IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2017] SGHC 157

Magistrate's Appeal No 9253 of 2016

Between

Liew Zheng Yang

… *Appellant*

And

Public Prosecutor

… *Respondent*

JUDGMENT

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

Liew Zheng Yang
v
Public Prosecutor

[2017] SGHC 157

High Court — Magistrate's Appeal No 9253 of 2016
Steven Chong JA
19 May 2017

14 July 2017 Judgment reserved.

Steven Chong JA:

Introduction

1 The appellant, Liew Zheng Yang ("Liew") is appealing against his conviction of two charges of abetting in a conspiracy to traffic controlled drugs. In her Grounds of Decision, *Public Prosecutor v Liew Zheng Yang* [2017] SGDC 21 ("the GD") at [39], the District Judge ("the Judge") found that the conspiracy charges were made out because Liew had an agreement with the seller, one Xia Fanyu ("Fanyu"), "to get the drugs and to deliver the drugs" to him and that "[t]he agreement to deliver the drugs to Liew was therefore an agreement to traffic the drugs to Liew." The Prosecution accepts that the decision, taken to its logical conclusion, means that every time a buyer orders drugs from a seller for delivery to the buyer, that buyer, without more, would be guilty of abetting in a conspiracy to traffic controlled drugs.

2 This decision has serious repercussions as the law has always made a principled distinction between the culpability of drug consumers and drugs traffickers. However, if the decision is correct, a buyer who orders drugs from a seller for his own consumption is liable to be convicted for abetting in a conspiracy with the seller to traffic which, significantly, carries the same sentence as the offence of trafficking. By the same token, if the quantity of controlled drugs is above the capital punishment threshold, the buyer would be liable for capital punishment even if the drugs are for his own consumption. This would effectively undermine and obfuscate the recognised distinction between consumption and trafficking.

3 For the purposes of the appeal, Liew is not challenging any of the statements which have been admitted in the court below or any of the factual findings made by the Judge. His appeal raises a discrete point of law as to whether a buyer who orders drugs from a seller for delivery to the buyer can be guilty of abetting the seller in a conspiracy to traffic the drugs even if the drugs were intended solely for the buyer's own consumption.

4 The Prosecution ran its case in the court below on the premise that it is irrelevant whether the buyer had intended to purchase the drugs for his own consumption or for onward sales to third parties. According to the Prosecution, the offence is constituted the moment the buyer orders drugs from the seller for delivery to the buyer. For this reason, Liew's testimony during the trial that the drugs were meant only for his own consumption was not challenged. The Prosecution maintained the same legal position in this appeal.

5 This judgment will examine whether a buyer of drugs for his own consumption is capable, as a matter of law, of abetting his seller in a conspiracy to traffic drugs to himself. In analysing this issue, the inquiry will focus on the

fundamental question whether Liew had the necessary *mens rea* to traffic when the unchallenged evidence before the court is that the drugs were intended solely for his own consumption.

The Decision below

The undisputed facts

6 The facts of this case were largely undisputed. They are set out in detail in the GD at [6]–[14]. I summarise them as follows.

7 Liew was 22 years old at the time of the offences.[1] He was a good friend of Fanyu, who had supplied drugs to him in the past. Fanyu was 20 years old at the time of the offences.[2]

8 On 23 September 2014, Liew wanted to smoke marijuana but did not have any on him.[3] He contacted Fanyu to purchase a brick of marijuana. Fanyu checked with his supplier and informed Liew that his supplier had none available. Fanyu then agreed that he would get the marijuana for Liew from other suppliers, and deliver it to Liew the following morning. In return, Liew would pay Fanyu a sum of $400.[4]

9 To obtain the drugs, Fanyu travelled to Johor Bahru on the same day. He was arrested when he returned the next morning at about 4.00am.[5] Fanyu was then directed by Central Narcotics Bureau ("CNB") officers to arrange a

1 Liew was born 23 August 1992: ROP at p 5 (charge).

2 Fanyu was born 17 December 1993: ROP at p 355 (charge).

3 Grounds of decision ("GD") at [2].

4 GD at [7] and [26].

5 GD at [10].

meeting with Liew to collect the drugs at Liew's condominium. Liew did so, and was duly arrested when he turned up.[6]

