# Koh Bak Kiang
# v
# Public Prosecutor

**[2016] SGHC 26**

High Court — Criminal Motion No 41 of 2014
Sundaresh Menon CJ
3 July; 11 September 2014; 8 October 2015

Criminal procedure and sentencing — Charge — Alteration

Criminal procedure and sentencing — Revision of proceedings

Criminal procedure and sentencing — Sentencing

26 February 2016

**Sundaresh Menon CJ:**

## Introduction

1 On 29 November 2007, the applicant pleaded guilty to three charges in respect of drug-related offences punishable under the Misuse of Drugs Act (Cap 185, 2001 Rev Ed) ("the MDA 2001"), which was the legislation then in force. Two were for trafficking in diamorphine (I shall refer to these as "the Disputed Charges") and one was for the possession of ketamine. The applicant, through counsel who was representing him at that time, in substance had qualified his plea of guilt by asserting in mitigation that, in respect of the Disputed Charges, he did not know the precise nature of the drug that he was trafficking. Despite this, however, his counsel also maintained in explicit terms

that "[the applicant] is *not* qualifying the plea". The district judge accepted the plea, convicted the applicant, and sentenced the applicant to an aggregate of 25 years' imprisonment and 24 strokes of the cane. An appeal against the sentence was subsequently dismissed.

2 On 23 April 2014, some six-and-a-half years after his plea of guilt, the applicant filed a motion which came before me. By this motion, the applicant sought an extension of time to appeal against his convictions on the Disputed Charges. Because of the time that had elapsed between his conviction and the filing of the motion, the applicant had already served a substantial period of his prison term and had also suffered the imposed punishment of caning. Upon reviewing the papers, it became evident to me that the relief sought by the applicant was unattainable for two reasons. First, an appeal does not lie against a *conviction* on a plea of guilt. Second, and in any event, the applicant had already brought a prior appeal against *sentence* which had been dismissed. However, it was also evident to me that the applicant's real complaint was that he ought not to have been convicted on the Disputed Charges because he did not know that he was carrying diamorphine at the time.

3 The procedural history leading to the filing of this criminal motion is as complicated as it is protracted, and I set it out in some detail at [7]–[22] below. It suffices to say that, by the time I came to my decision on the matter, the parties had reached a consensus on nearly every point of substance. In particular, by then, the parties had agreed that:

(a) the convictions on the Disputed Charges were wrongful because the applicant had in fact qualified his plea of guilt;

(b) the interests of justice lay in my exercising my revisionary powers to set aside the convictions for the two Disputed Charges;

(c) the convictions on the Disputed Charges should be substituted instead with reduced charges of attempted trafficking in a Class A controlled drug other than diamorphine; and

(d) the applicant should be resentenced on this basis.

I should add that even as to the final point on resentencing, while the parties differed on the exact sentence, the difference between their respective positions was modest.

4 After hearing the parties, I was broadly satisfied that the proposed course of action was fair and just in the circumstances. I therefore set aside the convictions for the Disputed Charges and convicted the applicant on the terms of the reduced draft charges that the Prosecution had tendered to the court ("the Amended Charges"). The applicant, through his counsel, had no objections to the Amended Charges as they were formulated, and accepted that they were appropriate in the circumstances. As for sentence, I considered that a sentence of 11 years' imprisonment and 12 strokes of the cane was appropriate for each of the Amended Charges and ordered that they run concurrently. The other conviction for the possession of ketamine, in respect of which the applicant had already been sentenced to 2 years' imprisonment, was to run consecutively with the sentences imposed for the Amended Charges. This resulted in an aggregate sentence of 13 years' imprisonment and 24 strokes of the cane.

5 These are the reasons for my decision.

**Background**

6 I will set out the background facts in three broad segments. The first concerns the applicant's plea of guilt at the hearing on 29 November 2007. I

will address this in some detail, covering the charges the applicant faced, the agreed statement of facts, his mitigation plea, and the district judge's decision. The second relates to the applications the applicant took out subsequent to his conviction and sentence. These include an appeal against his sentence and an application for a criminal revision. The third focuses specifically on the extension-of-time application that was before me.

### *The hearing on 29 November 2007*

*The charges*

7 At the hearing in the District Court on 29 November 2007, the Prosecution proceeded on the following charges against the applicant:

(a) trafficking in 14.99g of diamorphine under s 5(1)(*a*) of the MDA 2001 *vide* DAC 41589/2007 ("the first charge");

(b) being in possession of 24.8g of ketamine under s 8(*a*) of the MDA 2001 *vide* DAC 26073/2007 ("the second charge"); and

(c) abetting by entering into a conspiracy with one Chia Choon Leng (who was known as "Ah Hiang") to commit an offence of trafficking in 14.99g of diamorphine under s 5(1)(*a*) of the MDA 2001 read with s 109 of the Penal Code (Cap 224, 1985 Rev Ed) *vide* DAC 41588/2007 ("the third charge").

The first and third charges were the Disputed Charges.

8 A further four charges under the MDA 2001 were taken into consideration for the purposes of sentencing. These comprised one trafficking

charge, two possession charges, and one charge for the possession of utensils for drug consumption.

*The statement of facts*

9 The applicant was arrested by officers from the Central Narcotics Bureau ("the CNB") on the afternoon of 4 April 2007 at Katong Plaza, which is located along East Coast Road. Following his arrest, a blue plastic bag was recovered from his car, which was parked at the car park in Katong Plaza. The blue plastic bag contained 321.9g of a powdery substance, which was subsequently analysed by the Health Sciences Authority ("the HSA") and found to contain 25.07g of diamorphine. The applicant had transported the blue plastic bag from Serangoon Central to the car park at Katong Plaza earlier that day with the intention of delivering the diamorphine to an unknown destination. The drugs in the blue plastic bag formed the subject matter of the first charge (although the applicant was eventually only charged with trafficking in not less than 14.99g of diamorphine rather than the full amount of 25.07g).

