Quek Hock Lye v Public Prosecutor
[2012] SGCA 25

Case Number	: Criminal Appeal No 20/2010
Decision Date	: 09 April 2012
Tribunal/Court	: Court of Appeal
Coram	: Chao Hick Tin JA; Andrew Phang Boon Leong JA; V K Rajah JA
Counsel Name(s)	: Eugene Thuraisingam and Daniel Chia (Stamford Law Corporation) for the appellant; Lee Lit Cheng with Dennis Tan and Darryl Soh (Deputy Public Prosecutor) for the respondent
Parties	: QUEK HOCK LYE — PUBLIC PROSECUTOR — PHUTHITA SOMCHIT

Criminal Procedure and Sentencing – Appeal – Plea of Guilt

Constitutional Law – Attorney-General – Prosecutorial Discretion

Constitutional Law – Equality before the law

Constitutional Law – Judicial Power

[LawNet Editorial Note: (a) The decision from which this appeal arose is reported at [2011] 3 SLR 719. (b) The application in Criminal Motion No 25 of 2014 was dismissed by the Court of Appeal on 13 November 2014. See [2015] SGCA 7.]

9 April 2012 Judgment reserved.

Chao Hick Tin JA (delivering the judgment of the court):

Introduction

1 The appellant, Quek Hock Lye ("Quek"), a 48-year-old male Singapore citizen, was convicted by the judge ("the Judge") in the High Court of possession of not less than 62.14 g of diamorphine ("the seized drugs"), a controlled drug specified in Class A of the First Schedule of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) ("the Act") in furtherance of a criminal conspiracy with one Winai Phutthaphan ("Winai"), a 25 year-old male Thai national, to traffic the seized drugs, an offence under s 5(1)(a) read with s 5(2) of the Act. Quek was sentenced to the mandatory death penalty under s 120B of the Penal Code (Cap 224, 2008 Rev Ed) ("the PC") read with s 33 of the Act (see *Public Prosecutor v Phuthita Somchit and another* [2011] 3 SLR 719).

2 This is Quek's appeal against his conviction and sentence.

Background

Original and amended charge

3 The charge on which Quek was convicted pertained to his participation in a criminal conspiracy with Winai to traffic in not less than 62.14 g of diamorphine ("the amended charge"). However, it should be noted that at the commencement of the trial at the High Court, Quek was in fact jointly

charged with one Phuthita Somchit ("Somchit"), a 37-year-old female Thai national who, in addition to Winai, was identified as a party to the criminal conspiracy to traffic the seized drugs ("the original charge"). The amended charge preferred against Quek by the Judge was distinct from the original charge in only two respects:

(a) Somchit was no longer a named co-conspirator; and

(b) Quek, rather than Somchit, was stated to have been in possession of the seized drugs.

4 At this juncture, we should point out that Winai was a named party to the criminal conspiracy alleged in the original charge preferred against Quek and Somchit as well as in the amended charge forming the subject matter of this appeal. However, prior to the commencement of Quek's trial before the Judge, Winai pleaded guilty to a wholly separate charge of possession of not less than 14.99 g of diamorphine in furtherance of a criminal conspiracy with Somchit and Quek to traffic in the stated quantity of the drugs ("Winai's charge"). [note: 1] Winai's testimony was used by the Prosecution in the trial against Quek and Somchit.

5 By way of background, we ought to state that Somchit was distantly related to Winai and was also Quek's girlfriend. As per the original charge, Quek and Somchit were jointly tried in a 17 day hearing before the Judge. Although Quek claimed trial, he elected to remain silent when called upon to enter his defence. On the 17th day of trial, having conducted a thorough assessment of the evidence adduced before the court, the Judge made a number of findings which resulted in the charges preferred against Quek and Somchit being amended. In particular, the Judge made the following findings of fact and law:

(a) From her demeanour in the witness box and the consistency of her evidence, Somchit was a witness of truth. [note: 2]

(b) Somchit did not have actual knowledge and was not wilfully blind as to the *nature* of the drug. [note: 3] Somchit had proved on a balance of probabilities that she did not know the nature of the drug.

(c) Somchit had rebutted the presumption of knowledge raised by s 18(2) of the Act. [note: 4]

6 Accordingly, the Judge acquitted Somchit of the original charge. However, exercising his power under s 175(2) of the Criminal Procedure Code (Cap 68, 1985 Rev Ed) ("CPC"), the Judge amended the charge against Somchit and convicted her of attempting to traffic in a controlled drug under Class C of the First Schedule of the Act ("the separate charge"). On 2 September 2010, Somchit was sentenced to 9 years' imprisonment.

7 Having convicted and sentenced Somchit under the separate charge, the Judge further exercised his powers under s 163(1) of the CPC, and preferred the amended charge against Quek (see [3] above). The following exchange took place when the amended charge was read out to Quek: [note: 5]

Court: How do you plead?

Interpreter Ang: He pleads guilty.

Court: Wow! Technically, I'm not supposed---*anyway, I'll---I'll not accept the plea, all right*. Are you ready to be tried on the altered charge?

[Quek]: I don't want to be tried on this charge.

Court: Don't want to be tried? No, are you ready to be tried?

[Quek]: I wish to plead guilty, I want to plead guilty, Sir.

Court: Yes, are you ready to be tried? Is there any reason why the trial should not continue---proceed?

