IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2023] SGCA 9

Criminal Motion No 26 of 2022

Between

A Steven s/o Paul Raj

… *Applicant*

And

Public Prosecutor

… *Respondent*

JUDGMENT

[Criminal Procedure and Sentencing — Criminal review — Permission for review]
[Criminal Law — Statutory offences — Misuse of Drugs Act]

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Introduction

1 In a case where an accused person has been charged with drug trafficking and his defence was that he intended to consume the *entirety* of the drugs in his possession, must the court apportion and deduct a quantity meant for his own consumption from that amount even if the court should reject his total consumption defence (the "Apportionment Argument")?

2 The application by Mr A Steven s/o Paul Raj pursuant to s 394H(1) of the Criminal Procedure Code 2010 (2020 Rev Ed) (the "CPC") for permission to make a review application in respect of an earlier judgment of the Court of Appeal in CA/CCA 24/2021 ("CCA 24"), which was reported in *A Steven s/o Paul Raj v Public Prosecutor* [2022] 2 SLR 538 ("*A Steven (CA)*"), is premised on the Apportionment Argument. The applicant argues that the Court of Appeal

in CCA 24 fell into error by failing to engage in such an apportionment exercise notwithstanding its rejection of the total consumption defence.

3 The present application provides a fitting opportunity for this court to examine the consequences of pursuing an unsuccessful total consumption defence and to clarify the circumstances under which the court can and/or should apportion the drugs in the possession of an accused person for his own consumption in the context of s 394H(1) of the CPC.

4 Before turning to deal with the application, it should be clarified that unless otherwise stated, references in this judgment to the rate of consumption of diamorphine should be understood as referring to the weight of the *granular/powdery substance containing diamorphine*, as opposed to the weight of the diamorphine.

Factual and procedural background

Background facts

5 On 23 October 2017, the applicant ordered two "*batu*" (or bundles) of "*panas*" (a street name for diamorphine) from one "Abang", his Malaysian drug supplier. The applicant received the drugs on 24 October 2017 and was arrested by officers from the Central Narcotics Bureau ("CNB") on the same day. Following searches by the CNB officers, the following items, among other things, were found on the applicant's person or in his flat:

(a) Two packets of granular/powdery substances, which were the drugs the applicant had ordered from "Abang", were seized from the basket of the applicant's bicycle. These were found to contain a total of

901.5g of granular/powdery substance containing not less than 35.85g of diamorphine (the "Relevant Drugs").

(b) One yellow cut straw (which was examined and found to be stained with diamorphine), a large assortment of empty zip lock bags, one piece of stained aluminium foil, one improvised smoking utensil, two stained spoons, two lighters and four digital weighing scales were found beneath the kitchen sink in the applicant's flat.

The trial and the trial judge's decision

6 The applicant was charged under s 5(1)(*a*) read with s 5(2) of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) (the "MDA") with one charge of trafficking in a controlled drug. At the trial, the applicant did not dispute his possession of the Relevant Drugs or that he had knowledge that the Relevant Drugs were diamorphine. As the presumption of trafficking under s 17(*c*) of the MDA was triggered, the burden of proof was on the applicant to show that the Relevant Drugs were not in his possession for that purpose. The only defence raised by the applicant to rebut the presumption of trafficking was that the Relevant Drugs were meant *solely* for his own consumption (or to be given to his friends occasionally as part of some reciprocal arrangements to help each other), but not for trafficking to anyone else. He claimed to be a heavy user of diamorphine, smoking two to three packets of 8g (*ie*, 16–24g) of diamorphine per day: see *Public Prosecutor v A Steven s/o Paul Raj* [2021] SGHC 218 (the "GD") at [1], [6] and [8].

7 The trial judge (the "Judge") found that the presumption of trafficking under s 17(*c*) of the MDA was not rebutted as the applicant had failed to establish his total consumption defence on a balance of probabilities, and therefore convicted the applicant of the charge against him. In particular, the

Judge reasoned that the applicant's evidence on his claimed daily rate of consumption was contradicted by the evidence of the doctors who had examined him, and the applicant could not satisfactorily explain those discrepancies. The applicant's total consumption defence was also undermined by, *inter alia*, the large amount of the Relevant Drugs and his possession of paraphernalia normally used in drug trafficking: see the GD at [10]–[12], [17]–[45] and [51].

