IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2018] SGHC 50

Criminal Case No 63 of 2017

Between

Public Prosecutor

And

Abdul Ishak bin Mohd Shah

GROUNDS OF DECISION

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

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Public Prosecutor
v
Abdul Ishak bin Mohd Shah

[2018] SGHC 50

High Court — Criminal Case No 63 of 2017
19, 22, 26-27, 29 September, 23 October 2017

6 March 2018

Lee Seiu Kin J:

Introduction

1 The accused faced a single charge under s 7 of the Misuse of Drugs Act (Cap 1985, 2008 Rev Ed) ("MDA") for importing into Singapore a controlled drug. The drugs in question were three packets containing not less than 1123.4g of granular/powdery substance which were analysed and found to contain not less than 45.78g of diamorphine. Diamorphine is a Class A controlled drug listed under the First Schedule to the MDA.

2 At the conclusion of the trial, I was satisfied that the Prosecution had proved the charge beyond a reasonable doubt. I therefore convicted the accused on the charge. Under s 33(1) of the MDA, the punishment prescribed for the offence is death. However, s 33B(1)(*a*) of the MDA gives the court the discretion to impose the alternative sentence of life imprisonment and a

minimum of 15 strokes of the cane, provided that the conditions under ss 33(B)(2)(*a*) and 33B(2)(*b*) of the MDA are satisfied. I found that these conditions were met and exercised my discretion to impose life imprisonment and 15 strokes of the cane. I now provide the grounds of my decision.

Undisputed facts

The accused's background

3 The accused is Abdul Ishak bin Mohd Shah, a Malaysian male. At the time of the alleged offence, he was 24 years old, and married with two children.[1] He had received formal education up to Secondary Three level after which he attended vocational classes.[2] At the time of his arrest, the accused was employed as an operator with a company that manufactured or processed wires,[3] and was earning a monthly salary of about 2,400–2,500 Malaysian Ringgit.[4]

Arrest and seizure of exhibits

4 Sometime before 5.00pm on 27 July 2015, the accused entered Singapore through the Woodlands Checkpoint on board a Malaysian-registered taxi bearing registration number HJA 2147 ("the Taxi").[5] The Taxi was driven by one Mohd Taib bin Mujer ("Mr Mohd Taib"). The accused was seated directly behind the driver's seat in the Taxi. Also in the Taxi were two female passengers: Ms Tan Siew Huay ("Ms Tan"), who was seated in the front passenger seat, and Ms Chin Hock Mei ("Ms Chin") who was seated next to the

1 Certified Transcript ("CT"), 27 September 2017, pp 2 (line 26) to 3 (line 9).

2 CT, 27 September 2017, p 54 (lines 19–22).

3 CT, 27 September 2017, p 54 (lines 8–12)

4 CT, 27 September 2017, p 54 (lines 5–7).

5 Statement of Agreed Facts, paras 2 and 20.

accused. The three of them were not acquainted with one another.[6] They were at the taxi stand in Larkin Central, Johor Bahru and decided to share a taxi to come to Singapore so that the fare could be split between them.[7]

5 Staff Sergeant Roger Chen Zhongfu ("SSgt Roger"), an officer of the Immigration Checkpoints Authority ("ICA"), was stationed at the area marked "Secondary Clearance area for cars" at the time.[8] He approached the Taxi and spoke briefly with the accused.[9] What exactly transpired when SSgt Roger asked to inspect the accused's passport is a point in dispute and will be discussed further below. After this exchange, SSgt Roger directed the Taxi to the "100% inspection pit".

6 At the 100% inspection pit, SSgt Roger performed a search on the accused, and on the Taxi. Under the mat beneath the driver's seat, he found a red plastic bag ("the Plastic Bag") containing a black plastic bag, which in turn contained three black-taped bundles. SSgt Roger removed the Plastic Bag and its contents from under the driver's seat and placed it on the floor of the taxi, on top of the mat.[10]

7 Shortly afterwards, a team of officers from the Central Narcotics Bureau ("CNB") arrived at the 100% inspection pit;[11] they included Sergeant Muhammad Zuhairi Bin Zainuri ("Sgt Zuhairi"), Staff Sergeant Muhammad

6 CT, 22 September 2017, p 58 (lines 22–24).

7 Statement of Agreed Facts, para 3.

8 CT, 19 September 2017, p 66 (lines 24–32).

9 CT, 19 September 2017, p 69 (lines 3–11).

10 Statement of Agreed Facts, para 4; Certified Transcript, 19 September 2017, p 81 (lines 19–30.

11 Statement of Agreed Facts, para 5.

Zaid Bin Adam, Staff Sergeant Rozaiman Bin Abdul Rahman ("SSgt Rozaiman") and Senior Staff Sergeant Samir Bin Haroon ("SSSgt Samir").[12] At about 5.08pm, Sgt Zuhairi retrieved the Plastic Bag from the floor of the taxi. He then cut open the first black-taped bundle, and saw that it contained a brown, granular substance.[13] The other two black-taped bundles were then cut open and each was found to contain a similar granular/powdery substance. These packets were marked Exhibits A1A1A1, A1A2A and A1A3A respectively, sealed in tamper-proof bags and sent to the Health Sciences Authority ("HSA") for analysis.[14] Mr Mohd Taib and the three passengers, including the accused, were placed under arrest.[15]

8 Upon analysis, Exhibits A1A1A, A1A2A and A1A3A were respectively found to contain not less than 8.94g of diamorphine, not less than 18.09g of diamorphine and not less than 18.75g of diamorphine. In total, they contained not less than 45.78g of diamorphine. The three black-taped bundles formed the subject matter of the charge against the accused.