10 Fanyu was arrested with two blocks of marijuana in his possession. One block was meant for Liew while the other block was for his own consumption. The block which was intended for sale to Liew contained not less than 34.53 grams of cannabis and 68.21 grams of cannabis mixture ("the Drugs"). For each drug, Liew faced a separate charge of abetting in a conspiracy to traffic the drugs, under s 5(2) and s 12 of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) ("the MDA"). The specific form of abetment relied on by the Prosecution is abetment by conspiracy, under s 107(b) of the Penal Code (Cap 224, 2008 Rev Ed) ("PC") (collectively, "the Conspiracy Charges"). Liew claimed trial to the Conspiracy Charges.

11 Separately, on 9 December 2014, Fanyu pleaded guilty to one charge of importing 69.36 grams of cannabis under s 7 of the MDA and one charge of consumption under s 8(b)(ii) of the MDA. He also consented to another charge of importing 135.74 grams of cannabis mixture under s 7 of the MDA being taken into consideration for the purposes of sentencing.[7] The importation charges related to the drugs found in the two blocks of marijuana, which he was arrested with. Fanyu was placed on probation for these offences.[8]

The Judge's findings

12 In the court below, Liew, through his previous counsel, argued that there was no conspiracy between him and Fanyu to traffic the Drugs, making three

6 GD at [13].

7 ROP at p 307 (Statement of facts, para 11).

8 GD at [38].

submissions in this regard. First, there was no common objective between the two of them to traffic in the Drugs as this was a simple sale and purchase agreement. Second, Liew was not in a position to take delivery of the Drugs as he did not have the money to pay Fanyu for the Drugs. Third, the Drugs were intended for Liew's own consumption (GD at [16]–[18]).

13 These arguments failed to persuade the Judge. She found that there was an agreement between Liew and Fanyu for Fanyu to obtain the Drugs from one of his sources and deliver them to Liew (GD at [27]). On this basis, and for the reasons elaborated below at [15]–[16], the Judge convicted Liew of both Conspiracy Charges.

14 Upon his convictions, Liew, a first-time offender, also pleaded guilty to one charge of consumption of a cannabinol derivative and consented to having one charge of possession of utensils intended for consumption of a Class A controlled drug taken into consideration for the purposes of sentencing. The Judge sentenced Liew to 5 years' imprisonment and 5 strokes of the cane for each of the Conspiracy Charges, and 6 months' imprisonment for the consumption charge. The sentences for one Conspiracy Charge and one consumption charge were ordered to run consecutively, for a global sentence of 5 years 6 months' imprisonment and 10 strokes of the cane.

The import of the Decision

15 The crux of the Judge's Decision is found at [39]–[40] of the GD, where she reasoned as follows:

> 39 There are three elements to abetment by conspiracy. These were spelt out by the Court of Appeal in *Chai Chien Wei Kelvin v Public Prosecutor*. First, the person abetting must engage with one or more persons in a conspiracy. Second, the conspiracy must be for the doing of the thing abetted. Third, an

> act or an illegal omission must take place in pursuance of the conspiracy. It has been established that Liew had an agreement with Fanyu for Fanyu to get the drugs and to deliver the drugs to Liew. The definition of traffic in section 2 of the MDA includes 'to deliver'. The agreement to deliver the drugs to Liew was therefore an agreement to traffic the drugs to Liew. Liew had engaged with Fanyu in a conspiracy to traffic to himself. The first and second elements of a conspiracy under section 107(b) of the Penal Code are thus made out.
>
> 40 The third element is that an act took place in pursuance of the conspiracy. In this regard, Fanyu imported the drugs into Singapore. This act alone is sufficient to constitute 'an act took place in pursuance of the conspiracy'.

16 After listing out the three legal requirements to constitute abetment by conspiracy, the Judge relied on the definition of trafficking which includes "to deliver". She then concluded that the agreement to deliver the Drugs was an agreement to traffic the Drugs to Liew.

