Mervin Singh and another *v* Public Prosecutor
[2013] SGCA 20

Case Number	: Criminal Appeal No 18 of 2011
Decision Date	: 08 March 2013
Tribunal/Court	: Court of Appeal
Coram	: Chao Hick Tin JA; Andrew Phang Boon Leong JA; V K Rajah JA
Counsel Name(s)	: Selva K Naidu (Liberty Law Practice LLP) and Amarick Gill (Amrick Gill & Co) for the first appellant; Tan Chuan Thye, Daniel Chia, Loh Jien Li (Stamford Law Corporation) and M Lukshumayeh (Central Chambers Law Corporation) for the second appellantAnandan Bala, Kenneth Wong and Marcus Foo (Attorney-General's Chambers) for the respondent.
Parties	: Mervin Singh and another — Public Prosecutor

Criminal Law – Drug Trafficking

[LawNet Editorial Note: This was an appeal from the decision of the High Court in [2011] SGHC 222.]

8 March 2013 Judgment reserved.

Andrew Phang Boon Leong JA (delivering the judgment of the court):

Introduction

1 This is an appeal by the appellants against the decision of the trial judge ("the Judge") in *Public Prosecutor v Mervin Singh and another* [2011] SGHC 222 ("the Judgment").

2 Although they were linked in so far as the *factual* situation in question was concerned, both appellants were involved in different parts of the same transaction. More importantly, the issues raised as a result were also (as we shall see) different. What is most important in the context of the present appeal is this: Given the different issues raised, a finding of culpability in respect of one appellant would *not automatically* result in a similar finding in respect of the other appellant. Much would – as is expected in cases involving drug trafficking – depend on the precise factual matrix concerned. Hence, a granular examination of all the relevant facts is imperative.

3 The facts in the present appeal were straightforward.

Facts

4 On 27 November 2008, the Central Narcotics Bureau ("CNB") acted on a tip off and trailed a black Subaru Impreza car ("the vehicle") from about 2.20pm. The vehicle was driven by one Sallehuddin Bin Mohammad ("Sallehuddin") who was a close friend of Mervin Singh ("the First Appellant"). The First Appellant was in the front passenger seat, while one Muhammad Rizal Bin Sumani ("Rizal") sat in the rear passenger seat.

5 All three of them had spent the night at Sallehuddin's flat located at Block 317 Woodlands Street 31 #06-184. The First Appellant had asked Sallehuddin to send him to Tampines before sending Rizal back to Toa Payoh.

6 At about 2.50pm, the vehicle arrived at the carpark of Block 485B Tampines Avenue 9 ("Block 485B"). The First Appellant alighted and walked empty-handed to the void deck of Block 485B. Sallehuddin and Rizal remained in the vehicle. The First Appellant sat on a stone bench near the lift lobby on the ground floor of Block 485B.

7 While seated at the void deck of Block 485B, the First Appellant made two outgoing calls from his white Samsung mobile telephone to the mobile telephone held by Subashkaran s/o Pragasam ("the Second Appellant") – one at 2.49pm and the other at 2.54pm.

The transaction that allegedly took place between the First Appellant and the Second Appellant

8 At 3.04pm, the First Appellant received an incoming call on his white Samsung mobile phone from the Second Appellant's mobile phone. Moments later, the First Appellant walked towards Lift A of Block 485B. The door of Lift A opened and the Second Appellant walked out. The First Appellant then entered Lift A and carried out a pink detergent box of the brand "Daia" ("the pink box"). He then carried the pink box and returned to the vehicle. The vehicle then left the carpark.

The Second Appellant's arrest

9 In the meantime, the Second Appellant had walked to a blue Honda Civic car parked near Block 485A. At around 3.05pm, he was arrested by CNB officers as he was retrieving grocery bags from the boot of that car.

The First Appellant's arrest

10 At 3.07pm, the First Appellant received a call on his black Samsung mobile phone from the mobile phone held by one Nizam Bin Hamzah (also known as "Sopak"). Sopak instructed him to meet at a coffeeshop in Tampines called the "Afghanistan" coffeeshop. The First Appellant then told Sallehuddin to drive him to the said coffeeshop. On the way to the coffeeshop, the vehicle was stopped by CNB officers and the trio were arrested at about 3.10pm.

11 During the arrest, the pink box was found between the First Appellant's legs on the floor of the front passenger seat. The pink box was not sealed. In the presence of the trio, Senior Staff Sergeant Ng Tze Chiang Tony ("SSSgt Ng") removed a total of nine packets wrapped in newspaper from the pink box and placed them on the bonnet of the vehicle. After counting the nine packets, SSSgt Ng replaced them in the pink box and asked the trio whom the nine packets belonged to. The First Appellant replied that they were his.

The raid on the Second Appellant's flat

12 At about 4.15pm, the Second Appellant was escorted back to his residence at Block 485B Tampines Avenue 9 #10-130 where a search of his room was conducted in his presence. The following items were recovered under a table in the Second Appellant's room:

(a) one pink plastic bag ("the pink plastic bag") containing one plastic packet of brownish granular substance, later identified to be diamorphine;

(b) one blue sealer;

(c) one box of aluminium foil;

(d) two pieces of aluminium foil, each containing a straw; and

(e) one rolled-up note.

When questioned, the Second Appellant admitted that the above items belonged to him.

The raid of the First Appellant's room in Sallehuddin's flat

13 The First Appellant's room in Sallehuddin's flat was also raided and the CNB officers found two cartons of contraband cigarettes.

