during those times (GD at [95]).

(b) Second, the disembarkation card which was submitted for the Trailer's entry at 6.40pm also showed that it was Saminathan who

entered Singapore at 6.40pm, as the card was completed and signed by Saminathan (GD at [96]).

(c) Third, two CNB officers at the scene, Woman Station Inspector Rahizah Rahim (“W/SI Rahizah”), and Senior Staff Sergeant Mak Weng Chuen (“SSSgt Mak”), observed that the driver of the Trailer who loaded things into Zulkarnain’s car was a male Indian. After the drug transaction was completed, the Trailer was tailed all the way by CNB officers to the Tuas Checkpoint where it then left for Malaysia. Therefore, the same person who delivered the drugs to Zulkarnain also drove the Trailer (GD at [97]).

(d) Fourth, SSgt Goh, who processed the Trailer’s exit at 10.18pm gave evidence that he followed the established verification protocol in matching the distinguishing facial features of the person present before him with the passport presented to him. Saminathan’s passport showed the distinguishing features of his ears and his moustache. The driver passed the visual inspection. Thus, by virtue of the fact that the Trailer was allowed to exit Singapore without incident, it must have been the case that Saminathan was the driver at the time (GD at [98]).

(e) Fifth, Murugan’s evidence was that Saminathan had exclusive use of the trailer and that Saminathan had gone missing with the Trailer’s keys after the morning delivery to Singapore. Saminathan did not deny that he had used the Trailer to make a delivery in Singapore between 8.24am and 10.32am on 20 November 2013. The Trailer was therefore available for him to re-enter Singapore in the evening for the drugs transaction (GD at [99]).

(f) Sixth, Saminathan's DNA was found on two of the 35 bundles of drugs. These bundles were taped up with black tape which overlapped. Saminathan's DNA was found on the parts of the tape that were not directly exposed to external touch when the bundle was fully bundled. This linked Saminathan inextricably to the drugs. The Judge did not accept Saminathan's argument that his DNA had been transferred by someone else, perhaps from the trailer's steering wheel or the black tape that Saminathan kept in the Trailer. The Judge found this explanation unbelievable (GD at [100]–[101]).

48 The Judge then turned to consider Saminathan's defence. She noted that Saminathan in his statement given on 31 March 2014 did not deny his presence in Singapore on the night in question. Although Saminathan was not certain as to what he was doing and he offered three possibilities in his statement, what was critical was that he did not dispute being in Singapore at that time. It was only at the trial that Saminathan raised the belated defence that he was not in Singapore at all and that there had been an impersonator (GD at [102]). Since he had held the belief that he had been impersonated during the time of investigations, he should have stated so at the earliest opportunity. The situation was aggravated by his failure to mention that he was not in Singapore that night even in his Case for the Defence filed on 13 November 2015 (GD at [103]).

49 The Judge also found it "impossible" to accept that Saminathan would have left such an important document as his passport in the Trailer, particularly since he claimed that Murugan had a spare key and that he was not the only person with access to the Trailer (GD at [104]). Saminathan also accepted that he did not turn up for work for a few days after 20 November 2013 and would not be in control of the Trailer. In such a case, it was difficult to understand why

he did not remove his passport from the Trailer. The Judge also found it “hard to imagine in the first place” why Saminathan would pre-fill and pre-sign a stack of disembarkation cards and carelessly leave them in the Trailer (GD at [104]).

50 The Judge also rejected Saminathan’s claim that he did not write the words “SHIPYArD Rd”. The Prosecution’s expert, Dr Cheng, found at least six similarities between the handwriting used for those words and Saminathan’s handwriting specimens and concluded that the possibility that Saminathan had written the words could not be ruled out (GD at [105]). Saminathan’s expert witness, Mr Pang, was unable to come to a conclusion on this issue. Saminathan’s claim that he did not write “SHIPYArD RD” was a mere attempt to disassociate himself from the disembarkation card, which the Judge found was filled in by him (GD at [105]).

51 Further, the Judge found it difficult to believe that the impersonator would have chosen to enter Singapore using Saminathan’s passport. This would have involved the added risk of being detected by ICA for using a false passport and in turn, heightened the risk of being caught with the drugs (GD at [106]). The Judge also considered that it was unlikely that an impersonator could have known Saminathan’s plans and movements so well as to take the key from the office of MKG and to drive the Trailer to Singapore shortly after Saminathan returned from his delivery that morning. The impersonator must also have known that Saminathan would leave his passport and some pre-filled disembarkation cards in the Trailer. Taking all these together, the alleged impersonator appeared to know Saminathan well. However, Saminathan claimed that he did not know who would have framed him for this very serious crime (GD at [107]).

52 Finally, Saminathan’s defence depended on a confluence of a number of coincidences which taken together rendered the defence quite incredible. This included the fact that the impersonator must have had a reasonable resemblance to Saminathan’s appearance in order to be confident to pass ICA’s checks, the fact that the impersonator had handwriting similar to Saminathan’s or was able to copy his handwriting well and thus write the words “SHIPYArD RD” in the way Saminathan would and the fact that the impersonator must have used the black tape left behind in the Trailer or transferred Saminathan’s DNA from the Trailer to the bundles (GD at [108]).

53 As Saminathan was in possession of the 35 bundles of drugs, he was presumed by s 18(1) of the MDA to have been in possession of the drugs and therefore presumed by s 18(2) of the MDA to have known the nature of the drugs. As Saminathan adduced no evidence to rebut the presumption of knowledge, the charge against him was made out (GD at [110]).

54 On the issue of sentence, although Saminathan’s role was that of a courier, he was not issued a certificate of substantive assistance by the Public Prosecutor. Accordingly, the Judge passed the mandatory death sentence on Saminathan (GD at [118]–[119]).

The parties’ cases at the appeal

Rizwan

55 In his appeal, Rizwan argued that the Judge erred in finding that Zulkarnain’s evidence was corroborated by other evidence. Applying the standard laid down in *R v Baskerville* [1916] 2 KB 658 (“*Baskerville*”), which requires corroborative evidence to be independent and to implicate the accused

person in a material particular, none of the evidence relied on by the Judge could be considered corroborative evidence.⁷⁷ The effect of this was that Rizwan was convicted solely on the evidence of a co-accused person, Zulkarnain. As Zulkarnain's statements admitted at the trial did not satisfy the requirements of s 258(5) of the CPC on confessions, they could not be used by the Prosecution against Rizwan.⁷⁸

56 Rizwan also argued that the Judge erred in finding that he possessed the necessary *mens rea* for his charge. In particular, the errors pertained to whether Rizwan had knowledge of the nature of the seized drugs and whether he intended to traffic in them.⁷⁹

Saminathan

57 In his appeal, Saminathan argued that the Judge erred in placing undue weight on various strands of circumstantial evidence in order to convict him:

(a) First, in accepting the testimony of W/SI Rahizah and SSSgt Mak that the driver of the Trailer was a male Indian. While both W/SI Rahizah and SSSgt Mak were stationed along Quality Road during the drug trafficking transaction, their testimony indicated that they could not be certain that the driver of the Trailer was a male Indian. There were also internal inconsistencies in the testimony of W/SI Rahizah.⁸⁰

⁷⁷ Rizwan's skeletal submissions dated 23 December 2019 at paras 8–33.