9 The HSA also conducted DNA testing on the exhibits, the results of which were not challenged by the accused. HSA's tests revealed that the accused's DNA was found on the exterior surface of one of the black-taped bundles, and on the non-adhesive side of the tape from another one of the black-taped bundles.[16] Uninterpretable mixed DNA profiles were detected from swabs taken from the Plastic Bag and black plastic bags which contained the black-

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12 AB, p 85, para 2.

13 AB, p 86, paras 3–4.

14 Statement of Agreed Facts, paras 6–7.

15 CT, 23 September 2017, p 61 (lines 8–9).

16 Statement of Agreed Facts, para 17.

taped bundles.[17] Ms Ang Hwee Chen, the HSA analyst who performed the DNA tests, testified that this meant that at least two individuals had contributed to these mixed DNA profiles, but it was not possible to ascertain the identity of the contributors.[18] The DNA profiles of Mr Mohd Taib, Ms Tan and Ms Chin were not detected on any of the exhibits.[19]

Events leading up to the accused's arrest

10 Although many of the details surrounding the alleged offence were disputed by the parties, the following facts were not in dispute. The accused had boarded the Taxi at Larkin Central in Malaysia and had, throughout the journey, sat at the rear passenger seat behind the driver. A person known to the accused as "Kana" had asked the accused to deliver a bag from Malaysia to Singapore, and had offered him 2000 Malaysian Ringgit as payment. On 27 July 2015, Kana had specifically told the accused to take the taxi bearing registration number "2147" from Larkin Central.[20]

11 It should be noted that neither the Prosecution nor the Defence suggested that Mr Mohd Taib, Ms Tan or Ms Chin had anything to do with the drugs which were recovered from the Taxi.

Statements recorded from the accused

12 The accused did not dispute that he had voluntarily provided the following statements to officers of the CNB:[21]

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17 AB, p 68.

18 CT, 19 September 2017, p 36 (lines 13–23).

19 Statement of Agreed Facts, paras 17 and 21.

20 Statement of Agreed Facts, para 20.

(a) A contemporaneous statement recorded by SSgt Rozaiman on 27 July 2015, shortly after the accused's arrest.

(b) A cautioned statement recorded under s 23 of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) ("CPC") by Station Inspector Ranjeet s/o Ram Behari ("SI Ranjeet") on 29 July 2015.

(c) Three "long statements" recorded under s 22 of the CPC by SI Ranjeet on 29 July 2015, 30 July 2015 and 1 August 2015 respectively.

The accused's version of events

13 The accused gave the following account in his oral evidence:

14 The accused had been introduced to Kana by his friend Mamat in early 2015 at a coffee stall in Johor Bahru.[22] At Kana's request, the accused gave Kana his telephone number.[23] About a week later, the accused and Kana met again over coffee.[24]

15 About two weeks before 27 July 2015, Kana called the accused and asked him for help in sending a bag of clothes to his (that is, Kana's) friend in Singapore. The accused declined.[25] A few days later, Kana called the accused again and repeated the request.[26] The accused again declined and told Kana that he was busy with preparations for Hari Raya.[27] Kana then offered to pay the

21 Statement of Agreed Facts, paras 18–19.

22 CT, 27 September 2017, p 4 (lines 15–29).

23 CT, 27 September 2017, p 5 (lines 7–10).

24 CT, 27 September 2017, p 5 (lines 28–30).

25 CT, 27 September 2017, p 6 (lines 21–32).

26 CT, 27 September 2017, p 7 (lines 2–8).

accused 2,000 Malaysian Ringgit for the delivery, whereupon the accused told Kana that he would only help him after Hari Raya which fell on 17 July 2015.[28] About two or three days after Hari Raya,[29] Kana called the accused and told the accused to contact him when he was able to go to Singapore.[30]

16 On 26 July 2015, the accused called Kana and told him that he would be going to Singapore the following day.[31] The accused claimed he intended to come to Singapore to meet with his friend, one "Pak Cik".[32]

17 On 27 July 2015, Kana called the accused at about 7.00am. After confirming that the accused would be entering Singapore that day, Kana told the accused to wait for his call to collect the bag of clothes.[33] The conversation ended there. The next time Kana called the accused was about 4.00pm the same day. Kana told the accused that he had "already sent the bag at Larkin" in a taxi, and gave the accused the registration number of the Taxi.[34]

18 The accused then left his home and rode his motorcycle to Larkin Central.[35] Upon arrival, he parked his motorcycle and walked to the taxi stand. He saw that the Taxi bearing the registration number that Kana had given him was behind two other taxis in the taxi queue.[36] The accused intentionally gave

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27 CT, 27 September 2017, p 8 (lines 18–21).

28 CT, 27 September 2017, p 8 (lines 23–29).

29 CT, 27 September 2017, p 9 (lines 9–10).

30 CT, 27 September 2017, p 9 (lines 17–24).

31 CT, 27 September 2017, p 9 (lines 28–29).

32 CT, 27 September 2017, p 12 (lines 7–15).

33 CT, 27 September 2017, p 13 (lines 4–12).

34 CT, 27 September 2017, pp 13 (line 28) to 14 (line 4).

35 CT, 27 September 2017, p 15 (lines 1–8).

up his place in the queue when the first two taxis arrived in order to board the Taxi.[37]

19 Ms Tan and Ms Chin had separately arrived at the taxi stand shortly after the accused.[38] There was a marshal at the taxi stand who facilitated the sharing of taxis among passengers in the queue.[39] The marshal spoke to Mr Mohd Taib (the driver of the Taxi) and the accused, and then spoke to Ms Tan and Ms Chin.[40] It was agreed that the accused, Ms Tan and Ms Chin would share the Taxi.[41]

20 The accused claimed that immediately after this arrangement was made, Ms Tan and Ms Chin "went to the taxi right away", and that he was the last passenger to board the Taxi. The accused claimed that he "went to the seat that was vacant".[42] On the accused's version of events, it was fortuitous that he ended up in the seat behind the driver's seat, near the part of the Taxi where the drugs were eventually found. He also maintained that Kana had not given him any instructions on where the bag which he was supposed to bring into Singapore was to be found within the Taxi.[43]