The DNA analysis

14 On 2 December 2008, the pink box and the sheets of newspaper wrapped around the nine packets were sent to the Health Science Authority ("HSA") for DNA analysis.

15 DNA profiles were generated from four of the nine plastic packets. Both appellants' DNA profiles were not found on them.

16 However, the Second Appellant's DNA, together with the DNA profiles of unknown persons, were found on the DNA profiles generated from the pink box as well as the two sheets of newspaper used to wrap one of the nine packets.

17 The First Appellant's DNA was not found on any of the exhibits sent for DNA analysis.

The testing of the contents of the nine packets

18 On 3 December 2008, the nine packets were sent to the HSA for analysis. The gross weight of the granular substances in each packet ranged between 453.7g to 455.7g, with a diamorphine content ranging from not less than 17.21g to 25.39g per packet.

The testing of the brownish granular substance found in the Second Appellant's room

19 On 5 December 2008, the brownish granular substance found in the pink plastic bag in the Second Appellant's room was also sent to the HSA for testing. It was found to weigh 452.6g, with a diamorphine content of not less than 20.95g. However, it is not the subject of the present appeal and therefore ought not to – and does not – figure in the analysis that follows.

The decision in the court below

20 The Judge rejected the defences proffered by both appellants.

21 In so far as the First Appellant was concerned, the Judge observed thus (see the Judgment at [5]):

> The defence of the first accused was that he had no knowledge that he would be trafficking in diamorphine because throughout the relevant times he was under the impression that he was buying and collecting contraband cigarettes for his own business. He called one Nizam bin Hamzah who was known as "Sopak" ("Sopak") to corroborate his story that he (the first accused) was at Tampines Avenue 7 to collect contraband cigarettes for Sopak. Sopak's evidence differed slightly in that he (Sopak) was the one who asked the first accused to look for cigarettes. He said that

he told the first accused to pick up some cigarettes from someone known as "Ah Boy" if the first accused happened to meet Ah Boy. The thrust of the first accused person's defence was that he picked up the pink box thinking it contained contraband cigarettes. I do not find the first accused person's story about collecting cigarettes for Sopak compelling in any way. It was vague, inconsistent, and did not make much sense. He hardly knew Sopak and no details were given as to why Sopak would trust him and vice versa. Since the pink box in fact contained diamorphine, why would Sopak rely on the first accused to carry out the pick-up if the first accused believed that he was picking up cigarettes? No explanation was given as to why Sopak had no worry that the first accused might have taken away the diamorphine himself, or expose Sopak to the authorities if he (the first accused) did not want to be involved in a drug transaction. In any event, Sopak did not corroborate this. Sopak's evidence under cross-examination was that he did not know about the drugs in the pink box. He also denied talking to "Ah Boy". I took into account that there might be a possibility that Sopak was trying to avoid implicating himself. This was a transaction that involved the two accused in such a way that neither could have participated without knowing that it was a drop-off and pick-up of the diamorphine found. There was a dispute between counsel for the prosecution and the defence as to whether SI Goh was sufficiently close to see what he testified he saw, namely, that the first accused opening the pink box and looking into it. Having heard the evidence of SI Goh and the first accused, I am inclined to believe SI Goh. Even if he was at a distance from the first accused as the photographs showed, it was close enough, in my opinion, for a narcotics officer looking out for a target suspect to be able to see what he saw.

22 In so far as the Second Appellant was concerned, the Judge observed as follows (see the Judgment at [6]):

> The second accused admitted that he was in possession of the packet of diamorphine found in his room but he claimed that he was keeping that for his friend "Kacong". He denied everything else. His explanation as to why the telephone records show connections made between his mobile telephone and that of the first accused during the material time just before the arrests was that he (the second accused) had passed his telephone to "Ah Boy" and it was Ah Boy who was speaking to the first accused. He told the court that Ah Boy had mysteriously and suddenly appeared at his flat and knocked on his window. I find the defence of the second accused to be incredible, and the manner in which the second accused recounted the events was not persuasive. His defence of that story under cross-examination was also poor and I am unable to find any reasonable doubt in his favour. The problem for the second accused was that he had not only to disassociate himself from the telephone calls through his mobile telephone to that of the first accused, he had also to explain why the first accused told the court that in the call at 3.04pm the speaker said he was on the way down, and moments later, the door to lift "A" opened and the second accused walked out. The first accused also testified that he thought that the second accused was delivering contraband cigarettes when he (the second accused) gestured towards the lift where the pink box was left. The second accused also could not explain why his DNA profile was found on the newspaper wrapping the packets of diamorphine other than to question why the first accused person's DNA profile was not found when he (the first accused) clearly handled the pink box.

23 Let us turn now to consider, *seriatim*, the arguments of both appellants as well as our decision with respect to each set of arguments. Before proceeding to do so, a brief statement of the applicable legal principles would be appropriate.

The applicable legal principles

24 The applicable legal principles have now been well established and all counsel appeared to be in agreement on them. The more important issues related to the *application* of those principles to the relevant facts. Indeed, the most difficulties arose as a result of disagreements as to what the relevant facts were.

25 One key provision – particularly in so far as the First Appellant is concerned – is the presumption embodied in s 18(2) of the Misuse of Drugs Act (Cap 185, 2004 Rev Ed) ("MDA"), which reads as follows:

> **Presumption of possession and knowledge of controlled drugs**
>
> **18**.
>
> ...
>
> (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.

