Public Prosecutor v Tan Kiam Peng
[2006] SGHC 207

Case Number : CC 13/2006

Decision Date : 29 November 2006

Tribunal/Court : High Court

Coram : V K Rajah J

Counsel Name(s) : Christopher Ong Siu Jin and Ong Luan Tze (Deputy Public Prosecutors) for the Prosecution; B Rengarajoo (B Rengarajoo & Associates) and Ong Peng Boon (Ong & Co) for the accused

Parties : Public Prosecutor — Tan Kiam Peng

Criminal Law – Statutory offences – Misuse of Drugs Act – Illegally importing controlled drug – Accused arrested at customs clearance point with heroin strapped to his body – Possession of controlled drug not in dispute – Presumption of knowledge of nature of controlled drug applying – Defence arguing accused having no knowledge he was importing heroin – Distinction between recklessness and negligence on one hand and actual knowledge or wilful blindness on other – Whether presumption of knowledge rebutted – Section 18(2) Misuse of Drugs Act (Cap 185, 2001 Rev Ed)

29 November 2006

V K Rajah J:

1 Life, it may seem at first blush, has dealt a poor hand to the accused, Tan Kiam Peng ("Tan"). 46 years of age, he is unmarried and lived alone in a HDB flat until his arrest. Known to his friends as "*Pui Kia*" ("Fatty" in colloquial Hokkien) because he is on the heavy side, he held a job as a tipper truck driver until he met with an accident. Because he lost that job, he was unable to repay debts that had accumulated. His utility bills and housing loan instalments also fell into arrears. By August 2005, these debts exceeded $8,000. Tan repeatedly attempted to seek full-time employment but only managed to secure a temporary, part-time job delivering noodles. He decided to join a gambling syndicate sometime around May 2005. His assigned role was to rent an apartment that would be used as a gambling den. However, this scheme promptly fell through and the apartment was used only once. As a consequence of this failed endeavour, Tan became even further indebted as he was personally liable for the rent.

2 Yet another factual thread reveals that soon after losing his job as a driver, Tan had travelled to Kuala Lumpur on 6 February 2005 to seek out other job opportunities. He stayed with his friend ("Ah Huat") in whom he confided his financial problems. Out of desperation, Tan asked Ah Huat whether he had "*lobangs*" ("opportunities" in colloquial Malay) for "easy money" that could land him a job transporting drugs such as Ecstasy within Malaysia. This was to set in motion a train of events that has culminated in a capital charge being preferred against him.

3 Ah Huat duly introduced a man, known as "Uncle". Uncle told Tan that it was difficult to find any *lobangs* as there had been many raids in Malaysia. However, Uncle passed his contact number to Tan, inviting him to call again in one or two weeks. Tan later called Uncle sometime in June 2005 to enquire whether there were any job opportunities. Uncle responded by inviting Tan to Johor Bahru for a discussion. On 27 June 2005, Tan travelled to Johor Bahru and met Uncle; however, Uncle informed him that it was still difficult to find any work. He could continue trying. Disappointed, Tan returned to Singapore. The next day, Tan returned to Johor Bahru again but was requested, once more, to be

patient. Thereafter, Tan and Uncle remained constantly in touch with each other. On 17 August 2005, Tan borrowed some money from his friends and travelled again to Johor Bahru after being told by Uncle that "there might be something for [him] to do".

4 Tan and Uncle met up again on the evening of 18 August 2005 at a hotel room in Johor Bahru. Uncle was carrying a backpack which contained three big packets wrapped in mahjong paper. According to Tan, he asked Uncle what those packets were, and Uncle just held up three fingers in reply. Uncle unwrapped the packets, which then revealed smaller packets of yellow powder within each packet. These packets were wrapped in clear plastic. Tan told Uncle that it was "a lot" but Uncle responded that it was not and used his fingers to indicate seven. Several questions and answers followed regarding transportation and the location of the drop-off point. Uncle then secured with tape ten packets of the yellow powder onto various parts of Tan's body.

5 On Uncle's instructions, Tan called for a taxi to take him to an address in Redhill, Singapore, where he was supposed to drop off the packets. However, at the customs clearance point at Woodlands ("the Woodlands checkpoint"), Police Constable Phua Han Siang ("Constable Phua"), a Cisco Auxillary Police Constable attached to the Immigration Checkpoint Authority Supplementary Force, noticed that Tan's waist area appeared "bulky" and asked him whether there was anything on him. The accused gave a non-committal answer and Constable Phua, upon perceiving that Tan was "very nervous", proceeded to pat the "bulky" part of his body. He could feel Tan's body "shaking" during this examination. Upon confirming that there were strapped objects on the lower half of Tan's body, Constable Phua directed Tan to another police officer who then escorted Tan to the search room. A full body search revealed that Tan had concealed ten packets of a yellowish powdery substance. Upon a chemical analysis, this substance was identified as diamorphine or, as it is more commonly known in everyday parlance, heroin. All in, the ten packets weighed 3.28829kg and contained 145g of pure heroin.

6 Tan was placed under arrest and later charged:

> That you … on the 18th August 2005 at about 6.50 p.m., at the Inspection Pit Green Channel Left Lane 03, Woodlands Checkpoint, Singapore, did import into Singapore a controlled drug specified in Class "A" of the First Schedule to the Misuse of Drugs Act, Chapter 185, to wit, ten (10) packets of granular/powdery substance containing not less than 145.07 grams (nett) of diamorphine, without authorisation under the said Act or the regulations made thereunder, and you have thereby committed an offence under section 7 and punishable under section 33 of the Misuse of Drugs Act, Cap 185.

7 On 22 September 2006, I convicted Tan of the charge and sentenced him in accordance with the Misuse of Drugs Act (Cap 185, 2001 Rev Ed) ("MDA"). I now set out my reasons.

The Misuse of Drugs Act and its evidential presumptions

8 The drug trade is a major social evil. While drug peddlers may not be visibly seen or caught taking away or damaging lives, they nonetheless inflict alarmingly insidious problems on society that have the potential to destroy its very fabric if left unchecked. Each successful trafficker has the disturbing potential to inflict enormous and enduring harm over an extremely wide circle of victims. Apart from the harm that drugs inflict on an addict's well-being, drug trafficking engenders and feeds a vicious cycle of crime that inexorably ripples through the community.

9 It is relatively easy and inexpensive to manufacture drugs. The remarkable sums generated in the drug trade have nothing to do with the complexities of production but rather are linked to and

commensurate with the risks associated with being apprehended and severely punished. Given Singapore's uncompromising attitude and relentless pursuit in enforcing and maintaining a relatively drug-free environment, extremely high returns may be realised through the successful distribution of drugs. This creates a potent siren-like temptation for certain avariciously desperate and/or determined persons to engage in the drug trade.

10 In order to minimise the risk of detection, international drug syndicates often employ apprentice couriers who do not have a criminal record. Unfortunately for such individuals, the MDA which is designed to deter *all* manner of drug trafficking activities does not and clearly cannot draw a line of notional demarcation between veteran and apprentice couriers by according preferential treatment to the latter. Such an approach would both inevitably and completely undermine the deterrent effect envisaged by the uncompromising punitive regime that the MDA entails, thereby rendering it nothing more than a drug peddlers' charter. An apprentice courier who pleads that he has been apprehended on his first and last drug run cannot be excused if deterrence is to remain the hallmark of the drug enforcement regime.

11 When they are apprehended, apprentice couriers will almost invariably vigorously assert their innocence. The courts in dealing with such cases must adopt a sensible approach in assessing the credibility of an accused. While the truly innocent cannot be punished, such denials of knowledge must be scrupulously analysed and warily assessed for consistency and credibility. It is only too easy to disingenuously claim "I did not know". Associated with the plea of "I did not know" are often belated claims of "I did not inspect" or "I was told it was something else". These pleas are more often than not flimsy fabrications of last resort without an atom of credibility.

12 It bears emphasis that at all border control points and on all immigration entry cards, the mandatory penalties inextricably linked to trafficking or consuming drugs are clearly and unequivocally articulated. As a consequence, one can almost invariably assume that all persons entering Singapore would have been sufficiently alerted and sensitised of the need to take measures enabling them to ascertain the contents and nature of any substance they transport into or within Singapore. In so far as Singapore citizens and residents are concerned, it would certainly require remarkable temerity to plead an absence of knowledge of the risks pertaining to the transport or possession of drugs or other unascertained substances. This must be so in light of the all pervasive repetition of warnings about drug penalties through the many public channels of communication. Having said this, one cannot but acknowledge and accept that unusual instances will arise from time to time where drugs may be either planted on or inadvertently transported or possessed by entirely innocent persons. The courts must therefore remain constantly alert to and vigilant in identifying such cases, rare as they may be, when innocent victims have been duped by devious drug distributors.