17 With respect, this is a somewhat pedantic analysis by the Judge that does not address the fundamental issue of whether Liew could, as a matter of law, traffic the Drugs to himself. Taking the Judge's analysis to its logical conclusion, if Liew had simply ordered the Drugs for delivery, irrespective of whether Liew knew that Fanyu had to obtain the supply from a third party, Liew would, without more, be engaged in a conspiracy with Fanyu to traffic the Drugs. As highlighted by Liew in para 14.4–15 of his submissions, the third element requiring an illegal act to be carried out pursuant to the alleged conspiracy would invariably be satisfied because once Fanyu turns up with the Drugs, an illegal act would have taken place in pursuance of the conspiracy.

18 The result is that all buyers of drugs will almost always be liable for abetting in a conspiracy with the seller to traffic the drugs to themselves. This holding, if correct, would blur the legal distinction between the offences of drug

trafficking and drug consumption. This point is further elaborated at [39]–[47] below, with reference to the evidence of Liew's intended use of the Drugs.

Drugs were for Liew's own consumption

The unchallenged evidence

19 At the trial, Liew testified that the Drugs were meant for his own consumption. His evidence in this regard is set out below:[9]

> Sorry, can I also just say that it was because the---*I did not intend to buy because the---it was---I was actually quite desperate. I mean, I wanted to buy in a huge amount because I was desperate as the---the source was actually very limited. I wanted to actually use it for my own consumption* because at that point of time, during the mid-September, there was no availability during then and I was planning to stock up and keep it at home for---for my own consumption. That's all, thank you.
>
> [emphasis added]

20 Liew's evidence in this regard was not challenged by the Prosecution. In fact, the Prosecution appears to have accepted Liew's evidence in the following exchange:[10]

> Q So you asked him to check with---if other people had drugs which he could get from. If you asked him to check if he could get the cannabis from others, right?
>
> A Yes.
>
> Q Okay. With the intent that he would eventually get it from them so that he could pass it to you?
>
> A Yes.
>
> Q *And you asked him, of course, because you haven't smoked it in a while, you're a bit desperate*?

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9 ROP at p 228 (NE Day 2 p 89, lines 7–15).

10 ROP at pp 235 (NE Day 2 p 96, lines 12–21).

> A Yes.
>
> [emphasis added]

21 Furthermore the Judge herself also accepted Liew's unchallenged evidence that the Drugs were meant for his own consumption. The Judge was aware that Liew used to sell drugs, but she accepted that in this instance, Liew had bought the Drugs from Fanyu for his own consumption (GD at [1]–[2]):

> 1 … Over time, Liew bought increasingly larger quantities of marijuana. *He would sell part of his supply of marijuana to his close friends.*
>
> 2 On 23 September 2014, *Liew wanted to smoke marijuana* but he did not have any with him. Liew called Fanyu on the phone and asked him to get some for him…
>
> [emphasis added]

22 Interestingly, the Judge allowed the Prosecution's application to impeach Fanyu who testified, contrary to his 6 October 2016 Statement, that there was no arrangement with Liew for him to obtain the Drugs from a third party (GD at [28]–[38]). In doing so, the Judge relied on Fanyu's Statement of 27 September 2014 where Fanyu stated that Liew told him that "it is very difficult to find weed supplies now and so if he could have [a] bigger amount for *storage*, it would be more convenient" [emphasis added].[11] Fanyu's 27 September 2014 Statement, which the Judge accepted, is consistent with Liew's unchallenged evidence that he was planning to "stock up" the Drugs for his own consumption.

23 It is therefore clear from the evidence that Liew had bought the Drugs for his own consumption.

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[11] ROP p 362 (Fanyu's long statement dated 27 September 2014, para 3).