26 The applicable legal principles are well summarised in this court's decision in *Nagaenthran a/l K Dharmalingam v Public Prosecutor* [2011] 4 SLR 1156, as follows (at [21]–[28]):

> 21 Section 18 of the MDA provides as follows:
>
> **Presumption of possession and knowledge of controlled drugs**
>
> **18.**-(1) Any person who is proved to have had in his possession or custody or under his control -
>
> (*a*) anything containing a controlled drug;
>
> (*b*) the keys of anything containing a controlled drug;
>
> (*c*) the keys of any place or premises or any part thereof in which a controlled drug is found; or
>
> (*d*) a document of title relating to a controlled drug or any other document intended for the delivery of a controlled drug,
>
> shall, until the contrary is proved, be presumed to have had that drug in his possession.
>
> (2) Any person who is proved or presumed to have had a controlled drug in his possession shall, until the contrary is proved, be presumed to have known the nature of that drug.
>
> (3) The presumptions provided for in this section shall not be rebutted by proof that the accused never had physical possession of the controlled drug.
>
> (4) Where one of 2 or more persons with the knowledge and consent of the rest has any controlled drug in his possession, it shall be deemed to be in the possession of each and all of them.
>
> 22 In *Tan Kiam Peng* [*Tan Kiam Peng v PP* [2008] 1 SLR(R) 1], this court embarked on an extended discussion of whether the term "controlled drug" in s 18(2) of the MDA should be given

a narrow or a broad meaning (see *Tan Kiam Peng* at [83]-[95]). The broad interpretation is that "knowledge in s 18(2) ... is only a reference to knowledge that the drug concerned is a controlled drug" (see *Tan Kiam Peng* at [83]), and not knowledge that the drug in question is the actual drug found in the possession of the accused (*ibid*). The narrow interpretation is that the knowledge referred to in s 18(2) of the MDA is the "knowledge that the drug is *not only* a controlled drug *but is also* the **specific** drug which it turns out the accused was in possession of" [emphasis in original in italics; emphasis added in bold italics] (see *Tan Kiam Peng* at [90]). At [95], the court concluded that the narrow interpretation was to be preferred:

> ... [G]iven the specific language of s 18(2) of the [MDA], the need (given the extreme penalties prescribed by the [MDA]) to resolve any ambiguities in interpretation (if they exist) in favour of the accused, as well as the fact that no case has (to the best of our knowledge) adopted the [broad] interpretation, it would appear, in our view, that (whilst not expressing a conclusive view in the absence of detailed argument) the [narrow] interpretation appears to be the more persuasive one and ... will in fact be adopted in the present appeal.

23 In our view, while there may be a conceptual distinction between the broad view (that the knowledge in s 18(2) of the MDA refers to knowledge that the drug is a controlled drug) and the narrow view (that the knowledge in s 18(2) of the MDA refers to knowledge that the drug is a specific controlled drug, *eg*, heroin or "ice"), the distinction has no practical significance for the purposes of rebutting the presumption of knowledge of the nature of the controlled drug. To rebut the presumption of knowledge, all the accused has to do is to prove, on a balance of probabilities, that he *did not know* the nature of the controlled drug referred to in the charge. The material issue in s 18(2) of the MDA is *not* the *existence* of the accused's knowledge of the controlled drug, *but* the *non-existence* of such knowledge on his part.

24 As to the meaning of the phrase "the nature of that drug", our view is that it refers to the actual controlled drug found in the "thing" (*eg*, the bag or container, *etc*) that was in the possession of the accused at the material time. For instance, if heroin is found in a bag or a container in the accused's possession and he is unable to prove, on a balance of probabilities, that he had no knowledge of that heroin (see [27] below), he would be presumed under s 18(2) of the MDA to have known of the heroin in his possession.

25 In the present case, as the appellant was found to be in possession of the Bundle containing a controlled drug, he was presumed to have had that drug in his possession under s 18(1) of the MDA (by virtue of his possession of the Bundle) unless he proved the contrary. He was unable to do so because he could not prove that he had no knowledge of the Bundle or the contents of the Bundle. In fact, he knew the Bundle strapped to his thigh contained something (which he alleged to be "company product").

26 Consequently, the s 18(2) presumption applied, and the appellant was presumed to have known the nature of the aforesaid (controlled) drug (which he was presumed to have had in his possession), unless he proved the contrary. He was again unable to do so because the Judge rejected his defence that he believed or thought that the Bundle contained "company product", and found that he had actual knowledge that the Bundle contained heroin. We should add that the presumption in s 18(2) of the MDA also applies to a case where the accused is *proved* to have been in *possession* of a *controlled* drug, *eg*, where the accused knew or was wilfully blind to the fact that he was carrying a controlled drug. Another illustration of proven possession, without the aid of the presumption in s 18(1) of the MDA, would be where the accused has direct possession of a controlled drug (as opposed to possession of something containing a controlled

drug, the keys of something containing a controlled drug, *etc*), *eg*, where the accused has some white pills in his trouser pocket (whatever he believed them to be) that turn out to be a controlled drug. Ultimately, regardless of whether possession is *proved* or *presumed*, s 18(2) of the MDA would apply to presume that the accused knew the nature of that drug, unless he proves the contrary.