[Quek]: I hope that this case can continue---continue.

[emphasis added]

8 Notwithstanding the Judge's reluctance to accept Quek's plea of guilt, upon being called to enter his defence, Quek chose not to call any witnesses or tender any documents in his defence to the amended charge. In the result, the Judge convicted Quek of the amended charge, after he was satisfied, having assessed the evidence already adduced, that the evidence overwhelmingly supported it. As noted above (see [3]), the elements of the amended charge were identical to the original charge with the exception of the removal of any reference to Somchit in relation to the alleged criminal conspiracy as well as the amendment to state that Quek, instead of Somchit, was in possession of the seized drugs. As will be shown later, these changes did not affect the sufficiency of the weight of the evidence adduced in support of the amended charge (below at [9]-[13]; [32]-[40]).

Material facts in support of the amended charge

9 The facts supporting both the original and amended charges can be found in the statement of agreed facts ("SAF") which was signed by Quek and tendered before the Judge pursuant to s 376(1) of the CPC. [note: 6] In accordance with s 376(3) of the CPC, the SAF could be treated as an admission of facts for the purposes of the present appeal.

10 The following facts were undisputed before the Judge as well as before this Court. At the material time, Quek, Winai and Somchit resided at Block 21 Bedok Reservoir View #01-02, Aquarius by the Park, Singapore ("the Aquarius apartment"). Quek had, using his forged driving licence, entered into a lease agreement dated 6 September 2008 with the owner of the Aquarius apartment to rent it. On 3 October 2008, Quek was arrested by a team of officers from the Central Narcotics Bureau ("CNB") and was led to the Aquarius apartment where he was searched. Amongst other things, the following were recovered from his person:

(a) One bunch of four keys attached to a key tag with the words "21 Aquarius #01-02" written on it; and

(b) Cash amounting to a total of S$ 5948.00.

11 The CNB officers thereafter conducted a search of the Aquarius apartment and seized 124 packets of granular substances which were later established to contain not less than 62.14 g of diamorphine. Drug paraphernalia was also found in the apartment which formed the objective evidence before the Judge to show that the drugs in the apartment were intended for repacking for sale rather

than for personal consumption.

12 Quek made a contemporaneous statement on 3 October 2008 and a cautioned statement under s 122(6) of the CPC on 4 October 2008. Later, five long statements were recorded from him under s 121 of the CPC on 7, 8 and 9 October 2008 and 22 January 2009 (hereinafter all 7 statements taken by the police will be referred to as "statements"). In his statements, Quek unequivocally admitted to having possession of the seized drugs, the intent to traffic in them as well as the requisite knowledge of their specific nature. At the trial, Quek's statements were admitted into evidence without any challenge being made by him as to their voluntariness. [note: 7] Before us, Quek also did not dispute any of the above-mentioned facts or the Judge's findings in relation to his possession of the seized drugs, his knowledge of their specific nature or his intention to sell them.

13 Somchit's unchallenged evidence corroborated the evidence against Quek when she testified that it was Quek who procured the seized drugs and had directed her to repack them for sale to customers. [note: 8] Furthermore, Winai had also testified that Quek had instructed him to deliver the seized "white substances" to Quek's customers. [note: 9]

First ground of appeal

14 Two separate grounds of appeal are raised by Quek before this Court. First, in the petition of appeal filed by Quek's counsel ("Counsel"), he contended that the Judge had erred in law in proceeding to hear the charge against Quek after he had pleaded guilty to the amended charge. Quek's specific complaint was that the Judge had failed to follow the procedural safeguards set out in ss 139 and 187 of the CPC in relation to the recording of his plea of guilt ("the plea of guilt ground"). [note: 10]

The applicable law

15 The relevant sections of the CPC which Counsel has relied upon are reproduced below for ease of reference:

> **Committal for trial when accused wishes to plead guilty**
>
> **139**. Where an accused who is brought before an examining Magistrate states that he wishes to plead guilty to the charge preferred against him, the Magistrate shall record the facts of the case presented by the prosecution and if the facts disclose sufficient grounds for committing the accused, he shall satisfy himself that the accused understands the nature of the charge and intends to admit without qualification the offence alleged against him and, on being so satisfied, shall commit the accused for trial for the offence.
>
> **Commencement of trial**
>
> **187**. (1) When the court is ready to commence the trial, the accused shall appear or be brought before it and the charge shall be read and explained to him and he shall be asked whether he is guilty of the offence charged or claims to be tried.
>
> (2) If the accused pleads guilty the plea *shall* be recorded, or if he claims to be tried the court shall –
>
> (a) proceed to try the case; or

(b) if the accused was committed for trial under section 139, order him to be brought before an examining Magistrate for a preliminary inquiry.