The effect of the unchallenged evidence

24 At the oral hearing before me, the Prosecution sought to rely on evidence which, according to the Prosecution, suggested that Liew intended to sell the Drugs to third parties. For this purpose, the Prosecution referred me to the following paragraph from Liew's long statement dated 24 September 2014 ("the Statement"):[12]

> I usually get about $50 or $100 worth of weed from 'Fanyu' on every order, just enough for my own to smoke. $50 of weed is about 3 grams and I could make about 6 rolls. I frequently smoke about one roll in every two days just to make me feel relax and help me to sleep better. Gradually I bought weed in 1 brick form which was about 50 grams for $400 from 'Fanyu'. I had bought 1 brick of weed from 'Fanyu' in 3 occasions. It was only recently I ordered 2 bricks. The reason I bought weed in bigger quantity because I started selling them to close friends. I would sell them $50 per packet for about 2.5 grams worth of weed. From 1 brick I earn a profit of $200. I can repack to about 18 packets in 1 brick depending on the size of the brick. I do not sell all the packets as I am a smoker myself.

25 In my view, the Statement was equivocal at best. While it indicated that Liew had sold drugs to his close friends *before*, it did not state specifically that the Drugs were also bought for this purpose. Notably, the Statement indicated that when Liew bought drugs solely for his own consumption, he would typically purchase only one block of marijuana costing $400. When he intended to sell drugs to others, he would purchase two blocks of marijuana. In the present case, it is undisputed that he only bought one block of marijuana from Fanyu, for $400 (GD at [7] and [10]). Based on Liew's past practice as recorded in the Statement, it appears that the Drugs were indeed bought for his own consumption rather than for sale. Therefore, the Statement, on its face, does not support and, on the contrary, undermines the Prosecution's submission.

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[12] ROP p 336 (Liew's long statement dated 24 September 2014, para 9).

26 More importantly, the Prosecution did not put this point to Liew at the trial. This engages the rule in *Browne v Dunn* (1893) 6 R 67. As recently reiterated by the Court of Appeal in *Harven a/l Segar v Public Prosecutor* [2017] 1 SLR 771 at [66], the effect of the rule is that:

> … [w]here a submission is going to be made about a witness or the evidence given by the witness which is of such a nature and of such importance that it ought fairly to have been put to the witness to give him the opportunity to meet that submission, to counter it or to explain himself, then if it has not been so put, the party concerned will not be allowed to make that submission.

27 In my view, the Prosecution's submission before me that Liew intended to sell the Drugs to third parties is of such importance that it ought fairly to have been put to him. This is especially so when Liew had given clear and unchallenged evidence to the contrary (see [19] above). Failure or omission to do so precludes the Prosecution from submitting that the Drugs were purchased from Fanyu for resale to third parties.

28 I will therefore examine the merits of the legal question raised in this appeal on the basis that the Drugs were meant *only* for Liew's own consumption.

Liew's submissions

29 Broadly speaking, Liew made the following submissions:

(a) Liew lacked the requisite *mens rea* to traffic the Drugs as the Drugs were for his own consumption.

(b) In determining whether there has been an agreement to commit a crime, the notion of a "dominant" or "primary" intention or purpose is

important.[13] There was no conspiracy because Liew's dominant purpose was not to traffic in drugs ("the dominant purpose argument").

(c) There is an "important distinction" between an agreement *that* an offence should be committed, and an agreement *to* commit the offence.[14] The latter suffices for conspiracy, the former does not. Liew only agreed that trafficking should be committed, and did not agree to commit the offence ("the important distinction argument").

30 The dominant purpose argument and the important distinction argument were raised for the first time for the purposes of the appeal. They appeared to be supplemental to Liew's main argument in (a) – that Liew lacked the requisite *mens rea* for the offence.

The Prosecution's submissions

31 The Prosecution's principal submission is that the law on conspiracy was as summarised by the Judge at [39] of the GD which is reproduced at [15] above. In the context of drug trafficking, the law does not draw a distinction between offenders who intended to resell the drugs, and those who intended to consume the drugs themselves.

32 In addition, the Prosecution also highlighted the fact that it was Liew who "made the first move", causing Fanyu to commit an offence himself. In other words, the transaction for the sale and purchase of the Drugs was initiated by Liew.

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13 Appellant's submissions ("AS") at para 39.