The evidential presumptions

13 The MDA establishes three core evidential presumptions in connection with drug trafficking. *First*, a person who is proved to have had in his possession or custody or under his control a controlled drug shall, until the contrary is proved, be presumed to have *had* that drug in his possession: s 18(1) of the MDA. *Second*, if a person is proved or presumed to have had a controlled drug in his possession he shall, until the contrary is proved, be presumed to have *known* the *nature* of that drug: s 18(2) of the MDA. *Third*, upon proof of possession of an amount of the controlled drug in excess of a certain stipulated quantity it shall be presumed, unless it is proved to the contrary, that the possession was for the purposes of *trafficking*: s 17 of the MDA. These presumptions operate quite independently of one another and the unrebutted application of one presumption does not necessarily or inevitably preclude a rebuttal of the others.

14 *Warner v Metropolitan Police Commissioner* [1969] 2 AC 256 ("*Warner*") is widely considered by many legal jurists to be the *locus classicus* on the issue of what constitutes possession of drugs. It was the first decision of the House of Lords that considered a long line of often conflicting and confusing cases in the lower courts. Lord Reid was alone in holding that the statutory offence created was not an absolute one. While the majority agreed that an absolute offence had indeed been created, it was far from unanimous in its views and reasons on why this was the case. A leading textbook perceptively notes that "the opinions in *Warner* vary enormously. They are also difficult to reconcile in places and rely on decisions which themselves conflict": Rudi Fortson, *Misuse of Drugs and Drug Trafficking Offences* (Sweet & Maxwell, 4th Ed, 2002) at para 3-70. Another leading legal treatise opines "The five speeches in *Warner* differ so greatly and it is so difficult to make sense of parts of them that courts in later cases have found it impossible to extract a *ratio decidendi.*": Smith & Hogan, *Criminal Law* (Oxford University Press, 11th Ed, 2005) at p 152. What has not been adequately acknowledged or appreciated is that in reality "the question whether a person could possess a thing of which he had no knowledge was *not argued*" [emphasis added]: see Prof A L Goodhart's interesting commentary in "Possession of Drugs and Absolute Liability" (1968) 84 LQR 382 at 394. Prof Goodhart after correctly emphasising that it would be an exercise in futility to attempt to reconcile and/or explain all the conflicting authorities including the *dicta* in *Warner*'s case, astutely suggested (at 394):

> It is to be hoped, therefore, that all the technical distinctions between the various cases which now clutter the books will be swept away by the *simple provision that a person who has control of a thing is deemed to have possession of it*. [emphasis added]

This is precisely what Parliament in Singapore has implemented *vide* the progenitor of s 18 of the MDA. Such a provision, by allowing an accused to prove that he *is* morally guiltless, to that extent is clearly preferable to a situation of absolute liability, particularly in instances where the penalty for contravention entails capital punishment.

15 It also bears mention that s 18(2) of the MDA appears to have been directly inspired by certain observations and musings by Lord Reid and Lord Pearce in *Warner*. In mulling over the difficulties created by the rather maladroit drafting of s 1(1) of the Drugs (Prevention of Misuse) Act 1964 (c 64) (UK), Lord Reid opined (at 280):

> In a case like this Parliament, if consulted, might think it right to transfer the onus of proof so that an accused would have to prove that *he neither knew nor had any reason to suspect that he had a prohibited drug in his possession*. [emphasis added]

And Lord Pearce persuasively added (at 307):

> It would, I think, be an improvement of a difficult position if Parliament were to enact that when a person has ownership or physical possession of drugs he shall be guilty unless he proves on a balance of probabilities that he was unaware of *their nature* or had reasonable excuse for the possession. [emphasis added]

The original version of s 18(2) of the MDA was introduced in 1973, some four years after the decision in *Warner*.

16 It does not require a great deal of common sense to appreciate that in certain instances it is plainly necessary to alter evidential rules in order to combat pernicious social evils in the interests of the wider community. It would be difficult in the vast majority of this particular genre of cases (and particularly drug offences) to prove the existence of *mens rea* when the *factum* of possession is the

only objective factor invariably present; hence the entirely reasonable suggestion by these eminent legal jurists that it is imperative that the possessor of the substance explain persuasively his lack of knowledge. Inadequate comprehension or appreciation of the origins and basis of the entirely pragmatic and morally defensible legal reasoning underpinning such presumptions has often led to intemperate criticisms of the core presumptions created by the MDA by ill-informed observers and commentators.

17 It is also pertinent to note that the constitutionality of these presumptions has long been regarded as legally unassailable and has received the imprimatur of the Privy Council; see *eg*, *Ong Ah Chuan v PP* [1980-1981] SLR 48 at 62–63, [28]–[29] (*per* Lord Diplock):

> [I]t borders on the fanciful to suggest that a law offends against some fundamental rule of natural justice because it provides that upon the prosecution's proving that certain acts consistent with that purpose and in themselves unlawful were done by the accused, the court shall infer that they were in fact done for that purpose unless there is evidence adduced which on the balance of probabilities suffices to displace the inference. *The purpose with which he did an act is peculiarly within the knowledge of the accused. There is nothing unfair in requiring him to satisfy the court that he did the acts for some less heinous purpose if such be the fact*. Presumptions of this kind are a common feature of modern legislation concerning the possession and use of things that present danger to society like addictive drugs, explosives, arms and ammunition.
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> ... Their Lordships would see no conflict with any fundamental rule of natural justice and so *no constitutional objection to a statutory presumption (provided that it was rebuttable by the accused), that his possession of controlled drugs in any measurable quantity, without regard to specified minima, was for the purpose of trafficking in them*. ... It is not disputed that these minimum quantities are many times greater than the daily dose taken by typical heroin addicts in Singapore; so, as a matter of common sense, the likelihood is that if it is being transported in such quantities this is for the purpose of trafficking. All that is suggested to the contrary is that there may be exceptional addicts whose daily consumption much exceeds the normal; but these abnormal addicts, if such there be, are protected by the fact that the inference that possession was for the purpose of trafficking is rebuttable.
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> [emphasis added]

The evidential burden

18 Tan was charged under s 7 of the MDA, which prohibits the import of controlled drugs. "Import" is not defined in the MDA but it has been firmly established that the word bears the definition attributed to it in s 2 of the Interpretation Act (Cap 1, 2002 Rev Ed), *viz*, "to bring or cause to bring into Singapore by land, sea or air": see, *Ko Mun Cheung v PP* [1992] 2 SLR 87 at 91–92, [20]; and more recently, *Abdul Ra'uf bin Abdul Rahman v PP* [2000] 1 SLR 683 ("*Abdul Ra'uf*") at [26]. Contrary to popular belief, the offence of trafficking in controlled drugs in Singapore has never been and is not a strict liability offence. It continues to be incumbent on the Prosecution to prove that the accused knew or intended to bring the controlled drugs into Singapore: *Abdul Ra'uf* at [26]. However, the burden of proving a lack of knowledge of the nature of the particular drug being trafficked rests on an accused as a consequence of statutory presumptions. That this much is now settled law is evident both from the very structure of the MDA itself (in particular, s 18(2) of the MDA, which puts the burden of proof on the accused to disprove knowledge of the nature of the drugs) and the case law: see, most notably, *PP v Hla Win* [1995] 2 SLR 424 ("*Hla Win*"). All said and done, it is sufficient for the accused to prove on a balance of probabilities that he was not conscious of the fact that he was

importing controlled drugs into Singapore and/or the nature of the drug in question: see *Tan Ah Tee v PP* [1978-1979] SLR 211 at 220. Thus, for example, the Court of Appeal in *Abdul Ra'uf* accepted that the accused could properly contend notwithstanding the statutory presumption applying *de rigueur*, that he was unaware of the presence of the drugs that were found in the boot of his car.

19 In the present case, it is common ground that Tan knew that he was importing controlled drugs into Singapore; indeed, he had every intention of doing so in exchange for about $1,000. It is also undisputed that Tan had in his possession the controlled drugs thus allowing the Prosecution quite easily to avail itself of the statutory presumption in s 18(2) of the MDA. The extent to which Tan is able to rebut this particular presumption that he knew the actual nature of the drugs he was carrying is the critical fulcrum upon which this case ultimately rests.

20 What, then, must the Defence demonstrate in order to rebut the presumption? *First*, it is important to emphasise that the persuasive burden of proof lies on the accused. In other words, the onus is on the accused on a balance of probabilities to displace the presumption that he knew the actual nature of the drugs he had in his possession: *Tan Ah Tee v PP* ([18] *supra*) at 220, [25]; and most recently, *Iwuchukwu Amara Tochi v PP* [2006] 2 SLR 503 ("*Tochi*") at [5]. It is helpful to bear in mind that "an honest and reasonable belief entertained by the accused of the existence of facts which, if true, would make the act charged against him innocent": see *Bank of New South Wales v Piper* [1897] 1 AC 383 at 389–390.