⁷⁸ Rizwan's skeletal submissions dated 23 December 2019 at paras 36–79.

⁷⁹ Rizwan's petition of appeal at para 4.

⁸⁰ Saminathan's skeletal submissions dated 18 April 2019 at paras 17–31.

(b) Second, in failing to consider the possibility of transference in analysing the DNA evidence.⁸¹ The testimony of the HSA analyst, Ms Tang, was that by using the same swab to test for the presence of DNA on 15 of the bundles, DNA found on any of the bundles could be transferred to other bundles. Ms Tang also admitted that the DNA of a person who drove a vehicle regularly could be transferred by a different person who subsequently drove the same vehicle through contact with the steering wheel, the dashboard or the seat.⁸²

(c) Third, in accepting SSgt Goh's evidence that there was no reason for him to suspect that the person who presented Saminathan's passport to him on 20 November 2013 was not indeed Saminathan and that Saminathan's passport photo displayed distinguishing features such as his ears and moustache. SSgt Goh had testified that lapses could occur in scrutinising a person's face against his passport photo. There was also a real doubt as to how SSgt Goh could have identified Saminathan as the person who had used Saminathan's passport to exit Singapore at 10.15pm on 20 November 2013, given that the trial took place some three years later.⁸³

(d) Fourth, in finding that the words "SHIPYArD Rd" on the disembarkation card were written by Saminathan based on the evidence of Dr Cheng. Dr Cheng had concluded that the possibility of Saminathan being the author of the words could not be ruled out. Saminathan's

⁸¹ Saminathan's skeletal submissions dated 18 April 2019 at paras 32–39.

⁸² NE (07/09/16), ROP Vol 1 at p 272 (lines 13 – 21).

⁸³ Saminathan's skeletal submissions dated 18 April 2019 at paras 40–50.

expert witness, Mr Pang, had concluded that there was insufficient evidence to render a conclusion. Given the uncertainty in the conclusions reached by the expert witnesses, there was no basis for the Judge to have found that Saminathan had written the words in question.⁸⁴

(e) Fifth, in accepting the truth of the contents of Murugan's statement. As Murugan was not present in court for cross-examination, the Judge should not have accepted his evidence that Saminathan had exclusive possession of the Trailer and had gone missing with its keys on 20 November 2013.⁸⁵

The decision of the Court

58 Accordingly, in respect of Rizwan, the main issues before us are: (a) whether the Judge was right to accept Zulkarnain's evidence identifying Rizwan as the person who instigated him to collect and to deliver the 35 bundles of drugs on 20 November 2013; (b) if the answer is yes, whether Rizwan had knowledge of the nature of the drugs; and (c) whether Rizwan had intended to traffic in the drugs.

59 In respect of Saminathan, the main issue before us is whether the Judge was right in finding that Saminathan was the person who delivered the 35 bundles of drugs to Zulkarnain on the night of 20 November 2013.

⁸⁴ Saminathan's skeletal submissions dated 18 April 2019 at paras 51–63.

⁸⁵ Saminathan's skeletal submissions dated 18 April 2019 at paras 64–67.

Rizwan’s appeal

60 Rizwan was charged for abetment by instigation. The instigation alleged in the charge was that Rizwan “instructed [Zulkarnain] to collect and transport the said drug” (see [2] above).

61 We begin by considering briefly the law relating to abetment. In *Chan Heng Kong and another v Public Prosecutor* [2012] SGCA 18 (“*Chan Heng Kong*”), this Court observed at [33] that the word “abet” in s 12 of the MDA should bear the same meaning as it does in s 107 of the Penal Code (Cap 224, 2008 Rev Ed). Where abetment by instigation is concerned, as in the present case, there must be active suggestion, support, stimulation or encouragement of the primary offence (*Chan Heng Kong* at [34]). This requires the Prosecution to prove that the abettor intended that the person whom the abettor instigates carry out the conduct abetted (see *Ali bin Mohamad Bahashwan v Public Prosecutor and other appeals* [2018] 1 SLR 610 at [34]) (“*Bahashwan*”). Where the conduct abetted is the trafficking of drugs to the abettor, the Prosecution must also demonstrate that the abettor himself intended to traffic in the offending drugs (*Bahashwan* at [75]–[78], overruling *Chan Heng Kong* on this point).

62 Applying this approach to the present case, the charge against Rizwan would be made out if it was proved that Rizwan intended Zulkarnain, whom he instigated, to carry out the conduct abetted, *ie*, to be in the possession of the 35 bundles of drugs for the purposes of trafficking and that Rizwan himself intended to traffic in those drugs.

Identification evidence of Zulkarnain

63 The approach to corroborative evidence in Singapore was considered by this Court in *Public Prosecutor v Mohammed Liton Mohammed Syeed Mallik* [2008] 1 SLR(R) 601 (“*Mohammed Liton*”), where we held that the *Baskerville* test does not apply in its strict form. In determining whether evidence is corroborative, the trial judge has the flexibility to treat relevant evidence as corroborative; the overarching inquiry is the substance and relevance of the evidence and whether it supports or confirms the other evidence that is sought to be corroborated (*Mohammed Liton* at [43]). It follows from this that the Judge was entitled to take into account all relevant evidence before the court without first asking whether any particular piece of evidence individually satisfied the *Baskerville* test. We therefore reject Rizwan’s argument that he was convicted solely on the evidence of Zulkarnain.

64 Section 258(5) of the CPC has its genesis in the now-repealed s 30 of the Evidence Act (Cap 97, 1997 Rev Ed) (“EA”), which was one of the provisions in the EA which provided for exceptions to the hearsay rule. It makes it a prerequisite that a statement sought to be admitted against a co-accused in a joint trial for the same offence constitute a “confession”. It did not appear to us that Zulkarnain’s statements were used as confessions by the Prosecution in its case against Rizwan. Indeed, this was unnecessary given that Zulkarnain elected to testify at the trial and was liable to cross-examination. In any event, Zulkarnain’s statements were certainly not the only evidence on which the Prosecution’s case against Rizwan stood.

65 Turning now to the evidence, we agree with the Judge that Zulkarnain’s testimony identifying Rizwan as “Boss” was “cogent, coherent and consistent”

(GD at [65]). Zulkarnain was clear from the commencement of investigations that Rizwan was “Boss”. He identified Rizwan from a set of nine photographs shown to him just one day after he was arrested (see [20] above). At this time, Rizwan was still at large as he was not arrested in Malaysia until 28 November 2013. Zulkarnain maintained his identification of Rizwan as “Boss” at the trial. Zulkarnain explained that he was sure that Rizwan was the person who instructed him to carry out the drug transaction on the night of 20 November 2013 because he heard Rizwan’s voice over the walkie-talkie⁸⁶ and saw Rizwan’s car, the Black Mitsubishi, at the scene of the transaction.⁸⁷ Moreover, he recognised Rizwan because he could see his body from the back of the car when his car was parked behind the Black Mitsubishi. Zulkarnain said the following under cross-examination by Rizwan’s counsel:⁸⁸

Q Yes. From that angle --- it’s night time we all know that, from that angle, how can you describe the size of the person and his hair and even the colour of his attire on that day, because you would be facing the back of the driver’s seat?