14 AS at paras 43–52.

My Decision

No Conspiracy to Traffic if the buyer intended to consume the drugs

Current state of the law on abetting a conspiracy to traffic to oneself

33 I begin by considering precedents in which buyers of drugs have been charged for conspiracy to traffic the drugs to themselves. According to the Judge, there are two decisions where such prosecutions were successful, namely, *Public Prosecutor v Mohamad Shafiq bin Ahamad* [2015] SGDC 81 ("*Shafiq*") and *Public Prosecutor v Vejiyan a/l Muniandy and another* [2016] SGHC 76 ("*Vejiyan*"). The offenders in both cases appealed, and their appeals were dismissed by the High Court (for *Shafiq*) and Court of Appeal (for *Vejiyan*) respectively. No written grounds were issued by the appellate court in either case.

34 The facts of both cases share some similarities with the present case. In each case, the seller of the drugs was arrested by the police. On CNB's instructions, the seller assisted in arranging a meeting with the buyer, who was subsequently arrested when he turned up as arranged. In both cases, like the present one, the buyer was arrested before taking possession of the drugs: see *Shafiq* at [136] and *Vejiyan* at [14]. Had the buyer come into possession of the drugs, the quantity of drugs in both cases (not less than 91.29g of methamphetamine in *Shafiq* and not less than 22.41g of diamorphine in *Vejiyan*) would have triggered the presumption of trafficking under s 17 of the MDA.

35 The Judge accepted that these two cases supported the proposition that in a buyer-seller scenario, a buyer of drugs could be guilty of abetting in a conspiracy to traffic drugs to himself. However, both cases differed from the present case in one very significant respect. Unlike Liew, neither buyer in *Shafiq*

or *Vejiyan* claimed to have bought the drugs solely for their own consumption. Both buyers simply denied buying the drugs in the first place (*Shafiq* at [23]–[25] and *Vejiyan* at [15]).

36 From the facts of *Shafiq* and *Vejiyan*, it seems clear to me that neither buyer could plausibly have claimed that they bought the drugs for their own consumption in any event. There was sufficient material in both cases for the court to draw the inference that the buyers there had bought the drugs for sale to third parties. The large quantity of drugs bought by the buyers has already been referred to earlier (at [34] above). Additionally, in *Vejiyan*, the High Court found that the buyer was "in some kind of an illegal partnership involving drugs" (*Vejiyan* at [30]). While no explicit finding was made in *Shafiq*, the court did observe (*Shafiq* at [115]) that "the presence of a large number of empty ziplock bags were suggestive of the Accused's involvement in drug trafficking activities".

37 In my view, although *Vejiyan* and *Shafiq* both concerned a buyer-seller scenario, they nonetheless differed in a critical aspect from the present case. To my mind, in such a scenario, the intended final destination of the drugs is the critical inquiry. In this regard, there are at least three relevant permutations:

(a) Where there is clear evidence that the drugs were for the buyer's own consumption.

(b) Where the evidence is silent as to the final destination of the drugs, in which case the presumption of trafficking (if the buyer had received the drugs and the quantity exceeds the threshold) would remain unrebutted.

(c) Where the court finds that the drugs were intended for onward sales.

38 The present case falls under (a), whilst *Shafiq* and *Vejiyan* fell under either (b) or (c). I have not been referred to any case where the court has considered the question of whether the offence of abetting in a conspiracy to traffic would be made out in (a).

Lack of the necessary mens rea

39 In my judgment, a person who buys drugs for his own consumption would not have the necessary *mens rea* to commit the offence of abetting in a conspiracy to traffic. For such an offence to be made out, both seller and buyer must have the common intention to traffic. In a buyer-seller scenario, the *actus reus* would be satisfied – the seller is the trafficker while the buyer is the abettor. Both seller and buyer must however share the same *mens rea* as well. The *mens rea* here must be the intention to traffic the drugs to a third party ("the *mens rea* requirement").

