Public Prosecutor *v* Muhammad Farid bin Mohd Yusop
[2015] SGCA 12

Case Number	: Criminal Appeal No 4 of 2014
Decision Date	: 11 March 2015
Tribunal/Court	: Court of Appeal
Coram	: Chao Hick Tin JA; Andrew Phang Boon Leong JA; Tay Yong Kwang J
Counsel Name(s)	: Lau Wing Yum and Lim How Khang (Attorney-General's Chambers) for the appellant; Amolat Singh (Amolat & Partners) and Mervyn Cheong Jun Ming (Eugene Thuraisingam) for the respondent.
Parties	: Public Prosecutor — Muhammad Farid bin Mohd Yusop

Criminal Law – Statutory Offences – Misuse of Drugs Act

11 March 2015

Andrew Phang Boon Leong JA (delivering the grounds of decision of the court):

Introduction

1 This was an appeal against the decision of the High Court judge ("the Judge") in *Public Prosecutor v Muhammad Farid bin Mohd Yusop* [2014] SGHC 125 ("the Judgment"). The accused ("the Respondent") had claimed trial to the following charge of trafficking in methamphetamine (which we will hereinafter refer to by its street name "Ice") under s 5(1)(*a*) read with s 5(2) of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) ("the Act"):

> That you, MOHAMMAD FARID BIN MOHD YUSOP,
>
> on 10 March 2011, at about 5.30 a.m., in the vicinity of the traffic junction of Lavender Street and Bendemeer Road, Singapore, inside vehicle SGH3547U, did traffic in a controlled drug specified as a "Class A drug" in the First Schedule to the Misuse of Drugs Act (Cap 185,2008 Rev Ed) ("the Act"), to wit, by having in your possession for the purpose of trafficking, two packets of crystalline substance which was analysed and found to contain *not less than 386.7 grams of methamphetamine*, without any authorisation under the Act or the regulations made thereunder, and you have thereby committed an offence under s 5(l)(a) read with s 5(2) and punishable under s 33 of the Act, and further upon your conviction under s 5(1) of the Act, you may alternatively be liable to be punished under s 33B of the Act.
>
> [emphasis added]

2 After hearing the parties, the Judge accepted the defence of the Respondent and amended the capital charge to one of possessing 249.99g of Ice for the purpose of trafficking. He convicted the Respondent on the amended charge and sentenced him to 23 years' imprisonment and 15 strokes of the cane.

3 The Prosecution appealed against the decision of the Judge and the appeal came before us on 16 October 2014. After hearing the parties, we dismissed the appeal. Before setting out the detailed grounds of our decision, we would like to briefly highlight three general observations at the outset

which merit some attention in this appeal, and which we will elaborate upon towards the end of this judgment.

4 The first observation pertains to the issue as to whether the court should draw an adverse inference in situations where a party had elected not to call a witness who might have been instrumental in his case, despite the witness being available. In this appeal, this arose as the Respondent had chosen not to call the person who supplied him the drugs, and the Prosecution argued that by choosing not to do so, this cast a "real doubt" on the Respondent's evidence with regard to one crucial aspect of the case.

5 The second observation relates to the need for the courts to be particularly discerning towards *manufactured* defences and to guard against them. This appeal concerned certain presumptions that arose and which the Respondent had the legal burden of rebutting on a balance of probabilities. In such situations, there is a general concern that, through carefully rehearsed statements, an accused person might attempt to manufacture a defence specifically tailored to rebut such legal presumptions. In this regard, we had certain reservations as to the veracity of the Respondent's defence mounted in the court below, which the Judge accepted and thereby found that these presumptions had been rebutted.

6 However, despite these reservations, we nevertheless dismissed the appeal. This leads us to our third observation, which, although trite, bears repeating – that it must be shown that a trial judge's determination was *plainly wrong* or *plainly against the weight of the evidence* before appellate intervention is warranted. This appeal neatly illustrated this principle – while there were certain gaps in the Respondent's defence, especially given the fact that there was no objective or corroborating evidence from another party in support of the Respondent's defence, we were not satisfied that the Judge was *plainly wrong* in his findings and therefore dismissed the appeal.

7 As already mentioned, we will return to elaborate on these three observations later, but first set out our detailed grounds for dismissing the appeal.