A There were lamps or lights at the roadside. So I saw him from behind. His body is big. And I heard from his voice through the walkie-talkie. And I knew that he must be at the area because he’s using the walkie-talkie.

Q So is your observation based on what you saw or the voice that you claim you recognise?

A I saw and I heard his voice. I know that it was him because I work for him and I do not work for anybody else.

Q What is so distinctive about his voice that you would recognise it?

A I knew it was his voice because I always talk to him.

⁸⁶ NE (16/09/16), ROP Vol 1A at p 540 (lines 5 – 10).

⁸⁷ NE (14/09/16), ROP Vol 1A at p 495 (lines 1 – 19).

⁸⁸ NE (16/09/16), ROP Vol 1A at p 524 (lines 15 – 31).

Q Did you assume it was him? Sorry, did you assume it was [Rizwan] just because it was his car there? That it must have been him and nobody else driving.

A Not my assumption.

66 Zulkarnain testified that he was familiar with Rizwan as he had carried out about “three to five”⁸⁹ such other transactions for Rizwan before 20 November 2013. On all those previous occasions, after he had collected the things (which would be in plastic bags like those in the present transaction), he would drive to meet Rizwan who would then take the things from him.⁹⁰ In total, he had met Rizwan face-to-face more than ten times between August and 20 November 2013⁹¹ and had communicated with him over the phone. He was therefore able to recognise Rizwan’s voice.⁹²

67 Zulkarnain’s account was fortified by the extrinsic evidence. First, the Black Mitsubishi present at the scene of the drug transaction was registered in Rizwan’s name. Second, the text messages extracted forensically from the blue Nokia handphone (*ie*, ZK-HP3) seized from Zulkarnain supported his version of the events that night. The text message at 9.24pm on 20 November 2013 from one of the numbers identified by Zulkarnain as belonging to “Boss” indicated that the latter would be arriving in 10 minutes. Shortly thereafter, the Black Mitsubishi was observed arriving at Chin Bee Drive and parking in front of Zulkarnain’s car at about 9.55pm.⁹³ Third, Zulkarnain’s description of the drug

⁸⁹ NE (16/09/16), ROP Vol 1A at p 542 (lines 21 – 24).

⁹⁰ NE (16/09/16), ROP Vol 1A at pp 544 (line 28) to 545 (line 6).

⁹¹ NE (16/09/16), ROP Vol 1A at p 538 (lines 22 – 26).

⁹² NE (16/09/16), ROP Vol 1A at pp 538 (line 27) to 539 (line 1).

⁹³ NE (06/09/16), ROP Vol 1 at pp 170–172.

transaction, including how he was instructed to turn from Chin Bee Drive into Quality Road and stop in front of a trailer with blinking lights, was supported by the testimony of the CNB officers observing the scene that night.⁹⁴

68 During the hearing of these appeals, counsel for Rizwan, Mr Michael Chia (“Mr Chia”), stressed that the strongest possible corroborative evidence of Zulkarnain’s identification of Rizwan as “Boss”, *ie*, the walkie-talkie and handphones used by “Boss” to communicate with Zulkarnain, was not found on Rizwan when he was arrested and the handphone numbers were also not registered in Rizwan’s name. The apparent thrust of Mr Chia’s submission appeared to be that a conviction could not be sustained without this evidence. With respect, we do not agree. While finding the walkie-talkie and the handphones in Rizwan’s possession would undoubtedly have strengthened the Prosecution’s case further, the ultimate inquiry is still whether the Prosecution has proved the charge against Rizwan beyond a reasonable doubt on the evidence that it was able to muster.

69 We would also note that the possibility of Zulkarnain having identified Rizwan falsely as “Boss” in order to obtain a certificate of substantive assistance was not raised during Zulkarnain’s cross-examination at the trial but came about only during Rizwan’s testimony. Instead, the case which was put to Zulkarnain was that he assumed that the driver of the Black Mitsubishi that night was Rizwan as he had seen Rizwan’s car at Boat Quay before 20 November 2013.⁹⁵

⁹⁴ See *eg* conditioned statement of SSSgt Mak, ROP Vol 2B at pp 937–938 (para 13).

⁹⁵ NE (16/09/16). ROP Vol 1A at p 533 (lines 27 – 29), p 534 (lines 2 – 5).

Q: I'm putting it to you that you thought that the driver of [the Black Mitsubishi] on the night of your arrest was [Rizwan] because you recognise his car from Boat Quay.

A: I disagree.

...

Q: And finally, I'm putting it to you that for reasons best known to yourself, when you saw the car of [Rizwan] that night when you were arrested, you surmised that he was present and he was a driver of that car.

A: I disagree.

In any event, we agree with the Judge that there was no reason for Zulkarnain to implicate Rizwan falsely instead of naming the real “Boss” if his purpose was to obtain a certificate of substantive assistance (GD at [77]). At the material time of identification, Rizwan was not even in the custody of the CNB and it could not be said that Zulkarnain was simply looking for a convenient scapegoat.

Rizwan's defence

70 When weighed against Zulkarnain's evidence identifying Rizwan as “Boss” who instructed him to collect the drugs, we agree with the Judge that Rizwan's defence was plainly unconvincing.

71 First, as was noted by the Judge, Rizwan's account was “unbelievable” (GD at [72]). Rizwan testified that he met “Uncle” at Boat Quay only in September 2013 and did not even know his name. He could only describe “Uncle” as a fair-skinned male Malay in his forties and that his hair was black.⁹⁶ Rizwan was also unable to call any witnesses to support his account about the

⁹⁶ NE (20/09/16) ROP Vol 1A, p 578 (lines 17–19).

existence of “Uncle”.⁹⁷ Despite this, Rizwan testified that he was willing to lend his Black Mitsubishi to “Uncle” upon the latter’s request. Moreover, upon finding out that something had happened to his car, Rizwan’s reaction was to comply with “Uncle’s” instructions to leave home and then country over the next few days, rather than take the logical and obvious step of informing the authorities that he was not involved at all in the drug transaction or in whatever had happened that night. At the time of the incident, Rizwan was already 32 years old and could not have been so naïve or foolish. Further, taking the sort of medications that he claimed to have taken that night could not have made him so susceptible to complying with illogical instructions to leave home immediately especially since he said in court that when he left his home, “it did not occur to me what problem it was”.⁹⁸

72 Second, Rizwan’s testimony contradicted the objective evidence. Rizwan testified that he was told by “Uncle” at about 9pm on 20 November 2013 that “something happened” to his car and that he left his house soon thereafter.⁹⁹ The CCTV footage at Rizwan’s residence recorded him leaving at 9.20pm on 20 November 2013.¹⁰⁰ Given that the drug transaction only took place nearly an hour later at about 10pm that night, it was not possible that “Uncle” informed Rizwan at 9pm about something having happened to his car.