The appeal and the Court of Appeal's decision

8 The applicant's case on appeal, like his case at the trial, was confined to his total consumption defence. The Court of Appeal affirmed the Judge's decision that the applicant had failed to rebut the presumption of trafficking under s 17(*c*) of the MDA and dismissed the applicant's appeal against his conviction and sentence.

9 The Court of Appeal affirmed the Judge's conclusion that the applicant had failed to establish his claimed rate of consumption of 16–24g of diamorphine per day. Although the applicant's claimed rate of consumption was recorded in a statement taken from him under s 22 of the CPC on 30 October 2017 (the "First Long Statement"), it was significantly higher than the consumption rates recorded by the doctors who had examined the applicant both before and after the First Long Statement (*A Steven (CA)* at [31]–[33]):

> (a) Dr Tan Chong Hun ("Dr Tan"), a prison medical officer of the Changi Prison Complex Medical Centre who had examined the applicant on 26 October 2017, recorded that the applicant's consumption rate was 4g of diamorphine per day.

(b) In a report dated 28 October 2017 which was countersigned by Dr Munidasa Winslow, it was certified that the applicant consumed 4g of diamorphine per day.

(c) In the First Long Statement recorded on 30 October 2017, the applicant stated: "These days I smoke about 2–3 8g packets of *panas* every day."

(d) Dr Jaydip Sarkar ("Dr Sarkar"), a psychiatrist with the Institute of Mental Health at the material time who had conducted interviews with the applicant on 3, 6 and 9 November 2017, recorded in his report dated 14 November 2017 that the applicant claimed to have consumed "one packet of heroin daily" of about 8g each.

10 The explanations offered by the applicant for the substantially inconsistent consumption rates he provided to the doctors were unconvincing. The applicant's assertions that his consumption rates were incorrectly recorded were never put to Dr Tan and Dr Sarkar. The applicant also provided no basis to disturb the Judge's finding of fact that his mental state did not affect his communication with the doctors (*A Steven (CA)* at [29] and [35]).

11 The Court of Appeal also considered that the applicant's total consumption defence was further undermined by the following factors:

(a) The applicant possessed paraphernalia normally associated with drug trafficking activities, whose utility was obviously for the preparation of drugs for sale. The sheer amount of empty zip lock bags and weighing scales found in the applicant's flat constituted objective evidence that the Relevant Drugs were meant for trafficking (*A Steven (CA)* at [37]–[40]).

(b) The applicant made certain admissions in his statements and to Dr Sarkar to the effect that he sold small quantities of diamorphine to his friends on a regular basis (*A Steven (CA)* at [41]–[43]).

(c) The large amount of the Relevant Drugs found in the applicant's possession suggested that the Relevant Drugs were meant for trafficking. The applicant's explanation that "Abang" had persuaded him to purchase a larger quantity of the said drugs to avoid supply disruptions during the Deepavali festive period only emerged belatedly in a statement recorded from the applicant under s 22 of the CPC on 22 February 2018 (the "Second Long Statement"), and appeared to be a mere afterthought (*A Steven (CA)* at [45]–[46]).

The parties' cases in this application

The Applicant's case

12 In the present application, the applicant submits that the Court of Appeal in CCA 24 erred in not attempting to apportion the quantity of the Relevant Drugs which, on a balance of probabilities, was meant for the applicant's own consumption. Relying on the case of *Muhammad bin Abdullah v Public Prosecutor and another appeal* [2017] 1 SLR 427 ("*Muhammad bin Abdullah*"), the applicant argues that even if the Court of Appeal disbelieved his total consumption defence, that did not relieve the court of the task of undertaking an apportionment if it was accepted by the court that he intended to personally consume more than a *de minimis* amount of the Relevant Drugs. According to the applicant, the portion of the Relevant Drugs which the court accepts was meant for his own consumption must be calculated and deducted from the total quantity of drugs set out in the charge against him.