27 How can an accused rebut the presumption of knowledge of the nature of the controlled drug found in his possession (*eg*, in a bag he is carrying or on his person)? He can do so by proving, on a balance of probabilities, that he genuinely believed that what was in his possession was something innocuous (*eg*, washing powder, when it was in fact heroin (see *Warner v Metropolitan Police Commissioner* [1969] 2 AC 256)), or that he thought it was a controlled drug other than the one actually found in his possession (*eg*, where he genuinely believed he was carrying "ice", rather than heroin (see *Khor Soon Lee v PP* [2011] 3 SLR 201)).

28 Whether the accused's evidence is to be believed is a question to be determined in all the circumstances of the case.

[emphasis in original]

Our decision

The First Appellant

27 The defence raised by the First Appellant is straightforward. In essence, he argues that, whilst he does not dispute that he was in physical possession of the diamorphine, he has, nevertheless, successfully rebutted the presumption in s 18(2) of the MDA (reproduced above at [25]), which presumes that he *knew* that the pink box contained the diamorphine. He adduced a series of facts in support of this argument, as follows.

28 The First Appellant claimed that he was always under the impression that he would be helping to transport contraband cigarettes. That was, after all, his "trade". Indeed, he had testified that he had been caught by customs officers on 24 November 2008 (just days before his arrest for the present offence) for being in possession of contraband cigarettes, and had paid a $500 fine. In addition, his room at Sallehuddin's flat was found to contain two unopened cartons of contraband cigarettes. He further claimed that his friends, Sallehuddin and Rizal, knew of his "trade". Finally, at the time of his arrest, he had a sum of $1,354 in cash with him, from which $254 was confiscated by the CNB because that sum was from the sale of contraband cigarettes. *It is significant, in our view, that there is no evidence on record contradicting the fact that the First Appellant was a dealer in contraband cigarettes. In any event, there is, in our view, sufficient evidence on record to demonstrate that this was indeed the case.*

29 The First Appellant's counsel, Mr Selva Naidu ("Mr Naidu"), explained during oral submissions before this court that the First Appellant's sources of supply of contraband cigarettes had run "dry". The First Appellant also alleged that a contraband cigarette supplier and a runner had absconded with $5,000 of his funds. He was therefore desperate to locate a new supplier of contraband cigarettes. To this end, he had contacted Sopak, who was supposed to introduce him to a new supplier of contraband cigarettes. The First Appellant claimed that, as a favour for Sopak, he had been tasked to collect some contraband cigarettes from one Ah Boy for Sopak as Sopak's car was at the workshop. Although the First Appellant initially thought that Ah Boy was going to be his cigarette supplier, he stated that it was later made clear to him that the First Appellant was merely collecting cigarettes from Ah Boy on Sopak's behalf. The agreement was such that the First Appellant had to bring the

cigarettes collected from Ah Boy to Sopak before Sopak would introduce the First Appellant to a new supplier of contraband cigarettes. The First Appellant also claimed that he had also harboured the hope that he might also manage to locate the person who had absconded with his funds, although this is (as we shall see below) not crucial to our decision in so far as the First Appellant is concerned.

30 The First Appellant then telephoned Ah Boy, who told him to call him back later. Shortly after, Sopak called the First Appellant and told him that he had just spoken to Ah Boy, and that the First Appellant should just go down to Block 485 Tampines. The First Appellant spoke once more with Ah Boy after this call to tell him that he was on his way to Block 485 Tampines. At this point, the First Appellant was still in Sallehuddin's home with Sallehuddin, Rizal and Sallehuddin's wife. Sallehuddin was going to send Rizal back home to Toa Payoh when the First Appellant asked if he could get a lift to Tampines first. Sallehuddin agreed to this. On the way there, the First Appellant called Sopak to tell him that the First Appellant was on his way there. Sopak told him that he was at the car workshop and asked the First Appellant to call him after collecting the cigarettes.

31 When the First Appellant reached the area, he called Ah Boy again and told him "485". However, Ah Boy corrected him by telling him it was Block 485B instead, as there was no Block 485. The First Appellant then called Sopak and told him that he had already reached the Tampines area. After that call, the First Appellant proceeded to call Ah Boy and told him that he was at his block; Ah Boy then asked him to wait at the void deck.

32 The First Appellant got out of the vehicle and sat on a blue bench at the void deck which faced the lift. Ah Boy called the First Appellant and asked him where he was, to which the First Appellant told him at that he was at the void deck. Ah Boy then told the First Appellant that he was on his way down. Shortly after, the lift doors opened and the First Appellant saw the Second Appellant walk out. The First Appellant, however, maintained that there was no communication between them apart from a slight nod that the Second Appellant gave to the First Appellant when he walked out. He noticed a box in the lift. Thinking that that was the box which Sopak had told him about, he went into the lift, carried the box out and went back to the vehicle. After getting back into the vehicle with the box, the First Appellant received a telephone call from Sopak who asked if the First Appellant had received the box and told him to go to the Afghanistan coffee shop. The vehicle then left the car park and headed for the Afghanistan coffee shop. While on their way there, they were "ambushed" at the cross junction.

33 Sopak had also testified that he had asked the First Appellant to pick up a box of contraband cigarettes on his behalf. We note that it may be true that Sopak's evidence in this particular regard might not have been as forceful or persuasive as it might otherwise have been, due to the fact (as Mr Naidu correctly argued, in our view) that Sopak had also to be careful not to implicate himself in a capital offence and was, indeed, called as a witness *despite* his refusal to be interviewed by the First Appellant's lawyer before the trial in the court below. Given the context in which the task had been allotted to the First Appellant, the First Appellant claimed that he thought the pink box to contain contraband cigarettes. The fact that the pink box contained diamorphine was never within his contemplation.

