IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2021] SGCA 91

Criminal Appeal No 22 of 2019

Between

Imran bin Mohd Arip

… *Appellant*

And

Public Prosecutor

… *Respondent*

Criminal Appeal No 24 of 2019

Between

Tamilselvam a/l Yagasvranan

… *Appellant*

And

Public Prosecutor

… *Respondent*

In the matter of Criminal Case No 6 of 2019

Between

Public Prosecutor

And

(1) Imran bin Mohd Arip
(2) Pragas Krissamy
(3) Tamilselvam a/l Yagasvranan

GROUNDS OF DECISION

[Criminal Procedure and Sentencing] — [Charge] — [Alteration]

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v
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Court of Appeal — Criminal Appeal Nos 22 and 24 of 2019
Sundaresh Menon CJ, Andrew Phang Boon Leong JCA and Steven Chong JCA
13 July 2021

23 September 2021

Steven Chong JCA (delivering the grounds of decision of the court):

Introduction

1 The two appeals before us are a sequel to our decision in *Imran bin Mohd Arip v Public Prosecutor and other appeals* [2020] SGCA 120 ("CA Judgment") in which we acquitted one of three co-accused persons, Pragas Krissamy ("Pragas"), of a capital charge under the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) ("MDA"). This sequel concerns the appellant in CA/CCA 22/2019 ("CCA 22"), Imran bin Mohd Arip ("Imran"), and the appellant in CA/CCA 24/2019 ("CCA 24"), Tamilselvam a/l Yagasvranan ("Tamil").

2 As a result of Pragas's acquittal; our findings in the CA Judgment against Imran and Tamil; the fact that the charge against Imran refers to a conspiracy between Tamil and Pragas; and the fact that the charge against Tamil

refers to a shared common intention with Pragas, it became necessary to consider the appropriate amendments that should be made to Imran's and Tamil's charges ("the Amendment Query").

3 After hearing the parties, we exercised our powers under s 390(4) of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) ("CPC") to frame amended charges against both Imran and Tamil. We ordered a joint retrial of both amended charges before a different judge of the General Division of the High Court pursuant to s 390(7)(*a*) of the CPC. We now furnish our grounds of decision.

Facts and background

4 The detailed factual background pertaining to Imran's and Tamil's charges can be found at [3]–[13] of the CA Judgment. We lay out only the most salient portions relevant to the Amendment Query.

5 On 8 February 2017, at about 7.05am, Tamil and Pragas entered the carpark of Block 518A Jurong West St 52, after parking their motorcycle at the motorcycle lots behind Block 517 Jurong West St 52. Tamil and Pragas walked towards Block 518 Jurong West St 52 ("Block 518"), with Pragas carrying a black haversack (CA Judgment at [7]). When they arrived at Blk 518, Tamil took the lift up (without Pragas).

6 At about 7.09am, Tamil came out of the lift on the fourth floor of Block 518 and met Imran who came out of #04-139 of Block 518 ("the Unit"). Tamil then called Pragas, who answered with a handphone that Tamil had passed to him prior to entering the lift. Pragas then walked up the staircase to the fourth floor of Block 518 (CA Judgment at [7]–[8]).

7 Pragas met Imran, opened his black haversack, and took out a white plastic bag which he handed over to Imran. Pragas and Tamil then walked down the staircase of the block and headed back to their parked motorcycles where they were arrested by officers from the Central Narcotics Bureau ("CNB") (CA Judgment at [9]–[10]).

8 The CNB officers seized $6,700 from Tamil, amongst other things. After searches of the Unit, they also seized a white plastic bag (marked "D1") and a black plastic bag containing two bundles which in turn each contained a packet of granular/powdery substance. The two packets collectively contained 894.2g of granular/powdery substance which was analysed and found to collectively contain not less than 19.42g of diamorphine ("the Drugs") (CA Judgment at [3], [10]–[13]).

9 Imran was charged under s 5(1)(*a*) read with s 12 of the MDA for abetment by conspiracy with Pragas and Tamil to traffic the Drugs. Pragas and Tamil were charged under s 5(1)(*a*) of the MDA read with s 34 of the Penal Code (Cap 224, 2008 Rev Ed) for delivering the Drugs. After a joint trial before the High Court judge ("the Judge"), all three co-accused persons were convicted of their capital charges (CA Judgment at [3]–[4]).

The findings in the CA Judgment

10 On 18 December 2020, we released the CA Judgment, allowing Pragas's appeal and acquitting him on the basis that the Judge had erred in finding that it was proven beyond a reasonable doubt that Pragas was wilfully blind as to the nature of the Drugs (CA Judgment at [105]–[126]). Numerous findings were also made in relation to Imran and Tamil.

11 In respect of Imran, we held that:

(a) The first six statements given by Imran ("the Six Statements") were voluntarily made and contained highly textured confessions which possessed a ring of truth (CA Judgment at [49]).

(b) Imran's only defence, *ie,* that he had only intended to order one pound of heroin (the street name for diamorphine) and not two pounds, ought to be rejected in the light of the contents of the Six Statements (reproduced below at [12]) and objective evidence in the form of the sum of $6,700 which was passed from Imran to Tamil and found on Tamil following his arrest. This reflected the market price for two pounds of heroin at the time of the offence (CA Judgment at [50]–[53]).

(c) Imran's explanation that the $6,700 was partly a loan to Tamil and partly payment for an earlier delivery of one pound of heroin ought to be rejected as this was: (i) a belated explanation that emerged only in his fifth (and final) investigative statement dated 18 December 2017; and (ii) blatantly contradicted by his consistent account in the Six Statements that he had ordered two pounds of heroin and knew that this was exactly what he was getting in exchange for the sum of $6,700 (CA Judgment at [53]).

12 The Six Statements showed that Imran had intended to order two pounds of heroin from Tamil in exchange for a sum of $6,700 (CA Judgment at [51]):

> (a) In Imran's contemporaneous statement recorded on 8 February 2017, Imran admitted that Tamil had delivered two bundles of heroin to him, and that he paid Tamil $6,700 for the heroin.
>
> (b) In his cautioned statement recorded on the following day, Imran admitted, without qualification, to an initial charge of trafficking three bundles and 30 packets of granular/powdery substance believed to contain heroin.

> (c) In his investigative statements recorded on 10 February 2017, Imran explained in some level of detail that he was to meet Tamil and Pragas as they were supposed to pass him '2 pounds' of heroin in exchange for a sum of $6,700. Significantly, Imran admitted to knowing that the white plastic bag would contain two bundles of heroin when Pragas passed it to him. More specifically, Imran's account was that Tamil had called him the day before, on 7 February 2017. While Imran had initially informed Tamil that he did not want to buy any more heroin, he eventually agreed to do so as Tamil claimed that he had no place to store the heroin. The investigative statements also reveal that although Imran had initially agreed to take only '1 carton' (a term used to disguise the delivery of 'bundles' of heroin), he eventually agreed to buy '2 cartons' for $6,700.
>
> (d) In the investigative statement recorded on 11 February 2017, Imran identified the $6,700 seized and marked as 'E1' as the sum of money which he had passed to Tamil before his own arrest. According to Imran, this was the money that was meant to pay Tamil for two pounds of heroin.
>
> [emphasis in original omitted]

13 In respect of Tamil, we found that:

(a) The Six Statements could be relied on against Tamil and ought to be given significant weight as they essentially implicated *its maker* (*ie,* Imran) in a capital charge and only incidentally implicated *Tamil* in relation to the Drugs (CA Judgment at [62]–[65]).

(b) The white plastic bag that Pragas had passed to Imran contained the Drugs, not contraband cigarettes. As such, the Drugs were delivered to Imran on 8 February 2017 (CA Judgment at [76]–[79]).