13 The applicant submits that it was neither challenged that a significant portion of the Relevant Drugs was meant for his own consumption, nor that his "daily use of heroin could be 8g a day". The applicant further argues that the court may *infer* that he intended to consume the Relevant Drugs over a period of 69 days, as he allegedly last purchased diamorphine from "Abang" in mid-August 2017 prior to his arrest on 24 October 2017. On the basis that the applicant consumed 8g of the Relevant Drugs a day over 69 days, 552g would have been reserved for his own consumption, leaving 349.5g for sale. Based on the applicant's calculation, he contends that the average purity of that 349.5g would contain 13.98g of diamorphine, below the capital threshold of 15g.

14 The applicant also submits that the requirements set out under s 394J of the CPC are satisfied because:

(a) the Apportionment Argument could not have been adduced earlier as it would have undermined his total consumption defence at the trial and on appeal;

(b) the Apportionment Argument is compelling, reliable, substantial and powerfully probative as it relies on previously adduced evidence which has been tested at the trial and is supported by established authority;

(c) the Court of Appeal's failure to apportion the Relevant Drugs is demonstrably wrong as it was based on a fundamental misapprehension of the law; and

(d) the review can be conducted without any further evidence being taken or inquiry made.

15 While the applicant acknowledges that the Apportionment Argument is not based on new evidence or a change in the law arising after the conclusion of his criminal proceedings, he submits that this court should nevertheless exercise its inherent power to reopen its earlier decision in CCA 24.

The Respondent's case

16 The respondent submits that the present application does not satisfy the requirements set out under s 394J of the CPC because: (a) the Apportionment Argument is not based on a change in the law arising from a decision made after the conclusion of CCA 24, contrary to s 394J(4) of the CPC; and (b) the Apportionment Argument could have been raised in CCA 24 with reasonable diligence as the Judge's alleged omission to apportion the Relevant Drugs would have been apparent from the GD.

17 Moreover, the respondent submits that the Apportionment Argument is misconceived as there was no basis upon which the court could have apportioned the Relevant Drugs. First, there is no credible evidence to show, and the respondent never accepted, that *only* a significant portion as opposed to the total amount of the Relevant Drugs was meant for the applicant's own consumption. Second, there is no credible evidence of the applicant's daily rate of consumption of diamorphine or for how long the Relevant Drugs were meant to last the applicant; it was never accepted or proved that the applicant's consumption rate was 8g of diamorphine per day, nor that the Relevant Drugs were meant to last him for 69 days.

The applicable law and the issues to be determined

18 It should be noted at the outset that final judgments, especially those issued by an appellate court, will not be readily unsettled. However, the court's

revisionary powers may be invoked in two ways to depart from the default position of finality: (a) through the Court of Appeal's inherent power to reopen a concluded criminal appeal; and (b) through an appellate court's statutory power to review its earlier decision under s 394I of the CPC: see *Public Prosecutor v Pang Chie Wei and other matters* [2022] 1 SLR 452 ("*Pang Chie Wei*") at [13].

19 An applicant's choice between these two avenues would not affect the substance of the review application since the requirements for the exercise of the appellate court's power of review under s 394I of the CPC (as set out under s 394J of the CPC) mirror the requirements for the exercise of the court's inherent power to reopen a concluded criminal appeal (*Pang Chie Wei* at [30], referring to *Kho Jabing v Public Prosecutor* [2016] 3 SLR 135 ("*Kho Jabing*")). It follows that if the material put forth by the applicant does not satisfy the requirements set out under s 394J of the CPC, the court cannot, contrary to what the applicant suggests, exercise its inherent power to reopen a concluded criminal appeal on the basis of the same material – indeed, it would be arbitrary if the success of a review application depended on the applicant's choice of the remedial avenue (*Pang Chie Wei* at [30]).

20 To obtain permission under s 394H(1) of the CPC to make a review application, the application must disclose a "legitimate basis for the exercise of the [appellate court's] power of review" (*Kreetharan s/o Kathireson v Public Prosecutor and other matters* [2020] 2 SLR 1175 at [17]). If the applicant is unable to show that the material it will be relying on in the review application proper is *almost certain* to satisfy all of the cumulative requirements set out under s 394J of the CPC, there will be no legitimate basis on which to grant permission under s 394H(1) of the CPC (*Roslan bin Bakar and others v Public Prosecutor* [2022] 1 SLR 1451 at [21]).