[emphasis added]

16 Pursuant to s 187 of the CPC, where the accused wishes to plead guilty his plea of guilt *shall* be recorded prior to his formal conviction of the charge. Counsel, while noting that the Judge's failure to refer to Quek's plea of guilt in his grounds of decision ("GD") was a "technical" breach of s 187 of the CPC, went on to argue that this omission by the Judge cast doubt on whether the accused had received a fair trial in so far as the amended charge was concerned. Further, Counsel characterised the Judge's mind when hearing the amended charge, after Quek had entered his plea of guilt, as being "tainted by a reasonable suspicion of bias". [note: 11] With respect, we do not understand the sense in this argument. First, while the Judge rejected Quek's plea of guilt, he proceeded to assess the evidence already adduced against Quek on the amended charge and having determined that such evidence had established a *prima facie* case against him on the amended charge, called on Quek to enter his defence by calling such witnesses as he might wish to do. In these circumstances, we do not see how it could be validly argued that he did not receive a fair trial on the amended charge. Secondly, there is no requirement at law that a judge should refer to the accused's plea of guilt in his GD. Having said that, the notes of evidence of the trial had clearly captured Quek's plea and the Judge's rejection of the same. Thirdly, the Judge did not act on his plea of guilt. Instead, he called on Quek to call such witnesses as he might wish in his defence. This may explain why the Judge at [50] of his GD stated, though not entirely accurately, that Quek "claimed trial". However, we do not see how this discrepancy is in any way material or sufficient to amount to bias, either apparent or actual. It was only after Quek decided not to call any witnesses that the Judge, having assessed the evidence adduced, convicted Quek of the amended charge. Counsel's interpretation of the obligations imposed by ss. 139 and 187 of the CPC failed to have regard to what had in fact transpired, *i.e.* the guilty plea was rejected by the Judge. While we can see some basis for this argument to be advanced in a case where a judge had acted on the guilty plea (but on which we do not offer a concluded view), it can have no place where the plea is *not* accepted. While we recognise that the Judge could have, in his GD, made reference to the guilty plea which he had rejected, non reference could hardly have given rise to any impropriety or injustice. What the Judge did was to proceed as if the plea had never been uttered, a course which he was entitled to take.

17 In this regard, it is also important to note that the *guiding purpose* of the requirements in ss. 139 and 187 of the CPC is the avoidance of any prejudice to the accused. It is for this reason that the court is required to comply with a number of safeguards when recording any plea of guilt (see *Rajeevan Edakalavan v Public Prosecution* [1998] 1 SLR(R) 10 at [24] and [25]). Counsel did not and, in our view, could not argue that Quek had suffered any prejudice by the Judge's decision to reject his plea and to offer him the opportunity of calling for any additional evidence in defence to the amended charge. In our opinion, the Judge had followed the spirit and purpose of the two highlighted sections of the CPC. To our mind, the approach which the Judge took, following his rejection of the guilty plea, was clearly prompted by his desire to ensure that Quek received a fair trial. Accordingly, the first ground of appeal is dismissed as being wholly without merit.

Second ground of appeal

18 At the first hearing of this appeal on 18 August 2011, in response to queries from the Bench, Counsel also made arguments which raised questions as to the propriety of the amended charge on which Quek was convicted. That was in the light of the fact that Winai's charge, on which he had been convicted on, related to "not less than 14.99 grams of diamorphine" whereas the amended charge against Quek related to "not less than 62.14 grams of diamorphine". Counsel also made further

arguments with respect to certain attendant constitutional issues touching on the principles of equal treatment and protection under the law as well as the exercise of judicial power. As a result, this Court directed that further written submissions on those issues be made by the parties. We will first examine the constitutional issues.

Article 12(1) argument

19 Counsel argued that the Public Prosecutor's actions in charging Winai with possession of not less than 14.99 g of diamorphine while charging Quek with the total seized quantity of not less than 62.14 g of diamorphine are in breach of Article 12(1) of the Constitution of the Republic of Singapore (1999 Rev Ed) ("the Constitution") as both Winai and Quek essentially fell within the same class of accused persons and shared the same legal guilt, relying here on Lord Diplock's speech in the Privy Council decision of *Ong Ah Chuan and another v Public Prosecutor* [1979-1980] SLR(R) 710 ("*Ong Ah Chuan*") at [35], [36] and [39]. Counsel also sought to distinguish the line of cases following *Teh Cheng Poh v Public Prosecutor* [1979] 1 MLJ 50 ("*Teh Cheng Poh*") on the basis that unique to the present case was the fact that (a) both Winai and Quek were charged for trafficking in diamorphine and (b) both were in possession of the same amount of diamorphine. Furthermore, Counsel also took the position that the Court of Criminal Appeal was wrong in *Thiruselvam s/o Nagaratnam v Public Prosecutor* [2001] 1 SLR(R) 362 ("*Thiruselvam*") as it failed to consider the definition of "class" as elucidated by Lord Diplock in *Ong Ah Chuan*.

20 Counsel also argued that Winai and Quek fell within the same legal class for the following reasons: [note: 12]

a. First, [their offences arose] from the same factual matrix;

b. Second, [the offences relate] to the exact same amount of drugs trafficked; and

c. Third, [the offences arose] from effectively the same act/wrongdoing.

The argument seemed to flow from the premise that as an individual's personal circumstance and moral blameworthiness were not relevant for determining whether two or more individuals who had committed the same act fell within the same class, *Thiruselvam* should not be followed. In the alternative, Counsel argued that *Thiruselvam* should be distinguished from the present case because Winai and Quek were charged for "essentially the same crime, a conspiracy to traffic in diamorphine". In contrast, in *Thiruselvam*, one accused was charged for trafficking and another for abetment. In essence, Counsel's point was that: [note: 13]

> The act of prosecutorial discretion in formulating the artificial charge so as to discriminate against offenders of the same class violates Article 12 of the Constitution.