(c) The $6,700 (representing the market price for two pounds of heroin in 2017) was found on Tamil shortly after the white plastic bag marked "D1" was delivered to Imran (CA Judgment at [61] and [78]).

The events subsequent to the CA Judgment

14 In the CA Judgment, we invited the parties to tender submissions on the Amendment Query. After the Prosecution filed its submissions, the Defence for Imran and Tamil sought a three-week extension of time till 26 February 2021 to file their submissions in response. In particular, Eugene Thuraisingam LLP ("ET LLP") had just been instructed to act for Tamil on 22 January 2021 and needed some time to get up to speed on Tamil's case. This request was granted.

15 On 25 February 2021, a day before ET LLP's submissions were due, ET LLP sought a further four-week extension of time on the basis that Tamil had given them instructions regarding the Amendment Query which had to be investigated. ET LLP foreshadowed that as Tamil's instructions "relate to allegations against [Tamil's] previous solicitors, [ET LLP] may also *need to write* to his previous solicitors for clarification" [emphasis added]. A final three-week extension of time was granted and ET LLP eventually filed its submissions on 19 March 2021 ("ET LLP Submissions").

16 The ET LLP Submissions contained grave allegations against Tamil's counsel at the original trial before the Judge ("the Allegations"), Mr Dhanaraj James Selvaraj and by implication, his assisting counsel, Mr Mohammad Shafiq bin Haja Maideen and Mr Sheik Umar bin Mohamed Bagushair (collectively "the Original Counsel"). The relevant paragraphs therein stated as follows:

> 34. Tamilselvam instructs that he had aligned himself with Pragas and taken those positions at trial for reasons of litigation strategy and because the charge preferred against him at trial was one of common intention.
>
> 35. Further, in the course of preparing these submissions, Tamilselvam instructs that: -
>
> > a) When Tamilselvam instructed his previous counsel, Mr. James Selvaraj ('Mr. Selvaraj'), that he wishes to call one 'Prakash' – the supplier of the two

> cartons of cigarettes – as a defence witness, Mr. Selvaraj informed Tamilselvam that there was no need to implicate the supplier and that 'we don't have time for all that';
>
> b) Mr. Selvaraj had prepared a document containing the answers to possible Examination-In-Chief ('EIC') questions and told Tamilselvam [to] answer all the possible questions [in the] EIC in accordance with what Mr. Selvaraj had prepared for Tamilselvam;
>
> c) Mr. Selvaraj told Tamilselvam to follow what Pragas had stated in his statements so that their stories would match each other and that it would be easier to put forward Tamilselvam's defence that way as both Tamilselvam and Pragas were being charged with a common intention charge;
>
> d) When Tamilselvam informed Mr. Selvaraj that he wishes to run his defence in accordance with Tamilselvam's Statements and raised concerns as to whether following Pragas' statements would adversely affect his credibility, Mr. Selvaraj informed Tamilselvam that he need not to worry as he would be similarly acquitted if Pragas was acquitted, given that they both face a common intention charge; and
>
> e) Mr. Selvaraj informed Tamilselvam that the main crux of the defence would [be] that the plastic bag which contains the drugs that was seized by CNB is not the same plastic bag that Pragas had passed to Imran. However, we are instructed that this was never properly explored, nor put to the relevant witnesses at trial.
>
> (collectively the 'Allegations')

If required, we are instructed that Tamilselvam is willing and prepared to depose of [*sic*] the Allegations in an affidavit.

36. We pause at this juncture and note that pursuant to Rule 29 of the Legal Profession (Professional Conduct) Rules and the Law Society of Singapore Practice Direction 8.1.1, **we are obliged to provide Mr. Selvaraj with an opportunity to respond to the Allegations,** so as to provide this Honourable Court with a full and balance[d] picture of the allegations made against him. **However, given the impending deadline for these submissions, we regret to inform this Honourable Court that we are presently in the midst of obtaining Mr Selvaraj's response to the Allegations.** We had attempted to contact Mr Selvaraj over telephone but was unfortunately unable to reach him. As such, we had to send the letter to Mr Selvaraj today and request that he provided his response to

> the Allegations within 1 week, i.e by 26 March 2021. A copy of our letter to Mr Selvaraj of even date is enclosed herein, for this Honourable Court's reference.
>
> **We will write to inform this Honourable Court of Mr Selvaraj's response to the Allegations as soon as practicable.**
>
> [emphasis in original omitted; emphasis added in bold]

17 Accordingly, ET LLP wrote to Mr Selvaraj on 19 March 2021. On 1 April 2021, ET LLP informed this court that it had obtained a response from Mr Selvaraj to the Allegations. ET LLP, however, quite inexplicably took "the position that [the response] contains matters which should not be disclosed to this Honourable Court, unless directed otherwise". Apart from bare claims that the response contained matters which were "confidential", "not appropriate to be disclosed" and "would not be practicable for [ET LLP] to disclose", no elaboration whatsoever was provided by ET LLP.

18 We therefore sought clarification from ET LLP on *inter alia,* why it had not been possible to obtain Mr Selvaraj's response prior to the filing of the ET LLP Submissions and what exactly was the basis for its claim to confidentiality.

19 On 19 April 2021, ET LLP disclosed Mr Selvaraj's response which took the form of a *joint letter from* ***the Original Counsel*** dated 24 March 2021, along with its correspondence with the Original Counsel. It became clear at that point that Mr Selvaraj was not the only counsel with conduct of Tamil's defence at the trial before the Judge and that the Original Counsel unequivocally denied the Allegations. It also emerged that ET LLP had initial conduct of Tamil's defence at first instance, but had formally discharged itself on 22 January 2019, less than a month prior to trial which was scheduled for 19 February 2019. Subsequently, the Original Counsel were appointed to act for Tamil.

20 To situate the later discussion in its proper context, we state now that the Allegations were irrelevant to the Amendment Query before us. However, for the reasons set out below, it will be apparent that this chronology is relevant to our observations as regards the conduct of counsel from ET LLP.

The parties' cases on the Amendment query

21 In its written submissions, the Prosecution submitted that this court should exercise its powers under s 390(4) of the CPC to alter the charges against Imran and Tamil, and subsequently to convict them of the altered charges under s 390(7)(*b*) of the CPC as the evidence sufficiently establishes their guilt without the need for a further trial.

22 At the hearing of CCA 22 and CCA 24, lead counsel for the Prosecution, Mr Wong Woon Kwong ("DPP Wong") initially proposed that a limited retrial could be ordered for the Judge to decide the specific issue of whether the Allegations were in fact true, and if so, whether they had an impact on the way Tamil had run his defence at the original trial. At the end of the hearing, however, DPP Wong eventually accepted that the appropriate course of action would be for a joint retrial to be ordered for both accused persons before a different judge (see below at [90]).

23 In respect of Imran, DPP Wong submitted that the charge could be amended by simply deleting the reference to Pragas from the conspiracy that Imran and Tamil had engaged in. In respect of Tamil, DPP Wong put forth two alternative proposals which were to either: (a) excise the common intention element of Tamil's charge ("Option A"); or (b) amend Tamil's charge to one of abetment by instigating Pragas to traffic in the Drugs under s 12 of the MDA ("Option B").

24 Lead counsel for Imran, Mr Daniel Chia Hsiung Wen ("Mr Chia") made clear at the outset that Imran agreed to the amendment as proposed by the Prosecution. Imran wished to offer a defence to the altered charge and Mr Chia submitted that a retrial ought to be ordered.

25 Lead counsel for Tamil, Mr Eugene Singarajah Thuraisingam ("Mr Thuraisingam") made clear that Tamil objected to the amendments proposed by the Prosecution and argued that this court *should not* frame an altered charge under s 390(4) of the CPC. Mr Thuraisingam focussed on the notion of prejudice and averred that Tamil's defence would have been run differently in the trial below if the preferred charge had not been one of common intention.