21 Under s 394J(2) of the CPC, the applicant must satisfy the court that there is sufficient material on which the appellate court may conclude that there has been a miscarriage of justice in the criminal matter in respect of which the earlier decision was made. In order for the material to be "sufficient", the following requirements set out under ss 394J(3) and 394J(4) of the CPC must be satisfied:

> **Requirements for exercise of power of review under this Division**
>
> **394J.**—(3) For the purposes of [s 394J(2)], in order for any material to be "sufficient", that material must satisfy all of the following requirements:
>
> (*a*) before the filing of the application for permission to make the review application, the material has not been canvassed at any stage of the proceedings in the criminal matter in respect of which the earlier decision was made;
>
> (*b*) even with reasonable diligence, the material could not have been adduced in court earlier;
>
> (*c*) the material is compelling, in that the material is reliable, substantial, powerfully probative, and capable of showing almost conclusively that there has been a miscarriage of justice in the criminal matter in respect of which the earlier decision was made.
>
> (4) For the purposes of [s 394J(2)], in order for any material consisting of legal arguments to be "sufficient", that material must, in addition to satisfying all of the requirements in [s 394J(3)], be based on a change in the law that arose from any decision made by a court after the conclusion of all proceedings relating to the criminal matter in respect of which the earlier decision was made.

In the present case, s 394J(3)(*a*) of the CPC is satisfied: the Apportionment Argument was not raised in the prior proceedings before the Court of Appeal or the Judge.

22 While it is conceptually neat to analyse the requirements of sufficiency and miscarriage of justice under s 394J(2) of the CPC as two discrete elements,

s 394J(2) of the CPC ultimately lays down a composite requirement (*Rahmat bin Karimon v Public Prosecutor* [2021] 2 SLR 860 at [22]), and the analysis of the remaining requirements under ss 394J(3) and 394J(4) of the CPC may overlap to some degree. With that in mind, the issues which arise for my consideration in the present application may be broadly categorised as such:

(a) whether the Apportionment Argument could have been adduced earlier with reasonable diligence and relatedly, whether it is based on a change in the law arising *after* the conclusion of the applicant's criminal proceedings (collectively, the "Non-availability Requirements"); and

(b) whether the court can conclude that the Apportionment Argument is compelling in that it is reliable, substantial, powerfully probative, and capable of showing almost conclusively that there has been a miscarriage of justice (collectively, the "Miscarriage of Justice Requirements").

The Non-availability Requirements

23 As this court observed in *Kho Jabing* at [58], it would be rare for this court to entertain an application for review that is premised on new legal arguments alone because it will normally be difficult to show that the legal arguments in question could not, even with reasonable diligence, have been raised prior to the filing of the review application. Where the applicant relies on legal arguments (as in the present case), the criterion of "non-availability" will ordinarily be satisfied only if the legal arguments concerned are made following a change in the law (which is statutorily reflected in s 394J(4) of the CPC).

24 The reasons for only allowing the applicant to rely on material which could not have been adduced earlier with reasonable diligence are two-fold.

First, there is no basis for saying that there has been a miscarriage of justice where the applicant has, of his own volition, elected not to call evidence which he could reasonably have been expected to obtain and adduce. Second, it would facilitate the efficient and economical allocation of court resources by ensuring that parties present all their evidence at the time of the hearing, instead of doing so in a piecemeal and haphazard fashion: see *Kho Jabing* at [55].

25 In my view, it is clear that with reasonable diligence, the Apportionment Argument could have been raised, at the latest, before the Court of Appeal in CCA 24. As the respondent points out, it would have been clear from the GD that the Judge had not apportioned the quantity of the Relevant Drugs meant for the applicant's own consumption, and it would have been well within the applicant's ability to raise the Apportionment Argument on appeal. Furthermore, the Apportionment Argument, which is largely premised on the case of *Muhammad bin Abdullah*, is not based on a change in the law arising from a decision made *after* the conclusion of the applicant's criminal proceedings, and thus falls afoul of s 394J(4) of the CPC.