73 Third, Rizwan was unable to provide any explanation for the vastly differing accounts that he put forward in relation to his whereabouts on

⁹⁷ NE (20/09/16) ROP Vol 1A, p 611 (lines 9 – 12).

⁹⁸ NE (20/09/16) ROP Vol 1A, p 613 (lines 1 – 5).

⁹⁹ NE (20/09/16) ROP Vol 1A, p 582 (lines 17–21)

¹⁰⁰ NE (08/09/16), ROP Vol 1 at p 352 (lines 10–12).

20 November 2013. In his long statement recorded on 30 November 2013, Rizwan claimed that he could not recall what he had done on the night of 20 November 2013 as he was on medication (see [21] above). He also mentioned having spent 21 November 2013 with his friend Farhan. This was in stark contrast to his testimony during the trial where Rizwan was able to recall with details how he had spent the night of 20 November 2013 at Boat Quay with Farhan, Khairul and “Yan Kenet” until 3 to 4am the following day.¹⁰¹ Beyond that, he was able to give a detailed description of “Uncle’s” instructions over the ensuing period up until he was arrested in Malaysia. Additionally, Rizwan could not produce any witness to back up his account, as Khairul conceded that he could not be certain he had met Rizwan on the night of 20 November 2013.

74 Finally, Rizwan’s action in fleeing to Malaysia in the boot of a car provided strong evidence pointing to his guilt. It did not make any sense that Rizwan would leave Singapore illegally in such a clandestine fashion if he had nothing to do with the drug transaction. There was no ICA record of Rizwan having left Singapore. The absence of such record showed that he left illegally. While Rizwan’s passport was presented and stamped upon his entry into Malaysia, this did not mean that he left Singapore legally. Instead, all it showed was that at the time the car reached the Malaysian immigration checkpoint, Rizwan was out of the boot and inside the car.

75 In our view, the totality of the evidence showed that Rizwan’s defence was nothing more than a hopeless attempt to dissociate himself from the drug transaction on 20 November 2013. There was nothing to show that the Judge

¹⁰¹ NE (20/09/16) ROP Vol 1A, at pp 583 - 584.

erred in finding that Rizwan was the person who instigated Zulkarnain to collect and to transport the 35 bundles of diamorphine on 20 November 2013.

Whether Rizwan had knowledge that the drugs were diamorphine

76 We now consider whether Rizwan had the necessary *mens rea* for the charge against him. For this, it must be shown that Rizwan knew that the drugs were diamorphine and that he intended to traffic in the drugs (see [61]–[62] above).

77 The Judge found that Rizwan knew that the drugs were diamorphine. This was inferred from the fact that Rizwan intended for Zulkarnain to take possession of the 35 bundles of diamorphine and had devised an elaborate plan to carry out the transaction. The details of the drug transaction displayed careful planning. Rizwan equipped Zulkarnain with multiple electronic communication devices, the purpose of which was to avoid detection. He coordinated and directed Zulkarnain’s movements while maintaining constant communication with him throughout the transaction by way of walkie-talkies instead of by mobile phones. The mobile phones had to be switched off before the cars moved to meet the Trailer.

78 Rizwan chose to flee from the scene the moment the drug transaction went awry. As can be recalled, Rizwan also did not return home in the days following the drug transaction and eventually fled illegally to Malaysia in the boot of a car on 25 November 2013. All these showed clearly that Rizwan knew the high value of the drugs and correspondingly, what the nature of the drugs was.

79 As an alternative ground, the Judge also found that Rizwan was in joint possession of the drugs with Zulkarnain under s 18(4) of the MDA as Zulkarnain had possession of the drugs with the knowledge and consent of Rizwan. This meant that the presumption of knowledge of the nature of the drugs under s 18(2) of the MDA also applied against Rizwan and he was unable to rebut the presumption (see [44] above). During the hearing of the appeals, Mr Chia indicated that he would not be submitting on whether ss 18(2) and 18(4) of the MDA could be applied simultaneously. In any case, the position taken by the Judge on this issue accords with the recent decision of a five-judge Court of Appeal in *Mohammad Azli bin Mohammad Salleh v Public Prosecutor and another appeal and other matters* [2020] SGCA 39 delivered on 23 April 2020.

Whether Rizwan intended to traffic in the drugs

80 The Judge found that Rizwan intended to traffic in the drugs. The total quantity of drugs weighed more than 25 pounds and contained 301.6 g of diamorphine. The diamorphine content was more than 20 times the quantity of 15g that would attract the death penalty. The irresistible inference from the sheer amount of the diamorphine involved in the transaction was that Rizwan intended to traffic in them. There was also no suggestion that the drugs were for Rizwan's personal consumption and it would probably have been quite unbelievable in the circumstances here if the suggestion had been made that a consumer would stockpile 25 pounds of drugs for personal consumption.

81 The Judge (GD at [89], see also [44] above) appeared to have relied also on the presumption in s 17(c) of the MDA in coming to her conclusion that Rizwan intended to traffic in the drugs. That presumption states that any person who is proved to have had in his possession more than 2g of diamorphine shall

be presumed to have had that drug in possession for the purpose of trafficking unless it is proved that his possession of that drug was not for that purpose. In so far as the Judge relied on the presumption of knowledge of the nature of the drugs in s 18(2) of the MDA (see [44] and [79] above) together with the presumption of trafficking in s 17(c), this Court has ruled in *Zainal bin Hamad v Public Prosecutor and another appeal* [2018] 2 SLR 1119 (at [39] to [47]) (“*Zainal*”) that these two presumptions could not run together and (at [49] to [51]) that s 17 could be invoked only if both the fact of physical possession of the drugs and the fact of knowledge of what was possessed had been proved. The decision in *Zainal* was delivered on 3 October 2018, after the Judge gave her GD on 16 July 2018. Nevertheless, as we have explained at [80] above, the sheer amount of drugs involved in this transaction could lead only to the conclusion that they were intended for trafficking. There was therefore no need to invoke the presumption in s 17(c) in any case.

82 We agree with the Judge’s findings and affirm her conclusion that Rizwan was guilty of the charge of abetting Zulkarnain by instigating him to be in possession of the drugs for the purpose of trafficking. The Judge also held correctly that Rizwan was not a mere courier given the scope of his involvement in the drug transaction. He also did not receive a certificate of substantive assistance from the Public Prosecutor. He could not satisfy both requirements in s 33B(2) of the MDA and was therefore not eligible for the alternative sentencing regime in s 33B(1)(a). The Judge had to impose the mandatory death penalty.