26 Mr Thuraisingam further averred that no altered charge *could* be framed against Tamil and that he should instead be acquitted entirely as there is a real risk that the prejudice occasioned to him would "in effect render a fair trial near impossible". In the alternative, Mr Thuraisingam submitted that if indeed Tamil's charge is amended, a complete retrial ought to be ordered.

27 In the rest of these grounds, we will refer directly to s 390 of the CPC and its sub-sections as "s 390" or "s 390(x)" where "x" refers to the relevant subsection.

Issues to be determined

28 The only two issues to be determined in this case were:

(a) Should an altered charge be framed as against Imran and Tamil under s 390(4) ("Issue 1")?

(b) If Issue 1 is answered in the affirmative, what is the scope of the court's powers in respect of the altered capital charges against Imran and Tamil and what would be the appropriate course of action on the facts of CCA 22 and CCA 24 ("Issue 2")?

Issue 1: Alteration of charges under s 390(4)

The law

29 Section 390(4) provides that:

> **Decision on appeal**
>
> …
>
> (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.
>
> [emphasis added]

30 Section 390(4) provides that an appellate court may frame an altered charge against an accused on appeal without qualification as to the type of charge, if satisfied that, based on the records before the court, *there is sufficient evidence to constitute a case which the accused has to answer*. The exercise of such a power must be exercised sparingly, subject to careful observance of the *safeguards against prejudice to the defence*, which must be rigorously observed. The court must be satisfied that the *proceedings below would have taken the same course*, and the *evidence led would have been the same had the amended charge been presented at the trial.* The primary consideration is that the amendment will not cause any injustice, or *affect the presentation of the evidence*, in particular, *the accused's defence*: *Public Prosecutor v Koon Seng*

Construction Pte Ltd [1996] 1 SLR(R) 112 at [21]; *Sim Wen Yi Ernest v Public Prosecutor* [2016] 5 SLR 207 at [12]; and *GDC v Public Prosecutor* [2020] 5 SLR 1130 ("*GDC*") at [29].

31 The two key questions in relation to whether altered charges should be framed were as follows:

(a) Whether there is sufficient evidence to constitute a case for which Imran and Tamil have to answer.

(b) Whether it would be prejudicial to Imran and Tamil for the altered charge to be framed.

Our decision

Tamil's altered charge

32 In our judgment, an amended charge should be framed against Tamil. We endorsed Option A as it involved only the excision of the common intention element of Tamil's charge and, unlike Option B, did not introduce any new legal elements. In other words, the elements of the charge remained the same, save that there would now be no need to show a common intention with Pragas against whom it was not proven beyond a reasonable doubt that he was wilfully blind to the nature of the Drugs (CA Judgment at [126] and [136]). While we noted that Option A also made it explicit that both Tamil and Pragas had jointly delivered the Drugs to Imran, this was a point that was never in dispute. Paragraphs 7 and 8 of the Agreed Statement of Facts ("ASOF") stated that Tamil and Pragas rode and parked their motorcycles together, walked towards Block 518 together and subsequently met with Imran together and left together.

33 Option A read as follows (with alterations from Tamil's original charge in red):

> That you, **Tamilselvam A/L Yagasvranan**,
>
> …
>
> on 8 February 2017, at or about 7.09 a.m., at the level 4 corridor of Block 518 Jurong West Street 52, Singapore, ~~together with one Pragas Krissamy (FIN: GXXXXX76P) and in furtherance of the common intention of you both,~~ did traffic in a controlled drug listed in Class 'A' of the First Schedule to the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) ('MDA'), *to wit*, by jointly delivering with one Pragas Krissamy (FIN: GXXXXX76P) two (2) packets containing not less than 894.2 grams of granular/powdery substance which was analysed and found to contain not less than 19.42 grams of diamorphine to one Imran Bin Mohd Arip (NRIC No.: SXXXXX97B), without authorisation under the MDA or the Regulations made thereunder, and you have thereby committed an offence under section 5(1)(a) of the MDA ~~read with section 34 of the Penal Code (Chapter 224, 2008 Rev Ed)~~ and punishable under section 33(1) of the MDA, and further upon your conviction, you may alternatively be liable to be punished under Section 33B of the MDA

34 The first requirement of evidential sufficiency was clearly established in the light of our findings in the CA Judgment. It also appeared to us that this was a point that Mr Thuraisingam implicitly accepted given that his oral submissions and the ET LLP Submissions focussed almost entirely on the question of "prejudice". This can be dealt with briefly.

35 In the CA Judgment, we had found that the Six Statements showed that Imran intended to order two pounds of heroin from Tamil in exchange for a sum of $6,700 and that he was to meet Tamil and Pragas to obtain the two pounds of heroin. Imran admitted to *knowing* that the white plastic bag would contain exactly what he had ordered when Pragas passed it to him. According to Imran's account, Imran had *initially* informed Tamil that he did not want to buy any more heroin but eventually agreed to do so as Tamil claimed to have no place to store them. Imran further identified the $6,700 seized by the CNB as the sum

of money that he had passed to Tamil before his own arrest and used to pay for the two pounds of heroin (CA Judgment at [51]). Crucially, the Six Statements could be relied upon against Tamil and be accorded significant weight (CA Judgment at [65]).

36 On top of this, we had found that: (a) the white plastic bag that Pragas passed to Imran was the white plastic bag marked "D1" and it did in fact contain the Drugs (CA Judgment at [76]–[79]); (b) Pragas and Tamil jointly delivered the Drugs to Imran (see CA Judgment at [7]–[9] and ASOF at paras 7–8); and (c) the fact that $6,700 was found on Tamil shortly after the delivery of the white plastic bag was strong objective evidence that the Drugs were delivered to Imran (CA Judgment at [78]).

37 Crucially, none of these findings required Pragas to know the nature of the Drugs. This being the case, there was sufficient evidence to constitute a case which Tamil has to answer in respect of Option A under s 390(4).

38 Turning to the second key question, we were of the view that an alteration of Tamil's charge in the form of Option A would not flout the careful safeguards in our law against prejudice to the defence.

39 Mr Thuraisingam's argument on prejudice was two-fold. First, he submitted that if the preferred charge against Tamil had not been one of common intention, Tamil would have run his defence in accordance with his statements to the police and would not have aligned his defence with Pragas (respectively, the "Intended Defence" and "Original Defence" as defined below at [43]). Second, Mr Thuraisingam argued that if a retrial were ordered in respect of an altered charge against Tamil, Tamil would be unfairly prejudiced because: (a) his credibility would be severely undermined by the fact that he

would now take "certain positions which are diametrically opposed to those taken by him at the trial below" in advancing the Intended Defence; and (b) there would be difficulties in locating and calling a material witness to testify on behalf of Tamil at a retrial, namely, one "Prakash", the supplier of the two cartons of cigarettes. These being the same items which Pragas and Tamil claimed to have jointly delivered to Imran on 8 February 2017 during the original joint trial before the Judge (*ie,* in place of the Drugs) (CA Judgment at [77]).

40 We rejected Mr Thuraisingam's first point because we were satisfied that the proceedings below would have taken the same course, and the evidence led would have been largely the same even if Tamil had been faced with the altered charge under Option A at first instance. This was for two reasons.

41 First, the case that Tamil would have to meet under Option A would be the same as the case that he had to meet under his original charge. The Prosecution's case against Tamil at the trial below pursuant to the original charge was that Tamil knew and consented to Pragas's possession of the Drugs and was therefore deemed to be in possession of the Drugs pursuant to s 18(4) of the MDA. The Prosecution also sought to prove that Tamil had actual knowledge of the nature of the Drugs, or was presumed to have known this pursuant to s 18(2) of the MDA (CA Judgment at [16]). All these elements would similarly have to be proved in respect of Option A. In fact, the Prosecution had effectively pinned its colours to its mast and expressly confirmed that its case against Tamil would be the same regardless of whether the court endorses Option A or Option B.