Analysis of Article 12

21 Art 12(1) of the Constitution states as follows:

> 12.—(1) All persons are equal before the law and entitled to the equal protection of the law.

22 The issue in the present case is whether Art 12(1) of the Constitution was violated by the Public Prosecutor's exercise of prosecutorial discretion in preferring different charges against Quek and Winai, parties to the same criminal conspiracy. In this regard we must refer to the recent decision of this Court in *Ramalingam Ravinthran v Attorney-General* [2012] SGCA 2 ("*Ramalingam v AG*"), which

has shed further light on this issue. To better understand the decision in *Ramalingam v AG*, it is necessary for us to first set out the argument made by the applicant there. Similar to the present case, there the applicant argued that Art 12(1) of the Constitution was violated when the Attorney-General, in his capacity as the Public Prosecutor, charged the applicant (*i.e.* in a similar position to Quek) with a capital charge while the other member of the same criminal enterprise, one Sundar Arujunan ("Sundar"), was charged with a non-capital charge. In fact, similar to Winai's treatment in the present case, Sundar was charged with trafficking in a reduced quantity of the controlled drugs found, just below the threshold at which it would attract the mandatory death penalty on conviction. In the present case, while Quek was charged with trafficking in all 62.14 g of the seized drugs, Winai was charged only with *not less* than 14.99 g despite being part of the same criminal enterprise and underlying agreement. Thus, the position of Quek is identical to that of the applicant in *Ramalingam v AG* and Quek has also essentially raised the same constitutional argument as that was raised by the applicant in *Ramalingam v AG, i.e.* whether the exercise of prosecutorial discretion which resulted in differential treatment of two offenders involved in the same criminal enterprise constituted a breach of Art 12(1) of the Constitution.

23 In *Ramalingam v AG*, this Court had discussed many of the cases relied on by Quek's Counsel in this appeal. First, the Privy Council decision in *Ong Ah Chuan* was held to be irrelevant to the question of constitutionality of the Attorney-General's exercise of prosecutorial discretion as *Ong Ah Chuan* dealt with a different question, *i.e.*, the application of Art 12(1) of the Constitution to legislation (see *Ramalingam v AG* at [19]-[20] and [40]). The excerpts from *Ong Ah Chuan* which Counsel relied upon were in fact made in the context of criminal statutes providing for the mandatory death penalty. In *Ramalingam v AG* this Court pointed out that the test to be applied to the principle of equality before the law was not the same when it was being applied in relation to the exercise of prosecutorial discretion. The distinction has to be drawn because in addition to the legal guilt of the offender, the Public Prosecutor is obliged to consider a wide range of factors (see *Ramalingam v AG* at [63]):

> [the] moral blameworthiness, the gravity of the harm caused to the public welfare by his criminal activity, and a myriad of other factors, including whether there is sufficient evidence against a particular offender, whether the offender is willing to co-operate with the law enforcement authorities in providing intelligence, whether one offender is willing to testify against his co-offenders, and so on – up to and including the possibility of showing some degree of compassion in certain cases.

Accordingly, the appellant's dogged reliance on *Ong Ah Chuan* as a basis for contending that the exercise of the Public Prosecutor's discretion should be restricted to the sole question of the legal guilt of an offender is both ill founded and patently incorrect. *Teh Cheng Poh* and the subsequent line of cases, including *Thiruselvam*, were extensively discussed in *Ramalingam v AG* (see [40] of *Ramalingam v AG*). This Court in *Ramalingam v AG* noted that the circumstances in *Thiruselvam* were different from those in *Teh Cheng Poh* in the sense that the latter case did not concern the treatment of two offenders but that of a single offender. Further, in *Teh Cheng Poh*, the Public Prosecutor, in exercise of his prosecutorial discretion chose to bring a charge against the applicant which attracted capital punishment instead of under a different law where the punishment would have been less severe. Notwithstanding the identified factual differences between *Thiruselvam* and *Teh Cheng Poh*, this Court in *Ramalingam v AG* nevertheless held that Art 12(1) of the Constitution was not infringed if there were grounds for the Public Prosecutor to bring different charges of unequal gravity against two or more offenders in the same criminal enterprise. This Court did not think that the fact that in *Thiruselvam* the co-offenders were charged with different offences, one for abetting and the other for trafficking, constituted a material circumstance to distinguish *Ramalingam v AG* from *Thiruselvam*.

24 The fact situation in the present case is similar to that in *Ramalingam v AG*, where both the

accused persons in question were charged with identical offences of drug trafficking, save for the quantity of drugs involved, resulting in significantly different consequences as far as the punishment which could be imposed was concerned. However, the divergent consequences faced by accused persons in the same criminal enterprise from the prescribed punishments (whether mandatory or not), flowing from their respective charges by the Public Prosecutor, are not *per se* sufficient to found a successful Art 12(1) challenge. To the contrary, this divergence in sentence experienced by accused persons is but a consequence of the broader constitutionally vested discretion in the Public Prosecutor in preferring charges against accused persons. Accordingly, applying the principles as elucidated in *Ramalingam v AG*, Quek's Art 12(1) challenge fails as the issue is *not* whether the Public Prosecutor *can* exercise his discretion to prefer a lower quantum of the same seized drugs between co-offenders but rather whether this decision was made for legitimate reasons which, *inter alia*, include the considerations outlined above. It is the latter part of this analysis, *i.e.* an accused's complaint of illegitimate reasons operative on the mind of the Public Prosecutor in exercise of his discretion which gives rise to the metaphorical key capable of unlocking a successful Art 12(1) challenge of this nature.