Saminathan's appeal

83 As mentioned above, Saminathan argued that the Judge had placed undue weight on various strands of circumstantial evidence to reach the conclusion that he was the driver of the Trailer who delivered the drugs to Zulkarnain on 20 November 2013. We first consider the arguments raised by Saminathan in relation to specific categories of evidence before moving on to consider whether the conviction can be sustained on the totality of the evidence.

Evidence of W/SI Rahizah and SSSgt Mak

84 The focus of Saminathan's arguments against the testimony of W/SI Rahizah and SSSgt Mak was that both of them could not be certain that the driver of the Trailer was a male Indian.¹⁰² The Judge thus erred in relying on their testimony that the driver of the Trailer was a male Indian. However, it was not disputed that the driver of the Trailer which delivered the drugs to Zulkarnain was the same person who was processed by SSgt Goh at Tuas Checkpoint when the Trailer left Singapore on the night of 20 November 2013. This was because the Trailer was tailed continuously by the CNB officers after the handing over of the drug bundles. The possibility of SSgt Goh having been mistaken about the ethnicity of the person who presented Saminathan's passport for clearance was not raised during cross-examination. Instead, Saminathan's defence counsel focussed on whether certain facial features of Saminathan would have attracted greater scrutiny from SSgt Goh.¹⁰³

¹⁰² Saminathan's skeletal submissions dated 18 April 2019 at paras 17–31.

¹⁰³ NE (13/09/2016), ROP Vol 1A, p 482 (lines 11 – 30) to p 483 (lines 1 – 27).

85 The evidence of W/SI Rahizah and SSSgt Mak was also supported by the testimony of Zulkarnain. Zulkarnain testified that he thought that the driver of the Trailer which had placed the drugs in his car was a male Indian:¹⁰⁴

Q: ... So you are quite clear as to the race of the person who came down from the [Trailer] and put items into your car.

A: Because at the point in time it was dark, so I thought it was an Indian man.

Q: So the person whom you saw coming over to your car, he looked dark?

A: Yes, Your Honour.

Q: So he could have been an Indian male who did it?

A: Yes, Your Honour.

While Zulkarnain's testimony was far from unequivocal as to whether the driver of the Trailer was a male Indian, Saminathan's defence counsel did not seek to cross-examine him further on this point. In the circumstances, we do not think that the Judge's finding that the driver of the Trailer was a male Indian was against the weight of evidence.

Evidence of SSgt Goh

86 Saminathan argued that the Judge erred in accepting SSgt Goh's evidence identifying Saminathan as the person who had presented his passport when the Trailer left Singapore at 10.18pm on 20 November 2013.¹⁰⁵ Looking at the testimony of SSgt Goh, he did not appear to have gone so far as to identify Saminathan affirmatively as the person who drove the Trailer at the Tuas Checkpoint at 10.18pm on 20 November 2013 and presented Saminathan's

¹⁰⁴ NE (16/09/2016), ROP Vol 1A, p 542 (lines 8 – 14).

¹⁰⁵ Saminathan's skeletal submissions dated 18 April 2019 at paras 40–50.

passport in order to exit Singapore. Instead, SSgt Goh testified only as to the verification protocol which he would have applied on the day in question.¹⁰⁶

Q: Right. Now you also give us a run-through of the checks you will do to tally the person in the passport as well as the person that you actually see. And this is the --- starting with the name, the calling out of the name ---

A: Yes.

Q Now, in this case, did you perform these checks on the 20th of November 2013 at 10.18pm?

A: Yes. For this case the most outstanding feature of the person is the ears as well as the ... moustache. So these are the unique things about this person that I would pay more attention towards with. Because all passport photos, their facial features must be clearly seen at---by us. So we will tally that with the person in front of us before we carry on---carry on our processing.

Q: And in relation to these checks that you conducted, did this traveller pass your inspections?

A: Yes.

It is clear from SSgt Goh's evidence that he was only testifying as to how he would have verified that the person which presented Saminathan's passport to him was Saminathan. We do not think that SSgt Goh's statement that the traveller passed his inspection meant that he positively identified the man as Saminathan. The person presenting Saminathan's passport must have passed SSgt Goh's inspection. Otherwise, he would have been referred for further checks to ascertain his identity.¹⁰⁷ At most, SSgt Goh's testimony showed that he had no reason to suspect that the person who presented Saminathan's passport to him that night was not the person shown in the passport. The Judge

¹⁰⁶ NE (13/09/16), ROP Vol 1A p 472 (lines 21 – 31) to p 473 (lines 1–6).

¹⁰⁷ NE (13/09/16), ROP Vol 1A p 483 (lines 1 – 7).

was aware of this and it did not appear from the GD that she regarded SSgt Goh as having identified Saminathan positively as the person who was processed on 20 November 2013. Indeed, such a positive identification some three years after the event would be highly suspect since 20 November 2013 was an otherwise uneventful night for SSgt Goh and he had probably processed quite a number of trailers and lorries leaving Singapore that night.

Handwriting evidence

87 Saminathan argued that the Judge was not justified in finding that he was the writer of the words “SHIPYArD Rd” on the disembarkation card on the basis of the conclusion reached by Dr Cheng.¹⁰⁸ Dr Cheng testified that the possibility of Saminathan having written the disputed words “cannot be ruled out” (see [27(a)] above).¹⁰⁹ Saminathan’s counsel, Mr Rakesh Vasu, argued that Dr Cheng’s evidence was equivocal. While she had identified six similarities between the words “SHIPYArD Rd” on the disembarkation card and the samples provided by Saminathan, there were also differences. On the other hand, the conclusion reached by Saminathan’s expert witness, Mr Pang, was that he could not render a conclusion given the limitations stated by him (see [38] above).

88 The Judge found it “inexplicable” that the alleged impersonator would write the words “SHIPYArD Rd” as the destination address in Singapore when the drug transaction took place in Quality Road. Saminathan had stated that he had gone to Shipyard Crescent on a previous occasion. Additionally, Quality

¹⁰⁸ Saminathan’s skeletal submissions dated 18 April 2019 at paras 51–63.

¹⁰⁹ ROP Vol 2A p 830.

Road, the location of the transaction, was adjacent to Chin Bee Drive, the location where Saminathan had delivered goods to in the morning of 20 November 2013 (GD at [105]).

89 With respect, we do not think that the Judge dismissed Saminathan's claim that he did not write the words "SHIPYArD Rd" on the disembarkation card purely on the basis of Dr Cheng's testimony. The Judge considered various factors before she decided to reject Saminathan's defence, including his denial about being the author of the words in question (see GD at [105] to [109]). We would only comment that we disagree with the Judge only to the extent that we do not think that writing the word "road" as "RD" was very remarkable as that is a common abbreviation of that word (see GD at [108](b)). In any case, the Prosecution's evidence on handwriting was peripheral in that it only showed that it was possible, rather than probable, that Saminathan wrote the words in issue.