42 Flowing from the above, the nature of the evidence adduced by the Prosecution in respect of Option A would likely be the same. The Six

Statements which incriminated Tamil in the drug transaction remain strong evidence against Tamil. Tamil would also have to provide a satisfactory explanation for why the sum of $6,700 was found on him. It bears mention that such an explanation did indeed form a key part of the Intended Defence because the ET LLP Submissions framed it as follows: "[the] Intended Defence would have been that he had only gone to Imran's unit *to borrow a sum of S$6,700 from Imran* on 8 February 2017 and did not intend to deliver contraband cigarettes to Imran together with Pragas" [emphasis added]. The significance of the $6,700 found on Tamil was not merely that it was a sum of money found on Tamil, but also that it represented the prevailing market price for two pounds of heroin – *ie,* the exact quantity of controlled drugs transacted on 8 February 2017. The incriminating nature of these pieces of evidence as against Tamil remained unchanged.

43 Second, while it is impossible to say with exactitude that the Intended Defence and Original Defence would be run in exactly the same manner with the same evidence being adduced in Tamil's defence, the Intended Defence and Original Defence were materially similar. The two defences as conceptualised in the ET LLP Submissions were as follows:

Original Defence	Intended Defence
29 At the trial below, Tamilselvam's defence was that **he and Pragas had only intended to deliver contraband cigarettes to Imran, and that they had in fact only delivered contraband cigarettes to Imran.** Tamilselvam's evidence was that he had met Imran, together with Pragas, on the morning of 8 February 2017 for *the purposes of obtaining a loan from Imran to purchase a stock of cigarettes* and to deliver two cartons of cigarettes to Imran. Tamilselvam testified that he went up to Imran's unit first to obtain the loan from	31 In brief, Tamilselvam's Intended Defence would have been that he had **only gone to Imran's unit to borrow a sum of S$6,700 from Imran on 8 February 2017** and did not intend to deliver contraband cigarettes to Imran together with Pragas. Tamilselvam operated under the impression that Pragas was delivering contraband cigarettes to Imran as Pragas had informed him of the same on the night of 7 February 2017. Tamilselvam did not instruct and/or arrange to deliver contraband

Imran, while Pragas waited downstairs. After obtaining the loan from Imran, Tamilselvam instructed Pragas to come up to Imran's unit to pass the two carton of cigarettes to Imran. Tamilselvam denied any knowledge that the bag Pragas had delivered to Imran contained heroin, and maintained that he thought that the bag only contraband cigarettes. [emphasis added in italics and bold]	cigarettes to Imran together with Pragas, nor did he possess actual knowledge of what Pragas had in fact passed to Imran on 8 February 2017. Tamilselvam also denies any knowledge of the drugs that were seized from Imran's unit. [emphasis added]

44 It is clear from the emphasised words above that both defences go towards explaining one central point – *ie,* the reason for Tamil's presence at the site of the drug transaction on the very day on which the transaction occurred. The Intended Defence is that Tamil was present to "borrow a sum of S$6,700 from Imran" (*ie,* in accordance with Tamil's own statements to the police). The Original Defence is that Tamil was present to "obtain a loan from Imran to purchase a stock of cigarettes" **and** to deliver two cartons of cigarettes to Imran (*ie,* in accordance with Pragas's version of events). At the hearing before us, Mr Thuraisingam accepted that even in the Original Defence, Tamil had explained that the purpose for his presence was to "borrow the money [*ie,* S$6,700]", and the only difference is that under the Original Defence, the two explanations were advanced in tandem, whereas under the Intended Defence only one explanation would be advanced. To put it simply, the Intended Defence would re-advance a single prong of the double-pronged Original Defence that had been advanced before and rejected by the Judge at the trial below. The two defences were therefore essentially similar.

45 In response, Mr Thuraisingam emphasised that the absence of the second prong in the Intended Defence (*ie,* that Tamil was present to deliver two cartons of cigarettes) would constitute a material change in Tamil's defence which, if it had been advanced before the Judge at the original trial, might possibly have led to a different outcome (*ie,* such that proceedings would not have taken the

same course in respect of an altered charge). This was because this second prong was, in effect, a departure from Tamil's own investigative statements and the Judge had "give[n] considerable weight to the fact that Mr Tamil had no credibility because he departed from his statements".

46 We were unable to agree. As we made clear during the hearing, it was not clear to us how pursuing one sole explanation would inherently make Tamil's account more believable or credible given that the core of the Judge's reasoning was that Tamil did not have a *bona fide* or legitimate reason for his presence at the Unit (see *Public Prosecutor v Imran bin Arip and others* [2019] SGHC 155 at [97]–[103]). Further, even if the Intended Defence cohered with Tamil's account in his statements, this on its own did not mean that the Judge would have found him to be credible given the body of other evidence which pointed to his involvement in the drug transaction (*eg,* Imran's account in his Six Statements which primarily implicated Imran and only incidentally implicated Tamil, and the fact that $6,700 was found on Tamil shortly after the drug transaction was completed – see above at [13]). In any event, as we had made clear to Mr Thuraisingam during the hearing, it was not for an appellate court to speculate how an altered charge would be treated by a trial judge at first instance, or at a retrial. Rather, the question before us was confined to whether alterations ought to be made to the appellants' charges, and if so, the appropriate courses of action in respect of the altered charges.

47 Mr Thuraisingam eventually accepted that if Tamil wished to run a single pronged defence instead of a double pronged one, the appropriate forum to do so would be a retrial.

48 Bearing in mind the similarities between the Intended Defence and the Original Defence, as well as the fact that the Prosecution's case against Tamil

would be the same in respect of Option A, we therefore held that altering Tamil's charge in the form of Option A would not cause prejudice to the defence.

49 We pause at this juncture to briefly touch on the Allegations against the Original Counsel (reproduced above at [16]). Ostensibly, the Allegations are meant to show that Tamil had aligned his defence with Pragas in part for "reasons of litigation strategy" as advised by the Original Counsel. The upshot of these allegations is that Tamil was compelled to abide by the Original Defence despite it being contrary to: (a) his own wishes; and (b) the account in his statements which he now alleges to be true.

50 As we had stated at [20] above, the truth, veracity or credibility of the Allegations were not relevant to the disposal of the Amendment Query before us. These allegations, even taken to be true, do not demonstrate that prejudice would be caused to the conduct of Tamil's defence in respect of an altered charge in terms of the presentation of the evidence, or the complexion of the Intended Defence itself. Rather, the Allegations go towards explaining *why* a different defence would be adopted if an alternate charge were framed. We reiterate that the questions before us concern only the consequential orders to be made in respect of Imran and Tamil given the nature of their common intention and conspiracy charges and the acquittal of their co-accused, Pragas. In any event, as we had made clear to Mr Thuraisingam, this court is not the appropriate forum for investigating and making findings of fact or credibility in relation to new claims or allegations. Mr Thuraisingam eventually accepted that if Tamil wished to pursue the Allegations, the appropriate course would be to lodge an appropriate complaint against the Original Counsel.

51 We also rejected Mr Thuraisingam's second point that Tamil's charge should not be altered because any retrial in respect of an altered charge would be unfairly prejudicial to Tamil, and that he should therefore be acquitted of his original charge.