10 On the same day, a white plastic bag containing 24.8g of a crystalline substance, which was analysed by the HSA and found to contain a total of 20.7g of ketamine, was discovered in the applicant's home. This formed the subject matter of the second charge.

11 The third charge related to a brown envelope containing a powdery substance that the applicant delivered to one Goh Joon Fong ("Goh") at a tattoo parlour in Roxy Square early on the morning of 4 April 2007. The applicant had delivered the brown envelope by placing it in one of the drawers in a piece of furniture at the tattoo parlour. The tattoo parlour was raided later that day and the brown envelope was recovered. The contents of the brown envelope were later analysed by the HSA and found to contain not less than 16.74g of

diamorphine (although, again, the applicant was eventually only charged with trafficking in 14.99g of diamorphine). The applicant had received the brown envelope from Ah Hiang two days earlier, on 2 April 2007, in the vicinity of Serangoon Central with instructions to deliver it to Goh.

*The written mitigation plea*

12 Counsel who was acting for the applicant at that time tendered a substantial written mitigation plea that set out the applicant's background as well as an account of the events leading to his arrest.

13 The applicant admitted to delivering drugs for Ah Hiang. He said he was responsible for collecting packages from Ah Hiang (or Ah Hiang's wife) and delivering them to the intended recipients.

14 The applicant claimed that a few days before his arrest, he had received an envelope from Ah Hiang before the latter went to Vietnam. Ah Hiang had instructed the applicant to go to a tattoo shop at Katong Plaza and to place it inside a drawer, which the applicant did in the early hours of 4 April 2007.

15 Later that same morning, the applicant received a call from Ah Hiang's wife, who told him to go to Ah Hiang's home in Serangoon North. When the applicant arrived, he handed her some money he had collected for Ah Hiang, and she passed him a plastic bag containing a number of sealed packages. He was told the intended recipient would contact him later. The applicant then placed the plastic bag in his car and drove to Katong Plaza, where he was arrested by CNB officers. He said he was horrified when he was told the sealed packages in the plastic bag contained heroin because Ah Hiang had allegedly assured him that he did not deliver "dangerous drugs", and dealt only in ice, ketamine and ecstasy.

16 The mitigation plea also contained further details as to how the applicant was deceived by Ah Hiang into carrying heroin and how the applicant had actually seen the customers take ice, ketamine and ecstasy from the packages he delivered, but never heroin.

17 The applicant's counsel read out the mitigation plea at the hearing on 29 November 2007. At the same time, he was recorded as saying explicitly that although the applicant was "*not qualifying his plea*", he maintained that he had been "*duped* into believing that he was not carrying dangerous drugs… [and was] prepared to testify against [Ah Hiang]" [emphases added]. The Prosecution did not contest the narrative that was set out in the mitigation plea at the hearing.

18 The applicant's counsel submitted that the applicant should receive the minimum sentence of 20 years' imprisonment and 15 strokes of the cane for each of the Disputed Charges.

*The district judge's decision*

19 The district judge took note of the applicant's mitigation but, as he explained in his grounds of decision, *Koh Bak Kiang v Public Prosecutor* [2008] SGDC 18 at [21]–[22], he found that the doctrine of wilful blindness was applicable on the facts of the case. He accordingly found that the requisite *mens rea* for trafficking would have been established despite the applicant's statement that he did not know he was carrying diamorphine. This was so even though there had been no averment to that effect in the statement of facts that had been admitted to by the applicant. Nor had there been any evidence led, on the basis of which, the district judge could have come to a view on this potentially material factual contention that had been advanced by the applicant. The district judge also noted that, in any event, the applicant's counsel had clarified that the applicant was not qualifying his plea, and therefore, the *mens rea* for trafficking

had been established. With respect, I cannot accept the portion of the district judge's reasoning on the issue of the qualification of the plea. The question of whether a plea has been qualified cannot be determined merely on the basis of assertions made by counsel during the hearing, but must be a conclusion drawn from an analysis of the *substance* of what was said by or on behalf of the accused person at the time he pleads guilty.

20 In the event, the applicant was convicted and sentenced to 23 years' imprisonment and 15 strokes of the cane in respect of each of the Disputed Charges (*ie*, the first and third charges), and 2 years' imprisonment in respect of the second charge. The sentences of imprisonment for the Disputed Charges were ordered to run concurrently while the sentence for the second charge was ordered to run consecutively, resulting in an aggregate sentence of 25 years' imprisonment and 24 strokes of the cane (the latter being the statutory maximum number of strokes).

### *The applicant's subsequent appeal against sentence and application for criminal revision*

21 The applicant filed Magistrate's Appeal No 250 of 2007, which was his appeal against the district judge's sentence. It was heard and dismissed on 4 April 2008. The applicant was still represented by counsel at the time of the appeal. The applicant maintained at the hearing that the mandatory minimum sentence of 20 years' imprisonment should have been imposed. While his counsel alluded to the fact that the applicant might have had a defence to the charge of trafficking, the applicant did not challenge his conviction either in his written submissions or during the course of oral argument before the High Court judge. The High Court judge dismissed the appeal against the sentences, observing that he would be "hard-pressed to say that the sentences imposed by the [d]istrict [j]udge were manifestly excessive".

22 On 5 September 2013, the applicant filed Criminal Revision No 1 of 2014 to set aside his conviction on the Disputed Charges. It was heard and dismissed by a High Court judge on 28 March 2014 without written grounds of decision being issued. This led to the present application being filed.

### *The extension-of-time application*

*The hearing on 3 July 2014*

23 The matter first came before me on 3 July 2014. The applicant was acting in person at the time. Ms Ong Luan Tze, who appeared on behalf of the Prosecution, noted that the application was procedurally defective, but it seemed to me that it was necessary to look at the substance of the matter, which was whether the applicant's conviction was unsafe in the circumstances. I articulated the points that concerned me and then adjourned the matter. I directed the Prosecution to consider what I had said, and to then inform the court and the applicant of its position prior to the next hearing.