2 1 *Second*, the requisite *mens rea*, which is explicitly adverted to through the plain words employed in s 18(2) of the MDA itself, connotes actual knowledge. What is knowledge? In *Baden, Delvaux and Lecuit v Société Generale pour Favoriser le Développement du Commerce et l'Industrie en France SA* [1983] BCLC 325 ("*Baden*") at 407, five possible levels of knowledge were postulated:

(a) actual knowledge;

(b) wilfully shutting one's eyes to the obvious;

(c) wilfully and recklessly failing to make such inquiries as an honest and reasonable man would make;

(d) knowledge of the circumstances which would indicate the facts to an honest and reasonable man; and

(e) knowledge of circumstances which would put an honest and reasonable man on inquiry.

22 The Prosecution has submitted that all five levels of knowledge are embraced by s 18(2) of the MDA on the basis that in *PP v Teo Ai Nee* [1995] 2 SLR 69 ("*Teo Ai Nee*"), the High Court accepted that all five categories had "a place in criminal law": at 87, [48]. I beg to differ. In the first place, it is necessary to note that the *Baden* categorisation has been largely discredited even in the field of constructive trust cases (in which *Baden* was decided and has at best only been periodically applied). In *Royal Brunei Airlines Sdn Bhd v Philip Tan Kok Ming* [1995] 2 AC 378 ("*Tan*"), the Privy Council opined that in the context of the principle of accessory liability for breach of trust, "knowingly" was better avoided as an ingredient of the principle and that the *Baden* scale of knowledge was "best forgotten": at 392. As Nourse LJ in the subsequent English Court of Appeal case of *Bank of Credit and Commerce International (Overseas) Ltd v Akindele* [2001] Ch 437 ("*Akindele*") explained (at 454), the *Baden* categorisation was accepted by the judge without argument because both counsel for the plaintiffs and the defendant agreed to it. Nourse LJ also added (at 455) that he had "grave doubts" about the utility of the employing the *Baden*

categorisation in cases of knowing receipt. See also, Lord Goff of Chieveley and Gareth Jones, *Goff and Jones: The Law of Restitution* (Sweet & Maxwell, 6th Ed, 2002) at paras 33-028 and 33-029; Andrew Burrows, *The Law of Restitution* (Butterworths, 2nd Ed, 2002).

23 Even accepting arguendo that *Tan* and *Akindele* do not necessarily undermine the conceptual idea behind *Baden*, which advocates that knowledge may be conceived at five levels, the Prosecution's submission that all five levels of knowledge apply to the MDA is, with respect, entirely without merit. The difficulty with the Prosecution's argument is that *Teo Ai Nee* was a copyright case involving the interpretation of the broadly-worded statutory phrase "where he knows or *ought reasonably to know*" [emphasis added]. In such a case, the italicised language clearly embraces a wider spectrum of knowledge. Under s 18(2) of the MDA, what is presumed is that the accused had *known* of the nature of the drugs he possessed when apprehended. This is a far more circumscribed state of mind. It is a fundamental canon of statutory interpretation that in ascertaining Parliament's intention to assign criminal culpability a restrictive rather than a generous approach ought to be adopted. If the phrase "ought reasonably to know" does not figure in s 18(2) of the MDA, the statutory intent and purport of such a phrase simply cannot be deemed to have been imposed. The critical question to ask in assessing every statutory offence is this – what precisely has Parliament enacted and intended? In this respect, it is firmly established that only the wilful shutting of one's eyes to the obvious is legally and morally equivalent to actual knowledge: *Taylor's Central Garages (Exeter) Ltd v Roper* [1951] 2 TLR 284; *Warner* ([14] *supra*) at 279 (*per* Lord Reid). Though the Prosecution acknowledged that the statutory formulation employed in *Teo Ai Nee* is much wider than in s 18(2) of the MDA, it nonetheless went on to suggest that the cases interpreting the latter provision have accepted that all five levels of *mens rea* are applicable; and that the current legal position is that the mere lack of actual knowledge is insufficient to rebut the presumption.

24 I am not convinced that this is an accurate portrayal of either the correct or current state of the law apropos the mental state envisaged by s 18(2) of the MDA. It is first necessary to clarify what constitutes the *wilful* shutting of one's eyes to the *obvious*. Here, I find it both pertinent and profitable to borrow from the very cogent exposition of this term by Prof Andrew Ashworth in *Principles of Criminal Law* (Oxford University Press, 3rd Ed, 1999) at pp 196–197:

> This occurs where D knows that there is a risk that a prohibited circumstance exists, but refrains from checking it. An example is *Westminister City Council* v *Croyalgrange Ltd* (1986), where D was charged with knowingly permitting the use of premises as a sex establishment without a licence. The House of Lords held that:
>
> > it is always open to the tribunal of fact, when knowledge on the part of a defendant is required to be proved, to base a finding of knowledge on evidence that the defendant had deliberately shut his eyes to the obvious or refrained from enquiry because he suspected the truth but did not want to have his suspicion confirmed.
>
> It will be seen that Lord Bridge used the language of inference here, suggesting that a court might infer knowledge from wilful blindness in the same way as he suggested that intention might be inferred from foresight of virtual certainty.
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> *The true meaning of the passage is surely that wilful blindness is treated as actual knowledge, which has long been the law. Although, strictly speaking, D does not know, since he was refrained from finding out, he may have an overwhelmingly strong belief (he may believe it is virtually certain) that the prohibited circumstance exists. Thus, wilful blindness may be treated not as reckless knowledge, but as a form of actual knowledge*.

[emphasis added]

25 In his highly venerated classical work, *Textbook of Criminal Law* (Stevens & Sons, 2nd Ed, 1983) at pp 125–126, Prof Glanville Williams ("Prof Williams") also makes the following observations:

> [T]he strict requirement of knowledge is qualified by the doctrine of wilful blindness. This is meant to deal with those whose philosophy is: 'Where ignorance is bliss, 'tis folly to be wise.' To argue away inconvenient truths is a human failing. If a person deliberately 'shuts his eyes' to the obvious, because he 'doesn't want to know,' he is taken to know.
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> While all the cases agree on this, they are at sixes and sevens on what wilful blindness means. *The best view is that it applies only when a person is virtually certain that the fact exists. …*
>
> This very limited doctrine can reasonably be said to be an explanation of what is meant by knowledge as a matter of common sense, rather than an illegitimate extension of the meaning of the term. *If it does not give a sufficient extension to some particular offence, that is a matter for the legislature to consider when it is deciding between the word 'knows' and the words 'knows or ought to know.'*
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> …
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> *The courts sometimes do equate wilful blindness with reckless, but they ought not to do so.* If knowledge is judicially made to include wilful blindness, and if wilful blindness is judicially deemed to equal recklessness, the result is that a person who has no knowledge is judicially deemed to have knowledge if he is found to have been reckless — which is not what the statute says. The word 'knowing' in a statute is very strong. *To know that a fact exists is not the same as taking a chance whether it exists or not. …*
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> [emphasis added]

26 Prof Michael Hor ("Prof Hor"), a local academic, has also recently written in a similar vein ("Misuse of Drugs and Aberrations in the Criminal Law" (2001) 13 SAcLJ 54 ("Misuse of Drugs") at 71) reiterating Prof Williams's concerns:

> Knowledge can be a matter of degree. Convictions and beliefs are held to varying strengths. In the context of drug offences, the element of knowledge is clearly satisfied if the accused actually believed with complete certainty that he possessed the illicit drug in question. The doctrine of 'wilful blindness' extends liability to a situation where the accused had an '*overwhelmingly strong* belief' that he was carrying drugs. The accused must be aware of the '*high* probability' that he is in possession of drugs. ***If wilful blindness is to be treated on par with actual knowledge, then the 'blindness' must be morally equivalent to actual knowledge. A mere suspicion is not enough***. [emphasis added in bold italics]

27 I do not perceive the Prosecution as misunderstanding or failing to appreciate this critical distinction between wilful blindness and recklessness or gross negligence. However, as I highlighted above, the Prosecution appears to be submitting that a finding that an accused lacked actual knowledge (and was not wilfully blind) is not, based on its particular interpretation of the cases, sufficient to rebut the presumption under s 18(2) of the MDA; or, to view it from the other side, actual knowledge (or wilful blindness) is not required. Citing *Wong Soon Lee v PP* [1999] SGCA 42 ("*Wong Soon Lee*"), the Prosecution further submitted that even where assurances are given to an accused regarding the nature of the drugs, reliance on such assurances without attempts to verify

the true nature of the drugs, is not *per se* sufficient to rebut the presumption under s 18(2) of the MDA. Without careful qualification, this proposition is far too wide and quite simply, unwarranted. Once it is understood and acknowledged that the plain words of s 18(2) of the MDA permit an accused to disprove that he *knows* the nature of the drugs he possesses, it cannot seriously be suggested that our courts would nonetheless convict accused persons solely on the basis that they have failed to make proper inquiries. Such a stance would be tantamount to conceding that Prof Hor was correct in observing that the courts may sometimes have unduly equated wilful blindness with mere negligence or recklessness: see "Misuse of Drugs" at 72–74. In support of his observations Prof Hor relies on *dicta* in certain decisions that may have been awkwardly crafted. Such a view has been expressly and comprehensively debunked and negated by the very recent decision of the Court of Appeal in *Tochi*, where it was declared ([20] *supra* at [6]):