52 It is speculative to say that because Tamil planned to run his new defence in accordance with his statements (*ie,* the Intended Defence) as opposed to Pragas's account (*ie,* the Original Defence), the difference in his positions in the retrial would cause his credibility to be severely undermined, such that a fair trial is "near impossible". It is not possible to predict at this point how a judge will treat the evidence being placed before the court during a retrial. The circumstances surrounding Imran's and Tamil's charges have changed and any retrial will rest on a new foundation, not least because their co-accused has been acquitted of his charge. Furthermore, as we had pointed out to Mr Thuraisingam, if the Allegations are indeed true such that the Original Defence had been "thrust upon [Tamil] despite his objections", it is unlikely that any changes in Tamil's position will be held against him by the court.

53 As for Mr Thuraisingam's argument that there "may be difficulties in locating and calling a material witness at the retrial" (*ie,* Prakash), this was pure speculation. It appeared to us that efforts had not yet been made to even contact Prakash because the ET LLP Submissions stated that it was "uncertain if Prakash still remains contactable and/or willing to testify, should a retrial be so ordered". However, there was no evidence or indication that the position would have been any different if Tamil had sought to call Prakash as a witness at the original trial.

54 In sum, we therefore found that there was sufficient evidence to constitute a case against Tamil in respect of Option A and that such an alteration would not occasion prejudice to Tamil's defence.

Imran's altered charge

55 In our judgment, an altered charge ought to be framed against Imran. His original charge referred to a conspiracy between himself, Tamil and Pragas, and is now defective in the light of Pragas's acquittal. It will be clear from our analysis above at [34]–[37] that there is sufficient evidence to constitute a case which Imran has to answer. Furthermore, Imran "[did] not object to the Prosecution's proposed amendments" nor raise any claim to prejudice.

56 Imran's altered charge as agreed between the Defence and the Prosecution (with alterations from Imran's original charge in red) was as follows:

> That you, **Imran Bin Mohd Arip**,
>
> on or before 8 February 2017, in Singapore, did abet the doing of a thing by engaging in a conspiracy with one Tamilselvam A/L Yagasvranan (FIN: GXXXXX57M) ~~and one Pragas Krissamy (FIN: GXXXXX76P)~~ to do a certain thing, namely, to traffic in a controlled drug listed in Class 'A' of the First Schedule to the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) ('MDA'), *to wit*, two (2) packets containing 894.2 grams of granular/powdery substance which was found to contain **not less than 19.42 grams of diamorphine**, and in pursuance of that conspiracy and in order to the doing of that thing, on 8 February 2017, at or about 7.09 a.m., at the level 4 corridor of Block 518 Jurong West Street 52, Singapore, the said ~~Pragas Krissamy and~~ Tamilselvam A/L Yagasvranan and one Pragas Krissamy (FIN: GXXXXX76P) did jointly deliver two (2) packets containing 894.2 grams of granular/powdery substance which was found to contain not less than 19.42 grams of diamorphine to you, without authorisation under the MDA or the Regulations made thereunder, and you have thereby committed an offence under section 5(1)(a) read with section 12 of the MDA punishable under section 33(1) of the MDA, and further upon your

> conviction, you may alternatively be liable to be punished under Section 33B of the MDA.
>
> [emphasis in original]

Issue 2: The court's powers in respect of altered charges under s 390(7)(*b*)

57 Given our conclusion that altered charges ought to be framed against both Imran and Tamil, the question turned to how these charges ought to be dealt with. In their written submissions, the parties advanced various positions as to how the altered charges ought to be dealt with, namely, an acquittal, a retrial, and a conviction. At the oral hearing, however, all parties eventually agreed that the appropriate course of action would be a joint retrial of both altered charges. This was the order that we granted, with an added direction that the retrial would be heard by a different judge of the General Division of the High Court.

58 In the subsequent sections, we elucidate the reasons behind our order given that the legal issue at hand is one where there is conflicting *dicta* and upon which no court has, to date, provided definitive guidance on. For clarity, the issue can be stated as follows: what courses of action are open to an appellate court if it takes the view that it would be appropriate to frame an altered charge which carries the death penalty, in circumstances where the original charge already carries the death penalty ("the Consequential Query").

The current law on s 390(7)(b)

59 The starting point of this analysis is ss 390(5)–390(8) which enumerate the procedural steps that come into play once an appellate court frames an altered charge under s 390(4):

> **Decision on appeal**
>
> **…**

> (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.
>
> [emphasis added]

60 Section 390(7) lays out the various options in respect of altered charges generally: (a) to order a retrial pursuant to s 390(7)(*a*); or (b) to convict the accused on the altered charge pursuant to s 390(7)(*b*). The words "other than a charge which carries the death penalty" however, creates a distinction between capital charges and non-capital charges and raises the question of whether a court has the power pursuant to s 390(7)(*b*) to convict an accused of an altered capital charge.

61 While this precise issue has not been the subject of a definitive decision, s 390(7)(*b*) was referenced in two recent decisions of this court, *Moad Fadzir bin Mustaffa v Public Prosecutor and other appeals* [2019] SGCA 73 ("*Moad Fadzir*") and *Mui Jia Jun v Public Prosecutor* [2018] 2 SLR 1087 ("*Mui Jia Jun*").

62 In *Mui Jia Jun,* the appellant was tried with one Tan Kah Ho ("Tan") in the High Court on two counts of trafficking in controlled drugs in furtherance of their common intention. Tan was arrested by officers from the CNB after he had delivered three bundles of drugs to a third party. Seven other bundles of drugs were found in his possession. Each of these ten bundles of drugs ("the Ten Bundles") had been covered with cling wrap, with several layers of black tape applied over the whole of the cling wrap. Tan's DNA was found on the adhesive side of the tape covering five of the Ten Bundles. The Prosecution's case against the appellant at the trial comprised a single narrative with two intertwined facets.

(a) The first was that on the morning of Tan's arrest, the appellant had handed Tan a "Jorano" bag ("the Jorano bag of drugs") with the Ten Bundles pre-packed inside. On this narrative, Tan had not previously packed any of the Ten Bundles before receiving them from the appellant, and had handled these bundles only to the extent of separating them for their intended recipients.

(b) The second facet was that the appellant had allegedly sent Tan text messages which contained instructions regarding the delivery of the drugs ("the Delivery Messages").

The Prosecution did not advance the two individual facets of its case as *independent bases* for a conviction at the trial. After the first hearing of the

appeal, the Prosecution accepted that there was a reasonable doubt as to whether the appellant had given Tan the Jorano bag of drugs. However, the Prosecution contended that even if the appellant had not given Tan the Jorano bag of drugs, he should nonetheless be convicted on the sole basis that he had sent Tan the Delivery Messages ("the Alternative Case").

63 The court ordered a retrial of the matter before another High Court judge, where the Prosecution would be confined to mounting its case against the appellant on the basis that he had sent Tan the Delivery Messages (at [94] and [97]). In coming to its decision, the court held that it would have been wrong in principle for it to have affirmed the conviction of the appellant because: (a) the Prosecution *did not clearly advance* the Alternative Case at the trial; and (b) if the Prosecution had clearly advanced the Alternative Case in the court below, the *evidence might well have emerged differently* (at [81]). In the premises, the court considered that it would have been wrong in principle for the court to turn to the evidence, which was gathered in a trial where the Alternative Case was not clearly advanced, to determine whether the Appellant's conviction could be upheld on the basis of the Alternative Case (at [87]–[89] and [92]). The court accepted the appellant's submission that had he known that the Prosecution would be advancing the Alternative Case, this would have affected the Defence's cross-examination of Tan in relation to the Delivery Messages and the evidence might have emerged differently (at [88]).