*Subsequent correspondence*

24 On 12 August 2014, the Prosecution filed further submissions to set out the Public Prosecutor's views, which were as follows:

> (a) The *mens rea* required by law for a drug-trafficking offence, which was well settled by the time the applicant had pleaded guilty, was knowledge of the nature of the controlled drug referred to in the trafficking charge.
>
> (b) While an assertion by an offender in mitigation that he did not know the nature of the controlled drug in his possession would ordinarily qualify a plea of guilt, the applicant's case was far removed from such a

> situation. This was contended for primarily on the basis that he had elected not to claim trial to the charge and had instead instructed his counsel at that time to clarify, both at first instance and also on appeal, that he was not seeking to qualify his plea of guilt.

25 This reasoning seemed to me to be circular. On 14 August 2014, I accordingly invited the Prosecution to reconsider its position on whether the applicant should be allowed to take to trial the issue of whether he had knowledge that the drug he was trafficking in was diamorphine. This was especially since the Prosecution had accepted that if an offender charged with trafficking states in mitigation that he did not know the nature of the drug in his possession, this statement would ordinarily amount to the qualification of a plea of guilt.

26 On 1 September 2014, the Prosecution wrote to state that the Public Prosecutor would not object if the High Court were to exercise its revisionary jurisdiction to: (a) set aside the applicant's plea of guilt to the Disputed Charges; and (b) order a retrial for the purpose of determining whether the applicant is able to rebut the presumption of knowledge under s 18(2) of the MDA 2001. Section 18(2) of the MDA 2001 states that a person is presumed to know the nature of a controlled drug that he has in his possession.

27 The Prosecution also stated in that letter that if a retrial were ordered, they would proceed against the applicant on the charges as they had been reduced at the time he pleaded guilty in 2007. It should be noted that the applicant had originally faced capital charges but these had been reduced on the condition that he would not contest the charges. This concession from the Prosecution, which I think was very fairly and rightly made, was made to assure the applicant that he would not face the prospect of capital charges being revived

against him at the retrial. However, the Prosecution also urged this court to take the following two matters into account in formulating its orders. First, it would be gravely prejudicial to the administration of justice if the applicant were allowed to challenge facts that he had not previously disputed. Second, the four charges that had been taken into consideration for the purpose of sentencing were only stood down and not proceeded on because of the applicant's decision to plead guilty to the Disputed Charges. In the event that the convictions on the Disputed Charges were set aside, these stood down charges ought to be revived.

28 In the light of the Prosecution's letter, I appointed Mr Hamidul Haq as *amicus curiae* to assist the court in ensuring that the applicant, who was unrepresented at that time, was fully apprised of and understood the implications of the Prosecution's position, and also that he consented to the Prosecution's position as a whole before I made any order on the basis of the Prosecution's latest indications.

29 On 10 September 2014, which was a day before the adjourned hearing was scheduled to be heard, the Prosecution wrote to the court as well as to Mr Haq indicating that it would be inviting the court to consider making an order pursuant to s 257 read with s 268 of the Criminal Procedure Code (Cap 68, 1985 Rev Ed) ("the CPC 1985"), instead of ordering a retrial. The CPC 1985 was the applicable legislation governing criminal procedure at the time the applicant was first charged. Section 257(1) read with s 268 permits the High Court, in the exercise of its revisionary jurisdiction, to direct the District Court to take additional evidence if it thinks it necessary. Section 257(2) further stipulates that once the additional evidence is taken, "the District Court ... shall certify that evidence to the High Court", and that the latter shall then dispose of the matter "as soon as possible". The Prosecution suggested that the District Court should be allowed to take evidence on the specific issue of whether the

applicant knew that he had diamorphine in his possession at the time the offences in the Disputed Charges were allegedly committed. Once that had been done and the evidence certified, the High Court would be in a position to make any further orders that it deemed appropriate in the exercise of its revisionary jurisdiction.

*The hearing on 11 September 2014*

30 The applicant, in the meantime, engaged Mr Ramesh Tiwary as his counsel. At the hearing before me on 11 September 2014, the applicant (as well as Mr Haq) agreed with the foregoing suggestion made by the Prosecution. I therefore made an order in those terms.

*The recording of additional evidence*

31 The recording of the additional evidence before the District Court commenced on 3 June 2015. The applicant was represented in those proceedings (as he was in the subsequent hearings before me) by Mr Thrumurgan s/o Ramapiram. The Prosecution there sought to admit certain statements which the applicant had purportedly made to CNB officers. The applicant challenged the admissibility of those statements. The district judge recording the additional evidence therefore convened a *voir dire* (or a "trial-within-a-trial") to hear evidence relating to the admissibility of those statements. At the conclusion of the *voir dire*, the parties agreed that the recording of additional evidence should resume only after the High Court had determined the admissibility of those statements. The evidence that had been recorded thus far (including that in the *voir dire*) was accordingly remitted to the High Court for me to make a determination on the admissibility of the statements.

*The final hearing on 8 October 2015*

32 I thereafter directed that a hearing be fixed on 8 October 2015 for the purpose of determining whether:

(a) on the basis of the evidence led thus far (excluding the statements, the admissibility of which were disputed), there were grounds to grant the applicant's substantive prayer for the court's revisionary power to be exercised to set aside the plea of guilt; and

(b) if so, whether and what further directions were required.

The parties filed written submissions pursuant to my directions above on 28 September 2015. In the light of these submissions, as will be apparent later in this judgment, the areas of difference between the parties had narrowed very considerably.

**My decision**

33 In broad terms, I approached the issue before me by considering four separate matters:

(a) whether the applicant's convictions on the Disputed Charges should be set aside;

(b) what, if any, consequential directions would be required in that event;

(c) whether the court had the power to substitute the applicant's convictions on the Disputed Charges with convictions on the Amended Charges; and

(d) if the court had such power, what the appropriate sentence should be for the substituted convictions on the Amended Charges.