21 As the Taxi started to move off, the accused handed the taxi fare and his passport to Mr Mohd Taib.[44] During the journey to Singapore, the accused felt

36 CT, 27 September 2017, p 17 (lines 6–12, 23–24).

37 CT, 27 September 2017, p 56 (lines 1–4).

38 CT, 27 September 2017, pp 18 (line 25) to 19 (line 9).

39 CT, 22 September 2017, p 69 (lines 12–17).

40 CT, 27 September 2017, pp 19 (lines 15–30) to 20 (lines 5–17).

41 CT, 27 September 2017, p 20 (lines 5–17).

42 CT, 27 September 2017, p 21 (lines 5–16).

43 CT, 27 September 2017, p 25 (lines 12–13); 29 September 2017, p 20 (lines 30–31).

a bump near his feet.[45] He lifted the mat on the floor of the taxi and groped at the bump.[46] He felt the Plastic Bag, placed his hand inside it[47] and felt several rounded objects[48]. He looked in the Plastic Bag but could not see the contents clearly.[49] Thereafter, he withdrew his hand and adjusted the Plastic Bag and the mat to its original position.[50] The accused testified that he did not think that the Plastic Bag at his feet was the item which Kana had asked him to transport.[51]

22 Under cross-examination, the accused stated that Kana had called him many times during the journey from Larkin Central to Singapore to ask for updates on his location. The accused also claimed that he was not curious about why Kana did this.[52] In re-examination, however, he variously stated that he could not remember if Kana had called him repeatedly, and/or that Kana had given him a missed call but he did not answer.[53]

23 At the Woodlands checkpoint, Mr Mohd Taib handed the passengers' passports to the officer at the immigration counter.[54] The accused said that after the passports were handed back to Mr Mohd Taib, the latter did not return the passports to the passengers.[55] The Taxi then proceeded towards the "Secondary

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44 CT, 27 September 2017, p 22 (lines 7–10).

45 CT, 27 September 2017, pp 24 (line 18) and 25 (line 32).

46 CT, 27 September 2017, p 25 (lines 15–29).

47 AB p 139, para 25.

48 CT, 27 September 2017, pp 24 (line 18) to 25 (line 2); 27 (lines 1–6).

49 CT, 27 September 2017, p 27 (lines 10–23).

50 CT, 27 September 2017, pp 27 (line 30) to 28 (line 1).

51 CT, 27 September 2017, pp 28 (lines 5–7).

52 CT, 27 September 2017, pp 65 (lines 17–24, 31–32) and 66 (lines 2–6).

53 CT, 29 September 2017, p 32 (lines 22–31).

54 CT, 27 September 2017, p 28 (lines 8 – 12).

Clearance area for cars" (see [5] above). When SSgt Roger stopped the Taxi, the accused claimed that it was Mr Mohd Taib who handed the passengers' passports to SSgt Roger for inspection.[56] The significance of this point will shortly become clear (see [42]–[44] below). The accused also claimed that SSgt Roger asked him whether he had any bags in the boot of the Taxi, which he answered in the negative.[57] After asking the accused a few more questions, SSgt Roger sent the Taxi to the 100% inspection pit.[58]

The Prosecution's case

24 The Prosecution led evidence from a total of 30 witnesses, 25 of whom provided conditioned statements pursuant to s 264 of the CPC. 14 witnesses testified at trial.

25 The Prosecution's narrative was that the accused boarded the Taxi with the *objective* of taking possession or custody of the Plastic Bag. He deliberately took the seat behind the driver because he knew the Plastic Bag that he was supposed to transport was there.[59] As to the accused's knowledge of the contents of the Plastic Bag, the Prosecution's position was that the accused "did not care" what was inside the Plastic Bag. He agreed to transport the Plastic Bag because he had been offered 2,000 Malaysian Ringgit to do it, and "chose to ask no questions" even though any reasonable person would have found the transaction suspicious.[60]

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55 CT, 27 September 2017, p 28 (line 18–20).

56 CT, 27 September 2017, p 37 (line 28).

57 CT, 27 September 2017, pp 29 (line 21) to 30 (line 6).

58 CT, 27 September 2017, p 30 (lines 8–10).

59 Prosecution's Closing Submissions, para 14.

60 Prosecution's Closing Submissions, para 76.

26 Based on the above narrative, the Prosecution submitted that the accused had imported the drugs into Singapore, citing the decision of *Public Prosecutor v Adnan bin Kadir* [2013] 3 SLR 1052 ("*Adnan bin Kadir*"), where the Court of Appeal held that the term "import" in s 7 of the MDA bore its plain meaning of bringing or causing to be brought into Singapore by land, sea or air.[61] The Prosecution further submitted that the evidence showed that the drugs were in the accused's possession, and relied on the presumptions in s 18(1) of the MDA. It was argued that the accused was in possession of a container – *ie*, the Plastic Bag – which gave rise to a presumption that he was in possession of the drug contained therein.[62] This then also raised the presumption under s 18(2) of the MDA – *ie*, the accused was also presumed to know the nature of the drug unless he could demonstrate otherwise on a balance of probabilities.[63]

The Defence's case

27 As explained at [13]–[23] above, the crux of the accused's defence was that he believed that he was helping Kana to deliver a bag *of clothes* to a friend in Singapore. He had boarded the Taxi believing that this bag of clothes was somewhere in the vehicle, although he did not know exactly where it was stashed. He did not know that the Plastic Bag at his feet contained drugs and that this was the Plastic Bag which Kana wanted him to deliver to Singapore.