64 In arriving at its decision to remit the matter for a retrial, the court (at [90]):

> … ***took guidance from the law governing the somewhat analogous issue of an appellate court's power to convict an accused person on an amended charge.*** Section 390(4) of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) provides that an appellate court may frame an amended charge against an accused person on appeal. Section 390(7)(*b*) further

> empowers the appellate court to convict the accused on the amended charge 'after hearing submissions on questions of law and fact and if it is satisfied that … there is sufficient evidence to do so'. **Significantly, however, s 390(7)(*b*) also expressly provides that the appellate court has no power to convict the accused on the amended charge after merely hearing submissions where the amended charge attracts the death penalty**. In such a case, a trial of the amended charge must be ordered: see *The Criminal Procedure Code of Singapore: Annotations and Commentary* (Jennifer Marie & Mohamed Faizal Mohamed Abdul Kadir gen eds) (Academy Publishing, 2012) at para 20.108.
>
> [italics in original, emphasis added in bold-italics, added emphasis in underlined bold-italics]

65 In other words, while *Mui Jia Jun* suggests that an appellate court has no power under s 390(7)(*b*) to convict an accused on an amended capital charge after hearing submissions from the parties, this *dicta* is **obiter.** The case was not concerned with s 390(7)(*b*) and there was no analysis on this provision, save for a literal reading of the provision which did not consider a situation where the original charge faced by an accused was already a capital charge.

66 In *Moad Fadzir,* the appellants*,* Moad Fadzir bin Mustaffa ("Moad Fadzir") and Zuraimy bin Musa ("Zuraimy") were jointly tried for possession of controlled drugs for the purpose of trafficking in furtherance of a common intention between them. This court acquitted Zuraimy of possession for the purpose of trafficking in the controlled drug, in furtherance of a common intention with Moad Fadzir but found him guilty of an alternative charge (at [102]). It found that Zuraimy's act of concealing the controlled drugs did not amount to consent within the meaning of s 18(4) of the MDA. As such, Zuraimy was not deemed to be in joint possession of the controlled drugs with Moad Fadzir (at [97]–[98]) and the Prosecution was unable to prove the element of joint possession.

67 Given the lack of a common intention between Zuraimy and Moad Fadzir, it became necessary to reframe Moad Fadzir's charge under s 390(4). This court then went on to convict Moad Fadzir of the altered charge (which also carried the death penalty) under s 390(7)(*b*). The court held that:

> 105 Since the Judge held that there was no common intention between Moad Fadzir and Zuraimy to possess diamorphine for the purpose of trafficking and had amended the original charge against Zuraimy, he ought to have amended Moad Fadzir's charge as well by deleting the references to common intention. On the same day, after we heard the arguments in these appeals, we directed the Supreme Court Registry to send a letter to all parties to ask them whether they agree that in the event after considering the matter, this Court decides to dismiss the appeals and so affirm Moad Fadzir's conviction for trafficking and Zuraimy's conviction on the amended charge, the original charge against Moad Fadzir should be amended by deleting the words, 'together with one Zuraimy bin Musa, NRIC No. XXXXXXXXX, in furtherance of the common intention of both of you' and 'read with section 34 of the Penal Code (Cap 224, 2008 Rev Ed)'. We also asked counsel for Moad Fadzir, if the parties agree with the said amendments, for the purposes of s 390(6) and (7) of the CPC, whether he confirms, that the defence case will remain the same and the evidence of Moad Fadzir will be the same as that adduced during the trial in the High Court. The Registry has received the agreement and the confirmation sought.
>
> 106 We amend the charge against Moad Fadzir …
>
> […]
>
> As counsel for Moad Fadzir has given the confirmation sought, s 390(6) and (7) of the CPC have been complied with. In any case, we have read the above amended charge to Moad Fadzir and he has confirmed again before us today *that* **his defence case remains the same and his evidence will be the same** *as that adduced during the trial in the High Court.* **The original charge against Moad Fadzir was a capital offence charge. The amended charge remains a capital offence charge.** *The changes relate only to the deletion of the references to common intention and the statutory provisions governing such*, necessitated by the findings made by the Judge. We affirm the conviction and the mandatory death sentence based on this amended charge. …
>
> [emphasis added in italics, added emphasis in bold]

68 It is plain that this court took the view that the limitation in s 390(7)(*b*) only applied when the charge was changed from a *non-capital* to a *capital one*. As such, an appellate court could directly convict an accused of an altered charge carrying the death penalty under s 390(7)(*b*) if: (a) the original charge also carried the death penalty; (b) the changes to the original charge were not material; (c) the accused confirms that his defence would remain the same; and (d) the accused confirms that the evidence adduced would remain the same as that adduced in the trial below.

69 We crucially noted that *Moad Fadzir* did not refer to the contrary *dicta* in *Mui Jia Jun*. There was also no explicit consideration of the statutory wording of s 390(7)(*b*) which at first glance appears to exclude all charges carrying the death penalty. We were thus of the view that s 390(7)(*b*) and the Consequential Query had not been fully considered in either *Moad Fadzir* or *Mui Jia Jun,* and therefore undertook the analysis afresh.

Our analysis of s 390(7)(b)

70 The applicable framework for purposive statutory interpretation is set out in *Tan Cheng Bock v Attorney-General* [2017] 2 SLR 850 ("*Tan Cheng Bock*") at [37]:

> (a) First, ascertain the possible interpretations of the provision, having regard not just to the text of the provision but also to the context of that provision within the written law as a whole.
>
> (b) Second, ascertain the legislative purpose or object of the statute.
>
> (c) Third, compare the possible interpretations of the text against the purposes or objects of the statute.

Stage 1 of the Tan Cheng Bock Framework

71 To recapitulate, s 390(7) provides as follows:

> (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.
>
> [emphasis added in italics; added emphasis in bold]

72 Having regard to the plain and ordinary meaning of the provision, particularly the words in parentheses, one interpretation is that an appellate court may only convict the accused on the altered charge after hearing the submissions of parties *if the altered charge does not carry the death penalty.* In other words, the court cannot avail itself of s 390(7)(*b*) if the altered charge carries the death penalty, regardless of whether the original charge also carried the death penalty and regardless of the nature of the amendment. We term this "Interpretation 1".

73 Having regard to the context of s 390(7) within s 390 as a whole, another interpretation is that the word "altered" does not specifically refer to any *alteration to the original charge*. Rather, it refers specifically to a situation involving *an alteration in the nature of the penalty* which causes the original non-capital charge to morph into a capital charge. On this interpretation, if both the old and the new charge carry the death penalty, there is no alteration in the nature of the penalty and thus an appellate court may still avail itself of

s 390(7)(*b*) to convict on the altered capital charge. We term this "Interpretation 2".

74 In our judgment, support for Interpretation 2 comes from two sources. First, the context of s 390 as a whole. The wording of s 390(4) provides that "the appellate court may frame an altered charge (*whether or not it attracts a higher punishment*)" [emphasis added]. Read in context, it can be seen that the predicate provision that brings the court's powers into play under s 390(7) is concerned with the nature of the penalty, specifically, an increase in the severity of the penalty after a charge is reframed.

75 Second, the canon of statutory construction that Parliament is presumed not to have intended an unworkable or impracticable result, such that an interpretation that leads to such a result would not be regarded as a possible one (see *Tan Cheng Bock* at [38] citing *Hong Leong Bank Bhd v Soh Seow Poh* [2009] 4 SLR(R) 525 at [40]). It would be absurd that where the accused's capital charge needs to be amended because of a minor and inconsequential defect, or a clerical amendment to correct undisputed typographical errors (*eg,* a misspelling of a name or the address in the charge) and the accused confirms that his defence and evidence adduced at trial will not differ in the slightest, the appellate court has no choice but to remit the case for a retrial under s 390(7)(*a*). This would entail a wastage of judicial time and incur unnecessary expense to obtain a result that the appellate court has already determined. As nothing would change in terms of the presentation of evidence and the arguments advanced during the retrial, it would serve no purpose to order a retrial on account of such administrative amendments. Interpretation 2 accords with common sense as it allows the appellate court to apply a more textured analysis and consider individually the consequences of an amendment in each case.