I address each of these in turn.

### *Whether the applicant's convictions on the Disputed Charges should be set aside*

34 The parties were in agreement that it was appropriate for me to exercise the High Court's revisionary power to set aside the convictions on the Disputed Charges. They initially differed as to what should follow from such an order, but that gap too had disappeared by the time of the hearing on 8 October 2015.

35 The well-established principles governing the exercise of revisionary powers by the High Court were summarised by me in *Public Prosecutor v Yang Yin* [2015] 2 SLR 78 as follows (at [25]–[26]):

> 25 Having decided that this court could exercise powers of revision in the present case, the next question that arose for consideration was whether I should exercise those powers. It is settled law that the threshold is that of "serious injustice" and that reversionary power should be exercised "sparingly" (see *Yunani bin Abdul Hamid v PP* [2008] 3 SLR(R) 383 at [47]). The requirement of serious injustice was explained by Yong Pung How CJ in the High Court decision of *Ang Poh Chuan v PP* [1995] 3 SLR(R) 929 at [17] in the following terms:
>
> > … there cannot be a precise definition of what would constitute such serious injustice for that would in any event unduly circumscribe what must be a wide discretion vested in the court, the exercise of which would depend largely on the particular facts. But generally it must be shown that there is *something palpably wrong in the decision that strikes at its basis as an exercise of judicial power by the court below*. [emphasis added]
>
> 26 A similarly high threshold for intervention was also recognised in *Knight Glenn Jeyasingam v PP* [1998] 3 SLR(R) 196 at [19] where it was stated:

> … The court's immediate duty is to satisfy itself as to the correctness, legality or propriety of any order passed and as to the regularity of any proceedings of that subordinate court. However, this is not sufficient to require the intervention of the courts on revision. The irregularity or otherwise noted from the record of proceedings must have resulted in *grave and serious injustice*. [emphasis added]

36 It was common ground by this stage that the applicant had in fact qualified his plea of guilt when he maintained in mitigation that he did not know that he was carrying diamorphine. It was also significant that, at the time that the district judge took the applicant's plea of guilt on 29 November 2007, the Court of Appeal had already delivered its decision in *Tan Kiam Peng v Public Prosecutor* [2008] 1 SLR(R) 1 ("*Tan Kiam Peng*").

37 In *Tan Kiam Peng*, which was handed down by the Court of Appeal on 28 September 2007, just two months prior to the date on which the defendant had entered his plea in this matter, the Court of Appeal held that the presumptions of possession and knowledge of controlled drugs set out in ss 18(1) and 18(2) of the MDA 2001 were not intended to dispense with the *mens rea* for drug offences (at [55]). The Court of Appeal instead concluded that the weight of the authorities pointed to the conclusion that the reference to *knowledge* in s 18(2) of the MDA 2001 was to knowledge not only that the drug concerned was a controlled drug but also knowledge that it was the specific drug which the accused was in possession of (at [81], [91] and [94]).

38 Any doubt as to what this entailed was put to rest by the subsequent decisions of the Court of Appeal in *Khor Soon Lee v Public Prosecutor* [2011] 3 SLR 201 ("*Khor Soon Lee*") and *Public Prosecutor v Mas Swan bin Adnan and another appeal* [2012] 3 SLR 527 ("*Mas Swan*"). I will review the facts of these decisions in more detail below (see below at [63]–[64]), but for now it

suffices to note that in both those cases the court proceeded on the basis that an accused person could rebut the presumption of knowledge in s 18(2) of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) ("the MDA 2008") if he were able to show that he did not know that the controlled drug he was carrying was the specific drug that was the subject of the charge. However, the Court of Appeal also made clear that that state of affairs would not lead to the conclusion that no offence had been committed. Instead, when the court accepts the accused person's testimony that he believed he was trafficking in a controlled drug other than the specific drug he was found to be in possession of, then such a person would be guilty of the offence of attempting to import or traffic in the drug that he *believed* to be in his possession.

39 At the hearing on 29 November 2007, the district judge was presented with:

(a) the applicant's plea of guilt to the Disputed Charges;

(b) the applicant's admission to the statement of facts which, as I have noted, was silent on the applicant's knowledge of the nature of the drugs being trafficked; and

(c) a mitigation plea in which the applicant clearly and unequivocally disclaimed such knowledge.

40 The applicant had said in his mitigation that he did not know he was in possession of diamorphine, and that he instead thought he had delivered a different type of Class A controlled drug, such as ice, ketamine or ecstasy. In these circumstances, and despite the assertion to the contrary by the applicant's counsel at that time, he *had in fact* qualified his plea of guilt by averring that he did not have the requisite *mens rea* for the Disputed Charges. It is also

noteworthy that the applicant maintained this position consistently throughout the many subsequent hearings until and including the last hearing before me on 8 October 2015.

41 A qualified plea of guilt is in fact a plea of not guilty: see the decision of the English Court of Appeal in *Regina v Durham Quarter Sessions, Ex parte Virgo* [1952] 2 QB 1 at 7. The plea of guilt of an accused person carries with it grave implications. By it, the accused waives his right to be convicted *only* after a full trial. In such abbreviated proceedings, the Prosecution no longer needs to adduce evidence to prove the accused person's guilt and the court may pass sentence on the accused without hearing a further word of testimony. The accused is also precluded from appealing against his conviction even if he subsequently comes to regret the plea, so long as the plea is not set aside.