Murugan's statement

90 Saminathan submitted that the Judge ought not to have accepted the evidence in Murugan's statement that Saminathan did not return the keys to the Trailer after the first trip to Singapore in the morning of 20 November 2013.¹¹⁰ The Judge accepted Murugan's statement and considered that Saminathan would have the Trailer available to re-enter Singapore for the drug transaction that night. The Judge also appeared to have relied on the fact that Saminathan admitted in one of his statements that he used the Trailer to make deliveries for MKG and that he did not deny that he had used the Trailer to enter Singapore at

¹¹⁰ Saminathan's skeletal submissions dated 18 April 2019 at para 66.

8.24am on 20 November 2013 to make a delivery at Chin Bee Drive and then exited Singapore at 10.32am (GD at [99]).

91 The admission of Murugan’s statement was initially objected to by Saminathan as Murugan apparently could not be located. Prior to the ancillary hearing to determine the admissibility of the statement under 32(1)(j) of the EA and after a short adjournment for the parties to confer, Saminathan’s counsel informed the Judge that he was no longer challenging the admissibility of the statement and would submit subsequently on the weight to be accorded to it. The agreement was stated to be “subject to ... the eventual weight that this Court would give [to the statement]”. The statement was then admitted by consent of all three accused persons under s 32(1)(k) of the EA as P274.¹¹¹

92 Subsequently, it became clear from Saminathan’s testimony that he disputed Murugan’s statement (see [27(c)] and [35] above). The disputes were on two points: first, Saminathan said he did not park the Trailer near his home as he would always park the Trailer at MKG’s office and return the keys after he was done with the day’s work; second, he did not keep the Trailer’s keys with him when he returned to his hometown after the delivery in the morning of 20 November 2013. He said he returned the keys to Murugan.

93 In our view, the admission and the non-denial relied mentioned by the Judge at [90] above do not provide the basis for accepting Murugan’s statement over Saminathan’s testimony in court. Saminathan’s admission and non-denial did not support Murugan’s assertion that Saminathan did not return the keys to the Trailer after the morning trip on 20 November 2013 and that Saminathan

¹¹¹ NE (13/09/2016), ROP Vol 1A pp 452 - 453.

kept them for the next several days until he returned to work. They merely showed that Saminathan had driven the Trailer into and out of Singapore that morning but said nothing about what happened to the Trailer’s keys thereafter. In the circumstances, we do not rely on Murugan’s statement for the purpose of deciding Saminathan’s appeal.

DNA evidence

94 Saminathan argued that the Judge failed to consider the possibility of secondary transference of his DNA. This was premised on two statements made by Ms Tang of the HSA:¹¹²

(a) First, the use of the same swab to test for DNA on 15 of the bundles could have led to transference of DNA between the bundles.

(b) Second, the DNA of a person who drives a vehicle regularly could be transferred by a different person who subsequently drives the same vehicle. This meant that the alleged impersonator could have transferred Saminathan’s DNA from parts of the Trailer onto the two bundles of drugs when that person drove the Trailer and subsequently came into contact with the bundles of drugs.

95 We do not think that the first statement assists Saminathan’s defence. The evidence of Senior Staff Sergeant Muhamad Nizam bin Abudol Rahim was that he had conducted the swabbing of the exterior of the 15 fully-wrapped bundles (*ie*, exhibit A1A) from the first red plastic bag (*ie*, exhibit A1) using the

¹¹² Saminathan’s skeletal arguments dated 18 April 2019 at paras 32–39.

same set of two swab sticks.¹¹³ A similar procedure was adopted in respect of the exterior of the 20 fully-wrapped bundles (*ie*, exhibit B1A) from the second red plastic bag (*ie*, exhibit B1), with a different set of swab sticks. The process of transference through the swabbing process could not explain how Saminathan's DNA came to be found on the drug bundles in the first place and particularly, exhibits A1A9 and B1A6.

96 The second statement has more relevance for Saminathan's defence. It was not disputed at trial that Saminathan used the Trailer often because it was the vehicle assigned primarily to him by MKG for his deliveries. Even by Saminathan's own account in his statement, he drove the Trailer during his employment by MKG on all but one occasion.¹¹⁴ This raised the possibility that if the impersonator drove the Trailer on 20 November 2013, he could have transferred Saminathan's DNA from the Trailer onto the drug bundles. In our view, however, such a possibility should not be considered in isolation as a theoretical possibility. Instead, the case must be analysed as a whole in determining whether such secondary transference could have taken place as a matter of factual probability on the evidence adduced before the court.

Conclusion on Saminathan's conviction

97 In our judgment, the Judge's decision to convict Saminathan is correct even when Murugan's statement is excluded from consideration. The Prosecution's case against Saminathan hinged on Saminathan being the driver

¹¹³ NE (06/09/2016), ROP Vol 1 p 218 (lines 22 – 31) to p 219 (lines 1 –12).

¹¹⁴ Saminathan's Long Statement 28 March 2014, ROP Vol 2A, pp 711–713 (paras 12–15).

of the Trailer on the night of 20 November 2013. It was undisputed that the driver of the Trailer delivered the drugs to Zulkarnain and that the Trailer was tailed all the way from Quality Road to the Tuas Checkpoint where it left Singapore at about 10.18pm for Malaysia.¹¹⁵

98 The ICA records pointed to Saminathan as the driver of the Trailer. The records showed that Saminathan drove the Trailer into and out of Singapore on numerous occasions between 20 November 2013 and 15 February 2014. Saminathan left the employ of MKG after he was told by Murugan to look for another job sometime in the middle of February 2014. On 20 November 2013, Saminathan's passport was used by the driver of the Trailer to exit Singapore at the Tuas Checkpoint after the drug transaction took place. SSgt Goh's testimony as to the verification procedure he would have adopted showed at the very least that the person who presented Saminathan's passport bore a resemblance to the photograph in the passport and that nothing happened during the exit process that could have caused concern for SSgt Goh. If it were otherwise, SSgt Goh would have referred that person for further verification checks to confirm his identity. Saminathan had general access to the Trailer in the course of his employment in MKG. Leaving aside Murugan's statement, Saminathan's evidence in his statements and at the trial was that he used the Trailer regularly to enter Singapore, save for one or two occasions where he drove a different vehicle.¹¹⁶ Saminathan also admitted that he drove the Trailer into Singapore at

¹¹⁵ NE (02/09/2016), ROP Vol 1 p 80 (lines 17–31) to p 81 (lines 1–7).

¹¹⁶ NE (21/09/2016), ROP Vol 1A p 721 (lines 22–31) to p 722 (lines 1–3); Saminathan's Long Statement 28 March 2014 3.25pm, ROP Vol 2A, pp 711–713 (paras 12–15).

8.24am on 20 November 2013 and left for Malaysia at 10.32am that same morning.¹¹⁷

99 We agree with the Judge that the DNA evidence pointed “inexorably” to Saminathan having had contact with the bundles of drugs and that he was the one who delivered them to Zulkarnain (GD at [100]). Saminathan’s DNA was found on one bundle of drugs from each of the red plastic bags seized from the floor of Zulkarnain’s car (see [27(d)] above):

- (a) the exterior of the fully wrapped bundle B1A6 and the interior of the same bundle on the non-adhesive sides of the black tape after it was unwrapped; and
- (b) the interior of bundle A1A9 on the non-adhesive sides of the black tape after it was unwrapped.