26 The applicant's submission that the Apportionment Argument could not have been adduced earlier as it would have undermined his total consumption defence does not take him very far. While it may be true that the Apportionment Argument would have been inconsistent with the applicant's total consumption defence, that is a consequence of the applicant's own considered, strategic decision to pursue a defence which entailed arguing that the *entirety* of the Relevant Drugs was meant for his own consumption and that none of it was intended to be trafficked. The factual consequence of the applicant's decision to pursue a total consumption defence is that he must accept the risk that the Apportionment Argument may undermine his primary total consumption defence and that in his endeavour to establish his total consumption defence, he

may be compelled to deny a lower rate of consumption with the result that there is no credible and reliable evidence of his actual rate of consumption for the court to undertake any meaningful apportionment.

27 The observations of the majority in *Public Prosecutor v Chum Tat Suan and another* [2015] 1 SLR 834 ("*Chum Tat Suan*") are pertinent in this regard. There, the majority expressed its reservations on the view that an accused person may give evidence about his limited role as a courier at the sentencing stage, despite deliberately withholding such evidence at the trial, on the basis that such evidence would be inconsistent with his primary defence. It was observed that if there is evidence demonstrating that an accused person is a courier under ss 33B(2)(*a*) and/or 33B(3)(*a*) of the MDA, but that evidence is inconsistent with the accused person's primary defence, the accused person must elect what his evidence will be as all evidence should be given at the same trial: see *Chum Tat Suan* at [75]–[79]. Ultimately, the applicant must accept the consequences of his decision as to the calling and treatment of evidence (*Kho Jabing* at [55]).

28 There is no reason why the observations in the preceding paragraph should not apply equally to the deployment of legal arguments. Having elected to exclusively pursue the total consumption defence in the prior proceedings, it is now too late in the day for the applicant to rely on pieces of evidence (which were not even accepted by the Judge at the trial or the Court of Appeal in CCA 24) to advance the Apportionment Argument on the basis that it would have contradicted his total consumption defence. Accordingly, I find that the Non-availability Requirements in ss 394J(3)(*b*) and 394J(4) of the CPC are not satisfied.

The Miscarriage of Justice Requirements

29 Even if it were assumed for the moment that the Non-availability Requirements are satisfied, the Miscarriage of Justice Requirements must also be satisfied to obtain permission under s 394H(1) of the CPC. In arguing that the appellate court may conclude that there has been a miscarriage of justice, the applicant relies on s 394J(5)(*a*) of the CPC, submitting that the Court of Appeal's earlier decision in CCA 24 is demonstrably wrong. In this inquiry, it is not sufficient that there is a real possibility that the earlier decision is wrong; it must be apparent, based only on the evidence tendered in support of the review application and without further inquiry, that there is a powerful probability that the earlier decision is wrong (ss 394J(6)(*a*) and 394J(6)(*b*) of the CPC). Moreover, it must be shown that the earlier decision was based on a fundamental misapprehension of the law or the facts, thereby resulting in a decision that is blatantly wrong on the face of the record (s 394J(7) of the CPC).

30 I will first examine the law pertaining to the apportionment of drugs found in the possession of an accused person, before considering whether the Court of Appeal's decision in CCA 24 not to apportion the Relevant Drugs is demonstrably wrong.

The law pertaining to apportionment

31 Before any meaningful apportionment of the drugs in an accused person's possession can be made by the court, there must be credible evidence that part of those drugs was intended for the accused person's personal consumption. This in turn would entail an inquiry as to whether there is credible and reliable evidence of: (a) the accused person's *daily rate of consumption* of the relevant drug; and (b) the *number of days* the supply of drugs in his possession was meant to last for, which should be assessed in connection with

the frequency of supply. In this connection, the mere say-so of the accused person would not suffice as credible or reliable evidence: see *Jusri bin Mohamed Hussain v Public Prosecutor* [1996] 2 SLR(R) 706 at [52] and [62]–[63]; *Fung Choon Kay v Public Prosecutor* [1997] 2 SLR(R) 547 ("*Fung Choon Kay*") at [19]; *Chew Seow Leng v Public Prosecutor* [2005] SGCA 11 at [33].

32 Fundamentally, the burden of proof lies on the accused person to prove that part of the drugs in his possession should be apportioned for personal consumption (*Fung Choon Kay* at [19]). It is incumbent on the accused person to discharge that burden by adducing credible and reliable evidence of the matters identified in [31] above, since knowledge of such matters would reside solely with the accused person.