34 The law in this regard is clear: the First Appellant had to rebut the presumption in s 18(2) of the MDA on a balance of probabilities. The only – albeit crucial – issue before us was whether he has done so, based on the available evidence on record before us.

35 In this regard, we would respectfully differ from the Judge's decision with regard to the First Appellant. Whilst the Judge observed (see the Judgment at [5]) that he did not "find the first accused person's story about collecting cigarettes for Sopak *compelling* in any way" [emphasis

added], he did not elaborate adequately on his reasons for arriving at such a conclusion. More importantly, it bears repeating the point referred to in the preceding paragraph – that the burden on the First Appellant is to rebut the presumption *on a balance of probabilities*, and *not* to provide "compelling" evidence.

36 More specifically, the Judge's main reason for finding the First Appellant's story "vague, inconsistent" and lacking in "sense" (as stated in the Judgment at [5]) was the fact that the First Appellant hardly knew Sopak: hence, in the Judge's view, there would be no reason for Sopak to trust him and vice versa. It is clear that this particular gap in explanation operated, in the Judge's view, as a fatal flaw in the First Appellant's case. Yet, by rejecting the First Appellant's entire defence based solely on this point, the Judge had, with respect, failed to consider the other crucial aspects of the First Appellant's case. For example, the Judge did not address the First Appellant's evidence to the effect that he had believed that the pink box contained contraband cigarettes, and also did not consider the possibility of the First Appellant participating in the transaction for the purpose of finding another supplier.

37 The Judge also observed (see the Judgment at [5]) that "this was a transaction that involved the two accused in *such a way* that neither could have participated without knowing that it was a drop-off and pick-up of the diamorphine found" [emphasis added]. With respect, however, this observation was without any supporting evidence or explanation. Whilst the observation appears to allude to the fact that there was something specific about the appellants' involvement in the transaction that must have led to them knowing about the diamorphine, there is no elaboration as to why this ought to be the case. As both the preceding and subsequent sentences of the Judgment do not appear relevant to this particular observation, it is, with respect, difficult to discern the basis upon which such an observation was arrived at. In this regard, it is apposite to note this court's comment in *Thong Ah Fat v Public Prosecutor* [2012] 1 SLR 676 (at [37]) that "*the judge has to explicate how he has arrived at a particular conclusion*" and that "[i]mpressionistic statements are not helpful" [emphasis in original].

38 Finally, the Judge's treatment of Station Inspector Goh Teck Hock's ("SI Goh") evidence is, with respect, also problematic. Stating that he was "*inclined to believe* SI Goh" [emphasis added], the Judge concluded that "even if he was at a distance from the first accused as the photographs showed, it was close enough, in my opinion, for a narcotics officer looking out for a target suspect to be able to see what he saw" (see the Judgment at [5]). Without stating what this inclination was based on – for example, the witness's demeanour, veracity, and/or consistency – it is difficult to understand why SI Goh's evidence under cross-examination (to the effect that he had seen the First Appellant open the pink box) was found to be reliable despite that particular fact being found in neither his cautioned statement nor his evidence-in-chief. Further, none of the other CNB officers at the scene could verify that the First Appellant had in fact opened the pink box to look inside it. Even the pocket book which SI Goh had referred to during cross-examination did not actually state what SI Goh said it did (see [45] below). In the circumstances, more specific reasons as to why SI Goh's evidence in this regard was given such considerable weight should have been provided.

39 Having carefully considered all the evidence available to us, we are of the view that the First Appellant has rebutted the presumption in s 18(2) of the MDA on a balance of probabilities.

40 The First Appellant had clearly been involved in dealing with contraband cigarettes. This was borne out by the facts, as set out briefly above. It was therefore more than plausible – certainly on a balance of probabilities – that he had thought that the pink box contained contraband cigarettes. However, we are cognisant of the fact that there are at least two related facts that militate against such a finding by this court.

41 First, as emphasised by the Prosecution, there was a disparity in weight between the actual weight of the pink box (which contained the diamorphine) on the one hand and the weight it would have had if (as the First Appellant claimed) it had contained contraband cigarettes instead. Indeed, the Prosecution submitted the weights to be 4.09kg and 1.806kg respectively.

42 Whilst such an argument is attractive at first blush, this is only so if it is viewed from a strictly *theoretical* perspective. When such an argument is viewed from a more *practical* vantage point, it is probable that the difference in weight was not so significant as to be apparent to the First Appellant (whose testimony on this point was consistent with the view just expressed). We would add – parenthetically – that a (related) point raised by the Prosecution to the effect that the First Appellant had never received contraband cigarettes in a detergent box (here, the pink box) was, in our view, neutral at best. In this regard, the First Appellant's testimony was that, in dealing with contraband cigarettes, his focus was on collecting and selling such cigarettes, as opposed to their packaging.

43 Second, there was the testimony of SI Goh, which has been described briefly by the Judge (see the Judgment at [5]). However, it should be borne in mind that SI Goh was at a distance of 81.323 metres away and was operating without the aid of optical devices such as binoculars. At the trial below, Inspector Agnes Wong had confirmed that Exhibit D8 correctly depicted the view which SI Goh would have had on that day. Having considered Exhibit D8, we find it very unlikely that SI Goh could have seen with any degree of certainty what the First Appellant was doing. This will be significant, as we shall elaborate upon below at [45], to the issue of whether SI Goh saw the First Appellant looking *into* the box, or simply looking *at* the box.