42 Given these grave consequences that flow upon a plea of guilt, it is unsurprising that the law imposes a strict duty on the judge recording the plea to ensure that "the accused understands the nature and consequences of his plea and intends to admit without qualification the offence alleged against him" (see s 180(*b*) of the CPC 1985). This is not a mere technicality but a crucial procedural safeguard that is not to be taken lightly. Yong Pung How CJ said in *Koh Thian Huat v Public Prosecutor* **[**2002] 2 SLR(R) 113 that the safeguards in this procedure are threefold (at [29]):

> … The common law has evolved to include various procedural safeguards before a plea of guilt can be regarded as the basis for a conviction (*Ganesun s/o Kannan v PP* ([7] *supra*); *Lee Weng Tuck v Public Prosecutor* [1989] 2 MLJ 143). These safeguards require the convicting court to ensure that it is the accused himself who wishes to plead guilty. In *R v Tan Thian Chai* [1932] MLJ 74, Whitley J explained that this meant that an accused person should plead guilty or claim trial by his own mouth and not through his counsel. The second safeguard states that the onus lies on the judge to ascertain whether the accused understands the true nature and consequences of his plea. This

> goes hand in hand with s 180(*b*) of the CPC. Thirdly, the court must establish that the accused intends to admit without qualification the offence alleged against him. Procedurally, this means that the court is under a duty to ensure that all the ingredients constituting the offence are included in the SOF and admitted without qualification. In so doing, the court must also ensure that the accused is aware of the nature and consequences of such an admission. All three safeguards must be complied with before a court can convict on a guilty plea.

43 The subjective views of the judge or of the Prosecution as to the *factual* guilt of the accused or the likelihood of the success of his potential defences are irrelevant to the propriety of the accused's plea of guilt. As V K Rajah JA (as he then was) observed in *XP v Public Prosecutor* [2008] 4 SLR(R) 686 at [98], the guilt of the accused is determined "on the sole basis of legal proof and not mere suspicion or intuition". What follows from this is that a court may only come to the conclusion that the accused is guilty when there is a *legal* basis for it. A qualified plea does not afford such a basis. Of course, where, as here, the accused has nonetheless been convicted, it will still be necessary to show that there has been serious injustice when invoking the court's revisionary power. Notwithstanding the defect in the plea, if there is already sufficient evidence on record that would entitle the court to convict the accused, then it is conceivable that this threshold might not be crossed. If, however, the qualified plea of guilt were made before a trial has commenced or even at the very start of trial, it would be an unusual case if the revisionary powers were not invoked in the absence of any other steps being taken to resolve the issue, such as remitting the matter for evidence to be taken, as was done in this case.

44 At the first hearing before me on 3 July 2014 (see [23] above), the Prosecution argued that even though the applicant had not been tried, there was ample basis to find, at the very least, that he had been wilfully blind to the nature of the drugs in the Disputed Charges and therefore that he would not be able to rebut the presumption under s 18(2) of the MDA 2001 *based on the statement*

*of facts and his mitigation plea alone*. However, as I pointed out to the parties then, the statement of facts did not contain any assertion that the applicant knew the nature of the drugs, while the applicant's mitigation plea contained an express averment to the contrary.

45 It is true that the matter had been remitted to the District Court to take evidence on the state of the applicant's knowledge. But as both parties were by this stage in agreement that the convictions on the Disputed Charges could not stand, I was satisfied that it was appropriate for me to exercise the revisionary powers of the High Court to set aside the plea of guilt and quash the convictions on the Disputed Charges. As a result of this, it was also not necessary for me to make a ruling on the admissibility of the applicant's statements.

***What, if any, consequential directions were required***

46 In written submissions filed on 28 September 2015, the Prosecution initially reiterated its earlier position (see [26]–[27] above) that there should be a limited retrial of the Disputed Charges. The Prosecution pointed to potential prejudice that it might suffer if the applicant were permitted to raise new defences at the retrial other than what had been in dispute concerning his *mens rea*. They raised the following points: (a) the physical exhibits, including the seized drugs, had been destroyed pursuant to court orders for disposal; and (b) the memory of witnesses in relation to the details of events such as the circumstances surrounding the arrest of the applicant and the seizure of evidence would have faded substantially.

47 The applicant, on the other hand, argued that there should be no retrial for three reasons. First, the evidence had already been tested in the proceedings to record additional evidence in the District Court and a re-run would serve no purpose. Second, because of the passage of time, which the applicant submitted

was not due to any fault of his own, much of the evidence would no longer be available. Finally, a retrial would also mean that the punishment the applicant had already suffered would not be accounted for. The applicant contended that he should either be acquitted or that the proceedings in respect of the Disputed Charges should be stayed indefinitely. Alternatively, he submitted that he should be convicted on the lesser charge of attempting to traffic in a Class A drug other than diamorphine, as was done in the cases of *Khor Soon Lee* and *Mas Swan*.

48 Although the difference between the parties had been completely bridged by the time of the hearing, some observations may be made here. This was a case where the applicant had been convicted and sentenced on a qualified plea of guilt. Had it been appreciated at that time that the plea of guilt had been qualified, in all probability the applicant could and would have been tried and the evidence would thus have been tested. A retrial would therefore ordinarily be the usual course for the court to take. There were two further factors that weighed in favour of a retrial. First, there is a strong public interest in prosecuting alleged offenders for crimes as serious as those alleged in the Disputed Charges. Secondly, the fact is that, even on the applicant's own account, he was *not innocent* of drug trafficking. Even if he proved his version of facts at trial, he would only be innocent of trafficking in *diamorphine* but, without question, he would be found to have committed the offence of attempting to traffic in ice, ketamine or ecstasy (see [38] above).

49 However, it is undeniable that a very long time would have elapsed between the applicant's original conviction on 29 November 2007 and a new trial, if one were to be ordered. Both parties submitted that they stood to be disadvantaged by the passage of time.

50 It became apparent that the most sensible course in these unusual circumstances was the final one suggested by the applicant, which was to substitute, in the place of the convictions for the Disputed Charges, charges for attempted trafficking of a Class A drug other than diamorphine under s 5(1) read with s 12 of the MDA 2001. In a letter dated 1 October 2015, the Prosecution indicated that it was amenable to the Disputed Charges being substituted in that manner, and for the corresponding sentences to be revised accordingly. By 8 October 2015 there was no longer any dispute that this was the most appropriate way forward.