Stage 2 of the Tan Cheng Bock Framework

76 The legislative purpose and object of s 390(7)(*b*) can be gleaned from external and internal sources. Per *Tan Cheng Bock* at [47], extraneous material may be considered under s 9A(2) of the Interpretation Act (Cap 1, 2002 Rev Ed) in three situations:

(a) under s 9A(2)(*a*), to confirm that the ordinary meaning deduced is the correct and intended meaning having regard to any extraneous material that further elucidates the purpose or object of the written law;

(b) under s 9A(2)(*b*)(i), to ascertain the meaning of the text in question when the provision on its face is ambiguous or obscure; and

(c) under s 9A(2)(*b*)(ii), to ascertain the meaning of the text in question where having deduced the ordinary meaning of the text as aforesaid, and considering the underlying object and purpose of the written law, such ordinary meaning is manifestly absurd or unreasonable.

77 Extraneous material cannot be used to give the statute a sense which is contrary to its express text save in the very limited circumstances identified at [76(c)] above (*Tan Cheng Bock* at [50]).

78 Section 390 was introduced into the corpus of Singapore law through the Criminal Procedure Code Bill No. 11/2010 ("CPC 2010 Bill"). It did not exist in the previous version of the act – *ie,* Criminal Procedure Code (Cap 68, 1985 Rev Ed) ("CPC 1985"). During the parliamentary debates for the CPC

2010 Bill, the Minister for Law Mr K Shanmugam said that (Singapore Parliamentary Debates, Official Report (18 May 2010) vol 87 at col 418):

> Under clause 390 of the Bill, the appellate Court will be allowed to frame an altered charge and convict on it if there is sufficient evidence for it to do so based on records before the Court. *The amendment is a codification of case law as decided by the Court of Appeal in Lee Ngin Kiat [1993] 2 SLR 511.*
>
> *The amendments go one step further to provide safeguards should the appellate Court decide to frame an altered charge.* The appellate Court is *required to ask the accused if he intends to offer a defence to the newly framed charge.* The appellate Court will then have to decide, with reference to the nature of the defence and the records before the Court, whether to convict him of the freshly-framed charge or to send the matter for trial in the lower Courts.
>
> [emphasis added]

79 Two points can be gleaned from this. First, Parliament was greatly concerned with the notion of providing safeguards when altered charges are framed by an appellate court.

80 Second, s 390 was a codification of case law as decided by the Court of Criminal Appeal in *Lee Ngin Kiat v Public Prosecutor* [1993] 1 SLR(R) 695 ("*Lee Ngin Kiat*"). In that case, the appellant had been charged with trafficking in not less than 147.68g of diamorphine which was in his possession. The trial judge convicted him on the charge and sentenced him to the mandatory death sentence. The appellant appealed to the Court of Criminal Appeal against the conviction. In coming to its decision, the Court of Criminal Appeal took the view that the particulars in the charge with respect to the manner of trafficking should be more specifically stated (*Lee Ngin Kiat* at [39]). In accordance with s 160 of the CPC 1985, which is the predecessor of s 125 of the CPC, the court held that the charge should state the form of trafficking, that is, which of the overt acts of trafficking in s 2 of the Misuse of Drugs Act (Cap 185, 1985 Rev Ed) ("MDA 1985") the appellant was charged with. The court thus *amended the*

charge to add the words "by offering to sell or distribute" immediately after the words "did traffic in" (at [40]).

81 In this regard, the court set out the applicable principles for its power to alter charges. At that time, there was no express statutory provision (in the CPC 1985 or otherwise) for the Court of Criminal Appeal to alter charges. The court held that its power to alter charges stemmed from s 54(1) of the Supreme Court of Judicature Act (Cap 322, 1985 Rev Ed) read with s 163(1) of the CPC 1985 and must be *exercised judiciously* (at [42]–[43]). Further, when a court decides on whether to alter a charge, *the possibility of prejudice to the accused person or to the Prosecution* must be of utmost concern (*Lee Ngin Kiat* at [43]). The question was whether altering the charge would *"occasion any injustice"* (*Lee Ngin Kiat* at [44], [46]).

82 The court held that the amendment of the charge against the appellant would simply specify the manner of trafficking, and would not occasion any injustice (*Lee Ngin Kiat* at [46]). It further reasoned as follows:

> … If the accused had actively tried to adduce evidence that he was not in possession of the drugs in the course of trafficking the court might be slow to amend the charge and instead hold that the charge was defective. The fact that the charge was too widely framed may have made his task unjustifiably burdensome. However, *in the present case the accused chose to remain silent and it cannot be said that the fact that the charge was widely framed deprived him of a chance to establish a defence. The charge can thus be amended and the accused convicted accordingly.*
>
> [emphasis added]

83 In *Lee Ngin Kiat*, the Court of Criminal Appeal amended the capital charge to another capital charge and convicted the appellant on the amended charge, and sentenced him to death. Given that s 390 was a codification of case law as decided by the Court of Criminal Appeal in *Lee Ngin Kiat*, it would be

incongruous to suggest that because of the words in parenthesis in s 390(7)(*b*), the court cannot now do the very thing it was permitted to do in *Lee Ngin Kiat.* In our judgment, the extraneous material suggests that under s 390, the appellate court can alter a capital charge to another capital charge, and convict the accused person on the altered capital charge. Following *Lee Ngin Kiat*, this should only be done when there is no possibility of prejudice to the accused person or to the Prosecution and would not occasion any injustice. This was, in substance, the approach of this court in *Moad Fadzir.*

84 Bearing in mind the foregoing, we held that the purpose and object of s 390 generally and s 390(7)(*b*) specifically, is: (a) to codify the existing case law on the appellate court's power to alter charges which could apply in circumstances where both the original and altered charges carry the death penalty; and (b) to enact additional safeguards should an appellate court decide to exercise its power to alter a charge.

Stage 3 of the Tan Cheng Bock Framework

85 Comparing Interpretations 1 and 2 against the legislative purpose and object of ss 390 and 390(7)(*b*), it is evident that Interpretation 2 best furthers Parliament's intention. It is in line with the statutory language of s 390(7)(*b*) read in context with s 390(4) and avoids the impractical and absurd result of requiring a retrial in respect of all altered capital charges regardless of the nature of the amendment. Most importantly, it achieves Parliament's stated objective of codifying the position set out in *Lee Ngin Kiat.* This, however, must be subject to the caveat that in exercising its powers under s 390(7)(*b*), an appellate court should not treat an altered capital charge in the same way as an altered non-capital charge.

86 A capital charge carries the ultimate penalty for an accused person and the court's scrutiny in respect of this must not only be rigorous, but punctilious and searching. If there is a reasonable possibility that the accused person may offer a defence that differs or wishes to adduce evidence which was not previously adduced, the court should decline to exercise its power under s 390(7)(*b*). This is also in line with Parliament's concerns about providing additional safeguards when a court chooses to alter charges under s 390 as voiced in Parliament by the Minister for Law and expressed in s 390(7)(*b*) through the words "other than a charge which carries the death penalty". These words make clear that additional safeguards are necessary when a person's life is at stake. It would also be consistent with the approach in *Lee Ngin Kiat* which was expressly endorsed by Parliament.

87 Our answer to the Consequential Query is thus that two courses of action are open to an appellate court if it takes the view that it is appropriate to frame an altered charge which carries the death penalty in circumstances when the original charge already carries the death penalty.

(a) The first course of action is to order that the accused be tried by a trial court of competent jurisdiction under s 390(7)(*b*).

(b) The second course of action is to convict the accused on the altered charge after the accused confirms that his defence case remains the same and his evidence will remain the same as that adduced during a trial of the altered charge.