> The presumption of knowledge was therefore not rebutted, and all that remained was to determine whether the act of importing the drugs was proved. However, a statement in the trial judge's grounds requires clarification. At para 48, the trial judge stated, in what appeared to us as an emphasis to his rejection of the first appellant's evidence:
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> > I found he had wilfully turned a blind eye on the contents of the capsules because he was tempted by the US$2000, which was a large sum to him. … Consequently, even if he may not have actual knowledge that he was carrying diamorphine, *his ignorance did not exculpate him* … [emphasis added].
>
> That passage creates an impression that there is a legal duty not to 'turn a blind eye'. ***It would thus create a wrong assumption that there was some sort of positive legal duty, meaning that the first appellant was bound in law to inspect and determine what he was carrying, and that consequentially, if he did not do so, he would be found liable*** *on account of that failure or omission*. ***The Act does not prescribe any such duty***. All that the Act does (under s 18), is to provide the presumptions of possession and knowledge, and thus the duty of rebutting the presumptions lay with the accused. There could be various reasons why a court might not believe the accused person, or find that he had not rebutted the presumptions. The fact that he made no attempt to check what he was carrying could be one such reason. Whether the court would believe a denial of knowledge of the articles in the accused person's possession (made with or without explanation or reasons) would depend on the circumstances of the individual case. The trial judge then referred to *Yeo Choon Huat v PP* [1998] 1 SLR 217 at [22]:
>
> > [I]gnorance is a defence only when there is no reason for suspicion and no right and opportunity of examination …
>
> The above passage, however, was from the judgment in *Ubaka v PP* [1995] 1 SLR 267 and cited with approval by both the minority judgment in *PP v Hla Win* [1995] 2 SLR 424, as well as in the unanimous judgment in *Yeo Choon Huat v PP*. It is also pertinent that the same coram sat in both cases (*Yeo Choon Huat v PP* and *PP v Hla Win*). ***It will be gleaned from these cases that the true principle is that, ultimately, a failure to inspect may strongly disincline a court from believing an 'absence of knowledge' defence***. Therefore, to say, as in this case, that the first appellant thought it was chocolates was another way of saying he did not know that he was carrying drugs. Given the evidence, including the evidence that the first appellant did not inspect the articles when he could have done so (the turning of the blind eye), the court was entitled to find that the presumption had not been rebutted.
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> [emphasis added in bold italics]

28 That *Tochi* no more than reiterates the correct position in law may also be divined from this critical passage in *Wong Soon Lee* ([27] *supra* at [45]):

> Having considered all the arguments canvassed, we were unable to accept the appellant's contention that the trial judge erred in coming to the decision he came to. First, the circumstances in which the appellant received the drugs were so suspect that any reasonable man would have gone one step further and ascertained for himself the precise nature of the drugs. This the appellant had failed to do. *The only reason why he failed to do so was because he either knew the precise nature of the drugs or he did not care to know*. *If the appellant chose to turn a blind eye* ***and*** *merely relied on the assurance given by Ah Kee, he would not be able to rebut the statutory presumption of knowledge.* [emphasis added]

Careful analysis of the italicised phrases reveals that the failure to inspect or inquire is relevant and pertinent only where, together with the ambient circumstances of the case, they go towards establishing either that the accused knew what he was carrying or was wilfully blind to the obvious. I find in this context the following analysis of knowledge by Lord Sumner in *The Zamora No 2* [1921] 1 AC 801 at 812 both instructive and illuminating:

> [T]here are two senses in which a man is said not to know something because he does not want to know it. A thing may be troublesome to learn, and the knowledge of it, when acquired, may be uninteresting or distasteful. To refuse to know any more about the subject or anything at all is then a wilful but a real ignorance. On the other hand, a man is said not to know because he does not want to know, where the substance of the thing is borne in upon his mind with a conviction that full details or precise proofs may be dangerous, because they may embarrass his denials or compromise his protests. *In such a case he flatters himself that where ignorance is safe, 'tis folly to be wise, but there he is wrong, for he has been put upon notice and his further ignorance, even though actual and complete, is a mere affectation and disguise.* [emphasis added]

If the facts of the case merely show that he was uncommonly stupid, unconventionally ignorant, extremely naïve or plainly reckless in failing to determine the nature of what he was carrying, the accused is entitled to an acquittal. Put another way, it is legitimate for the courts to infer from an accused's failure to check that this was because he already knew or was virtually certain of the nature of the drugs he was importing; but if the failure to inspect was, for instance, because he had recklessly or unreasonably relied on someone else's assurance he is not guilty of a violation of the MDA *as it is presently drafted and stands*. Thus a person is not guilty if he can prove that though he may be in possession or control of a controlled drug he did not know of the nature of the drug. The *mens rea* or the subjective element of guilt is absent in such a case.

29 I agree with these observations of Prof Hor in "Misuse of Drugs" at 74:

> I do not mean to disregard the fact that a finding that a reasonable man ***ought*** to have suspected is often strong evidence that the accused ***did*** suspect, ***but the distinction is morally, and sometimes practically, crucial*** (as it was in *Hla Win*). Negligent ignorance is of a completely different order of culpability from wilful ignorance. Foolishness or carelessness is one thing, *deliberately* shutting one's eyes to the *obvious* is quite another. One might think that the wilfully blind is deserving of death, but few, if any, would think that the careless or foolish should be similarly treated. [emphasis added in bold italics]

30 The uncompromising and distinct line between recklessness and negligence on the one hand and actual knowledge and wilful blindness on the other must be vigilantly policed and preserved by the courts and cannot be lightly dismissed as a mere semantic nicety. Even where an accused

possesses what he believes to be illicit goods (albeit not controlled drugs), that does not *ipso facto* render him wilfully blind if he merely failed to inspect what he was carrying: *Hla Win* ([18] *supra*). As the majority correctly held, at 437, [41], in that case:

> *It is not the law that by reason of the respondent's knowledge of the illicit nature of the content of his bag his evidence that he did not know that the content was drugs could not and should not be believed.* Such knowledge on his part only renders it all the more difficult for the court to believe his evidence. *Very much of course depends on the circumstances of the case.* [emphasis added]

31 The courts must assiduously, and to the best of their ability, examine the precise factual matrix in extensive detail before deciding whether the threshold has been crossed. This requires a scrupulous and holistic assessment of the entire spectrum of relevant subjective and objective factors. As succinctly summarised by the Court of Appeal in *Van Damme Johannes v PP* [1994] 1 SLR 246 at 252–253, [21]:

> It would then be up to the court to decide whether or not to believe him; to assess his credibility and veracity; to observe his demeanour; to listen to what he had to say; to go through the evidence and determine whether his story was consistent; and finally to make a judicial decision.

32 A *third* facet of the inquiry (see [11] and [12] above) that the courts must address in deciding whether the statutory presumption is rebutted is whether, in the words of s 18(2) of the MDA, an accused knew the *nature* of the drugs he was in possession of. This begs the question: what does "know the nature of the drug" mean? Ambiguity over what is necessary to prove or disprove knowledge of the nature of the controlled drug stems from the oft-cited but commonly misunderstood *dictum* of Lord Pearce in *Warner* ([14] *supra* at 305):

> Though I ... believe the tablets which I possess to be aspirin, yet if they turn out to be heroin I am in possession of heroin tablets. This would be so I think even if I believed them to be sweets. It would be otherwise if I believed them to be something of a *wholly different nature*. [emphasis added]

33 This passage might at first blush create the impression that even though an accused believes that he was carrying something as benign as sweets or cough drops, he would still be found liable if what he was carrying turned out to be heroin. A literal reading of Lord Pearce's *dictum* would also seem to suggest that it would be very difficult for an accused to ever prove that he did not "possess" the drugs he was carrying. Indeed, it is a challenge to conceive of anything more vastly different from sweets than heroin. If sweets are not considered of a "wholly different nature" from heroin, it would effectively turn possession into a strict liability offence. This paradoxical interpretation of Lord Pearce's speech, however, does not sit well and is inherently inconsistent with the final decision that he reached. This is what he said towards the end of his opinion (at 307–308):

> In the present case, therefore, there was a very strong prima facie inference of fact that the accused was in possession of the drugs. But he was entitled to try to rebut (or raise a doubt as to) that inference by putting before the jury his defence that, although the package itself was clearly in his possession, the contents were not. *He could have sought to persuade them in spite of his lies and evasions that he received the contents innocently, that he genuinely believed the package to contain scent* …
>
> In the present case *you may think that the difference between scent and tablets is a sufficient difference in kind to entitle the accused to an acquittal if on the whole of the evidence it*

appears that he may have genuinely believed that the parcel contained scent, and that he may not have had any suspicions that there was anything illicit in the parcel, and that he had no opportunity of verifying its contents. *For in that case it is not proved that he was in possession of the contents of the parcel.*