25 At this juncture we would highlight the fact that unlike in *Ramalingam v AG*, Counsel did not make any arguments concerning the relative culpability of Winai and Quek which could have enabled this Court to review the Public Prosecutor's decision to treat Quek differently from Winai. In this regard, the following passage in *Ramalingam v AG* is of particular assistance, at [70]:

> ... the Applicant must specifically produce *prima facie* evidence of bias or the taking into account of irrelevant considerations by the Attorney-General in differentiating, pursuant to his prosecutorial discretion, between the charges against the Applicant and the charges against Sundar. In this regard, the mere differentiation of charges between co-offenders, even between those of equal guilt, is not, *per se*, sufficient to constitute prima facie evidence of bias or the taking into account of irrelevant considerations that breaches Art 12(1). Differentiation between offenders of equal guilt can be legitimately undertaken for many reasons and based on the consideration of many factors ... It is for the offender who complains of a breach of Art 12(1) to prove that there are no valid grounds for such differentiation. In the absence of proof by the offender, the court should not presume that there are no valid grounds in this regard.

As such, we find that Quek has not discharged his burden of establishing a *prima facie* case that the Public Prosecutor has infringed Art 12(1) of the Constitution in charging him with a capital charge while sparing Winai of the same. In any event, we find that on the evidence, Quek was really the brain behind the criminal enterprise and thus the main culprit. In addition, Winai's willingness to testify against Quek and Somchit was a relevant consideration which could have operated on the mind of the Public Prosecutor in preferring separate charges against Quek and Winai. Accordingly, the Art 12(1) argument is dismissed.

Article 93 argument

26 We turn now to the second constitutional issue and the argument here is that the "selection of punishment for members of a class of offenders is for the Judiciary by virtue of Article 93 of the Constitution". [note: 14] Counsel's point is that the Public Prosecutor's actions in formulating a drug trafficking charge against Winai, which was *just under* the amount necessary to trigger the mandatory death penalty, contravenes the doctrine of separation of powers and breaches Article 93 of the constitution as it "[*usurps*] *the judicial function of sentencing*". [note: 15] Borrowing the language of *Ong Ah Chuan*, Counsel took the position that so long as the two accused persons were of the same legal guilt, the "manipulation" of the quantum of seized drugs in their respective charges infringed Art 93 of the Constitution. Counsel averred that the manner in which the Public Prosecutor

acted in relation to Winai and Quek amounted to reserving to itself the ability to determine who should face the death penalty and who need not, even though both Quek and Winai were "charged for the same offence". [note: 16] Counsel seemed to be suggesting that the decision to charge one offender with a non-capital charge and another with a capital charge fell within the jurisdiction of the court and that the Public Prosecutor would be acting unconstitutionally by virtue of Art 93 of the Constitution if it were to be permitted to "manipulate" the quantum of seized drugs resulting in a non-capital charge being preferred against a co-offender. Counsel also argued that this objection would not arise so long as both co-offenders were charged with separate offences such as trafficking and abetment, as in *Thiruselvam*.

Analysis of the Article 93 argument

27 We would first observe that Counsel's complaint against the Public Prosecutor's exercise of his discretion which could result in two offenders in the same criminal enterprise being liable for different sentences could also arise in other situations (*i.e.* non drug-related) where mandatory penalties are involved. For example the same objection could be taken when the Public Prosecutor decides to charge A with murder and B with culpable homicide where both A and B were part of the same criminal enterprise. If the charge was proven beyond a reasonable doubt, the court would be compelled to sentence A to the mandatory death penalty whereas B would only be liable for life imprisonment. Another instance would be where two persons were acting in concert to damage property. One could be charged for mischief and the other for vandalism, the latter of which would attract mandatory caning as the prescribed punishment. Thus, if Counsel's submission is valid and ought to be accepted, it would have implications in relation to all offences which carry mandatory penalties and not just offences which attract the mandatory death penalty.

28 Counsel's argument characterising the Public Prosecutor's exercise of his discretion in relation to Quek and Winai as unconstitutional disregards the fact that Art 35(8) of the Constitution confers upon the Attorney-General, as the Public Prosecutor, a constitutional power to exercise his discretion in individual cases, which must necessarily impact the sentencing range available to the court in relation to the particular charge preferred. In a mandatory penalty scenario, this impact is further heightened as the court, in sentencing, is not in a position to take into account the mitigating circumstances. However, the question of usurpation of judicial power does not arise. It is not the function of the court to prefer charges against an accused brought before it. The court exercises its judicial power in relation to the charge or charges brought by the Public Prosecutor against an accused person. The court may only exercise its power to amend the charge in the light of the evidence adduced before it. The powers and jurisdiction of the courts as set out in Art 93 of the Constitution are distinct and separate from the powers of the Public Prosecutor under Art 35(8) of the Constitution.