Whether the decision in CCA 24 is demonstrably wrong

33 In my judgment, the Court of Appeal's decision not to apportion the quantity of the Relevant Drugs meant for the applicant's personal consumption cannot be said to be demonstrably wrong as it was not possible to meaningfully apportion the Relevant Drugs. Furthermore, for the reasons elaborated on below at [41]–[47], the decision in CCA 24 is entirely consistent with the relevant authorities pertaining to apportionment.

Evidence that the Relevant Drugs were meant for the applicant's own consumption

34 As evidence that part of the Relevant Drugs was meant for his own consumption, the applicant relies on: (a) a statement recorded from him on 24 October 2017 when he was arrested, in which he stated that he intended to "smoke or sell" the Relevant Drugs; and (b) the First Long Statement and the Second Long Statement, in which he stated that the diamorphine he purchased

in the past was mostly for his own consumption. However, as noted above at [31], bare allegations from the applicant would not suffice as credible and reliable evidence.

35 The applicant also argues that based on what was put to him during cross examination, the respondent accepted that at least one "*batu*" of the Relevant Drugs could have been for the applicant's personal consumption. However, what was put to the applicant was that he "intended to sell at least one *batu* of the [Relevant Drugs]". That is not the same as accepting that the applicant therefore intended to consume at least one "*batu*" of the Relevant Drugs (being the balance of the two "*batu*" which were found in his possession), and does not constitute credible or reliable evidence that part of the Relevant Drugs was intended for the applicant's own consumption.

Evidence of the applicant's daily rate of consumption of diamorphine

36 In the present application, the applicant submits that his rate of consumption "could be 8g [of] heroin a day", and that this was not challenged by the respondent. However, the applicant had explained on the stand that the consumption rate of 8g of diamorphine per day reflected in Dr Sarkar's report was erroneously recorded, and that what he had meant to tell Dr Sarkar was that if he did not have drugs, he would have to "go looking" to buy one packet of drugs weighing 8g. In short, he had disowned the very evidence which he seeks to rely on in this application. Given the applicant's own evidence that the consumption rate of 8g of diamorphine per day was factually inaccurate, it would have been entirely inappropriate for the court to rely on that evidence to apportion the Relevant Drugs.

37 More pertinently, it bears recalling that there were substantial fluctuations between: (a) the applicant's claimed consumption rate in his First Long Statement and in his oral testimony (of 16–24g of diamorphine per day); and (b) the consumption rates recorded by the doctors who had examined him both before and after the First Long Statement was recorded (ranging from 4g to 8g of diamorphine per day) (see [9] above). To compound matters, the applicant's own evidence was that the amount of diamorphine he consumed per day depended on the quality of the diamorphine. Yet, the applicant has not provided any evidence on how his daily consumption rate would vary based on the quality of the diamorphine. In light of the inconsistencies and inadequacies in the evidence surrounding the applicant's daily rate of consumption, there was simply no credible and reliable measure of the applicant's daily rate of consumption of diamorphine which could have been used to apportion the Relevant Drugs.

Evidence of the number of days the Relevant Drugs were meant to last for

38 The applicant submits that the Relevant Drugs should be apportioned on the basis that they were meant to last the applicant for 69 days, as the applicant last purchased one "*batu*" of diamorphine in mid-August 2017. It appears to me, however, that the claimed duration of 69 days is an entirely arbitrary measure proposed by the applicant in order to conveniently reduce the drugs available for trafficking below the capital threshold.

39 In the first place, the applicant's claimed duration of 69 days is based entirely on his own unsubstantiated assertion that he last purchased drugs from "Abang" on 16 August 2017 – a date which emerged for the first time in CM 26 and appears to have been plucked out of thin air. The applicant's evidence at the trial was that he had started buying diamorphine from "Abang" "[s]ometime in

August", without identifying a specific date in August. When the applicant *started* to buy drugs from "Abang" is quite different from when he *last purchased* drugs from "Abang".