Background facts

8 Following the successful conclusion of an operation led by Senior Station Inspector Heng Chin Kok ("SSI Heng"), the Respondent, a 30-year-old male Singaporean, was arrested by Central Narcotics Bureau ("CNB") officers at about 5.30am in the vicinity of the traffic junction of Lavender Street and Bendemeer Road inside vehicle SGH3547U ("the Car"). After the Respondent was arrested, the Car was searched by Senior Station Inspector Ng Tze Chiang Tony ("SSI Tony Ng"), and the following items were found on the front passenger's seat:

(a) one plastic bag which was tied up and contained a packet of crystalline substance ("A1"); and

(b) one black and grey chequered plastic bag which was untied and contained a packet of crystalline substance ("A2").

9 The crystalline substance in A1 and A2 contained Ice, and the net weight of Ice in A1 and A2 was found to be 386.7g altogether. SSI Heng then recorded a contemporaneous statement from the Respondent who was sitting in the rear passenger's seat of the Car at about 6.00am.

The cautioned statement

10 On the same day at about 6.30pm, a cautioned statement was taken from the Respondent ("the Cautioned Statement"), which reads as follows:

> If I had knew that the amount of ICE that I was going to collect this morning was 500 grams, I would not have collected the ICE. Before today, I used to collect ICE below the weight of 250 grams. I really do not know why the ICE amount today was 500 grams which is more than usual. The reason for me not dealing with ICE more than 250 grams is that I knew it would be death sentence if I am caught.

The four long statements

11 Four long statements were subsequently recorded from the Respondent. In these statements, the Respondent related when he had started to get involved in trafficking Ice, and his version of what had happened on the day of his arrest.

12 According to the Respondent, he started dealing in Ice since the start of 2010. He would receive his supplies from a Malay man known as "Bapak", and then weigh and re-pack the Ice into mini-packets to sell for a profit. In early 2011, Bapak asked the Respondent to deliver Ice to various other customers for him, and offered the Respondent $500 for each delivery job. The Respondent took up the offer and made his first delivery for Bapak sometime in January 2011. On that occasion, he drove his car under the overhead pedestrian bridge at Kranji MRT station, where a Malaysian Indian man later arrived and placed a packet of Ice into the Respondent's car through his front passenger's window. They did not speak. The Respondent then drove off to deliver the packet of Ice to Bapak's friend. The $500, which he was promised for making the delivery, was then duly deducted from what the Respondent owed Bapak for the Respondent's personal supply of Ice which he had bought from Bapak.

13 The Respondent later made two more deliveries of Ice for Bapak – one around the end of January 2011 and the other sometime in February 2011. On both occasions, the Respondent followed essentially the same *modus operandi* that was used on the first delivery as described above. The Respondent stated that he handled 125g of Ice on his first and second deliveries, and 250g of Ice on his third delivery. It appears that the Respondent was referring to the *gross* weight of the Ice (*ie*, the total weight including impurities) rather than the *net* weight (*ie*, the weight of the pure drug as determined after scientific analysis). The Respondent himself had said that 250g was the weight "before you analyse".

14 The Respondent was instructed to make what would be his fourth delivery job for Bapak on 10 March 2011. He was told, early that morning at about 4.00am, to proceed to Kranji MRT station to collect the Ice. The Respondent complied, and, as on previous occasions, stopped his car under the overhead pedestrian bridge. A Malaysian Indian man approached his car and placed two plastic bags on his front passenger's seat, after which the Respondent drove off.

15 The Respondent stated that, while he did not open the plastic bags to check the contents, he knew that they contained Ice. He did not know the exact weight of the Ice but assumed that it was less than 250g. As the Respondent was driving, he received a call from Bapak who instructed him to bring the Ice to Woodlands for delivery to its intended recipient. Shortly after this call, however, he found his car being "sandwiched" by the CNB officers at the junction of Lavender Street and Bendemeer Road. This eventually led to his arrest.

The decision below

16 In the court below, the Prosecution relied on the presumptions under ss 18(1) and 18(2) of the Act to prove that the Respondent had in his possession the two plastic bags containing Ice (*viz*, A1 and A2) and that he knew that the contents therein were Ice. It was also clear that the Respondent was trafficking in Ice since he had admitted that he was on the way to deliver the drugs to one of Bapak's customers. The Respondent's defence was that he did not intend to traffic in the *quantity* of Ice that was in fact found on him, *viz*, 386.7g, but only in a lesser quantity of up to 250g. This particular defence was crucial as any quantity beyond 250g would have attracted the death penalty. In support of this particular defence, the Respondent claimed that he had an agreement with Bapak not to deliver more than 250g of Ice. Given this agreement and that there was nothing suspicious about that delivery that should have caused the Respondent to suspect that he would be given more than 250g of Ice, the Defence submitted that the Respondent *did not know* and that it was not reasonable for him to expect that the weight of Ice passed to him would be more than 250g.