The fact that Saminathan’s DNA was found on the interior of the bundles on the non-adhesive sides of the black tape when the bundles were unwrapped was strong evidence that Saminathan had handled the drugs.

100 Saminathan’s defence was that he was not the driver of the Trailer on the night of the drug transaction. As mentioned above at [34]–[37], he claimed that some unknown person must have taken the Trailer from MKG’s office and then drove it into Singapore to carry out the drug transaction. That person was able to use Saminathan’s passport and pre-filled disembarkation cards which he had left on the Trailer’s dashboard. As for how his DNA came to be found on

¹¹⁷ ROP Vol 2A at p 750.

the two drug bundles, this was possibly due to secondary transference because he kept a number of rolls of black tape in the Trailer for the purpose of fixing wiring in the vehicle.

101 In our view, Saminathan's defence was premised on a fortuitous confluence of several highly unlikely coincidences:

- (a) The impersonator was aware of Saminathan's practice of leaving his passport on the dashboard of the Trailer and had planned to use it to enter Singapore to deliver drugs in order to conceal his own identity.
- (b) Alternatively, that person saw Saminathan's passport in the Trailer by chance and decided to use it for entry into Singapore for the delivery of 35 bundles of drugs.
- (c) The evidence of SSgt Goh was that a visual inspection would be conducted to confirm the identity of the person presenting a passport for the purpose of exiting Singapore. Anyone presenting a passport at international borders would be aware of this anyway. By coincidence, the impersonator's face must therefore have borne a reasonable resemblance to Saminathan's photo in the passport because it would otherwise make little sense for him to use Saminathan's passport.
- (d) Alternatively, the impersonator did not look like Saminathan but decided to take the risk of using the passport in the hope that the ICA would not notice the discrepancy.
- (e) The impersonator found the rolls of black tape kept by Saminathan in the Trailer and decided to use the black tape to wrap some of the bundles of drugs. The black tape had Saminathan's DNA on it or

the impersonator somehow transferred Saminathan's DNA from parts of the Trailer onto the black tape. That led to Saminathan's DNA being found on the drug bundles B1A6 and A1A9.

102 From the above, it can be seen that the possible actions of the alleged impersonator were patently illogical and highly improbable. Entering Singapore on Saminathan's passport in order to deliver such a huge quantity of drugs would add to the already highly dangerous drug transaction the unnecessary risks of being stopped by the ICA at the checkpoint, both when going into and when leaving Singapore.

103 In any case, it was highly unlikely that Saminathan would have left his passport on the dashboard of the Trailer after he returned to Malaysia from his morning trip to Singapore on 20 November 2013. Saminathan's evidence was that he would leave the Trailer at MKG's office and return the Trailer's keys to Murugan whenever he had completed his deliveries. If the Trailer was not under his control or not for his exclusive use, it would make little sense for him to leave such an important document on the dashboard of the Trailer. More importantly, as was noted by the Judge, Saminathan testified that he could have returned to his hometown after completing his delivery on the morning of 20 November 2013 and that he remained there until 27 November 2013.¹¹⁸ If he was going to be away from work for such an extended period of time, it would be even more unlikely that he left his passport in the Trailer on 20 November 2013.

¹¹⁸ NE (21/09/2016), ROP Vol 1A, p 721 (lines 1 – 17).

104 Saminathan also did not mention in any of his statements the possibility of an impersonator having used his passport to carry out the drug transaction. This was despite Saminathan claiming that, in the course of investigations, he was aware of the possibility that somebody might have impersonated him by using his passport. This further diminished his credibility.

105 The impersonator would also have to be an unusual drug trafficker who wrapped drug bundles only after entering the Trailer in Johor Bahru or somewhere during the journey to the meeting point along Quality Road in Singapore on 20 November 2013. There were 35 bundles altogether in that transaction. He would have to know, again quite fortuitously, that there would be black tape available in the Trailer.

106 In summary, we agree with the Judge's conclusion that Saminathan's defence was implausible and could not raise a reasonable doubt. The Judge was correct in holding that the Prosecution had proved that Saminathan was the driver of the Trailer who delivered the drugs to Zulkarnain on the night of 20 November 2013. As Saminathan was in possession of the 35 bundles of drugs, he was presumed to have known the nature of the drugs pursuant to s 18(2) of the MDA. Given the nature of his defence, there was no evidence to rebut the presumption of knowledge.

107 We therefore agree that the charge against Saminathan was proved beyond reasonable doubt and we affirm the Judge's decision to convict him. Although the Judge found Saminathan to be a courier within the meaning of s 33B(2) of the MDA, he did not receive a certificate of substantive assistance from the Public Prosecutor. He was therefore not eligible for the alternative

sentencing regime provided in s 33B(1)(a) and the Judge had to impose the mandatory death penalty.

The Criminal Motions

108 We now deal with the applications in CM 4/2019 and CM 11/2019.

109 CM 4/2019 was brought by Saminathan to adduce three categories of evidence:¹¹⁹

(a) First, testimony from Saminathan’s mother, Mdm Mahalatchmay, and sister, Ms Selvakumari, that he was actually in his hometown of Tampin, Negeri Sembilan, Malaysia on the night of 20 November 2013 when the drug transaction was taking place in Singapore. This was allegedly communicated to Saminathan’s former defence counsel (for the trial), Mr Udeh Kumar s/o Sethuraju (“Mr Kumar”) and Mr M Lukshumayeh (“Mr Lukshumayeh”), but they failed to act on this information.

(b) Second, documentary evidence consisting of other statements recorded from Saminathan that were not tendered at the trial and the delivery records of jobs undertaken by him for MKG.

(c) Third, communications between Saminathan’s counsel in this appeal and Mr Pang, the expert witness on handwriting. In these communications, Mr Pang stated that he was not paid for his services in this case and that he did not want to be involved in the matter any further.

¹¹⁹ See Saminathan’s affidavit filed in support of CM 4/2019.

110 CM 11/2019 was an application by Rizwan to admit testimony from Farhan that Rizwan was with him and one “Yan” at Boat Quay on the night of 20 November 2013 at the time the drug transaction was taking place in Quality Road in Jurong. Farhan and his girlfriend, Kristin, then spent 21 November 2013 together with Rizwan in a hotel before Rizwan left sometime in the evening with someone named “Man”. The next day, on 22 November 2013, Farhan was arrested after leaving the hotel together with Kristin, “Man” and another person, “Sugiman”.¹²⁰

111 Farhan was unavailable for the trial as he had absconded after having been arrested and then placed on bail for some unrelated offences. The scope of the application expanded considerably prior to the first hearing on 22 November 2019, with Rizwan seeking to admit evidence of up to five other persons to corroborate Farhan’s account.