40 More importantly, the applicant's evidence was that he had purchased diamorphine from "Abang" for the first time in August 2017, and his next purchase was on 24 October 2017 when he was arrested. It would be speculative for the court to accept that the applicant obtained diamorphine at *regular* intervals of 69 days, based only on a *single* alleged purchase of diamorphine from "Abang" in August 2017. The applicant's claimed duration of 69 days is also contradicted by his own evidence on the stand, where he explicitly denied that the one "*batu*" of diamorphine he allegedly purchased from "Abang" in August 2017 would last him two months but stated instead that it would last him "perhaps 1½ months".

Consistency of the decision in CCA 24 with relevant authorities

41 I turn to consider whether the Court of Appeal's decision in CCA 24 coheres with the relevant authorities where apportionment for personal consumption was undertaken by the court.

42 The applicant cites the cases of *Muhammad bin Abdullah* and *Public Prosecutor v Kwek Seow Hock* [2009] SGHC 202 ("*Kwek Seow Hock*") in support of the Apportionment Argument. There is, however, a critical difference between the present case and those two cases: while a *total consumption* defence was pursued in the present case, the first accused in *Muhammad bin Abdullah* (the "First Accused") and the accused in *Kwek Seow Hock* both pursued a *partial consumption* defence. In *Muhammad bin Abdullah*, the First Accused's defence was that he intended to repack one of the four bundles of drugs found

in his possession into small packets and to retain around 28 to 30 small packets for his own consumption (*Muhammad bin Abdullah* at [13]). Similarly, in *Kwek Seow Hock*, the accused's defence was that out of the 46 sachets of drugs found in his possession, he intended to retain half of them for his own consumption and that only half of the remaining packets were intended for sale (*Kwek Seow Hock* at [21]). It was in those circumstances that the quantity of drugs which the offenders intended to retain for their own consumption became an issue for the court's determination, in order to decide whether the partial consumption defence had been established on a balance of probabilities. In other words, apportionment was undertaken by the court in *Muhammad bin Abdullah* and *Kwek Seow Hock* because in those two cases, the offenders had advanced a *partial* consumption defence which by its very nature necessitated apportionment.

43 Conversely, where an accused person has elected to pursue a total consumption defence (as the applicant has), the quantity of drugs which he intended to *retain* for his own consumption would not be an issue for the court's determination, and there would accordingly be no need for the court to apportion the drugs in his possession. As this court observed in *A Stevens (CA)* at [1], as the applicant's only defence was that the Relevant Drugs were meant *solely* for his own consumption, it was essential for the applicant to establish that the *entire* amount of the Relevant Drugs was intended for his own consumption. Should the applicant fail to do so, his total consumption defence would fail, without any further need to determine if he intended to consume *part* of the Relevant Drugs. It would also be entirely inappropriate for the court to perform an apportionment of the Relevant Drugs – an exercise which presupposes that the applicant intended to retain only part of the drugs for his own consumption and to sell the remainder – when the applicant's defence was that he intended

to consume the *entirety* of the Relevant Drugs and not to sell any of the Relevant Drugs.

44 Furthermore, it bears reiterating that regardless of whether a partial consumption defence or total consumption defence is pursued, apportionment can only be meaningfully carried out by the court where there is credible and reliable evidence of the accused person's daily rate of consumption of the relevant drug, and the duration which the supply of drugs in his possession was meant to last for. In this respect, the case of *Muhammad bin Abdullah* is further distinguishable from the present case. In *Muhammad bin Abdullah*, the First Accused had informed his doctor that he would consume a maximum of two small packets (weighing about 7.5–8g each) of diamorphine per day, but less than one small packet on some days. The First Accused's doctor thus recorded that the First Accused consumed an average of one small packet per day, which the First Accused *accepted* at the trial (*Muhammad bin Abdullah* at [34]). Moreover, there was also evidence that the First Accused received four separate deliveries of diamorphine within a span of three weeks, with the third and fourth deliveries being about a week apart. Assuming that the First Accused intended to store sufficient diamorphine for a week, based on his average daily consumption rate, he would have needed to store seven small packets for his own consumption. The Court of Appeal agreed with the trial judge's finding of fact that the First Accused intended to store only ten small packets to provide allowance for the First Accused's concern about a possible break in supply (*Muhammad bin Abdullah* at [38]), and accordingly rejected the First Accused's defence that he intended to keep 30 small packets for his own consumption (*Muhammad bin Abdullah* at [42]). It is thus clear that the apportionment of the drugs in *Muhammad bin Abdullah* was only possible because, unlike in the present case, there was credible and reliable evidence of the First Accused's

daily consumption rate of diamorphine and the duration which the First Accused's supply was meant to last for.