17 The primary issue before the Judge was therefore whether the Respondent's defence (*ie*, that he *did not know* the weight of Ice in his possession was more than 250g) should be accepted. The Judge approached this by considering, first, whether there was an agreement between the Respondent and Bapak, and secondly, whether there were any circumstances which would have caused the Respondent to suspect that there was more than 250g of Ice in the packets.

18 The Judge made the following findings:

(a) On a balance of probabilities, there was an agreement between the Respondent and Bapak that the Respondent would not be required to deliver more than 250g of Ice for each delivery job. In particular, the Respondent had satisfactorily outlined his defence in his statements. Although this was not done in detail, the absence of elaboration was not a proper basis to draw an adverse inference against him as there was no need for the Respondent to have minutely detailed his defence in his statements.

(b) The Respondent could not be said to have been wilfully blind as there was no reason for the Respondent to have suspected that he had been given more than 250g of Ice for the fourth delivery. In particular:

(i) Although there was an increase in the weight from the first and second delivery (125g of Ice) to the third delivery (250g of Ice), the weight of Ice for the third delivery was still within the 250g limit. This alone was not a persuasive reason to find that the Respondent must have then suspected that there was an increasing trend in the weight of Ice being delivered, and that he must have at least suspected that Bapak would have increased the weight of Ice for the fourth delivery.

(ii) Although he had received two plastic bags of Ice, it was not reasonable to expect the Respondent to have been able to guess the weight of the Ice merely from the size or number of plastic bags. The difference between 386.7g and 250g of Ice was not so significant that there would be a discernible physical difference between the plastic bags. We would note at this juncture that the Judge, with respect, had erred in using the net weight of the Ice (386.7g). In such a context, the appropriate comparator is the gross weight of the drug (which was nearly 500g), as it is impossible to determine the net content of pure Ice through a visual inspection, although nothing really turned on this.

19 The Judge therefore accepted the Respondent's defence that he did not know that the weight of Ice in his possession was more than 250g. Accordingly, he amended the charge to one of possessing 249.99g of Ice for the purpose of trafficking and convicted the Respondent on that

amended charge instead.

Issues in this appeal

20 The Prosecution appealed against the entirety of the Judgment, raising two broad issues on appeal:

(a) whether the Judge had erred in finding that there was an agreement between the Respondent and Bapak that the weight of Ice for each delivery would not exceed 250g; and

(b) whether the Judge had erred in finding that the Respondent's conduct did not amount to wilful blindness inasmuch as he did not know that the weight of Ice in his possession was more than 250g.

Our decision

21 After considering the submissions of the Prosecution, we were not satisfied that the findings of the Judge were plainly wrong or plainly against the weight of the evidence. We first elaborate on the two issues raised in this appeal, before returning to the three general observations alluded to at the outset of the judgment.

The agreement with Bapak

22 The first finding of fact which was appealed against was the Judge's finding that there was an agreement between Bapak and the Respondent that the weight of Ice for each delivery would not exceed 250g. What was apparent to us was that the only evidence supporting this agreement was the Respondent's own evidence in both his oral testimony as well as his statements. It was therefore pertinent to examine the consistency of the Respondent's evidence and the Judge's reliance on this to ascertain whether the Judge's findings in this regard were plainly wrong or plainly against the weight of the evidence.

23 The Prosecution raised a number of challenges against the Respondent's evidence regarding this agreement, arguing that the evidence could not support the Judge's findings. This included the following arguments:

(a) although the Respondent might have alluded to such an agreement in the Cautioned Statement, the agreement was not mentioned at all in his long statements. This had to be considered against the evidence of the investigating officer, Deputy Superintendent Tan Seow Keong ("DSP Tan"), who had testified that he had recorded everything which the Respondent had mentioned;

(b) the fact the Respondent had mentioned the agreement in the Cautioned Statement but failed to mention this in his long statements demonstrated that there was an inconsistency in his position. His credibility had to be considered in the light of this inconsistency; and

(c) the Respondent's credibility was put into serious doubt because he had made several allegations for the first time during cross-examination and these allegations were never put to the relevant Prosecution witnesses when they took the witness stand.