***Whether the court had the power to substitute the applicant's convictions on the Disputed Charges with convictions on the Amended Charges***

51 Before proceeding in this manner, however, I had to be satisfied that it was open to the court as a matter of law to substitute the Disputed Charges for the Amended Charges under the CPC 1985. The powers of the High Court on revision are set out in s 268 of the CPC 1985. Section 268 permits the High Court to exercise, among other things, the powers conferred by s 256 of the CPC 1985, which sets out the powers of the court hearing an appeal. Section 256(*b*) of the CPC 1985 states that the court may:

> in an appeal from a conviction —
>
> > (i) reverse the finding and sentence and acquit or discharge the accused or order him to be retried by a court of competent jurisdiction or committed for trial;
> >
> > (ii) alter the finding, maintaining the sentence, or, with or without altering the finding, reduce or enhance the sentence; or
> >
> > (iii) with or without the reduction or enhancement and with or without altering the finding, alter the nature of the sentence …

52 This provision was considered in *Garmaz s/o Pakhar and another v Public Prosecutor* [1996] 1 SLR(R) 95 ("*Garmaz*"), where the Court of Appeal confirmed, pursuant to a criminal reference, that s 256(*b*) of the CPC 1985 empowered the High Court, when hearing an appeal from a conviction made after a trial, to amend a charge and convict the accused person on the amended charge. The Court of Appeal emphasised, however, that this power should be "exercised with great caution and not to the prejudice of the accused" (at [29]).

53 *Garmaz* concerned an appellant who had claimed trial. But the court's power to amend a charge and convict an accused on the amended charge has also been exercised in cases where the accused had pleaded guilty in the court below. In *Public Prosecutor v Henry John William and another appeal* [2002] 1 SLR(R) 274, the Prosecution brought a criminal revision to substitute the charges which the accused had pleaded guilty to in the District Court, while the accused appealed against his sentence. Yong Pung How CJ granted the application for criminal revision but dismissed the appeal. It was clear that the charges were erroneously worded as they purported to charge the accused for non-existent offences. In granting the application, the learned Chief Justice took the view that the defects in the charges arose from a failure to ensure that the wording of the charges conformed to the wording of the statute. This, he opined, was analogous to a situation where the charge as framed failed to disclose the necessary elements of the offence (at [9]). Yong CJ then turned to consider if an amendment would cause the accused any injustice and concluded that it would not. Apart from the fact that the accused indicated he had no objections, it was plain, first, that the offences were made out on the facts and, second, that the accused would not be prejudiced in terms of his sentence since the sentences meted out for these charges were ordered to run concurrently with the sentenced imposed for the other (correctly worded) charges. For these reasons, Yong CJ granted the application for criminal revision by amending the two defective

charges and convicting the accused on them. However, he found no reason to disturb the sentences already imposed.

54 By contrast, Yong CJ declined to exercise the same power in *Public Prosecutor v Sinsar Trading Pte Ltd* [2004] 3 SLR(R) 240. There, the accused had pleaded guilty by way of letter to an offence of selling or offering for sale a hazardous substance without a licence. Such a course was not in fact permitted in the circumstances of the case as the offence in question was one which attracted a maximum imprisonment term of two years' imprisonment and s 137(2) of the CPC 1985 only permitted a plea of guilty to be entered *in absentia* where the offence is either punishable only by fine or by imprisonment for a term not exceeding three months. In addition, the charge as drafted was plainly defective. Yong CJ therefore set the charge aside. The learned Chief Justice then considered that even though the High Court could amend the charge as long as there was no prejudice to the accused, he declined to do so because there was no reliable evidence before him as to the concentration of the hazardous substance in question, which meant the charge could not be amended with certainty. Yong CJ remitted the case to the Subordinate Courts for a plea to be taken from the accused after the charge had been appropriately amended by the Prosecution.

55 In all the circumstances, I am satisfied that under the CPC 1985, the High Court has the power to set aside a conviction, substitute a charge, and resentence the accused on the basis of the amended charge even where the accused has pleaded guilty. I also observe that any want of clarity in the CPC 1985 has been resolved in the present Criminal Procedure Code (Cap 68, 2012 Rev Ed) ("the CPC 2012"), as the powers of the appellate court and, in consequence, the powers of the court on revision pursuant to s 401(2) of the CPC 2012, are much more clearly defined. Section 390 of the CPC 2012, which

sets out the powers of an appellate court in hearing an appeal against a sentence imposed following a plea of guilt, states as follows:

> …
>
> (3) Notwithstanding section 375 and without prejudice to the generality of subsections (1) and (2), *where an accused has pleaded guilty and been convicted on such plea,* the appellate court may, upon hearing, in accordance with section 387, any appeal against the sentence imposed upon the accused —
>
> > (*a*) *set aside the conviction;*
> >
> > (*b*) *make such order in the matter as it may think just; and*
> >
> > (*c*) *by such order exercise any power which the trial court might have exercised.*
>
> (4) Notwithstanding any provision in this Code or any written law to the contrary, when hearing an appeal against an order of acquittal or conviction or any other order, *the appellate court may frame an altered charge (whether or not it attracts a higher punishment)* if satisfied that, based on the records before the court, there is sufficient evidence to constitute a case which the accused has to answer.
>
> (5) If the offence stated in the altered charge is one that requires the Public Prosecutor's consent under section 10, then the appeal must not proceed before such consent is obtained, unless the consent has already been obtained for a prosecution on the same facts as those on which the altered charge is based.
>
> (6) *After the appellate court has framed an altered charge, it must ask the accused if he intends to offer a defence.*
>
> (7) If the accused indicates that he intends to offer a defence, the appellate court may, after considering the nature of the defence —
>
> > (a) order that the accused be tried by a trial court of competent jurisdiction; or
> >
> > (b) convict the accused on the altered charge (other than a charge which carries the death penalty) after hearing submissions on questions of law and fact and if it is satisfied that, based on its findings on the submissions and the records before the court, and after hearing submissions of the accused, there is sufficient evidence to do so.