40 This *mens rea* requirement is firmly established for the offence of drug trafficking *simpliciter*. The MDA defines "trafficking" in s 2 as follows: "to sell, give, administer, transport, send, deliver or distribute", or to offer to do any of the above acts. As most recently restated by the Court of Appeal in *Public Prosecutor v Adnan bin Kadir* [2013] 3 SLR 1052 at [34], it has been established since the seminal Privy Council case of *Ong Ah Chuan v Public Prosecutor* [1979–1980] SLR(R) 710 ("*Ong Ah Chuan*") that to "traffic" under the MDA means not only doing any of the acts stated in s 2 of the MDA, but also doing them "for the purpose of distribution *to someone else*" [emphasis added].

41 Hence, it has always been a defence for persons accused of drug trafficking to prove that the drugs were intended for their own consumption as opposed to distribution to third parties. This has commonly been referred to by our courts as the "defence of consumption": see *eg*, the Court of Appeal's decision in *Muhammad bin Abdullah v Public Prosecutor and another appeal* [2017] 1 SLR 427 at [29]–[30]. The recognition of the defence of consumption (which is not explicitly provided for in the MDA) is an implicit recognition of the *mens rea* requirement to traffic the drugs.

42 An example of a case where the defence of consumption was successfully invoked is *Public Prosecutor v Dahalan bin Ladaewa* [1995] 2 SLR(R) 124 ("*Dahalan*") (upheld on appeal to the Court of Appeal in *Public Prosecutor v Dahalan bin Ladaewa* [1995] SGCA 87). In *Dahalan*, the accused was charged for trafficking drugs in such quantities that attracted the mandatory death penalty. He claimed that part of the drugs in his possession were for his own consumption which the High Court accepted. Thus, the court reduced the quantity of drugs stated on the charge by deducting the amount for his own consumption, and convicted the accused on the amended charge (*Dahalan* at [139]). In other words, the offence of trafficking was not made out in relation to the quantity of drugs meant for the accused's own consumption.

43 This distinction between the drug trafficker and the drug consumer, preserved through the *mens rea* requirement, is also consistent with parliamentary intention. This distinction may be inferred from the severe penalties directed at drug traffickers, which could include the mandatory death penalty when the quantity of drugs exceeds a certain threshold. As recognised in *Ong Ah Chuan* at [10]:

> …the evident purpose of the [MDA] is to *distinguish between dealers in drugs and the unfortunate addicts who are their*

> *victims*... Supplying or distributing addictive drugs to others is the evil against which [s 5 of the MDA] with its draconian penalties is directed.
>
> [emphasis added]

44 This distinction has existed since the inception of the MDA. As stated by the then-Minister for Home Affairs and Education, Mr Chua Sian Chin observed during the enactment of the Misuse of Drugs Act 1973 (*Singapore Parliamentary Debates, Official Report* (16 February 1973) vol 32 at col 417), "A *clear distinction* has been made *between the drug addict and the trafficker and pedlar*" [emphasis added].

45 Both Parliament and case law have consistently treated trafficking and consumption as mutually exclusive offences. Such distinction and its underlying rationale applies also to charges of *conspiracy* to traffic. The distinction cannot be ignored by the Prosecution's choice of charging the consumer of drugs with a conspiracy to traffic drugs to himself. To hold otherwise is to punish a consumer as if he were a trafficker, simply because he agreed with his drug dealer to procure drugs for him (see s 12 of the MDA, which provides that an abettor of an offence shall be liable to the punishment provided for the offence). In fact, if that were the case, the consumer would be in a worse position than the drug trafficker: unlike the drug trafficker, the consumer would not be able to rely on the defence of consumption. This would turn Parliamentary intent of treating drug traffickers more severely than drug consumers on its head.

46 Even more curiously, if the drugs were physically delivered to the buyer for his own consumption at the time of the arrest, he would not be guilty of trafficking since he would have successfully rebutted the presumption of possession for the purpose of trafficking. That being the case, can the consumer be guilty of abetting in a conspiracy to traffic when he cannot be liable for

trafficking since the presumption of trafficking would have been rebutted? It is intuitively incongruous that such a buyer can be guilty of abetting the offence of trafficking when he himself would not have been guilty of the offence of trafficking.