44 In addition, there was some uncertainty between what was initially recorded in SI Goh's conditioned statement and SI Goh's testimony at the trial itself. In the former, the First Appellant was observed to have "look[ed] inside the pink box" whilst, in the latter, the First Appellant was described as having "opened up" the pink box. Mr Naidu sought to drive this inconsistency home in the court below during his cross-examination of SI Goh. At this juncture, it is perhaps not insignificant to note that the former version is consistent with the First Appellant's version of events, in which he claimed that he saw a bit of newspaper coming out of the side of the pink box and that other than that the pink box was closed and he did not open the pink box and look inside. It is also of no small significance, in our view, that the First Appellant's DNA was *not* found on any of the exhibits sent for DNA analysis, including the pink box and samples of the newspapers used to wrap the nine packets. This evidence supports the First Appellant's version of events that he did *not* open the pink box.

45 SI Goh did seek to clarify his testimony by referring to what he had recorded in his *pocket book*, where he stated, *inter alia*, that the First Appellant had "looked inside" the pink box. However, there was no record in his pocket book of the First Appellant *opening up* the pink box. The Prosecution argued that one could *not* "look *inside*" something *without* "*opening*" it first. However, given the distance between SI Goh and the First Appellant as evidenced by Exhibit D8, we reiterate our view that it is very unlikely that SI Goh could have seen with any degree of certainty what the First Appellant was doing. Perhaps it may be more accurate to describe the First Appellant as "looking *at*" the pink box. Whilst it is acknowledged that it is important not to indulge in semantic hair-splitting, it is also important to bear in mind the fact that there is a significant distinction between "looking at" (if this was indeed what SI Goh had meant) and "opened", particularly when it is borne in mind that the First Appellant is being tried on a capital charge. There are, in our view, sufficient difficulties which tend to militate against the persuasiveness of this particular part of SI Goh's testimony (as discussed in this paragraph, as well as above at [44]). All things considered, SI Goh's testimony should, in our view, not be accorded too much weight in so far as the issue regarding the First Appellant's claim that he did not know that the pink box contained diamorphine is concerned.

46 The Prosecution also argued that, unlike the situation, for example, in *Khor Soon Lee v Public Prosecutor* [2011] 3 SLR 201, there was no relationship of trust between the First Appellant and Sopak that would have led the former to believe that whatever he was supposed to collect on the latter's behalf was indeed contraband cigarettes and not something more sinister. In this regard, we note that, pursuant to this court's directions given during the course of oral submissions, the Prosecution had adduced several statements made by one Kacong to the CNB. In Kacong's statement dated 15 July 2009, he had stated that the First Appellant and Sopak were all members of the Omega gang together with himself. Although this could give rise to a possibility of there being some sort of trust between the First Appellant and Sopak, we are of the view that little weight, if any, should be placed on Kacong's statements. Kacong was not called as a witness and was not subject to cross-examination at the trial below. Furthermore, this court only had the benefit of a selection of Kacong's statements, whilst the other statements were not disclosed by the Prosecution who relied on s 41 of the Criminal Law (Temporary Provisions) Act (Cap 67, 2000 Rev Ed) and rule 10(2) of the Criminal Law (Advisory Committee) Rules (Cap 67, R 1, 1990 Rev Ed) in support of this particular course of action. Given the piecemeal nature of the disclosure, it would not be safe to rely on the selective disclosure of Kacong's statements.

47 Returning to the issue of the relationship of trust, we are of the view that, given the fact that the First Appellant purportedly dealt only with contraband cigarettes, whether or not there was a relationship of trust between the First Appellant and Sopak was not, in our view, a crucial issue. It was, at best, a neutral factor.

48 Having regard to all the objective evidence as well as circumstances, we would respectfully differ from the Judge and find that the First Appellant did in fact rebut, on a balance of probabilities, the presumption in s 18(2) of the MDA. In the circumstances, the Prosecution has failed to prove a key element of the offence contained in the charge proffered against the First Appellant and we therefore set aside the conviction against him.

The Second Appellant

49 In so far as the Second Appellant is concerned, it is unclear whether the Prosecution is relying on the presumptions found in the MDA. The Judgment is also silent on this matter. As such, the issues are whether the Prosecution has proven a beyond reasonable doubt that:

(a) The Second Appellant was in possession of the pink box containing diamorphine;

(b) The Second Appellant was in possession of the pink box for the purposes of trafficking; and

(c) The Second Appellant had knowledge that the pink box contained diamorphine.