45 It is also important to note that the inconsistencies in *Muhammad bin Abdullah* which the applicant alludes to were not inconsistencies in the evidence of the First Accused's daily rate of consumption, but inconsistencies in the evidence relating to the amount of drugs the First Accused intended to keep for his own consumption (see *Muhammad bin Abdullah* at [32]–[35]). In other words, the evidence of the First Accused's daily rate of consumption in *Muhammad bin Abdullah* did not suffer from the substantial inconsistencies in the present case which plagued the evidence relating to the applicant's daily rate of consumption of diamorphine, and which precluded this court from undertaking any meaningful apportionment of the Relevant Drugs.

46 Finally, I should mention that in exceptional cases, the court has undertaken an apportionment notwithstanding its rejection of the total consumption defence based on credible and reliable evidence of the quantity of drugs in the offender's possession intended for personal consumption. This was warranted on the facts in *Yeo Hee Seng v Public Prosecutor* [1994] 3 SLR(R) 992 ("*Yeo Hee Seng*"). The Prosecution's case was that out of the 27.24g of diamorphine found in the appellant's room, an amount of 24.29g was for the purpose of trafficking (*ie*, the Prosecution conceded that 2.95g of the 27.24g was meant for the appellant's own consumption). The appellant, on the other hand, claimed to be a severe drug addict and that the entirety of the 27.24g of diamorphine found in his room was for his own consumption (*ie*, he pursued a total consumption defence): see *Yeo Hee Seng* at [18]–[19].

47 However, the trial judge disbelieved the appellant's claimed daily rate of consumption of diamorphine. Instead, the trial judge relied on the

unchallenged evidence of one Dr Leow Kee Fong (an expert witness called by the Prosecution) who testified that the appellant was "at best a moderate drug user" and gave evidence of the consumption rates of persons suffering from moderate drug withdrawal symptoms. On that basis, the trial judge determined that at most 6.1g of the 27.24g of diamorphine found in the appellant's room would have been reserved for his own consumption, leaving 21.14g of diamorphine unaccounted for. Thus, it is clear that in *Yeo Hee Seng*, the apportionment carried out by the court was based on the Prosecution's expert evidence which was tendered to challenge the total consumption defence. The trial judge thus amended the charge against the appellant to one of trafficking in more than 15g but less than 24.29g of diamorphine and convicted the appellant of the charge, which was affirmed on appeal: see *Yeo Hee Seng* at [20]–[25] and [30]. In the circumstances, it was unremarkable for this court to observe in *Abdul Karim bin Mohd v Public Prosecutor* [1995] 3 SLR(R) 514 at [38] that there was reliable evidence (*ie*, the Prosecution's expert evidence) of the rate of consumption in *Yeo Hee Seng* on which a meaningful apportionment could be made.

Conclusion on the Miscarriage of Justice Requirements

48 In the absence of any credible and reliable evidence: (a) that part of the Relevant Drugs was meant for the applicant's own consumption; (b) of the applicant's daily rate of consumption of diamorphine; and (c) of the number of days which the Relevant Drugs were meant to last the applicant for, it was simply not possible for the Court of Appeal in CCA 24 to perform any meaningful apportionment of the Relevant Drugs. It follows that the Court of Appeal's decision in not apportioning the quantity of the Relevant Drugs meant for the applicant's own consumption is not demonstrably wrong. Thus, it cannot be concluded that there has been a miscarriage of justice on the basis of the

Apportionment Argument. Accordingly, the Miscarriage of Justice Requirements in ss 394J(2) and 394J(3)(*c*) of the CPC are also not satisfied.

Conclusion

49 For the reasons stated above, I find that the cumulative requirements set out under s 394J of the CPC are not satisfied. There is accordingly no legitimate basis to grant permission to the applicant to make a review application under s 394H(1) of the CPC. Pursuant to s 394H(7) of the CPC, I dismiss this criminal motion summarily without setting it down for hearing.

Steven Chong
Justice of the Court of Appeal

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