47 For the foregoing reasons, I find that the *mens rea* requirement of an intention to distribute the drugs to a third party also applies to a conspiracy charge. Accordingly, the consumption defence is also available to a buyer who is accused of conspiring with the seller to traffic drugs to himself.

Liew's supplementary arguments

48 While I agree with Liew's main argument that in a buyer-seller scenario, a buyer who purchases the drugs for his own consumption does not have the necessary *mens rea* for a trafficking conspiracy charge to be made out, I did not find Liew's "dominant purpose argument" and/or "important distinction argument" helpful. Ultimately, they do not add anything to the principal argument that to be convicted of a conspiracy charge to traffic in drugs, the accused person must have the requisite *mens rea* to traffic the drugs to "someone else". As the arguments were developed at length in Liew's written submissions I will briefly explain why they do not offer any independent assistance to Liew.

49 In essence, they seek to make the same point in a somewhat roundabout way. Liew argues that when assessing whether an accused person has the necessary *mens rea*, the person's dominant intention is relevant. In support of his submission that an accused's dominant purpose is important in determining whether there has been an agreement to commit a crime, counsel for Liew, Mr Eugene Thuraisingam ("Mr Thuraisingam") relied on *R v Anderson* [1986] 1 AC 27 ("*Anderson*") and *Yip Chiu-Cheung v R* [1995] 1 AC 111 ("*Yip*").

These cases concerned "pretence conspirators", *ie*, conspirators who outwardly agree to commit an offence but privately have no intention of so doing.

50 *Anderson* and *Yip* both held that a pretence conspirator cannot be guilty of a conspiracy, even if the conspirator ostensibly agreed to commit the crime, so long as he or she did not *actually* intend to carry the conspiracy into effect. Yong Pung How CJ adopted the same position in *Kannan s/o Kunjiraman and another v Public Prosecutor* [1995] 3 SLR(R) 294 at [10]–[12]. This proposition is not in itself controversial. However, it is clear from the cases that whether a pretence conspirator can be guilty of conspiracy depends on whether that pretence conspirator had the intention to carry the conspiracy into effect even if the purpose was to apprehend the actual offender. This is illustrated in *Yip* where a law enforcement agent entered into a conspiracy to export drugs out of Hong Kong. The Privy Council observed that there was no doubt that the agent "was acting courageously and with the best of motives; he was trying to break a drug ring" (*Yip* at 118). Nevertheless, the Board found that the agent would have been guilty of conspiracy if he was charged. In other words, the agent in *Yip* had intended to actually carry out the offence as part of the plan to break the drug ring. In such a case, the actual offender can be guilty of the conspiracy because the pretence conspirator likewise had the requisite *mens rea*. Therefore the relevant inquiry is not whether there was a dominant intention, but whether the *mens rea* requirement in respect of the offence for which he was charged has been satisfied.

51 Liew's important distinction argument is premised on the distinction between an agreement that an offence *should be* committed and an agreement *to* commit the offence. Mr Thuraisingam argues that in ordering the Drugs, Liew had at best agreed with Fanyu that trafficking *should be* committed, and did not

agree to commit the offence of trafficking. In support, he relied on three Australian decisions: *Rolls v The Queen* [2011] VSCA 401 ("*Rolls*"), *R v Moran & Mokbel* [1998] VSCA 64 ("*Moran*") and *R v Thomas Roland Trudgeon* [1988] 39 A Crim R 252 ("*Trudgeon*").