50 In our view, the key matter with regard to the Second Appellant centres on the telephone records which demonstrate that he was in contact with the First Appellant at the material time. The Second Appellant attempted to explain this away, but his explanation was rejected by the Judge, who made the following observations (see the Judgment at [6]) which, whilst reproduced above (at [22]), ought (because of their significance) to be reproduced again, as follows:

> *His explanation* as to why the telephone records show connections made between his mobile telephone and that of the first accused during the material time just before the arrests *was that he (the second accused) had passed his telephone to "Ah Boy" and it was Ah Boy who was speaking to the first accused. He told the court that Ah Boy had mysteriously and suddenly*

appeared at his flat and knocked on his window. ***I find the defence of the second accused to be incredible, and the manner in which the second accused recounted the events was not persuasive.*** His defence of that story under cross-examination was also poor and I am unable to find any reasonable doubt in his favour. [emphasis added in italics and bold italics]

51 We agree with the Judge's finding (highlighted, in particular, in bold italics in the above extract).

52 According to the Second Appellant's version of events, on 27 November 2008 at about 2am, Kacong had called the Second Appellant to ask him to safe keep "something" for Kacong. In exchange for the safekeeping, Kacong would cancel all the debts that the Second Appellant owed to him (the Second Appellant had previously borrowed "about $300" from Kacong). The Second Appellant agreed. Kacong then told the Second Appellant that one Ah Boy (whom the Second Appellant did not know at that time) would go to the Second Appellant's residence that very afternoon and pass that "something" to him on Kacong's behalf. Kacong informed the Second Appellant that Ah Boy would knock on his room window upon arrival.

53 Later the same day, Ah Boy arrived at the Second Appellant's residence and knocked on the window of his room as earlier informed. The Second Appellant told Ah Boy to wait for him at the staircase outside his residence. As the Second Appellant was walking out of his residence to meet Ah Boy, Kacong called the Second Appellant on his mobile telephone asking the Second Appellant to "pass the next call to [Ah Boy]". When the next call came, the Second Appellant passed his mobile telephone to Ah Boy. After this call ended, the Second Appellant received another call from Kacong, telling him to lend Ah Boy his mobile telephone as Ah Boy's mobile telephone battery was flat, and to pass his mobile telephone to Ah Boy whenever that particular caller should call again from that phone number. Kacong also asked the Second Appellant if Ah Boy had passed him the "pink plastic"; the Second Appellant told Kacong that Ah Boy had not. Kacong then asked to speak to Ah Boy. After the call ended, Ah Boy handed the Second Appellant the pink plastic bag. The Second Appellant took it and put it at the side of the stairs, and then proceeded to show Ah Boy how to operate his mobile telephone. Kacong soon called again and asked the Second Appellant if he had collected the pink plastic bag, to which the Second Appellant affirmed that he did. When the Second Appellant asked Kacong what the pink plastic bag contained, Kacong told him that there was something in it for the Second Appellant to consume, but that the Second Appellant was not to finish it. Kacong then told the Second Appellant that he would collect it after he returned from Kuala Lumpur. After speaking to the Second Appellant, Kacong asked to speak to Ah Boy, which he did. When the call ended, the Second Appellant returned to his residence, leaving his mobile telephone with Ah Boy.

54 The Second Appellant went back to his room and opened the pink plastic bag to discover that it was "*ubat*". He then began to smoke the "*ubat*" with aluminium foil from his kitchen. Some time later, Ah Boy returned and knocked on the Second Appellant's window, an act earlier agreed on by them to signal that Ah Boy was ready to hand him back his mobile telephone. As the Second Appellant was leaving to get his mobile telephone back from Ah Boy, he was told by his mother to retrieve some groceries from the car. The Second Appellant took the car keys and made his way out of his residence, meeting Ah Boy at the staircase adjacent to his residence. Ah Boy returned the Second Appellant's phone to him and said that he was "leaving". The Second Appellant said that he wanted to go downstairs as well, and so they both went up to the lift lobby on the 11th floor. At this point while walking to the lift the Second Appellant observed that Ah Boy was carrying a pink coloured box. As will be seen below, the Second Appellant gave conflicting evidence as to whether or not he had touched the pink box. They both took the same lift down. Ah Boy got off on the 6th floor but told the Second Appellant to "just carry on down". The Second Appellant then continued down to the ground

floor. At the ground floor, the Second Appellant exited the lift and went to where his car was parked to retrieve the said groceries. He stated that he did not recall seeing the First Appellant.

55 One great mystery, of course, in so far as the present appeals are concerned, relates to the existence or identity of Ah Boy. Ah Boy was clearly a central figure in this case. As we have seen, the First Appellant was clearly under the impression that Ah Boy existed, although he was also under the impression that the *Second Appellant* was Ah Boy. But did Ah Boy exist, or was he an "invention" of the Second Appellant? If he did exist, who was he? All that is clear is that Ah Boy – if he did, in fact, exist – played a major role in the entire scheme of things in so far as the present case is concerned.

56 We are of the view that the Second Appellant and Ah Boy were probably one and the same person. However, even if this were *not* the case, there were two insurmountable obstacles facing the Second Appellant in raising a reasonable doubt with regard to the Judge's findings for the Prosecution in relation to the issues set out above (at [49]). First, he had to disassociate himself from the telephone call at 3.04pm when his mobile telephone was used to call the First Appellant, and moments thereafter, the Second Appellant emerged from the lift with the pink box on the ground floor. Second, the Second Appellant had to explain why his DNA was found on the pink box and the two sheets of newspaper used to wrap one of the nine packets. Each obstacle will be discussed in turn.

57 Addressing the first obstacle, we find that the Second Appellant has failed to disassociate himself from the telephone call at 3.04pm when his mobile telephone was used to call the First Appellant. The First Appellant had testified that moments before the lift door opened and the Second Appellant walked out, he (the First Appellant) had received a call from the Second Appellant's mobile telephone in which the caller stated that he was on his way down. When the Second Appellant exited the lift, the First Appellant testified that the former had given him a slight nod. The First Appellant saw the pink box on the floor of the lift and proceeded to retrieve it. In the circumstances, the First Appellant was under the impression that the Second Appellant was Ah Boy.