28 The Defence thus argued that the accused was not in possession of the drugs,[64] and further that he had no knowledge of them.[65] It was further submitted that the accused had no reason to suspect that the bag contained drugs.[66]

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61 Prosecution's Closing Submissions, para 4.

62 Prosecution's Closing Submissions, para 7.

63 Prosecution's Closing Submissions, paras 7–8.

Legal principles

29 The relevant provisions were ss 7, 18(1)(*a*) and 18(2) of the MDA which provide as follows:

> **Import and export of controlled drugs**
>
> **7.** Except as authorised by this Act, it shall be an offence for a person to import into or export from Singapore a controlled drug.
>
> **Presumption of possession and knowledge of controlled drugs**
>
> **18.** — (1) Any person who is proved to have had in his possession or custody or under his control —
>
> (*a*) anything containing a controlled drug;
>
> …
>
> shall, until the contrary is proved, be presumed to have had that drug in his possession.
>
> (2) Any person who is proved or presumed to have had a controlled drug in his possession shall, until the contrary is proved, be presumed to have known the nature of that drug.

30 The Court of Appeal in *Adnan bin Kadir* at [67] held that the term "import" under s 7 of the MDA bears the same meaning ascribed to that term in s 2 of the Interpretation Act (Cap 1, 2002 Rev Ed) – *ie*, to bring or cause to be brought into Singapore by land, sea or air. There is an overlap between the act of bringing or causing to be brought into Singapore and the concepts of possession and knowledge. In order to establish that the accused has "brought or caused to be brought" a controlled drug into Singapore, the Prosecution is required to establish that the accused was in possession, and had knowledge of

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64 Defence's Closing Submissions, para 62.

65 Defence's Closing Submissions, para 84.

66 Defence's Closing Submissions, para 70.

the nature of the drugs: see for example, the decision of Court of Appeal in *Pham Duyen Quyen v Public Prosecutor* [2017] 2 SLR 571 ("*Pham Duyen Quyen*") where the court considered, in the context of a charge of importation, whether possession (at [34]–[48]) and knowledge of the nature of the drugs (at [49]) were made out. As illustrated by *Pham Duyen Quyen*, such possession and knowledge may be established using the presumptions under ss 18(1) and 18(2) of the MDA. In the present case, the heart of the dispute between the Prosecution and the Defence was whether possession and knowledge were made out.

31 As noted by the Court of Appeal in *Obeng Comfort v Public Prosecutor* [2017] 1 SLR 633 ("*Obeng Comfort"*) at [34], s 18(1) of the MDA deals with secondary possession. Whether the presumption of possession is raised depends on: (a) whether a "thing in issue" exists, and (b) whether the accused had possession, control or custody of this "thing in issue". In the context of s 18(1)(*a*) of the MDA, the "thing in issue" is the container holding the controlled drugs. Once it is established that the container exists and that the accused had possession, control or custody of it, s 18(1) of the MDA raises a presumption of fact that the accused also possessed the drugs which are contained within (*Obeng Comfort* at [34]).

32 To rebut the presumption in s 18(1), the accused must prove on a balance of probabilities that he did not have the drug in his possession. This may be done by proving that the accused did not know that the container contained that which is shown to be the drug in question (*Obeng Comfort* at [35]).

33 Once the accused is proved or presumed to have had a controlled drug in his possession, he is then presumed to know the nature of that drug under s 18(2) of the MDA– which refers to the nature of the specific controlled drug

found in his possession (*Obeng Comfort* at [35], citing *Nagaenthran a/l K Dharmalingam v Public Prosecutor* [2011] 4 SLR 1156 ("*Nagaenthran*") at [23]–[24]). To rebut this presumption, the accused must prove on a balance of probabilities that he did not know the nature of the drug (*Obeng Comfort* at [37]).

Issues

34 I accepted that the Plastic Bag was a container holding a controlled drug and that if it was established that the Plastic Bag was in the accused's possession, custody or control, then the presumption under s 18(1) of the MDA would arise. Thus, the issues which arose for consideration were as follows:

(a) Was the accused in possession, control or custody of the Plastic Bag?

(b) If the accused was in possession of the Plastic Bag, had the accused rebutted the presumption of possession in s 18(1) of the MDA on a balance of probabilities?

(c) If the accused had not rebutted the presumption of possession, had he rebutted the presumption of knowledge under s 18(2) of the MDA?

Decision and reasons

Factual findings

35 Before I analyse the above issues, this is an appropriate juncture to set out my findings on two of the key factual disputes.

36 The first factual dispute related to how it transpired that the accused took the seat behind the driver in the Taxi. This was a significant issue because an important part of the Prosecution's case was the claim that the accused *deliberately chose* that particular seat because he knew that the drugs were hidden beneath the driver's seat. Equally, it was an important part of the Defence's case that the accused unknowingly and fortuitously ended up in that seat, and had no knowledge that the drugs were hidden beneath the driver's seat. As mentioned, the accused's evidence was that Ms Tan and Ms Chin had boarded the taxi first, and that he had simply taken the remaining vacant seat (see [20] above).

37 The Prosecution led oral evidence from Ms Tan who, as mentioned, was seated in the front passenger seat. The police also made attempts to locate Ms Chin, who was seated in the rear passenger seat beside the accused, and to procure her attendance at trial. However, it seems she was uncontactable.[67] Ms Tan testified that of the three passengers, the "Malay man" (by which she meant the accused) boarded the Taxi first, and sat behind the driver.[68] After this, she and Ms Chin boarded at the same time.[69] Ms Tan chose to sit in the front because she saw that the accused had chosen to sit in the back.[70] Ms Tan's evidence was that she had initially expected that the accused would have gone to sit in front and that she would sit in the back of the Taxi with "the other lady".[71] This was because it was her understanding that "usually women would

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67 CT, 23 September 2017, p 71 (lines 23–32).