29 In the scheme envisioned under the Constitution, the judiciary does not possess the power or jurisdiction to formulate or prefer charges against accused persons; that is the constitutional provenance of the Attorney-General. As rightly pointed out by the Prosecution, only when the charge is preferred against the accused can the court exercise its judicial power over the proceedings. The limitation of the sentencing range or sentence (in a mandatory penalty scenario) available to the court is a necessary consequence following the charge preferred. While the court has the power to review the considerations taken into account by the Public Prosecutor in preferring the charge, to decide whether or not the evidence adduced by the Public Prosecutor proves the charge beyond a reasonable doubt and to amend the charge in light of the evidence before it, it is not for the court to determine what charge should be preferred against an accused person irrespective of whether the charge would invoke a mandatory penalty. This principle applies equally to the situation where multiple parties are involved in a criminal enterprise. It is the very essence of prosecutorial discretion that due

weight is given to all relevant circumstances or considerations prior to the formulation of a charge. Arts 93 and 35(8) of the Constitution should be construed harmoniously, with neither being subordinate to the other. Counsel's submission would mean that Art 93 of the Constitution overrides Art 35(8) of the Constitution. His characterisation of the Public Prosecutor's exercise of his discretion as "manipulation" would appear to stem from his misconception of Art 12(1) of the Constitution wherein the Public Prosecutor is limited to preferring charges solely on the basis of legal guilt. This submission has been shown to be incorrect (see [21]-[25] above).

30 For completeness, we will briefly comment on the Privy Council decision in *Mohammed Muktar Ali & Anor v The Queen* [1992] 2 AC 93 ("*Muktar Ali*") which is relied upon by Counsel. In *Muktar Ali*, the court was concerned with the question of whether a provision in the Mauritius Dangerous Drugs Act 1986 which conferred on the Director of Public Prosecutions the discretion to determine the court which a drug importer should be tried, infringed the principle of separation of powers. There, if the court selected by the Director of Public Prosecutions was the Supreme Court and if the offender was found to be guilty of drug trafficking he would be sentenced to death. Contrarily, if he was tried in an Intermediate or District Court, the offender would be sentenced to a fine and a term of penal servitude. The Privy Council found that since the discretion to select the court enabled the Director of Public Prosecutions to, in effect, select the penalty to be imposed, the relevant provision of the Mauritius Dangerous Drugs Act 1986 was unconstitutional.

31 Similar to the discussion in *Ong Ah Chuan*, it would be noted that *Muktar Ali* concerned an ordinary legislative provision rather than the exercise of prosecutorial discretion, a power conferred and governed by the Constitution itself, which is the issue in the present appeal. In fact, as pointed out by the Prosecution, Lord Keith of Kinkel expressly stated at pp 103-104 of *Muktar Ali* that the case was concerned with the particular legislative provision's impact on the court before which a person was tried. His Lordship clearly articulated at p 104 of *Muktar Ali* that"[i]n general, there is no objection of a constitutional or other nature to a prosecuting authority having discretion of that nature". In fact, the Privy Council expressly stated that the prosecuting authority's discretion to prefer a more serious charge rather than a less serious one against an accused would not give rise to any constitutional objection. Counsel's reliance on this case was accordingly misplaced. In the present case, it is the Prosecutor's discretion which Counsel seeks to challenge, a discretion conferred under the Constitution. The situation here is completely different from that in *Muktar Ali*. The Public Prosecutor's decision to prefer separate charges on members of the same criminal enterprise does not interfere with the court's judicial power. Accordingly, Quek's second ground of appeal is dismissed.

The use of criminal conspiracy in Quek's amended charge

32 Having disposed of the two constitutional issues, what remains to be addressed is the issue of the propriety of the amended charge on which Quek was convicted. This issue may, in turn, involve the consideration of the following two sub-issues:

(a) Whether Quek and Winai could be said to be parties to the same criminal conspiracy to traffic diamorphine despite being separately charged for different quantities of the same parcel of seized drugs found in their possession; and

(b) If not, whether this Court should exercise its discretion to amend the charge on which Quek was convicted and to offer him an opportunity to plead thereto.

33 As a starting point it bears noting that, like abetment and attempt, criminal conspiracy is defined as an incomplete or inchoate crime in ss 120A and 120B of the PC as follows:

Definition of criminal conspiracy

120A. —(1) When 2 or more persons agree to do, or cause to be done —

(a) an illegal act; or

(b) an act, which is not illegal, by illegal means, such an agreement is designated a criminal conspiracy:

Provided that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof.

(2) A person may be a party to a criminal conspiracy notwithstanding the existence of facts of which he is unaware which make the commission of the illegal act, or the act, which is not illegal, by illegal means, impossible.

Punishment of criminal conspiracy

120B. Whoever is a party to a criminal conspiracy to commit an offence shall, where no express provision is made in this Code for the punishment of such a conspiracy, be punished in the same manner as if he had abetted such offence.

34 It is trite law that a charge of criminal conspiracy requires *two or more persons* in agreement to do or cause to be done an illegal act (or an act, which is not illegal, by illegal means) which in the present case is the trafficking of 62.14 g of diamorphine. As such, a finding of the existence of a co-conspirator, in the present case Winai, is necessary in order for this Court to uphold Quek's conviction under the amended charge. In this regard, two questions arise:

(a) Whether the evidence before this Court supports a finding that there was an underlying agreement between Winai and Quek to traffic the seized drugs; and

(b) If so, notwithstanding the Court's satisfaction with the evidence in relation to the underlying agreement, whether the difference in the precise quantity of the seized drugs in Quek and Winai's respective charges *per se*, undermines a positive finding of criminal conspiracy?