58 It is significant to note that, even if we were to accept the Second Appellant's version of events, the telephone call made to the First Appellant by Ah Boy must have occurred *before* Ah Boy knocked on the Second Appellant's window for the second time (in order to return the mobile telephone) since the Second Appellant had neither seen nor heard Ah Boy making any calls *after* the latter knocked on his window. From the telephone records, the call was made to the First Appellant at 3.04pm. The Second Appellant was arrested at approximately 3.05pm and the First Appellant was arrested at approximately 3.10pm. This would mean that in the short span of approximately one minute (or slightly more, to account for any time difference between the telephone records of the telecommunications company and the time as recorded by the CNB officers), the following would have had to have taken place: the Second Appellant would have had to leave his room, take the car keys from his mother, walk with Ah Boy from his residence on the 10th floor to the lift lobby on the 11th floor, wait for the lift to arrive (it is unclear whether the lift was already waiting at the 11th floor), enter the lift, have Ah Boy stop at the 6th floor, and then emerge from the lift at the ground floor. The occurrence of this series of events within such a short time, in our view, appears highly improbable. In addition, if Ah Boy was not the Second Appellant, how could Ah Boy have been sure that the First Appellant would have known that the pink box on the floor of the lift contained the drugs? In this particular regard, it should be noted that the First Appellant had testified that there were no prior arrangements made between him and the caller on the phone as to how the contraband cigarettes (which turned out to be drugs) would have been collected. Given the value of the nine packets of drugs, it would not have made sense for Ah Boy to have left it to chance when any person could have entered the lift when it arrived at the ground floor and picked up the pink box. In fact, the Second Appellant himself could have discovered that the pink box contained drugs and kept the box

for himself. It was very unlikely that Ah Boy would have run this risk. Finally, the Second Appellant failed to account as to why the First Appellant testified that the former had signalled to the latter by giving a slight nod when the former exited the lift.

59 Turning to the second obstacle, we find that the Second Appellant has failed to satisfactorily account as to why his DNA had been found on the pink box and the two sheets of newspaper used to wrap one of the nine packets. In the court below, the Second Appellant's evidence in this regard was extremely shaky and lacked credibility. He shifted between denying that he had touched the pink box to saying that he could not remember whether he had touched it. However, in his prior statements given whilst in custody, he stated that he had touched the pink box. We have no hesitation in disbelieving the Second Appellant's testimony in the court below on this point. If he did not touch the pink box, why was his DNA found on the pink box and the two sheets of newspaper used to wrap one of the nine packets? If he could not remember whether he had touched the box because he was "high" on drugs, why did he say that he touched it in his statements made whilst he was in custody?

60 Significantly, even though the Second Appellant stated that he was too "high" to remember whether he had touched the pink box, he still had the lucidity and presence of mind to do the following just moments after he had exited the lift at the ground floor: (i) he went to his car to check the undercarriage for damage as he could recall that, the day before, he had heard sounds of parts falling out while he was driving it; and (ii) he opened his car boot to collect groceries for his mother. In this regard, we note that counsel for the Second Appellant had written in to court for leave to adduce evidence from medical journals. The evidence was intended to demonstrate that the cocktail of drugs found in the Second Appellant's urine tests would have rendered him incapable of executing the alleged drug transaction between him and the First Appellant. However, the extracts from the journals were not helpful as they were of a very general and theoretical nature and failed to show precisely how the cocktail of drugs would have affected the Second Appellant on that day. In any event, the evidence given by the Second Appellant (as discussed above) demonstrates clearly, in our view, that he had a lucid mind at the material time.

61 The other main argument proffered by the Second Appellant was that notwithstanding that Kacong was a key witness in determining whether Ah Boy existed, Kacong had not been called as a witness and had, instead, been granted a discharge not amounting to an acquittal. Furthermore, his statements, testimony and evidence were never brought before the court. The Second Appellant thus argued that an adverse inference should be drawn against the Prosecution for Kacong's non-production, with regard to the issue of Ah Boy's existence. The Prosecution responded that the onus was not on it to call Kacong as a witness and that no adverse inference should therefore be drawn. The Prosecution also argued that the Second Appellant ought to have called Kacong as witness instead. We agree with the Prosecution. The Second Appellant bore at the very least the evidential burden to adduce evidence to demonstrate why Ah Boy – and not the Second Appellant himself – was associated with the transaction involving the diamorphine in the pink box. There is no evidence on record in which the Second Appellant was denied the opportunity to call Kacong as a witness. Neither was there, in our view, a duty on the Prosecution to lead evidence from Sopak as to the existence and identity of Ah Boy.

62 We should add, for the sake of completeness, that we did request the Prosecution to furnish this court with Kacong's statements as stated above at [46]. Having perused the statements, however, we found nothing of relevance to the issues set out above with regard to the Second Appellant.

63 Having regard to all the objective evidence as well as circumstances, we are of the view that the Prosecution has proven beyond reasonable doubt that the Second Appellant was in possession of

the pink box for the purposes of trafficking, and that he had knowledge that the pink box contained diamorphine.

Conclusion

64 For the reasons set out above, we allow the First Appellant's appeal and set aside his conviction and dismiss the Second Appellant's appeal. We will hear counsel on any consequential orders, if any, that need to be made.