The Prosecution also took issue with the fact that the Respondent had chosen not to call Bapak as a witness. We will return to address this point later.

24 As can be seen, one of the key planks of the Prosecution's argument on appeal was that there was no record of any agreement in the Respondent's long statements. While this was true to some extent, this evidence, however, had to be considered in the light of the three points below.

25 First, it was important to understand the significance of the absence of any agreement being mentioned in the long statements against the backdrop of how the long statements were recorded. When this issue was raised, the Judge noted (see the Judgment at [33]) that DSP Tan had admitted during cross-examination that the Respondent had mentioned an agreement, but that this might not have been written down when DSP Tan recorded the long statements. In this appeal, the Prosecution pointed out that, during re-examination, DSP Tan actually explained that he might have misunderstood the question during cross-examination, and that the Respondent might not have explicitly mentioned an agreement during the recording of his statements. The Prosecution therefore contended that the Judge had erred in relying on this lapse to reason why the Respondent had not mentioned any agreement in his long statements.

26 Whilst that was true, what was important to note was that, when questioned by the Judge as to why he seemed to have an idea of this agreement, DSP Tan went on further to state as follows:

> A: Er, Your Honour, I, erm, to answer the question, it's---it's---*it's an impression that I got from, er, the accused that---there---he will not transaction more than, er, 255* [*sic*] gram *of Ice and above*. Er, but on the fact that whether he has an agreement with "Bapak", er, that one I'm not so sure. Er, because if---if the accused has mention this to me earlier on, during the statement recording, I would have recorded it down.
>
> [emphasis added]

27 The important point to note in the context of the present appeal was that whether there was an agreement between Bapak and the Respondent was only *indicative* of the *mens rea* of the Respondent – *even if* the Respondent was under the *misimpression* that he would only be delivering less than 250g of Ice because of an agreement (which may or may not have existed), this was still indicative of what the Respondent's state of knowledge was. In this regard, it was significant that DSP Tan had observed that, whilst the Respondent may not have explicitly mentioned an agreement, the Respondent *did* give an *impression* that he would only be delivering less than 250g of Ice. This lent credibility to the Respondent's assertion that he did not know he was carrying more than 250g of Ice.

28 Secondly, we also noted that the Respondent had, in a number of his statements, mentioned that the weight of the Ice in his possession was 250g. When the packets of Ice were first retrieved from the Car, SSI Tony Ng had asked the Respondent what the packets contained, and how heavy they weighed. The Respondent, albeit after some hesitation, stated that it was "250g" of Ice. This was corroborated by the evidence of another CNB officer present, Woman Senior Staff Sergeant Jenny Woo. The second time the Respondent mentioned the weight of Ice was, as observed by the Judge, in the Respondent's Cautioned Statement, where the Respondent mentioned that he "used to collect ICE below the weight of 250 grams". Finally, in his long statement dated 23 March 2011, the Respondent had also mentioned that he did not "know the exact weight of Ice", but had assumed "that the total weight was 250 grams". Apart from the lack of details in his long statements, there was therefore really no inherent contradiction between his statements and his defence. Looked at as a whole, this lent further credibility to the Respondent's assertion of such an agreement.

29 Thirdly, we could also find no fault with the Judge's reasoning that it would be odd that the Respondent would only be paid $500 for every single delivery of Ice, regardless of the weight. The

impression from the notes of evidence as well as his statements suggested to us that the Respondent was of reasonable intellect and was proficient in English. The Prosecution had also alluded to this and, in their closing submissions in the trial below, characterised the Respondent as "an intelligent and enterprising person". In a commercial bargain, it would be reasonable to think that the Respondent would not have agreed to be paid a flat rate of $500 for every single delivery of Ice, regardless of the weight.

Whether the Respondent was wilfully blind

30 The second finding of fact which was appealed against was the Judge's finding that the Respondent was not wilfully blind, inasmuch as he did not know or had little reason to suspect that the weight of Ice in his possession was more than 250g. The Prosecution relied on three facts to argue that the Respondent should be found to have been wilfully blind. First, it was submitted that the Respondent had knowledge that there were two plastic bags instead of one, unlike in the previous three deliveries. He should therefore have at least suspected that there was a greater quantity of Ice in his possession. Secondly, the Respondent had conceded that he could not trust Bapak generally and, therefore, he would already have had his suspicions as to whether the weight of Ice in his possession exceeded 250g (despite the alleged agreement with Bapak). Thirdly, the Respondent could have easily checked whether the weight of Ice in his possession was more than 250g, and, by choosing not to do so, was really turning a blind eye to the actual facts.