68 CT, 22 September 2017, p 64 (lines 9–14).

69 CT, 22 September 2017, p 64 (line 28).

70 CT, 22 September 2017, p 64 (lines 23–25).

71 CT, 22 September 2017, p 64 (lines 23–24).

sit together", and if there were two women and one man in a group, it was the "normal practice" that the two women would sit at the back of a car.[72]

38 The Prosecution also led evidence from Mr Mohd Taib on this issue. His evidence was that he could not remember who had boarded the Taxi first.[73] When asked if he thought that the seating arrangement of the three passengers was "unusual", he said that it was "normal" and it was "up to the passengers whether they want to sit at the front or at the back".[74]

39 I also noted that SSgt Roger had testified that the reason the Taxi stood out to him at the Woodlands Checkpoint was that he found the arrangement of the passengers within the Taxi "weird". He stated as follows:[75]

Q	You stated that you had --- you saw the taxi and you spoke to the subject. Can you tell us, where were you and where was the taxi? Were you next to the taxi or ---
A	Oh, I was a distance from the taxi whereby I saw the taxi, I see the subject in --- from my own profiling, my experience, I find that the taxi is a --- a bit weird with the combination of the --- arrangement of the subject in the taxi.
Q	Now, can you elaborate a bit more what was --- firstly, what was the combination in the taxi?
A	The combination is two middle-age Chinese lady together with a young Indian-looking guy who's sharing a taxi. And then seating arrangement is also, to me ---

…

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72 CT, 22 September 2017, p 65 (lines 4–16).

73 CT, 23 September 2017, p 13 (lines 22–23).

74 CT, 23 September 2017, p 14 (lines 1–4).

75 CT, 19 September 2017, p 68 (lines 12–30).

Witness:	And then the seating arrangement is also a bit weird as I --- I see them, the Chinese lady is talking to each other, but they are not sitting side by side; it's sitting front and back.
Court:	Alright.
Witness:	Then that made me feel that I want to check the taxi.

40 Having considered the evidence, I was satisfied that the accused had boarded the Taxi first, and that his claim that he had boarded the Taxi last and fortuitously took the seat behind the driver could not be believed for the following reasons. Firstly, Ms Tan's evidence was logical – the three passengers were strangers and her evidence was that, had the accused not already taken the rear passenger seat, she and Ms Chin would have naturally taken the rear seats given their common gender. I found that this was entirely in accord with the natural behaviour of the community they belong to. This is also corroborated by SSgt Roger's evidence that it was precisely this anomalous situation that attracted his attention to the Taxi.

41 Further, Ms Tan had no reason to lie about what had happened. This being a significant event in her life, it was not difficult to conceive that she would recall these details clearly. Another reason supporting her veracity is because she had found it unusual that the accused had chosen the rear seat, instead of sitting in front.

42 The second area of factual dispute broadly relates to the accused's behaviour immediately before and immediately after his arrest. In seeking to demonstrate the accused's knowledge and state of mind, the Prosecution pointed to evidence that the accused was seen to be nervous at the material time:[76]

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[76] Prosecution's Closing Submissions, para 40.

(a) SSgt Roger's evidence was that he decided to send the Taxi for a "100% check" because he perceived that the accused was "quite nervous" and seemed "shaky".[77] SSgt Roger stated that it was the *accused himself* who handed over his passport, and that as he did so, his hands were shaking.[78]

(b) SSSgt Samir's evidence was that when he arrived at the scene (this was after the Taxi had been directed to the 100% inspection pit and after the drugs had been found under the driver's seat – see [7] above), he noticed that the accused was sweating profusely, more so than other passengers in the area, and appeared pale and nervous.[79]

43 Although the point was not taken up in closing submissions, the Defence sought to cast doubt on SSgt Roger and SSSgt Samir's evidence. As mentioned, the accused testified that it was the driver, Mr Mohd Taib, and not him, who handed his passport to SSgt Roger (see [23] above). It was also put to SSgt Roger that it was not the accused who handed his passport over, and that even if it was, the accused was not nervous as he did so.[80] SSgt Roger disagreed. Similarly, it was put to SSSgt Samir that the accused was neither sweating profusely nor looking pale or nervous when he arrived at the scene.[81] SSSgt Samir also disagreed.

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77 CT, 19 September 2017, p 74 (lines 8 and 26–27).

78 CT, 19 September 2017, p 82 (lines 29–31).

79 CT, 22 September 2017, p 20 (lines 21–25).

80 CT, 19 September 2017, p 92 (lines 25–30).

81 CT, 22 September 2017, pp 32 (line 23) to 33 (line 15).

44 Having considered the evidence, I was satisfied that it was the accused who had handed his passport to SSgt Roger. My reasons are as follows. First of all, the accused's claim that it was not he who handed his passport to SSgt Roger was contradicted by his own investigative statement recorded on 1 August 2015. There he said that *he* gave his passport to the uniformed officer who asked him for his passport after the Taxi had cleared immigration.[82] Secondly, it was contradicted by Mr Mohd Taib, who testified that on that day, he followed the "same procedure", which was that after "[getting] the passport chop", he would return the passports to the passengers *before* driving away from the immigration counter.[83] Thirdly, it was contradicted by Ms Tan, who could not remember exactly what had happened on that particular day, but said that in general, the taxi driver would return the passengers their passports immediately after clearing immigration.[84] Fourthly, such a practice is logical. There is no further need for a taxi driver in Mr Mohd Taib's position to retain his passengers' passports once the immigration check is over on the Singapore side. The passengers would be anxious to retrieve their passports from him as soon as possible and doing so before driving off after the passport check is consistent with common sense.

45 I also saw no reason to disbelieve SSgt Roger and SSSgt Samir's evidence that the accused generally appeared nervous. In particular, it was the accused's nervous demeanour that made SSgt Roger decide to send the Taxi to the 100% inspection pit.