> (8) *If the accused indicates that he does not intend to offer a defence, the appellate court may —*
>
> > (*a*) *convict the accused on the altered charge (other than a charge which carries the death penalty) if it is satisfied that, based on the records before the court, there is sufficient evidence to do so; or*
> >
> > (*b*) order that the accused be tried by a trial court of competent jurisdiction, if it is not satisfied that, based on the records before the court, there is sufficient evidence to convict the accused on the altered charge.
>
> (9) At the hearing of the appeal, the appellate court may on the application of the Public Prosecutor, and with the consent of the accused, take into consideration any outstanding offences which he admits to have committed for the purposes of sentencing him.
>
> (10) *The sentencing powers of the appellate court in the exercise of its appellate jurisdiction shall not exceed the sentencing power of the trial court whose judgment, sentence or order is appealed against.*
>
> [emphasis added in italics]

56 Under the Amended Charges, which the Prosecution prepared in substitution of the Disputed Charges, the applicant was charged with two counts of attempting to traffic in Class A controlled drugs other than diamorphine under s 5(1)(*a*) read with s 12 of the MDA 2001. In the particulars of the charges, it was stated that he had done so by delivering not less than 14.99g of diamorphine, which he *believed* to be Class A controlled drugs other than diamorphine, from Serangoon Central to Katong Plaza on 4 April 2007.

57 I pause to make two observations on the Amended Charges. First, the Prosecution had reflected the amount of diamorphine that had been trafficked in as not less than 14.99g, even though the actual amount involved was higher.

58 Second, based on the sentencing ranges, a substitution of the convictions for the Disputed Charges with convictions for the Amended Charges would inevitably result in a substantial reduction in the sentences meted out to the

applicant. An offence of attempting to traffic in a Class A drug which is not specified in the second column to the Second Schedule of the MDA 2001 (of which diamorphine is one) carries a minimum sentence of 5 years' imprisonment and 5 strokes and a maximum sentence of 20 years' imprisonment and 15 strokes. By contrast, the Disputed Charges — which related to the trafficking of a drug specified in the second column — attracted a minimum sentence of 20 years' imprisonment and 15 strokes and a maximum sentence of life imprisonment and 15 strokes. The applicant was in fact sentenced to 23 years' imprisonment and 15 strokes of the cane in respect of each of the Disputed Charges. There was therefore no risk of the applicant being exposed to a *higher* sentence than the one he had already been serving.

59 The Amended Charges were tendered on 8 October 2015. I also invited the parties to agree to consequential amendments to the statement of facts if any were necessary. The High Court's powers under s 256(*b*) of the CPC 1985 are sufficiently broad to encompass the power to amend the statement of facts (see *Annis bin Abdullah v Public Prosecutor* [2004] 2 SLR(R) 93 at [21]). The parties, however, were agreed that it was not necessary to take this step. The applicant accepted that the Amended Charges as framed were appropriate and supported by the evidence before the court. The applicant (both personally, and through his counsel, Mr Thrumurgan) confirmed that he did not intend to submit a defence to the Amended Charges.

60 I was satisfied that, in all the circumstances, no prejudice would be occasioned to the Applicant and, accordingly, I convicted the Applicant on the Amended Charges.

61 Finally, the parties also agreed that it was open for this court to resentence the applicant on the basis of the facts set out in the statement of facts

with due regard also to the applicant's mitigation plea. I therefore proceeded on this basis and it is to this matter I now turn.

***What the appropriate sentence should be for the substituted convictions on the Amended Charges***

62 As to sentencing, both parties agreed that the most appropriate sentencing precedents could be found in the Court of Appeal's decisions in *Khor Soon Lee* and *Mas Swan.*

63 In *Khor Soon Lee*, the accused was charged with and convicted of importing 27.86g of diamorphine into Singapore. The trial judge first found that the accused had failed to rebut the presumption of knowledge under s 18(2) of the MDA 2008. Additionally, he also found that the accused had ample time to ascertain the identity of the drugs he was carrying but did not, and was therefore wilfully blind to the fact that those drugs were diamorphine. On appeal, the accused maintained that while he knew he was importing controlled drugs into Singapore, he had no knowledge that his cargo contained diamorphine. The Court of Appeal allowed the appeal and found that the accused had not been wilfully blind but had at most been negligent or reckless in failing to check the package. The court also found that it followed in the circumstances that the accused had succeeded in rebutting, on a balance of probabilities, the presumption of knowledge under s 18(2) of the MDA 2008. An editorial note to the reported judgment states that the Court of Appeal subsequently convicted the accused on an amended charge of attempting to import Class A controlled drugs (other than diamorphine) in contravention of s 7 read with s 12 of the MDA 2008 and sentenced the accused to 18 years' imprisonment and 8 strokes of the cane.

64 *Mas Swan* concerned two persons, Mas Swan and Roshamima, who had been tried together on a joint charge of importing not less than 21.48g of diamorphine into Singapore under s 7 of the MDA 2008. The trial judge convicted Roshamima but acquitted Mas Swan on the basis that the latter believed he was carrying ecstasy pills rather than diamorphine. The Prosecution appealed against Mas Swan's acquittal but only to the extent that it was argued that the judge should have convicted Mas Swan on an amended charge of attempting to import ecstasy instead. The Court of Appeal held that, on the facts, Mas Swan had committed the offence of attempting to import ecstasy into Singapore under s 7 read with s 12 of the MDA 2008 and convicted him of the amended charge put forward by the Prosecution. The Court of Appeal held that it was inappropriate to use precedents for the importation of ecstasy to determine the sentencing range because, although what was *attempted* to be imported was ecstasy, what was *in fact* imported was diamorphine, a much more serious Class A controlled drug. For that reason, the Court of Appeal considered that *Khor Soon Lee* was the more appropriate precedent to consider, and sentenced Mas Swan to a sentence of 15 years' imprisonment and eight strokes of the cane (at [57]–[59]).