31 In support of this argument, the Prosecution submitted that the facts of this appeal were similar to those in the decision of this court in *Dinesh Pillai a/l K Raja Retnam v Public Prosecutor* [2012] 2 SLR 903 ("*Dinesh Pillai*"). In *Dinesh Pillai*, the accused was paid to deliver "food" wrapped in brown packets to Singapore. During the third of such deliveries, the accused was detained at Woodlands Immigration Checkpoint, and diamorphine was found inside the brown packet. In dismissing his appeal, this court found that the accused had failed to prove that he did not know that the brown packet in his possession contained a controlled drug. It was observed (at [17]) that the accused "did not believe" that the brown packet contained food, suspected that they contained something illegal, and had ample time and opportunity to check. By not doing so, the accused therefore (see [21]):

> … failed to rebut the s 18(2) MDA presumption on a balance of probabilities because he turned a blind eye to what the Brown Packet contained despite suspecting that it contained something illegal. ...

The Prosecution submitted that essentially the same factors were present in this appeal – basically, a certain suspicion on the part of the Respondent and his subsequent failure to check.

32 We were not persuaded by this argument. In our judgment, the appeal before us was different from *Dinesh Pillai* in the following manner. First, although the Respondent might have had *some* sort of suspicion on his part, we agreed with the Judge that such a suspicion was "not firmly grounded on specific facts but arose simply by virtue of the risky venture which he undertook" (see the Judgment at [43]). Even if the Respondent had suspected that Bapak *might* have increased the weight of the Ice to be delivered, it was significant that in his previous three deliveries, the weight of the Ice was 250g or less, in accordance with his alleged agreement with Bapak. The Respondent had followed a similar, if not the same, *modus operandi* as he did in his previous delivery jobs, where he had driven to a point where he would wait to be passed the drugs, and then delivered the drugs to the instructed destination. There was therefore nothing out of the ordinary such as to arouse his suspicion which was (in turn) sufficient to ground a finding of wilful blindness. Secondly, it must also be remembered that in this case, unlike *Dinesh Pillai*, it could not be said that the Respondent could have easily ascertained the weight of the Ice in his possession. In fact, during his previous deliveries,

it was only after he had received the drugs and returned would he then weigh the Ice passed to him. That was how he had known that the weight of the Ice in his previous deliveries was less than 250g in gross weight.

33 In the trial below, the burden was on the Respondent to "prove on a balance of probabilities that he did not know or could not reasonably be expected to have known" (see *Dinesh Pillai* at [21]) that the weight of Ice was above 250g. In the Judge's view, which we agreed with, he had successfully discharged this burden of proof. In this regard, we found the decision of this court in *Khor Soon Lee v Public Prosecutor* [2011] 3 SLR 201 ("*Khor Soon Lee*") helpful. To briefly summarise, in *Khor Soon Lee*, the accused was a drug courier who had had agreed to transport Erimin, Ketamine, Ice and Ecstasy into Singapore. However, on the day of his arrest, he was found to be in possession of *diamorphine* instead (a charge which attracted the death penalty). He was convicted for trafficking in diamorphine, and appealed to this court, arguing that he did not know that the drugs in his possession were diamorphine. The appeal was allowed, and two facts were significant in this particular regard. First, this court noted (at [23]) that the accused had sought assurances from his supplier that he would not be trafficking in diamorphine as he was afraid of the death penalty. Second, it was also significant that, on numerous previous occasions, he had only trafficked in Erimin, Ketamine, Ice, Ecstasy, but not diamorphine. Having this in mind, the court was therefore satisfied that the accused was "at most, either negligent or reckless in not checking the package, but *not* wilfully blind" (at [28]). Given our observations above, we likewise found that the Respondent could not be said to be wilfully blind simply because he did not check the weight of the Ice in the packets. To this end, we would also affirm the Judge's findings that the sight of two plastic bags would not be significant enough to cause the Respondent to suspect that the weight of Ice in his possession was more than 250g (notwithstanding the Judge's error in using the net weight of the Ice instead of the gross weight, as he should have done (see above at [18(b)(ii)])).