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82 AB, p 140.

83 CT, 23 September 2017, pp 17 (lines 12–30) and 18 (lines 1–8).

84 CT, 22 September 2017, p 75 (lines 3–20).

Whether the accused was in possession, control or custody of the Plastic Bag

46 I turn now to address the first issue of whether the accused was in possession of the Plastic Bag. The concept of possession under s 18(1) of the MDA was elaborated on by the Court of Appeal in *Pham Duyen Quyen*, where the court noted that "possession" included concepts of both physical and legal possession (*Pham Duyen Quyen* at [32]). In both *Pham Duyen Quyen* and an earlier decision cited in that judgment, *Van Damme Johannes v Public Prosecutor* [1993] 3 SLR(R) 694 ("*Van Damme*"), it was held that the accused persons were in "possession" of luggage or suitcases containing controlled drugs, notwithstanding the fact that they had lost physical possession when they checked in these pieces of luggage at airports. In both cases the court noted that the accused persons had received luggage tags which entitled them to access the luggage (see *Pham Duyen Quyen* at [32] and *Van Damme* at [8]). In *Pham Duyen Quyen*, it was held that the accused had "legal possession" of the luggage "by virtue of her ability to reclaim it", while in *Van Damme* it was held that the accused had possession because with the baggage tag he had received he "could obtain access" to the bag in question. Thus, even where an item is not found on an accused's person, it may still be within his possession if he has an "ability" to take possession of it or can "obtain access" to it.

47 I also found instructive the English decision of *Warner v Metropolitan Police Commissioner* [1969] 2 AC 256 ("*Warner*"). The concept of possession set out in this case has been endorsed by our courts in several decisions (see for example, *Tan Kiam Peng v Public Prosecutor* [2008] 1 SLR(R) 1 at [53] and *Pham Duyen Quyen* at [31]). In *Warner*, Lord Wilberforce remarked as follows:

> … Ideally a possessor of a thing has complete physical control over it; he has knowledge of its existence, its situation and its qualities: he has received it from a person who intends to confer

> possession of it and he has himself the intention to possess it exclusively of others. …

48 Bearing the above principles in mind, I was satisfied that the accused had possession of the Plastic Bag. The accused chose to sit in the Taxi knowing that it contained an item which Kana wanted him to deliver. I had found that the accused deliberately chose to sit behind the driver where the Plastic Bag was placed. I noted that the accused never asked Mr Mohd Taib about any bag in the Taxi.[85] This suggests that he knew where to find it. Taking these factors in the round, I concluded that the accused had chosen his seat because he knew just where the item from Kana was located. I would add that even if the accused had merely chanced upon the Plastic Bag, he had concluded that this was the item that Kana had placed in the taxi for him. The accused gave a contemporaneous statement to Staff Sergeant Rozaiman bin Abdul Rahman (SSgt Rozaiman) at 11.17pm, less than seven hours after the Plastic Bag was discovered by the ICA officers. He did not challenge the voluntariness or accuracy of this statement, which was given in a question and answer format. The responses to the following questions showed that he knew the Plastic Bag he was handling in the Taxi was the item from Kana:

> Q2: What are these 03 bundles?
> A2: Initially I do not know. After I was shown the content, then only I know they are all drugs.
>
> Q3: Who does these drugs belong to?
> A3: Kanna
>
> Q4: How do you know that these drugs belong to Kanna?
> A4: He was the one who instructed me via phone call to board this taxi. He said that there is a bag inside the taxi and he instructed me to bring the bag to Bugis.
>
> Q5: What exactly did he tell you and what time did he call you?

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85 CT, 26 September 2017, p 13 (lines 20–21); 27 September 2017, p 58 (lines 28–31).

> A5: He called me at about 4pm and told me that the taxi is already at Larkin. I am to go to Larkin to find and board the taxi. Along the way he kept calling for updates of my location and I updated him.
> …
> Q7: What are you suppose (*sic*) to do once you reach Bugis?
> A7: I am supposed to wait for a call from a Singaporean man to tell me the location to go to deliver the bag and its contents.
> …
> Q11: Did Kanna tell you to collect any money from the Singaporean man?
> A11: No. He only asked me to pass the plastic bag to him.

49 It is clear from the foregoing that the accused had gone into the Taxi with the objective of locating the item which Kana had placed inside and which he would bring into Singapore to deliver to somebody in Bugis. He located the Plastic Bag which he concluded was the item from Kana. He actually examined its contents, after which he placed it back in the location he had found it, with the intention of delivering it to the intended recipient. The purpose of this exercise was to be able to collect payment from Kana for his work. It is clear from this chain of events that, once he concluded that the Plastic Bag was the item from Kana, the accused had taken physical possession of it. Even after placing it back in its original concealed position, he retained control over it as he was the only person who knew where it was and had the intention to retrieve it when the Taxi arrived at Bugis and deliver it to the person designated by Kana.

50 Accordingly, I was satisfied beyond reasonable doubt that the accused had possession of the Plastic Bag.

51 I should say at this point that the findings above also support the conclusion that the accused was in actual possession of the bundles within the Plastic Bag, without having to rely on the presumption under s 18(1) of the MDA. As the evidence points to the conclusion that the accused had located the Plastic Bag as well as the bundles therein, and had made an examination of the

bundles before restoring the items in their original position with the intention to subsequently retrieve them, it is clear that the accused had actual possession of both the Plastic Bag and the bundles. The presumption in s 18(1) of MDA and in particular s 18(1)(*a*) of the MDA, as evident from the cases of *Pham Duyen Quyen* and *Van Damme* cited above, are generally relied on in cases where the accused was found to be in possession of a bag or suitcase which in turn contained controlled drugs amongst other things. Whereas there is nothing to suggest that a plastic bag cannot be a 'container' within the meaning of s 18(1)(*a*) of the MDA (see *eg*, *Public Prosecutor v Ng Peng Chong and another* [2017] SGHC 99, which similarly involved a plastic bag containing bundles of drugs), to make a distinction in this case between the Plastic Bag as a container and the bundles of drugs contained within appears to me to be rather artificial, especially where there is nothing else in the Plastic Bag apart from the bundles of drugs themselves.