[emphasis added]

34 In this connection it is instructive once again to pay heed to the measured analysis of this very issue by Lord Reid. With his customary incisiveness and acuity he noted at (280–281):

I think the best approach to this case is to suppose that an innkeeper is handed in ordinary course a box or package by a guest for safe keeping. He has no right to open the box — it may be locked. If he is told truthfully what is in it, it may be right to say that he is in possession of the contents. But what if he is told nothing or is told that it contains jewellery and it contains prohibited drugs? It may contain nothing but drugs or it may contain both jewellery and drugs or it may be an antique trinket apparently empty but containing drugs hidden in a small secret recess. *It would in my opinion be irrational to draw distinctions and say that in one such case he is in possession of the drugs and therefore guilty of an offence, but not in another. It is for that reason that I cannot agree with the contention that if the possessor of a box genuinely believes that there is nothing in the box then he is not in possession of the contents, but that on the other hand if he knows there is something in it he is in possession of the contents though they may turn out to be something quite unexpected.* And in any case this contention does not seem to me to take account of the case where the possessor of the box believes that it does contain jewellery and in fact it does contain jewellery but it contains drugs as well. *It would, I think, be absurd to say that the innkeeper is not guilty if he genuinely believes that the box is empty and it has some drugs secreted in it, but that he is guilty of an offence under the Act if he truly believes that it contains jewellery but it also contains some drugs secreted in it.* And if he is not guilty in the case where the box contains jewellery as well as drugs, on what rational ground can he become guilty if there is no jewellery in the box but only drugs? [emphasis added]

35 Of course, the English position does not bind our courts. However, there can be no doubt that the approach adopted by Lord Reid currently reflects the position in Singapore. This much has been made axiomatic by the majority decision in *Hla Win* ([18] *supra*). In that case, the appellant's defence was that he believed the bag he was carrying to be precious stones or gems but not drugs. The majority in the Court of Appeal agreed with the trial judge that the appellant was entitled to an acquittal. In my view it would not be appropriate to lightly impute to Parliament an intention to create an offence punishable by capital punishment if an accused is merely reckless or negligent by sensible standards. Indeed for a quick analogy one need only refer to the Penal Code (Cap 224, 1985 Rev Ed) ("PC") which carefully calibrates the punishment for homicide depending on the precise intentional culpability of the guilty accused: see for example ss 302 and 304A of the PC. Accordingly, a genuine belief that the goods that one possesses is something other than the controlled drug referred to in the charge – even if it also happens to be contraband or illegal – constitutes a sufficient basis on which to hold that an accused has not crossed the threshold. It may thus be safely assumed that for an accused to be found guilty of drug trafficking he must at least know or be wilfully blind to the fact that he is carrying a particular controlled drug.

36 The plain words of s 18(2) of the MDA states that it is for an accused to prove that he did not know the nature *of the drug*. That an accused knows he is carrying *a* drug is only one aspect of the issue; he can still be exonerated if he can show that he did not know its nature. As such, it is still conceivably open to an accused carrying a drug to assert that he did not know that he was carrying the particular type of drug which was in fact found on him. *His credibility alone forms the crux of the*

matter in such cases. In *Wong Soon Lee* ([27] *supra*), the appellant's central claim was that he did not realise that he was carrying heroin, and that he thought he was carrying drugs that attracted only a fine. While both the trial judge and the Court of Appeal disbelieved the accused it is plain that they recognised that such a defence was indeed open to the accused. The Court of Appeal noted (at [45] and [48]):

> The only reason why [the accused] failed [to inspect the drugs] was because he either knew the *precise nature* of the drugs or he did not care to know. …
>
> The difficulty which the court faces in such situations it that *the defence of lack of knowledge of the precise nature* of the drugs is all too often raised by drug couriers. …
>
> [emphasis added]

37 As a matter of pure principle as well as common sense, this must be correct. Once it is accepted that offences under the MDA are not strict liability offences, it follows that the requisite *mens rea* must be present in respect of all the necessary elements of the offences. As Goff LJ (as he then was) presciently held in *Westminster City Council v Croyalgrange Ltd* [1985] 1 All ER 740 at 743:

> Prima facie, as a matter of ordinary construction, when the word 'knowingly' is so introduced in a provision of this kind, it required [*sic*] knowledge by the accused *of each of the facts constituting the actus reus of the offence*. [emphasis added]

The MDA, it must also be remembered, prescribes varying levels of punishment depending on the class of drugs imported. This itself unequivocally signals that Parliament did not intend to target, brand and punish all manner of drug traffickers with a single broad brush. Accordingly, it stands to reason that an accused who is punished for importing heroin should have known that he is importing heroin, and not some other drug. If an accused *honestly* believed on the other hand that he was importing only Ecstasy (or some other drug), it would be incorrect to penalise him for importing heroin. To do so would be to convert s 7 of the MDA into a strict liability provision, a notion which the cases have emphatically rejected and which is inimical to the intent of the MDA. Of course, it has never been the position that an accused may escape conviction simply because he was ignorant of the exact chemical or physical properties of the drug; nor must it necessarily be proved that he knew the drug by its name or the classification it fell under or the punishment associated with that particular type of drug. All that can be said is that the purported lack of knowledge of any of these may well lead a court to conclude that the accused did not know the nature of the drug he had imported; but that need not invariably be the case. Much will turn on the specific factual matrix before the court. If an accused chooses for profit to deal with any manner of controlled drugs, it bears emphasis that he has chosen of his own volition to engage in a dangerous business and generally speaking to accept the attendant risks. The courts have to approach these matters with pragmatism laced with a good dose of common sense, I can only add that a court, in assessing whether an accused knew enough about the nature of what he was carrying, must be guided by the fact that a finding that an accused knew the nature of the drug he was importing or trafficking may lead to extremely severe penalties including capital punishment. I doubt that the articulation of precise or rigid formula with greater specificity will assist further. It may, on the contrary, only lead to unintended results.

Tan's defence

38 The crux of Tan's defence is that while he knew he was importing illegal drugs, he did not think that the drugs were of the type that would attract the death penalty. This is simply another way of saying that he did not know the nature of the drugs he was carrying. To put it in a nutshell,

the only issue that arises for determination in this case is whether Tan knew that he was carrying heroin. In support of his claim that he did not, the following arguments were made:

(a) Given that the Central Narcotics Bureau ("CNB") officers were themselves unable to immediately identify the drugs in question, it would be inappropriate to draw any inference that the accused would or could have known that he was carrying heroin.

(b) There were several procedural irregularities in respect of statements purportedly taken by investigating officers; most critically, it was disputed that Tan ever acknowledged that he was carrying heroin.

(c) Since he did not run away, his conduct after being approached at the Woodlands checkpoint spoke volumes in his favour and the reliability of his testimony.

(d) That the reward for his importing the drugs into Singapore was meagre suggested that it was reasonable for Tan to infer that the drugs were not of a serious nature.

Is it appropriate to draw any favourable inference from the CNB officers' inability to immediately identify the drugs?

39 Defence counsel has created a legal contretemps concerning the initial inability of the CNB officers to immediately identify the drugs that were seized from Tan. Given that the drugs in question were fine and powdery in form and yellow in colour; as opposed to most previously seized heroin imports which were white in colour and usually ball-shaped and solid, the thrust of defence counsel's argument is that if narcotic officers, with a wealth of training and experience in detecting and analysing drugs, could not readily identify the drugs, resulting in testimonies which were contradictory in some respects – how then could one expect Tan to know that what he was carrying was indeed heroin?

40 This argument cut little ice and I promptly dismissed it. First of all, as the Prosecution correctly pointed out, it was never the Defence's position that Tan knew how to identify drugs. On the contrary, Tan testified that he had no knowledge of what heroin looked like. Therefore, even if the drugs seized were easily identifiable, it would severely undermine the Defence's case to suggest that Tan would have been able to identify the drugs as heroin. Secondly, the critical question in all cases is not whether the CNB officers could identify the drugs but whether *the accused* knew the nature of the drugs. The appearance of the drug is usually only one of the factors to take into account when assessing an accused's knowledge. An analyst from the Centre for Forensic Science testified that the colour and appearance of a drug alone cannot indicate its purity or nature. That CNB officers (or any other person) had difficulty identifying the drugs is not usually relevant to the issue of the accused's knowledge. That does not however preclude the possibility that in some circumstances, it would be reasonable to infer that an accused did not know the nature of what he was carrying on account of the unusual appearance of the drug in question. For example, a person may frequently traffic in a particular type of drug that comes in the form of green tablets. Assume, for the moment, that trafficking in this particular drug attracts only a fine. Suppose further that on a particular occasion, he is arrested with a bag of green tablets and the drugs seized, when analysed, turned out to be heroin. His claim will be that he did not know he was carrying heroin because it came in the form of green tablets whereas heroin is usually white in colour and ball-shaped. The fact that the drugs seized were difficult to identify could, in such a case, arguably be probative of his lack of knowledge as to the nature of the drug trafficked. That, however, is plainly not a reflection of the situation presented in the instant case.