52 In my view, the distinction which appears to have been developed in these Australian cases merely supplements the ultimate inquiry of whether the accused person had the *mens rea* for the offence that he was charged with conspiring to carry out. In *Rolls*, the court found that the mistress had agreed with her lover to murder the lover's wife because she had a stake in the plan to murder the wife, and both the mistress and her lover saw the plan as an enterprise in which both were involved (*Rolls* at [64]–[65]). In *Moran*, a supplier of ingredients to make drugs was found not guilty of conspiring to manufacture the drugs because the supplier had no stake in what the buyer was to do with the ingredients once it was supplied to him. The fact that it might be inferred that the supplier knew the purpose for which the ingredients was to be used was not sufficient. Finally, in *Trudgeon*, the court found that the mere fact that the seller of drugs would have expected the buyer to sell the drugs to third parties did not mean that there was an agreement between the buyer and seller for the buyer to subsequently sell the drugs to others. The seller was accordingly acquitted of the conspiracy charge to traffic the drugs. In my view, these decisions can be explained with reference to the *mens rea* requirement instead of ascribing labels to the arguments and thereby giving the impression that they represent separate and independent points.

Application to the undisputed facts of this appeal

53 I have found that for the offence of abetting in a conspiracy to traffic in drugs, the conspirators must have the requisite *mens rea* to traffic the drugs to

someone else. Here, Liew did not have the *mens rea* to traffic the Drugs simply because his intention in the transaction was to procure the Drugs for his own consumption and therefore not to traffic to "someone else". This was Liew's unchallenged evidence in the court below.

54 The Prosecution also submitted that Liew's conviction could be upheld on the basis that Liew knew that Fanyu had no available drugs to sell to him and therefore had to obtain them from another source.

55 It is not clear what the legal basis for this submission was. The Prosecution's case is that the offence is committed once the buyer orders the drugs from the seller and agrees that the drugs would be delivered to him. On this premise, by the Prosecution's own case theory, the seller's immediate availability of stock at the point of agreement should be irrelevant.

56 In any event, in my view, Liew's knowledge that Fanyu did not have available drugs to sell would not and should not change the outcome. To hold otherwise would mean that a buyer's liability for abetting a seller in a conspiracy to traffic would in turn depend on the fortuity of whether the seller had any existing stock to sell. Accepting this submission would mean that if the seller has existing stock, there would be no conspiracy to traffic. But, if the seller does not have immediate stock and the buyer asks him to get it from another source in order to supply to him, then it would amount to a conspiracy to traffic. It is hard to see why the buyer's liability for abetting in a conspiracy to traffic should be dependent on the seller's immediate access to the controlled drugs, when in both cases, the controlled drugs were meant for the buyers' own consumption.

57 The Prosecution pointed out that by asking Fanyu to procure the drugs, Liew had caused Fanyu to commit an offence. Again, it is difficult to

comprehend the legal significance of this submission. The crucial point that Liew lacked the necessary *mens rea* to sell or distribute the Drugs to a third party remains unanswered.

58 Accordingly, I set aside Liew's convictions on the Conspiracy Charges.

Alternative charge of attempted possession

59 At the oral hearing before me, parties agreed that if Liew was acquitted of the Conspiracy Charges, he should be convicted of two lesser charges of attempted possession of controlled drugs under ss 8(*a*) and 12 of the MDA, *ie*, one charge of attempted possession of 34.5 grams of cannabis and another charge of attempted possession of 68.21 grams of cannabis mixture.

60 Having acquitted Liew of the Conspiracy Charges, I exercise my powers under ss 390(4) and 390(8)(*a*) of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) to reduce the Conspiracy Charges and convict Liew of reduced charges on the terms agreed to by parties.

61 As it is permissible for this court to pass sentence on the reduced charges instead of remitting the case back to the Judge for sentencing: see *eg*, *Public Prosecutor v Lam Leng Hung and other appeals* [2017] SGHC 71 at [315] and [362]–[407]; *Sim Wen Yi Ernest v Public Prosecutor* [2016] 5 SLR 207 at [26]–[46] and *Mohd Hazwan bin Mohd Muji v Public Prosecutor* [2013] 1 SLR 516 at [30]–[38], I will therefore hear parties' submissions on sentence.

Conclusion

62 For the reasons above, I set aside the convictions for the Conspiracy Charges and convict Liew on the reduced charges.

Steven Chong
Judge of Appeal

Eugene Singarajah Thuraisingam and Suang Wijaya (Eugene Thuraisingam LLP) for the appellant;
John Lu and Rimplejit Kaur (Attorney-General's Chambers) for the respondent.