The existence of an underlying agreement between Quek and Winai to traffic the seized drugs

35 The critical question is whether there was indeed an agreement between Winai and Quek to traffic in 62.14 g of the diamorphine found. On this question, the statement of facts to which Winai pleaded guilty to under the separate charge brought against him (*i.e.* Winai's charge above at [4]), for a lesser quantum of not less than 14.99 g of the seized drugs, states as follows ("Winai's SOF"): [note: 17]

At all material times, Quek, Somchit and Winai had agreed to perform specific tasks in the process of procuring, packaging and delivering diamorphine for the purposes of trafficking. Pursuant to this agreement, Somchit was in possession of 62.14 grams of diamorphine at the unit of 3 October 2008 for the purpose of trafficking, which is an offence under Section 5(1)(a) read with Section 5(2) of the Act.

36 Winai's SOF also details the various packets of controlled substance found and the HSA analysis

of the seized drugs which established that a total of 62.14 g of diamorphine was found at the Aquarius apartment. By admitting to the SOF, and by pleading guilty to the separate charge brought against him, Winai admitted to having the knowledge and the intention to traffic in the total quantum of the seized drugs. The evidence adduced at the trial against Quek also amply demonstrated that such an underlying agreement existed between Quek and Winai. It also bears noting that at his appeal, Counsel did not canvas the argument that there was any deficiency in the evidence supporting the existence of an agreement between Winai and Quek to traffic in the total quantity of the seized drugs. Indeed, we do not see how he could as the evidence overwhelmingly shows that Quek and Winai had agreed to traffic in the total quantity of the seized drugs.

The issue of congruity arising from Quek and Winai's respective charges

37 On the present facts, the incongruity in the charges faced by Quek and Winai does not impact their underlying agreement to traffic in the 62.14 g of diamorphine. This is for the simple reason that Winai's charge specifying a lower quantum of diamorphine merely reflects the Public Prosecutor's discretion to prefer a less serious charge, and we do not see how that could have any impact on or affect the primary factual question, namely, the existence of an agreement between Quek and Winai to traffic in the full 62.14 g of diamorphine. As noted above at [35]-[36], substantial evidence was adduced before this Court in satisfaction of this crucial question. In this regard, the following statement in Stanley Yeo, Neil Morgan and Chan Wing Cheong, *Criminal Law in Malaysia and Singapore* (LexisNexis, 2nd Ed, 2012) at p 918, discussing the burden of proof on the Public Prosecutor setting out to establish criminal conspiracy, is germane:

> [34.54] … It is also sufficient for the prosecution to prove that there are two or more persons guilty of conspiracy even though the other person involved *may still be at large, dead, unknown, o r for some reason acquitted on a technical ground*. However, a conviction for criminal conspiracy is improper if it is inconsistent with the acquittal of the other alleged co-conspirator such as absence of proof of an agreement between the parties.
>
> [emphasis added]

38 In *Pradumna Shriniwas Auradkar v State of Maharashtra* 1981 Cri. L. J. 1873, the applicant, A, argued that he could not be convicted of criminal conspiracy as his only co-conspirator, B, was acquitted of the same offence. In dismissing the appeal, similar to the present case, the court held at [11] that the conspiracy had been clearly established on the facts and as the acquittal of B was on a purely technical ground, the appellant could not be exonerated in the circumstances. The court also held that to prove criminal conspiracy, it was unnecessary that the co-conspirator be tried and/ or convicted. Crucially, as no authority had been presented to suggest that A should be acquitted *ipso facto*, following from B's acquittal, his conviction could not be challenged. As such, the acquittal of B *per se* did not affect A's conviction under the criminal conspiracy charge. One must however note that it is the *reason* supporting the acquittal of a co-accused that the court must pay attention to.

39 In the House of Lords decision in *Director of Public Prosecutions v Shannon* [1975] AC 717, a similar issue was canvassed wherein the conviction of the accused person was challenged on the basis that his co-conspirator had been acquitted. The appellant argued that at least two persons must be proved to be guilty of the same criminal conspiracy before anyone could be convicted of the same. The argument that "if A and B alone were indicted together and 'tried together' for conspiracy ... that 'both must be convicted or both must be acquitted'" was considered by their Lordships at 722. The court opined as follows at 745 and 754:

> So the question arises whether if A and B (but no others) are charged with conspiracy and if A,

with full intention, pleads guilty and if B pleads not guilty and if B's trial is postponed, but, taking place at some subsequent time, results in his acquittal, the law requires the conviction of A (on his own confession) must be set aside. If it must, the law will be producing a strange result. No one could know better than A whether he did or did not agree with B to do something wrongful and if, fully understanding what he was doing, and having skilled advice to guide or assist him, he acknowledged by way of confession to the court that he had so agreed, the law might seem to be artificial and contrariwise which required that because the charge against B failed A must be held to be not guilty when he himself knew and had admitted that he was guilty.