52 In any case, as the Prosecution and Defence have both made submissions relating to s 18(1) of the MDA, I shall discuss this briefly despite my finding that the accused was in actual possession of the bundles of drugs.

Whether the accused had rebutted the presumption of possession in s 18(1) of the MDA

53 Under s 18(1) of the MDA, the finding that the accused was in possession of the Plastic Bag gave rise to the presumption that he was in possession of the drugs contained within the Plastic Bag. The next question to consider was whether the accused had rebutted the presumption, by proving on a balance of probabilities that he did not have the drugs in his possession.

54 The most obvious way to rebut the presumption under s 18(1) of the MDA would be for the accused to show that he did not know that the Plastic Bag contained that which is shown to be the drug in question, *eg,* by showing that the bundles were slipped into the Plastic Bag without his knowledge (*Obeng Comfort* at [35]). In this case, as the accused's version of events was that he had actually seen and touched the bundles contained within the Plastic Bag, he has naturally not attempted to adduce any evidence to rebut the presumption in this manner. In any case, the existence of the accused's DNA on the bundles within the Plastic Bag also showed that the accused had physically examined the contents of the Plastic Bag, even though it was by feeling it rather than viewing it. This is not a case where, for example, the Plastic Bag had contained various other items in addition to the bundles, and the accused could then seek to persuade this court that he was only aware of the existence of those other items but not the bundles of controlled drugs. As such, it is clear on the evidence that the presumption under s 18(1) MDA has not be rebutted.

55 In seeking to rebut the presumption in s 18(1) of the MDA, the Defence had also made submissions pertaining to the accused's alleged lack of knowledge that there were drugs inside the Plastic Bag.[86] The bulk of these contentions have already been dealt with by my finding that the accused was in actual possession of the Plastic Bag at [48]–[49] above. For the sake of analytical clarity, the Defence's remaining contentions pertaining to the accused's alleged belief that he was tasked with transporting clothes rather than any illicit substance, are better dealt with under the presumption of knowledge in s 18(2) of the MDA, to which I shall now turn.

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86 Defence's Closing Submissions, paras 64–68.

Whether the accused had rebutted the presumption of knowledge in s 18(2) of the MDA

56 I should state at the outset that there was very little by way of direct evidence that the accused knew that the wrapped bundles were controlled drugs. Even the Prosecution's submissions stated that the accused "subjectively *knew* that he was dealing in something illicit" [emphasis in original],[87] and that the remuneration offered by Kana "would have notified the accused of the fact that he was transporting something valuable and illegal" [emphasis in original],[88] but stopped short of saying that the accused knew that he was transporting *controlled drugs*. However, once the presumption of knowledge in s 18(2) of the MDA was raised, it fell to the *accused* to rebut it.

57 As stated in *Obeng Comfort* at [36], to rebut the presumption in s 18(2) of the MDA, the accused must prove on a balance of probabilities that he did not have knowledge of the nature of the controlled drug. The accused may do this by showing that he did not know and could not reasonably be expected to have known the nature of the controlled drug (*Obeng Comfort* at [36] citing *Dinesh Pillai a/l K Raja Retnam v PP* [2012] 2 SLR 903 at [18]). The court in *Obeng Comfort* stated at [39] that the accused should be able to say what he thought or believed he was carrying, and give an account of what he thought it was. The court then assesses the veracity of this account against the objective facts, including the nature, value and the quantity of the purported item, and any reward the accused had been offered for transporting the item (*Obeng Comfort* at [40]).

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87 Prosecution's Closing Submissions, para 58.

88 Prosecution's Closing Submissions, para 57.

58 In this regard, I was faced with two competing narratives. On the Prosecution's case, the accused had been asked to transport a bag in highly suspicious circumstances but *chose* not to ask questions and displayed a "wanton indifference" to what he was to carry.[89] The Prosecution stopped short of using the term "wilful blindness" but the submissions certainly call that concept to mind. On the other hand, the accused's claim was that he thought that he was carrying a bag of clothes. The accused denied that he knew or suspected that he was carrying some illicit item. The evidence had to be considered in light of these two competing narratives.

59 On the arguments and evidence before me, I concluded that the accused had failed to rebut the presumption of knowledge. My conclusion was based on the following three factors:

60 First, the suspicious circumstances surrounding the transaction between Kana and the accused made it wholly unbelievable that the accused genuinely thought he was carrying a bag of clothes, as he claimed. As disclosed in his investigative statement recorded on 29 July 2015, the accused knew that Kana had been banned from entering Singapore.[90] Kana had offered the accused a large sum of 2,000 Malaysian Ringgit to make the delivery. He had devised a highly elaborate scheme of planting the Plastic Bag inside a taxi bearing a certain number plate, instead of simply giving the Plastic Bag to the accused. According to the accused, Kana had not even told him whether the driver of the Taxi would know that the bag of clothes was inside the vehicle.[91] The transaction was shrouded in a level of secrecy and surreptitiousness that would suggest to

89 Prosecution's Closing Submissions, paras 54 and 59.

90 AB, p 131, para 2.

91 AB, pp 131–132.

any person that the item in question could not have been an innocent bag of clothes. The suspicious nature of the transaction was reinforced by the fact that Kana had repeatedly called the accused several times throughout the journey from Larkin Central to Singapore, to ask for updates on his location (see [22] above). The accused had maintained that he was not even curious as to why Kana was calling repeatedly.