88 Our *dicta* above should not be taken as a legal *carte blanche* for accused persons to submit for a complete retrial the moment their capital charges are amended. In cases where the amendments are minor, inconsequential or merely clerical in nature, it is unlikely that a retrial will be ordered.

89 Furthermore, in the interests of finality and to ensure that the second course of action is not abused by accused persons facing capital charges, an accused seeking to avail himself of this course cannot simply assert that his defence or evidence will be different. He ought to be able to lay out the general contours of his "new" defence(s) at a retrial of the altered charge, and explain the qualitative differences between his original defence at the trial and any new intended defence(s) as well as the new evidence necessary to substantiate it and how the new evidence is material or relevant to the amendment to the charge.

Application to the facts

90 Both Imran and Tamil refused to confirm that: (a) their defence will remain the same in respect of their altered charges; and (b) the evidence adduced in respect of their altered charges will remain the same as that adduced in the trial below. Furthermore, in the present case, Tamil had made clear that he intends to offer a new Intended Defence during a retrial (albeit one that shares some common elements with his Original Defence at the trial). He had also provided an explanation as to why he had, in his Original Defence, departed from his police statements at the trial by way of the (as yet unproven) Allegations against the Original Counsel which can only be fully explored at a retrial. We reiterate that proof of the Allegations can only be properly explored at the retrial. Since Imran and Tamil were jointly tried before the Judge, a joint retrial should be ordered for both of them if we were to allow a retrial for one. We therefore exercised our powers under s 390(7)(*b*) to order a joint retrial of both altered charges before a different judge of the General Division of the High Court. This was a course of action that all parties were in agreement with.

91 For completeness, we address DPP Wong's initial suggestion at the hearing that the matter be remitted only for the Judge to consider the specific

issue of whether the Allegations were in fact true, and if so, whether they had an impact on the defence that Tamil had run in the trial below. As we had explained to DPP Wong, this was not a feasible option because a limited remittal on a specific issue should only be ordered in a matter which lends itself to a clear and clean outcome in a discrete area of the case. The remittal suggested by DPP Wong, however, may well go towards Tamil's general credibility and perhaps even the credibility of Imran's account in the Six Statements. An effort to be efficient by way of a limited remittal might well end up in great inefficiencies because the findings of the Judge on one point may well have an impact on many other issues. In any event, DPP Wong eventually conceded that a full joint retrial ought to be ordered in respect of the altered charges.

The conduct of counsel

92 We turn finally to make some observations about Mr Thuraisingam's conduct in these proceedings and the Allegations against the Original Counsel.

93 The Allegations are not relevant for the purposes of the Amendment Query. We are, however, troubled by the manner in which they were placed before us. The Allegations are of a grave and very serious nature – *ie,* witness coaching, refusing to run Tamil's case in accordance with Tamil's instructions, placing a false version of events before the court, to name a few. They were raised for the very first time in the ET LLP Submissions, *before* the Original Counsel had been given any opportunity to respond to them.

94 We note Mr Thuraisingam's explanation that ET LLP had sought to contact Mr Selvaraj on 17, 18 and 19 March 2021 via the telephone but received no reply and that ET LLP had no choice but to file the ET LLP Submissions without Mr Selvaraj's input as the court-imposed deadline was fast approaching.

95 This explanation, however, is plainly unsatisfactory. It is unclear to us why Mr Selvaraj could not have been informed earlier *in writing* of the Allegations prior to the filing of the ET LLP Submissions given the gravity of the Allegations and their alleged potential impact on Tamil's conviction for a capital charge. ET LLP had been aware that Tamil wished to make very grave allegations against the Original Counsel as early as February 2021. This omission is particularly disturbing because in its letter of 25 February 2021 seeking an extension of time, ET LLP informed the court that the purpose of the time extension was due to the "*need to write* to his previous solicitors [Original Counsel] for clarification". Mr Thuraisingam was certainly aware of the need to not only investigate into the veracity of the Allegations, but also to obtain the responses of his fellow members of the bar to them – this point being stated both in the ET LLP Submissions and in ET LLP's letter to court dated 25 February 2021.

96 We are also concerned by the fact that only one out of the three Original Counsel, Mr Selvaraj, was notified of the filing of the ET LLP Submissions on 19 March 2021. There was no mention of the fact that Mr Shafiq and Mr Umar had even been involved in the case as Tamil's Original Counsel for the trial before the Judge until Mr Selvaraj's response dated 24 March 2021.

97 We took a dim view of this conduct which was in contravention of Rule 29 of the Legal Profession (Professional Conduct) Rules 2015 (S 706/2015) ("PCR"). We take this opportunity to remind all counsel of this fundamental rule, which states:

> **Allegations against another legal practitioner**
>
> **29.** A legal practitioner (*A*) must not permit an allegation to be made against another legal practitioner (*B*) in any document filed on behalf of A's client in any court proceedings, unless —
>
> (*a*) *B* is given the opportunity to respond to the allegation; and
>
> (*b*) where practicable, *B*'s response (if any) is disclosed to the court.

98 The rationale behind Rule 29 of the PCR is to ensure that a legal practitioner (*A*) gives another legal practitioner (*B*) an opportunity to provide the court with a "full and balanced picture of the allegation made against *B* when *B,* not being a party to the proceedings, would not have had an opportunity to respond" (see Practice Direction 8.1.1 of the Law Society of Singapore). We stress that it is a matter of **duty** for *A* to provide *B* with *sufficient particulars of the allegation* against *B* to enable *B* to fully respond. A letter sent to Mr Selvaraj informing him of the Allegations, on the same day that the Allegations were made known to this court, falls far short of the standards that are expected of counsel.

99 The rules governing professional conduct are safeguards meant to protect the conduct and the administration of justice in our courts. Further, where allegations are made against counsel who have appeared in proceedings, it is a matter of common fairness and professional courtesy that the person at the receiving end of the allegations has a chance to know what is being said about him, and to comment on the allegations, before they are raised before the court.

100 To Mr Thuraisingam's credit, however, he acknowledged that he had acted in breach of Rule 29 of the PCR by failing to obtain Mr Selvaraj's response to the Allegations prior to making them known to the court, took full

responsibility for it, and unreservedly apologised at the outset of the hearing before us.

101 It remains for us to make one final observation. In recent years, cases in which accused persons seek to level accusations and allegations against their previous lawyers have increased in frequency in a bid to escape the consequences of their crimes (see for example, our recent decisions in *Nazeri bin Lajim v Public Prosecutor* [2021] SGCA 41 and *Iskandar bin Rahmat v Law Society of Singapore* [2021] SGCA 1). This is a disturbing trend, and one that appears to be evolving given that allegations are now being made through an accused's newly appointed lawyers in their submissions before this court. Regardless of the truth of any such allegations, they cannot and should never be made lightly, and certainly not without proper observance of the relevant professional conduct rules. We express our strong disapprobation of such conduct and leave the full extent of which, if any, to be addressed separately.

Conclusion

102 We exercised our powers under s 390(4) to frame amended charges against both Tamil and Imran (as stated at [33] and [56] above) and ordered a joint retrial of the amended charges before a different judge of the General Division of the High Court pursuant to s 390(7)(*a*).

Sundaresh Menon
Chief Justice

Andrew Phang Boon Leong
Justice of the Court of Appeal

Steven Chong
Justice of the Court of Appeal

Daniel Chia Hsiung Wen and Ker Yanguang (Morgan Lewis Stamford LLC) (instructed), Prasad s/o Karunakarn (K Prasad & Co) for the appellant in CA/CCA 22/2019;
Eugene Singarajah Thuraisingam, Johannes Hadi and Koh Wen Rui Genghis (Eugene Thuraisingam LLP) for the appellant in CA/CCA 24/2019;
Wong Woon Kwong and Chin Jincheng (Attorney-General's Chambers) for the respondent.