112 The law on adducing fresh evidence under s 392(1) of the CPC was set out by this Court in *Public Prosecutor v Mohd Ariffan bin Mohd Hassan* [2018] 1 SLR 544 (“*Ariffan*”). The three conditions articulated in *Ladd v Marshall* [1954] 1 WLR 1489 – non-availability at trial, relevance and reliability – apply. The condition of non-availability is relaxed where accused persons are the ones seeking to adduce further evidence. In such situations, the key considerations are the relevance and reliability of the evidence sought to be adduced (*Ariffan* at [48]–[49]). When assessing the reliability of new evidence sought to be adduced, the inquiry is whether such evidence is “presumably to be believed, *ie*, apparently credible, although it need not be incontrovertible” (*Iskandar bin*

¹²⁰ See Rizwan’s affidavit filed in support of CM 11/2019

Rahmat v Public Prosecutor and other matters [2017] 1 SLR 505 at [73]). The proportionality of admitting the fresh evidence must also be considered. This involves striking a balance between the significance of the new evidence and the need for swift conduct of litigation alongside any prejudice that might arise from additional proceedings (*Ariffan* at [72]).

113 At the first hearing of these appeals, we were not satisfied that leave should be granted in respect of any of the three categories of evidence in Saminathan’s CM 4/2019. Apart from not satisfying the requirement of non-availability, we were not satisfied that the evidence of Mdm Mahalatchmay and Ms Selvakumari was reliable. Both ladies stated that they recalled that Saminathan was with them on the night in question because of various incidents during that time. They alleged that they had informed Saminathan’s former defence counsel about the *alibi* evidence but, quite inexplicably, both former defence counsel failed to raise it at the trial. The family members were not called as defence witnesses during the trial.

114 However, no evidence was put forward to substantiate these allegations against Mr Kumar and Mr Lukshumayeh. In their affidavits filed in response, Mr Kumar and Mr Lukshumayeh denied strenuously the allegations made against them. We accepted their evidence. Mr Kumar and Mr Lukshumayeh had paid personally for the expenses incurred in engaging Mr Pang as Saminathan’s handwriting expert when some issue arose about payment for his services. It made no sense that they would go to such lengths to assist Saminathan’s defence that he was not the driver of the Trailer on the night of the drug transaction and yet would ignore completely the *alibi* evidence that would have exonerated

Saminathan if it was accepted by the court.¹²¹ We did not see any reason to think that there was gross incompetence or indifference on the part of both former defence counsel.

115 Further, Saminathan claimed in his application that his mother and his sister did not inform him before the trial that he was actually back in his hometown on the night of the drug transaction in Singapore. This was despite their many visits to the prison while he was in remand awaiting trial. He claimed that they mentioned the *alibi* evidence to him only after his conviction and he exclaimed in surprise, “Why say this only now?”. They then allegedly told him that they had already informed his former defence counsel about it before the trial.

116 We found Saminathan’s claim quite unbelievable. If his family members knew that he was not in Singapore on the night in question, surely they would have raised the issue with him as soon as they recalled that fact instead of waiting until after the Judge had given her decision. It was also absurd that they did not discuss the issue with Saminathan at all during their many visits to the prison but claimed that they had informed the former defence counsel about it without even mentioning to him that they had done this. A simple defence that the accused person was not at the scene of crime was something that any ordinary person would appreciate and raise as soon as possible.

117 As for the remaining two categories of evidence (see [109(b)]–[109(c)] above), we were not satisfied that they met the requirement of relevance. The documentary evidence did not traverse any ground that was not covered at the

¹²¹ Mr Lukshumayeh’s affidavit filed in CM 4/2019 at para 15.

trial. Saminathan failed to show that they would have had an important influence on the result of the appeals. We reached the same conclusion in respect of the communications between Saminathan's counsel and Mr Pang. It appeared to us that the communications were tendered to insinuate that Mr Pang's retraction of the conclusion reached in his second report was motivated by the non-payment of his fees (see [38] above). We did not see anything on the face of the evidence to suggest any such motive on the part of Mr Pang. In fact, the transcripts of the trial made it clear that Mr Pang's retraction was based on his view that there was insufficient material for him to conclude that the words "SHIPYArD RD" were not written by Mr Saminathan.¹²² In any event, we did not think that the handwriting evidence from the Prosecution and Mr Pang would have any impact on the appeal. As shown above, it does not feature in our deliberations on the correctness or otherwise of the Judge's decision to convict Saminathan. Saminathan's application to admit further evidence was therefore dismissed.

118 We also dismissed Rizwan's application in CM 11/2019. Even if we accepted that the evidence sought to be admitted (particularly that of Farhan) was not available during the trial, it did not satisfy the requirement of reliability. Prior to the hearing on 22 November 2019, we directed the Prosecution to produce any statements given by the persons mentioned at [110] above or any records which made mention of Rizwan. Farhan's account in his statements was completely at odds from that which he sought to put before us for the appeal. In his statements, Farhan mentioned that he only met Rizwan for lunch on 21 November 2013 rather than on the night of 20 November 2013.¹²³ Rizwan's

¹²² NE (06/09/17), ROP Vol 1A, p 891 at line 14 – p 892 at line 9; p 902 at lines 17–27.

¹²³ Farhan's Statement dated 11 December 2013 at para 3.

own account was contradicted by a statement recorded from him on 10 December 2013. In it, he stated that he went to look for Farhan at Siloso Beach Resort on 21 November 2013.¹²⁴ This was entirely inconsistent with his assertion that he was with Farhan from the night of 20 November 2013. In addition, none of the other statements produced was consistent with Rizwan's account nor was there any evidence provided to substantiate it. In the circumstances, we were of the view that Farhan's alleged further evidence was plainly incredible and did not satisfy the requirement of reliability.

Conclusion

119 For the above reasons, we affirm Rizwan's and Saminathan's convictions on their respective charges. The mandatory death penalty imposed on them stands. Accordingly, Rizwan's appeal in CCA 9/2018 and Saminathan's appeal in CCA 13/2018 are dismissed.

Judith Prakash
Judge of Appeal

Tay Yong Kwang
Judge of Appeal

Woo Bih Li
Judge

Chia Soo Michael, Hany Soh Hui Bin and Wang Shi Mei (MSC Law Corporation) for the appellant in CCA 9/2018 and the applicant in CM 11/2019;
Thangavelu (Thangavelu LLC) (Instructed Counsel),
Rakesh s/o Pokkan Vasu, Nevinjit Singh J and Yeo Ying Hao

¹²⁴ Rizwan's Long Statement 10 December 2013 5.36pm, ROP Vol 2B at p 847 (para 85).

(Gomez & Vasu LLC) for the applicant in CM 4/2019;
Rakesh s/o Pokkan Vasu, Winnifred Gomez and Nevinjit Singh J
(Gomez & Vasu) for the appellant in CCA 13/2018;
Mohamed Faizal SC, Chan Yi Cheng and Teo Siu Ming (Attorney-
General's Chambers) for the respondent in CCA 9/2018, CCA
13/2018, CM 4/2019 and CM 11/2019.