Tan's statements

41 Three primary statements were challenged by Tan's counsel presumably on the basis that they unequivocally demonstrated Tan's knowledge of what he was carrying. The first was an oral statement to Constable Phua in the search room at the Woodlands checkpoint. In his statement (PS 8), Constable Phua merely stated that upon searching Tan's body and discovering that Tan was in fact hiding packets of drugs on his body, he had asked Tan a few questions. No mention was made of precisely what questions were asked and what answers were given. It was Tan's counsel who, in further cross-examination, enquired as to what had transpired in the course of the interrogation:[note: 1]

> Q: Now, let me read this [reads]: 'I asked the accused some questions pertaining to the said packets.'
>
> Can you tell the court what are those questions that you asked?
>
> A: Sir, I asked him in Hokkien.
>
> Q: Yah, what did you ask him?
>
> A: '*Jee eh sim mee lai eh*?'
>
> Q: Can you tell us that in English?
>
> A: I asked him in Hokkien. I told him – I asked him, 'What is this?' He told me that is number 3. Then I asked him again, 'What number 3?' Then he still answer 'number 3'.

42 The second statement made was to Ong Lu Hieow ("SI Ong"), who was a Station Inspector with the CNB attached to its Enforcement Division. SI Ong was one of the officers who had escorted Tan to his residence in order to conduct a search on 19 August 2005 at about 1.25am. Nothing incriminating was found during this search. His testimony in court was as follows:[note: 2]

> Court: Did you speak to the accused?
>
> Witness: Yes, I did.
>
> Court: Can you recollect what was said?
>
> Witness: Yes. I asked the accused what were those things. He told me that it was number 3.

43 A third statement (PS 15) was recorded by Inspector Jack Teng ("Insp Teng"), a CNB officer attached to the Woodlands Team, Enforcement Division, at an interview room in the CNB office in Woodlands. This statement was taken at about 9.21pm on 18 August 2005, the very day of the arrest. The following questions by Insp Teng and answers by Tan were recorded:

> Q: What are these? (pointing to several packets of yellowish substance)
>
> A: I believe it is Heroin number 3.
>
> Q: The yellowish substance belongs to who?

A: It belongs to a Malaysian known to me as 'Uncle'.

…

Q: What are they meant for?

A: I am to deliver to someone in Singapore.

44 During closing submissions, Tan's counsel took issue that the first two statements had not been reduced to writing as required under s 121(1) of the Criminal Procedure Code (Cap 68, 1985 Rev Ed) ("the CPC"). However, counsel refrained from suggesting that these statements should be excluded simply on account of such a procedural irregularity in their recording. Indeed, such an argument has long been rejected since the decision in *Vasavan Sathiadew v PP* [1992] SGCA 26, where the Court of Appeal held:

> We think it is right that at the time the oral statement is alleged to have been made, Vasavan was not yet an accused person, and that any statement made by him, and reduced into writing, ought not only to have been read over to, but also signed by, Vasavan in order to fulfil the requirements of [s 121]. Insp Teo failed to secure Vasavan's signature to the entry in the field book, *but we were not prepared for that reason, to conclude that the inspector was lying, and that Vasavan made no statement to the inspector at all*. Once Vasavan became an accused person, the statement he made to Insp Teo was rendered admissible by [s 122(5)]. *That is so whether or not the statement was recorded; and whether or not it was read back or signed, but subject always to the statement having been voluntary.* [emphasis added]

45 Of course, the failure to follow the procedural safeguards explicitly articulated in s 121 (or s 122(5)) of the CPC may, in some circumstances, diminish in the court's eyes the veracity or accuracy of the statements purportedly made by an accused. The learned authors of *Halsbury's Laws of Singapore* vol 10, (Butterworths Asia, 2000) at para 120.138 have correctly surmised:

> *While admissibility of evidence is unaffected by breach of procedure, the weight of the evidence may be affected by the increased risk of insincerity, embellishment and indoctrination occasioned by the breach.* Ex hypothesi, the fact that the person being interrogated was not informed about the purposes of the investigations cannot affect admissibility but the weight of any statement made may be diminished if the person interrogated was speaking at cross-purposes as a result of confusion or misunderstanding as to the purport of the interrogation. [emphasis added]

46 In the present case, Constable Phua's and SI Ong's testimonies as to what Tan had said to them was not challenged. Tan's counsel did not cross-examine either officer in order to undermine either their credibility or the accuracy of their recollection. Indeed, there was not the slightest hint from the record that Tan's counsel doubted the officers' testimony. It appears that this particular closing submission came as an afterthought.

47 In respect of the third statement recorded by Insp Teng, Tan's counsel attempted to suggest that the statement did not accurately reflect what had actually transpired. The following exchange between defence counsel and Insp Teng is a pithy encapsulation of the Defence's stance apropos what occurred during Tan's interview with Insp Teng:[note: 3]

> Q: … Now, when you recorded the statement, your first question, you asked him, according to – 'What are these?' Now, what was his first reply to that question, the accused's reply? He

was speaking to you in Hokkien, right?

A: Yes, Your Honour.

Q: All right, what was his first reply to you?

A: '*Wah siong sin jee eh si peh hoon sar ho*', that's what his reply is, your Honour. ['I believe this is heroin'.]

Q: ***Witness, my instructions are that he told you he did not know what the substance was, I am putting it to you.***

A: That is not true, your Honour.

Q : ***All right. Now, to that reply, your next question to him was, 'You don't know this is heroin?' That was the words?***

A: Your Honour, that is not true.

Q : ***Now, witness, I am putting it to you, after you said that, you used the word 'heroin' and he said, 'I believe it to – believe it is number 3.' That was his response.***

A: Your Honour, this is not true. This is the first reply that he gave it to me.

Q: Witness, I am putting it to you, it was you who used the word 'heroin' first.

A: Your Honour, this is not true.

Q: Now, witness, he used the word – are you saying the accused used the word 'heroin' in English?

A: Your Honour, he used – he spoke to me in Hokkien. He used the word '*pei hoon*'.

Q: You translated it, in 'heroin'?

A: Yes, your Honour, I translated into heroin.

[emphasis added in bold italics]

48 This suggestion – that Tan had initially claimed not to know the nature of the powdery substance in the packets shown to him, and that it was Insp Teng who put the word "heroin" in Tan's mouth – is both belated and entirely improbable. In fact, Tan's own testimony undermines this version of events. During cross-examination by the Prosecution, Tan was asked what transpired during the interview with Insp Teng. Tan's testimony runs as follows:[note: 4]

A: Jack Teng asked me what were those things. I told him 'number 3'. He asked me what is 'number 3'. I told him that I did not know but I believed it was number 3 powder. That was what I said to him.

Q: So when was the word '*pei hoon*' mentioned by Insp Jack Teng?

A: I told him that it was number 3 powder and he wrote it down. ***After he explained it to***

me that I believe it is 'pei hoon', or "bai fen" in Mandarin, number 3.

Q: Sorry Madam Interpreter, can you just clarify with the witness. Is he saying that Jack Teng explained to him that what he had written down was 'I believe it is '*pei hoon*' number 3', which is what is captured in the statement? Well, Jack Teng says he said *'pei hoon sar ho'*.

A: ***He explained the meaning of that sentence –***

Q: In Hokkien, correct?

A: ***- 'I believe it is heroin number 3' in Hokkien.***

[emphasis added in bold italics]

It is clear from the above quotation that the third statement had been accurately explained to Tan and recorded. Tan neither claimed to have unequivocally denied knowledge of what he was carrying; nor did he claim that Insp Teng had used the word "heroin" in any of his questions. In short, none of the assertions put to Insp Teng by Tan's counsel were borne out in Tan's subsequent testimony. Moreover, the italicised words reflect Tan's acknowledgement that Insp Teng had read the statement back to him, and even more significantly, that according to the statement Tan had admitted that the drugs were "heroin number 3". Yet, he voluntarily signed the statement. Tan is not a simpleton. He passed his "O" level exams, even managing a pass mark for English.

49 When asked why, Tan's response was as follows:[note: 5]

Q: [W]hen Insp Teng told you that – or asked you to sign this statement in which, as he explained to you, you said, 'I believe this drug is – I believe this is heroin number 3', did you not – why did you not protest and say, 'No, I thought this drug was something else, so please write it down'? Because he used the word 'pei hoon' to you, so you knew he was saying you were carrying heroin?

A: From my observation and from what I've heard from the people there before the arrival of Jack Teng, I started to suspect that what Jack Teng had said was true.