…

… [W]here there is a charge of conspiracy against A and B (the charge not alleging any conspiracy with anyone else) and where A is first separately tried and pleads or is found guilty and where B is later separately tried and acquitted, *such acquittal does not of itself warrant setting aside the conviction of A* …

[emphasis added]

40 Thus the point is that where sufficient evidence can be adduced to prove the underlying agreement between the co-conspirators beyond a reasonable doubt, the outcome *per se* of the proceedings of a co-conspirator, or the death or disappearance of the co-conspirator is not *ipso facto* a reason to set aside the conviction or amend the charge preferred against the other co-conspirator. In the present case, the Public Prosecutor's decision to prefer charges against Quek and Winai involving different quantities of the seized drugs does not undermine the fact that there was a conspiracy between them to traffic in the total seized quantity. The situation that results is in fact not dissimilar from the situation where a co-conspirator has either been acquitted or has disappeared. It bears emphasising that the evidence adduced establishing the underlying agreement between the respective co-conspirators remains undisturbed. Indeed, in contrast to a situation involving the acquittal of a co-conspirator, both Quek and Winai were in fact convicted in the present case; the difference in punishments arising solely from the exercise of prosecutorial discretion, a discretion accorded to the Public Prosecutor under the Constitution. Furthermore, we also think that Winai's separate charge for possession of *not less* than 14.99 g of diamorphine in furtherance of a criminal conspiracy with Somchit and Quek to traffic in the stated quantity of the seized drugs, is not, on a plain reading, incongruous with the amended charge on which Quek was convicted as "not less than 14.99 g" could include 62.14 g. We would reiterate that in Winai's SOF upon which he was convicted on the reduced quantity, the *full weight* of the seized drugs discovered was clearly stated.

41 Since this Court is not confronted with the slightly different scenario whereby Winai lacked the requisite knowledge of the full quantity of the seized drugs forming the basis of the criminal conspiracy alleged, whether the answer to the question of congruity in that scenario might be different is a question on which there is no necessity for us to offer a concluded view. There is however authority for the proposition that it is not necessary that all the conspirators must know each and every detail of the conspiracy as long as they are co-participators in the main object of the conspiracy – see *Yash Pal Mittal v State of Punjab* (1977) 4 SCC 540 at [9] and *Nomura Taiji and others v Public Prosecutor* [1998] 1 SLR(R) 259 at [110]. The question which must follow and remains unanswered is (a) whether knowledge of the precise *quantity* of the controlled drugs specified in the charges preferred against co-conspirators can be characterised as a mere *detail* as outlined by the case law cited above or (b) whether it should more rightly be viewed as an integral *element of the underlying agreement* as part of the main object of the criminal conspiracy. While on the first proposition, (a), the quantity *per se* is not a factor which each co-conspirator need be alive to, on the second proposition, (b), the Public Prosecutor's ability to establish the individual's actual

knowledge of the specific quantity of the controlled drugs in the preferred charge will directly impact the fundamental enquiry before the court as to whether criminal conspiracy has been made out.

42 On the present facts, in light of this Court's finding on the knowledge of Quek and Winai of the total quantity of the seized drugs, these questions did not arise. In passing, we would venture to think that there is much to be said in favour of the first proposition. This is perhaps best illustrated by an example. Say A and B agreed to bring 14 g of diamorphine into Singapore. Unknown to B, and motivated by greed, A changed his mind and brought in double the quantity. It would be curious to say that in those circumstances, just because of the change in quantum of drug brought in, that there was no conspiracy by them to bring in the drug illegally. Quite clearly, there was a conspiracy by A and B to commit an illegal act (*i.e.* to import 14 g of the drug) although B cannot be said to have conspired with A to import the larger quantity of the drug. On the other hand, if A and B had agreed to import the drug illegally without discussion as to the quantity, both could be charged with conspiracy to import the quantity of the drug actually brought in by either of them. Ultimately, what conspiracy charge(s) could be brought against co-conspirators must be dictated by the evidence.

43 Accordingly, we hold that there is nothing irregular in Quek being convicted on the amended charge.

44 For the reasons stated above, Quek's appeal is dismissed.

[note: 1] Record of Proceedings ("RP"), Volume 6A, p 338.

[note: 2] RP, Volume 7, Grounds of Decision ("The GD") at [31].

[note: 3] RP, Volume 7, The GD at [39].

[note: 4] RP, Volume 7, The GD at [40].

[note: 5] RP, Volume 5, NE Day 17 p 20 line 18 – 28.

[note: 6] RP, Volume 6 at (3a to 3l), Statement of Agreed Facts.

[note: 7] RP, Volume 3, NE Day 9 p 8 line 13; p 20, line 1-3.

[note: 8] RP, Volume 4, NE Day 13 p 30-31.

[note: 9] RP, Volume 2, NE Day 4, p 55.

[note: 10] Petition of Appeal dated 9 May 2011 (Crime) at [5].

[note: 11] Appellant's submissions dated 11 August 2011 at [7]-[8].

[note: 12] Appellant's supplemental submissions dated 13 September 2011 at [20].

[note: 13] Appellant's supplemental submissions dated 13 September 2011 at [27].

[note: 14] Appellant's supplemental submissions dated 13 September 2011 at [29].

[note: 15] Appellant's supplemental submissions dated 13 September 2011 at [28]-[37].

[note: 16] Appellant's supplemental submissions dated 13 September 2011 at [36].

[note: 17] RP at Volume 6A at p 339(P).