61 Secondly, I found that the accused was not a credible witness and had shifted his position in several ways. First, the accused had taken shifting positions as to what he thought was contained in the Plastic Bag which Kana tasked him with delivering. In his contemporaneous statement, the accused did not mention that he believed that the Plastic Bag contained clothes. He simply stated that he had been instructed by Kana to deliver "a bag" or "a plastic bag" – see [48] above.

62 There was similarly no mention in the cautioned statement that the accused believed that the Plastic Bag contained clothes. He simply stated that he had "nothing to say".[92] It was in his first investigative statement, recorded on 29 July 2015, that the accused mentioned clothes for the first time. However, even then, his position was that he "thought" that the bag contained clothes. He specifically stated that Kana did not tell him what was inside:[93]

> I thought that he will ask me to bring a bag of clothes to pass to his friends. I did ask him what was inside the bag that he wants me to deliver. He told me that it was a bag belonging to his friend whom had left it back in Malaysia. *He did not tell me what was inside the bag.* [emphasis added]

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92 AB, p 130.

93 AB, p 131, para 2.

63 It was not until his third investigative statement, recorded on 1 August 2015, that the accused came to the position which he took in oral evidence,[94] and stated that he had *asked* Kana what the Plastic Bag contained, and Kana *told him that it contained clothes*.[95]

64 There were other aspects of the accused's evidence which showed that he was generally not a credible witness. For example, the accused had stated in his third investigative statement that *he* had given his passport to an officer in uniform,[96] but at trial he maintained that it was *the driver* who handed the passport to SSgt Roger.[97] To explain this inconsistency, the accused said under cross-examination that when SI Ranjeet recorded the third investigative statement, he had actually told SI Ranjeet that he could not remember who had passed the passport to the uniformed officer, but SI Ranjeet nevertheless recorded that the accused had personally handed his passport to the uniformed officer.[98] Yet when SI Ranjeet took the witness stand it was never put to him that he had inaccurately recorded the third investigative statement.

65 I have also described above how the accused had given inconsistent evidence about whether Kana had called him during the journey from Larkin Central to Woodlands Checkpoint. He first claimed Kana had called him many times during the journey, in line with his contemporaneous statement,[99] but later

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94 CT, 27 September 2017, p 50 (line 6).

95 AB, p 135, para 15.

96 AB, p 140, para 27.

97 CT, 27 September 2017, p 37 (lines 7–28).

98 CT, 29 September 2017, p 5 (lines 11–19).

99 AB,p 95.

stated that he could not remember, and/or that Kana had only given him a missed call which he did not answer (see [22] above).

66 The third reason I did not believe the accused's evidence that he thought he was tasked with transporting a bag of clothes related to his demeanour and behaviour around the time of the arrest. As I have mentioned, I accepted SSgt Roger and SSSgt Samir's testimony on this issue. The evidence that the accused was "shaking" as he handed his passport to SSgt Roger, and that he was sweating profusely, and was pale and visibly nervous to SSSgt Samir, supports the inference that he knew that he had been tasked with carrying an illegal item. He did not think he was merely transporting a bag of clothes.

67 Considering the above factors, I found that the accused's alleged belief that he was tasked with transporting a bag of clothes to be wholly unbelievable. I also found it difficult to believe that the accused would not have asked Mr Mohd Taib if there was a bag in the Taxi, and if so, where it was, if he had genuinely believed that Kana simply wanted him to deliver a bag of clothes. As such, I found that the accused had failed to rebut the presumption of knowledge under s 18(2) of the MDA.

68 As the Prosecution had made out the elements of both possession and knowledge, I found that the offence in s 7 of the MDA was made out. I therefore convicted him of the charge.

Sentence

69 The quantity of drugs in question was 45.78g of diamorphine. Under the sixth column of the Second Schedule to the MDA, the charge of importing more than 15g of diamorphine is punishable by death. However, under s 33B(1)(*a*) of

the MDA, the court has the discretion to impose the sentence of life imprisonment and caning in lieu of the death penalty, provided that both the requirements in s 33B(2)(*a*) and s 33B(2)(*b*) were satisfied.

70 As mentioned earlier, the Prosecution had issued a Certificate of Substantive Assistance under s 33B(2)(*b*) of the MDA. The Prosecution also did not dispute that the accused was a mere courier whose role was restricted to the activities under s 33B(2)(*a*) of the MDA – *ie* transporting, sending or delivering a controlled drug.[100]

71 The factors relevant to the analysis of whether an accused is a mere courier are, *inter alia*, (a) whether the accused's role is a common and ordinary incident of transporting, sending, or delivering a drug, (b) whether such involvement is necessary to deliver the drugs; (c) the extent in scope and time of the functions which the offender performs; (d) the degree of executive decision-making powers which the accused has; and (e) whether the accused receives a distinct form of benefit for performing his extra functions. (*Public Prosecutor v Christeen d/o Jayamany and another* [2015] SGHC 126 at [68]).

72 Having regard to these factors, I was satisfied that the role of the accused was restricted to the activities set out in s 33B(2)(*a*) of the MDA. There was no suggestion, and certainly no evidence, that the accused was doing anything other than transporting the drugs from Kana to their intended recipient. There was also no suggestion that he had any decision-making powers, as he seemed to be acting on Kana's instructions. This also appeared to be a one-off transaction in which the accused agreed to deliver the drugs in return for payment. I considered this to be an appropriate case to exercise my discretion under s 33B(1)(*a*) to

100 Minute Sheet, 23 October 2017.

impose the sentence of life imprisonment and 15 strokes of the cane instead of the death penalty.

Lee Seiu Kin
Judge

Mark Jayaratnam and Marcus Foo (Attorney General's Chambers) for the Prosecution;
Ismail Hamid (A Rohim Noor Lila LLP) and Ho Thiam Huat (T H Ho Law Chambers) for the accused.