65 Mr Francis Ng for the Prosecution submitted that the 6g difference in the quantum of diamorphine actually trafficked in *Khor Soon Lee* and *Mas Swan* explained why the latter accused was given a lighter imprisonment term (a term of 15 years' imprisonment rather than 18). Applying this to the present case, where the charge was for the importation of not less than 14.99g of diamorphine, the appropriate duration of the prison term would be about 12 years' imprisonment. However, he proposed a higher number of strokes in the present case on the basis that: (a) the applicant faced more charges than the accused persons in the precedent cases; (b) there were four other charges which the applicant agreed should be taken into consideration for purpose of sentencing;

and (c) the applicant had a previous drug antecedent in 2005 for which he had been sentenced to a term of 6 months' imprisonment. Mr Ng therefore submitted that a fair sentence for each of the Amended Charges would be 12 years' imprisonment and 12 strokes of the cane. Mr Ng further contended that the sentence of imprisonment for one of the Amended Charges should run consecutively with the sentence for the possession of ketamine (*ie*, the second charge, which was not disputed) for a total sentence of 14 years' imprisonment and 24 strokes of the cane.

66 Before I turn to Mr Thrumurgan's arguments, I pause to observe that the sentencing framework that was devised in *Khor Soon Lee* and *Mas Swan* is one that is driven by the desire to do substantial justice in circumstances where the court finds that there has clearly been serious criminal conduct, but where the original charge put forward does not adequately deal with the facts as found. These cases therefore seek to take due regard of the *consequences* of the actual conduct that had transpired in developing the appropriate sentence for the offence that the offender may properly be convicted of.

67 Against that background, I turn to the submissions by counsel for the applicant. Mr Thrumurgan submitted that the court should be mindful that *Khor Soon Lee* and *Mas Swan* dealt with the offence of drug importation, which carries a higher maximum imprisonment term of 30 years and not 20 years. It was further contended that even if there were aggravating circumstances in the applicant's case, this would not justify an increase of four strokes from the benchmark sentence of 8 strokes for each offence (as was imposed in *Khor Soon Lee* and *Mas Swan*). On that basis, Mr Thrumurgan contended that the applicant, having already suffered 24 strokes, had suffered an additional 8 strokes in excess of what he deserved through no fault of his own. Mr Thrumurgan accordingly submitted that this should merit a significant discount to the

sentence of imprisonment. He contended that the sentence for each of the Amended Charges should be 10 years' imprisonment and 8 strokes of the cane. He agreed that the sentences for the Disputed Charges should run concurrently and that sentence for the second charge should be ordered run consecutively, resulting in a global sentence of 12 years' imprisonment and 16 strokes of the cane. Mr Thrumurgan accepted that, but for this factor, Mr Ng's proposed sentence in respect of the term of imprisonment would have been in order.

68 I begin with some observations on the arguments made before me. Mr Thrumurgan advanced the point that the applicant had suffered a wrong "through no fault of his own". As will be apparent from the narrative that I have outlined (see [17] and [21] above), the truth is that although the applicant had maintained in his plea of mitigation that he did not know the nature of the drug, it was expressly put forward in the context of his counsel's submission at the same time that the plea of guilt was not being qualified. Indeed, before the trial judge as well as the appellate judge, the applicant's position was that he should get the mandatory minimum of 20 years' imprisonment for each of the diamorphine charges. Hence the present sequence of events is to be seen in this context. As noted above at [48], had it been appreciated that the plea of guilt had been qualified at the time it was taken, it is likely that the matter would have proceeded to trial. Indeed, one ventures to suggest that the desire to avoid a trial was the reason why the applicant's counsel at that time was at pains to make it clear that the applicant was not qualifying the plea of guilt. Moreover, before me, the fact was that both parties agreed that even though a retrial would ordinarily have been the appropriate course to take, they also agreed that that would have been less than optimal in the circumstances, having regard to the lapse of time that took place between the events and when the matter came before me.

69 In all circumstances, it seemed to me that this case was readily distinguishable from both *Khor Soon Lee* and *Mas Swan* in one important respect. In those cases, the accused had maintained their innocence throughout and claimed trial and the courts had concluded that the Prosecution had failed to prove beyond a reasonable doubt that the accused knew the nature of the drugs in their possession. By contrast, the applicant's assertion that he did not know the nature of the drugs was not tested at trial because the applicant elected not to claim trial to the charges. It was only raised at the time of his mitigation plea and although his counsel had said the plea was not being qualified, the fact of the matter is that it did give rise to a procedural defect in the conviction, which, for that reason, could not stand. For this reason, I could not fully accept Mr Thrumurgan's submission that the applicant had suffered a wrong "through no fault of his own".

70 At the end of the day, the parties accepted, and I agreed, that, considering the practical difficulties with the issue of knowledge being tried so many years after the fact, the present course of action was being taken as an effort on the part of all the parties to achieve substantial justice having regard to the applicant's acceptance that he did commit a serious drug trafficking offence — just not the one he was charged with. In all the circumstances, I considered that a term of imprisonment of 11 years' imprisonment and 12 strokes was appropriate for each of the Amended Charges. I ordered these to run concurrently and also ordered that the existing conviction for possession of ketamine with a sentence of two years' imprisonment run consecutively with one of them, giving rise to an aggregate sentence of 13 years' imprisonment and 24 strokes of the cane.

**Conclusion**

71 It has been a long process to get to this point. I wish to register my appreciation for the approach that Mr Thrumurgan and Mr Ng have taken to the case. I would like to also express my thanks for the assistance rendered to the court by Mr Haq and Mr Tiwary, in ensuring that the applicant was duly advised, and especially Mr Thrumurgan, whose submissions I found to be extremely helpful.

Sundaresh Menon
Chief Justice

R Thrumurgan and A Sangeetha (Trident Law Corporation) for the applicant;
Francis Ng and Quek Jing Feng (Attorney-General's Chambers) for the respondent.