Tan's reply to the Prosecution's question is both incongruous as well as incredible. The issue is not, as Tan's counsel has also submitted, whether Tan had started to suspect that the yellowish powder was in fact heroin, by dint of what he had heard and seen after his arrest; it is whether *Tan realised* the yellowish powder to have been heroin when he agreed to bring it into Singapore. Neither is one persuaded, as Tan's counsel appears to imply, that because Insp Teng *"told"* Tan that the drugs were heroin, Tan responded by affirming what was being said to be a fact. Tan's own evidence, highlighted above at [43], confirms that he knew and was conscious that Insp Teng was recording and translating his, *ie*, Tan's, own statement that "I believe it is heroin number 3". By appending his signature to a critical statement one can only infer, in the absence of any other plausible reason, that it represents a truthful account of his story. There has been no suggestion that the statement had not been properly interpreted. In any event, as stated earlier, he has a reasonable grasp of the English language. For completeness, I should add that I have found Insp Teng, who gave his evidence in a direct and forthright manner, a credible witness and accept his testimony that he had not suggested the Hokkien equivalent of heroin when he recorded Tan's responses to his initial queries.

50 What then is the import of these three statements? It will be recalled that Tan was reported to have said, in his first two statements, that the drugs seized were "number 3". Briefly put, the case

for the Prosecution is that "number 3" is the street term for heroin, and that by stating that the drugs were "number 3", Tan had explicitly acknowledged that he was importing heroin; the Defence's position, on the other hand, was that "number 3" had no significance by itself.

51 I am not persuaded by the Defence's interpretation of what Tan meant when he referred to the drugs as "number 3" drugs. First, it is true that "number 3" by itself does not carry any particular connotation. It literally refers to the numerical digit three. To accept the Defence's position at face value would, however, be to take Tan's statements completely out of context. Both statements were responses to questions pertaining to the nature of the packets of yellowish powder were, which in turn, by his own admission, Tan knew to be drugs. In this regard, Insp Teng's testimony was both compelling, instructive as well as entirely plausible:[note: 6]

> Court: '*Sar ho*'. Now, what does '*sar ho*' mean? Because if '*pei hoon*' already means heroin, why the '*sar ho*'?
>
> Witness: Your Honour, because there's different grading of heroin in the market, so you got different grading, so number 3 is one of the grades.
>
> …
>
> Court: And when you use these different grades like number 3 …, other than heroin, would you use the grades in relation to other types of drugs like opium or cannabis or *ganja*?
>
> Witness: Your Honour, from what I know, there's no grading for cannabis or ketamine, that sort of drugs.
>
> …
>
> Court: ***But heroin is the only drug used on the streets which has a number attached to it to signify purity?***
>
> Witness: ***That is from my limited knowledge, Your Honour.***
>
> [emphasis added in bold italics]

Defence counsel did not challenge this assertion. Therefore, it is reasonable to conclude that when a reference is made to illicit drugs, the phrase "number 3" would usually refer to one particular type: heroin. Given the circumstances under which Tan stated that the drugs were "number 3", I was persuaded that this was not an innocent reference but a clear and express admission that he was carrying heroin.

52 The second reason why I found Tan's counsel's submission that the reference to "number 3" did not amount to an acknowledgement of the nature of the drugs untenable is this: When cross-examined by the Prosecution, Tan confirmed that he knew that the drug he was carrying was called "number 3". According to Tan's evidence, the reason he told the various officers that the drugs were "number 3" was because this was what Uncle disclosed when Tan asked what the drugs were. Upon closer scrutiny and consideration of the evidence, I am of the view that such an assertion is devoid of even a scintilla of credibility. In fact, it runs counter to Tan's detailed narration of the events leading to his arrest in his unchallenged statement dated 20 August 2005 recorded by Assistant Superintendent of Police Herman Hamli. In that statement, he stated as follows (at para 21):

> [Uncle] then took out *3 big packets*, all wrapped in mahjong paper. I cannot see what was inside the packet. … I asked him what those packets are. *Uncle then held up 3 fingers in reply*. He then proceeded to open the wrappings. After the wrappings were opened, I saw that each package contained 3 plastic packet[s] containing yellow powder. Each packet was wrapped in some clear plastic. *I told him it was a lot. He told me that that it was not and just used his fingers to indicate seven.* I asked him how I am supposed to carry so many. Uncle said he will help me to strap the packets onto my body. [emphasis added]

Clearly, any person of average intelligence, including Tan who asserts that he did not know that "number 3" was the street name for heroin, would naturally assume that Uncle was referring to the common name for the drugs or their classification when he held up three fingers. It was decidedly not a reference to the number of packets of drugs. Uncle held up seven fingers just moments later, and Tan clearly acknowledged having understood that to the gesture reflected the number of packets he was supposed to carry. Why else should he readily infer that the three fingers related to the name or classification of drugs but not seven? Why else should he consistently tell the various police and CNB officers – including this court – that the drugs were "number 3"? He could have said that while he did not know what the drugs were, he *thought* they might have been called number 3. He failed to do so. Instead, he has intimated unequivocally time and time again that he knew that the drugs were called "number 3." In my view, Tan knew full well that he was carrying heroin and his statements indicating that the drugs were "number 3" were not, by any stretch of imagination, benign references to the numerical digit three. The Defence has failed dismally to disprove or displace the Prosecution's evidence that in the drug trade the reference to "number 3" points to heroin.

53 These inferences, if anything, are strengthened and sealed by the third statement recorded by Insp Teng, critical excerpts of which have been reproduced at [43] above. It amounts to a conclusive statement that he knew he was carrying heroin. I have already set out the reasons why I cannot accept Tan's counsel's submission that Insp Teng had deliberately or negligently misinterpreted or wrongly recorded Tan's statement (see [47] to [49] above). Accordingly, I have no hesitation in coming to the conclusion that Tan was fully aware that he was carrying heroin.

54 Two further points may be alluded to briefly. First, if, indeed, Tan neither knew what he was carrying nor what "number 3" referred to, why did he not state this critical fact in his various statements? For example, in his statement recorded on 19 August 2005 pursuant to s 122(6) of the CPC, all Tan stated was that "The driver does not know anything about the *pei hoon*. That is all". Tan's counsel suggested that perhaps Tan was tired and confused, particularly after being informed that he faced the death penalty. Be that as it may, it is noteworthy that he had the presence of mind to exculpate the taxi driver. Surely it would not have taken much more effort to further assert that he too likewise, was in the dark; or that he did not realise he was carrying heroin. In fact, by stating that the driver did not know of the *pei hoon*, Tan had implicitly articulated and affirmed his knowledge that the drugs were indeed heroin. Tan's counsel submitted that *pei hoon* simply referred to "white powder" and not heroin. This argument, with respect, is simply too contrived. Given that the drugs brought in by Tan were yellowish in colour, Tan's reference to them as "white powder" could not have been an entirely guileless description. It was on the contrary, a blatant reference to heroin. Indeed, Tan admitted in cross-examination that he knew that *pei hoon* was the Hokkien term for heroin:

> Q: Witness, what I am driving at is prior to your arrest, did you know that *pei hoon* was the Hokkien term for heroin?
>
> A: I roughly ***knew*** about it but I did not understand it fully.

[emphasis added in bold italics]

Even if I were to accepted that on 19 August 2005, Tan's mind was clouded and confused with the potential threat of a capital charge, it strikes me as odd that the day after in his statement dated 20 August 2005 or in his further statement on 25 August 2005 there was no mention that he was oblivious to the nature of the substance he had brought with him. Both these statements, particularly the former, were comprehensive and detailed and failed to reflect, in my opinion, anything other than a perfectly lucid mind. Not a single exculpatory reference was made professing innocence *despite knowledge that he faced the death penalty for importing heroin*. If indeed he appreciated that different drugs attracted different penalties (the essence of his defence was that he thought he was importing drugs that did not attract the death penalty), why did he not so much as suggest that he did not know what he was carrying? Even if he did not appreciate that the lack of knowledge of the nature of the drug imported constituted a legal defence, any person capable of producing a statement as lengthy and detailed as that dated 20 August 2005 would have immediately seized the opportunity, upon being aware that he was being charged for importing *heroin*, to state that he did not know that the drugs he had imported were heroin. Given that the burden of persuasion lies on the Defence, it bears the duty to adduce credible and cogent evidence that will prove, on a balance of probabilities, that Tan did not know that he had imported heroin. Tan's half-hearted concession that he "roughly knew" that the Hokkien term *pei hoon* was a reference to heroin is damning. This constitutes evidence, if not of actual knowledge then certainly of "wilful blindness" to the nature of the drug he was bringing into Singapore. In the circumstances, I find the statutory presumption of knowledge of the nature of the drugs has not been dislodged even remotely.

55 The second point is this. Even if I was wrong to hold that Tan knew (and/or has failed to disprove that he knew) that he was importing heroin, I was persuaded that he had been wilfully blind to the obvious fact that he was carrying heroin. The picture portrayed by the evidence is that of a man desperately in need of money. He approached, without instigation or encouragement, his friend to ask for *lobangs* in the drug trafficking business. He claims to have asked only to be involved in the trafficking of Ecstasy within Malaysia; but this alone inherently demonstrates both knowledge of the assortment of drugs available and of the potential severity of punishment for smuggling drugs into Singapore. Yet, despite his professed willingness to traffic only drugs that would attract a lower sentence, he did not flinch when Uncle purportedly responded by holding up three fingers when he asked what drugs he was carrying. It may be reasonably inferred from the fact that he was prepared to traffic Ecstasy that he knew what Ecstasy looked like. Moreover, he admitted during cross-examination that he read the newspapers regularly enough to know that trafficking heroin attracted the death penalty. Tan must have known that the yellowish powder could not have been Ecstasy; he even accepted it was "number 3". That Tan did not press on with his inquiry concerning the nature of the drug even while he asked a barrage of other questions regarding how he was going to carry so many packets of drugs, whether he looked too bulky because of the drugs, and where he was supposed to deliver them to, *inter alia*, shows that if he did not already know that he was carrying heroin, he was virtually certain that it was heroin but wilfully chose to turn a blind eye. This is not a case of a trafficker recklessly or negligently relying on an assurance that the drugs were not serious; Uncle had given what Tan himself understood as an *affirmative* indication that the drugs were "number 3" drugs. The inexorable inferences from all these facts is that Tan must have known clearly, or else, at the very least, chose to be wilfully blind to the fact that he was importing heroin.

Tan's demeanour at the Woodlands checkpoint

56 Tan's counsel submitted that a favourable inference should be drawn from Tan's calm demeanour at the Woodlands checkpoint even after he had been stopped and directed towards the search room. According to Tan's counsel, had Tan known he was carrying heroin, he would– quite

literally – have run for his life. That he did not, indicates, or so the argument goes, that while he knew he was in possession of something illegal, he did not expect that it was so grave as to cause him the loss of his life.

57 I am not persuaded that any inference – much less one that is favourable to Tan – ought to be drawn from the mere fact that Tan had not sought to escape or cause a commotion at the Woodlands checkpoint. There could be a multitude of reasons why an accused would choose not to run. One reason could be there were simply no reasonable opportunities or conceivable escape routes available to the accused. Yet another could be that an accused is hoping for exactly what Tan's counsel is now submitting, *ie*, that the courts will be more likely to draw an inference in his favour if he did not run than if he had. Alternatively, knowing that his game was up, an accused could have resigned himself to his fate; or he could literally have been "frozen" or paralysed by fear upon being caught in possession of the drugs. Constable Phua, it should be remembered, noted that Tan was nervous and shaking, presumably with fear and anxiety. I should caution that this does not mean that a favourable inference should never be drawn, especially if there are other circumstances or facts that also speak in the accused's favour; nor is it the case that a negative inference should automatically be drawn if an accused attempts to avoid arrest: see the recent Malaysian Court of Appeal decision in *Roslan bin Sabu @ Omar v Pendakwa Raya* [2006] 4 AMR 772 at 779.

58 In the present case, the evidence that Tan did not attempt to escape is neither here nor there. Tan's statement dated 20 August 2005 stated that he was "speechless" when Constable Phua tapped the bulky parts of his body and asked him what it was. He also claimed that he became "confused" and could not "remember what exactly happened after that". These facts hardly serve to illustrate that Tan had failed to seize any opportunity to escape simply because he did not think the drugs were serious. Rather, it points to only one of two conclusions. Either Tan had simply been too shocked to even contemplate the possibility of escape (especially since he had been assured by Uncle that the customs officers would not ask him to alight from the taxi), or he was speechless because he knew he was carrying heroin and that he faced the possibility of death. Neither of these inferences can assist Tan in his defence.

The quantum of payment

59 The final and flimsy string to the Defence's bow is that if Tan had indeed known that he was importing heroin, he would not have settled for the paltry fee of $1,000 (or $800 as he confirmed during trial). To put it bluntly, such an argument is hardly compelling. In this respect, I agree wholeheartedly with the Prosecution's submission that the acceptance of a low fee was probably motivated by his urgent and rapidly deteriorating financial situation. Moreover, given his professed ignorance of the drug trade, how could Tan have known what an appropriate fee was?

60 Most crucially, I am not persuaded by this argument because of Tan's own evidence in court:[note: 7]

> Court: At what point of time did you agree to the fee or remuneration for couriering the drugs? Was it before or after they were strapped on to your body?
>
> Witness: *At the time when the drugs were being strapped on to my body*.
>
> [emphasis added]

That the first – and only – mention of a fee surfaced while Uncle was strapping the drugs onto Tan signifies that there was no genuine attempt whatsoever to negotiate a fee for transporting the drugs.

Indeed, according to Tan's statement dated 20 August 2005, no bargaining took place over how much he was to be paid:

> I asked Uncle how much I will get for this errand. Uncle told that he has already given me RM 200 earlier. I told Uncle that the money has been spent on hotel accommodations. Uncle said that it was no problem. Uncle said that when I hand over packets to the person receiving it, he would give me S$1,000. I was not supposed to collect any other payment from this person except my fees for the errand. I asked him what happened if the other party does not pay me. Uncle assured me not to worry. At this point, Uncle's phone rang and he answered the call.

It is abundantly clear that Tan was willing to traffic drugs for Uncle, for any fee he perceived as acceptable. It is the tragic but inescapable truth that many, if not the majority, of naïve and desperate drug couriers are exploited and paid a pittance even though they are risking their lives. In the absence of other compelling evidence (such as a course of negotiation, or a custom dictating a certain price for certain drugs), the price at which a courier is willing to traffic drugs is rarely (if ever) a barometer to signal that the courier did not know the nature of the drugs he was trafficking.

Conclusion

61 As stated at the outset, it is common ground that the only issue in dispute is whether Tan knew the nature of the drugs he had imported into Singapore. As a result of the statutory presumption enacted under s 18(2) of the MDA, the burden of proof lies with the Defence to displace the presumption of knowledge of the nature of the drugs on a balance of probabilities. Tan's defence is that he did not know that he was importing heroin; he thought it was some other drug. In some cases, a bare denial might suffice to disprove knowledge. This is not one of those cases. In this case, Tan's consistent admissions to various police and CNB officers that the drugs in his possession were "number 3" drugs constitute inexorably damning evidence. The belated submission that this was simply a coincidence and that it did not refer to heroin is both counterintuitive and illogical. None of his assertions that the drugs were "number 3" were accompanied by protestations of ignorance as to what "number 3" meant. Moreover, the fact that he instantly and unhesitatingly connected Uncle's three fingers to the precise type of drugs in question unerringly points to knowledge of the nature of the drug. Even if these inferences seem insufficient, Tan's unambiguous statement to Insp Teng that he knew he was carrying heroin must surely seal the case against Tan. While Tan's counsel has tried to question the accuracy of the recorded statement, Tan's own evidence in court reveals that he was fully aware, when Insp Teng read the statement back to him, that he, *ie*, Tan, had admitted knowledge of importing heroin.

62 Even if I attached little or no weight to any of these statements in an attempt to be charitable, what should one make of the failure to plead ignorance in his later statements dated 20 and 25 August 2005? These statements were not challenged in any manner either for voluntariness or content. Furthermore, as I have already pointed out, they were detailed, comprehensive, lengthy and extremely cogent.

63 Counsel for Tan argued valiantly in respect of the CNB officers' difficulties in ascertaining that the drugs seized were heroin, then in respect of Tan's conduct at the Woodlands checkpoint and finally in respect of the paltry fee Tan had accepted to traffic the drugs. However, none of these arguments can even begin to sustain a plausible defence that Tan did not actually have knowledge of the nature of the drugs.

64 Having considered the totality of the evidence and especially the submissions made in Tan's defence, I have come to the unwavering conclusion that the presumption that Tan either knew that

he was importing drugs (or at the very least was wilfully blind to that fact) has not been rebutted on a balance of probabilities. Indeed, based on the evidence adduced, Tan's guilt is axiomatic even without the application of the statutory presumptions. He knew he was importing heroin. In the circumstances, I have convicted and sentenced Tan accordingly.

65 Tan is not a hapless victim caught in the web of inevitable circumstances beyond his control. He had real choices. While life may not have been kind to him, he was under no compulsion to risk his life by committing an illicit act for meagre returns. He has consciously chosen to run the legal gauntlet and to leave everything to chance. Given the concatenation of circumstances, Tan's plaintive plea that "I am just unlucky as this was my first time doing it and I was caught" is a tragic but futile one. The quantum of heroin involved is hardly insubstantial. With a street value of some $900,000 it carries with it the potential to ruin many lives and to cause incalculable pain and misery to the wider community.

[note: 1] Notes of Evidence ("NE") at p 33, lines 25-33; at p 34, line 1

[note: 2] NE at 59, lines 25-29

[note: 3] NE at p 94, lines 2-32; at p 95, lines 1-2

[note: 4] NE at p 220, lines 30-32; at p 221, lines 1-12

[note: 5] NE at p 224, lines 23-31

[note: 6] NE at 97, lines 7-11, 26-31; at 98, lines 10-12

[note: 7] NE at p 231, lines 19-22