Conclusion on the substantive appeal

34 For the reasons set out above, we were of the view that the Judge's findings were not plainly against the weight of the evidence. His findings were reasoned and supported by the evidence, and, thus, the threshold for appellate intervention had not been crossed. We therefore dismissed the appeal.

General observations

35 Notwithstanding the fact that we dismissed the appeal and affirmed the Judge's decision that the presumption under s 18(2) of the Act had been rebutted on the evidence before him, we think that it is timely to render some general observations on certain specific issues – some of which arose during the course of oral submissions before this court.

The failure to call Bapak as a witness

36 One specific – and related – issue that arose in the present appeal and which might have a potentially broader application beyond this case related to whether the courts should draw an adverse inference in situations where the accused person claims that somebody had given him the drugs concerned and that person is in fact available to be called as a witness during his trial. In this appeal, that potential witness (who was *not*, in fact, called) was Bapak. The Prosecution had relied on this fact in challenging both the Judge's findings of fact, arguing that by choosing not to do so, this cast a "real doubt" on the Respondent's evidence that there had been an agreement between the Respondent and Bapak that the weight of Ice for each delivery would not exceed 250g.

37 When faced with this particular issue, the Respondent's counsel, Mr Amolat Singh ("Mr Singh"), in his characteristically candid style (which has now become a sterling hallmark all criminal practitioners would do well to emulate) did not seek to avoid the issue, but instead, dealt with it head-on. Put simply, his point was that the choice of whether or not to call a witness (such as Bapak) is *a tactical decision which lies within the purview of the defence*. In this particular case, for example, Mr Singh stated that Bapak was not called as a witness because it was felt that his evidence would not be of assistance or might even be prejudicial to the Respondent. Bapak, Mr Singh submitted, would (in order to assist and corroborate the Respondent's case) have to give evidence *which might implicate him in an offence under the Act as well*. In our view, this point is well-taken. Indeed, it was possible that Bapak might, instead, have attempted to implicate the Respondent. Whilst it is true that he could then have been treated as a hostile witness, it would, in the general scheme of things, not only not have advanced the Respondent's case but might also have *prejudiced* it instead. Put simply, the Respondent might have been in no better a position or might even have been in a *worse* position had he chosen to call Bapak as a witness.

38 It is true that, in *Khor Soon Lee*, we expressed the view (at [32]) that:

> ... [W]here there are at least two co-accused who have been charged in relation to the same transaction, the Prosecution should endeavour, if … it proposes to release one of the co-accused, to inform counsel for the other co-accused as expeditiously as possible. Likewise, counsel for the *other* co-accused should also act with equal expedition in determining whether the evidence of the co-accused (to be released) is necessary for his or her client's defence. If deemed necessary, counsel ought to make the necessary applications to secure the co-accused's attendance at the trial of his or her client. [emphasis in original]

39 The present appeal is different from that in *Khor Soon Lee* in so far as Bapak was not a co-accused together with the Respondent. However, there is, in principle, no reason why the Prosecution should not have made Bapak available as a witness. In fact, the Prosecution confirmed that it *did* indeed make Bapak available to the defence to be called as a witness, although, it was submitted, there was no *duty* on the part of *the Prosecution* to call Bapak as a witness. This last-mentioned point is well-taken and brings us back to the issue as to whether or not, faced with the choice of calling Bapak as a witness, an adverse inference ought to be drawn against the Respondent (pursuant to s 116, Illustration (*g*) of the Evidence Act (Cap 97, 1997 Rev Ed) ("s 116(g)")) as he had chosen *not* to call Bapak as a witness. And this in turn brings us back to the submission by Mr Singh (above at [37]). We think that his submission is generally a persuasive one, especially when we take into account the relevant case law.

40 An oft-cited decision (see, for example, Dr V Kesava Rao, *Sir John Woodroffe & Syed Amir Ali's Law of Evidence* (LexisNexis, 18th ed, 2009) vol 3 at p 4947) is the Calcutta decision of *In the Matter of the Petition of Dhunno Kazi and another; The Empress v Dhunno Kazi and another* (1881) ILR 8 Cal 121 ("*Kazi*"), where Wilson J, in delivering the judgment of the court, observed as follows (at 124–125):

> The only legitimate object of a prosecution is to secure not a conviction, but that justice be done. The prosecutor is not therefore free to choose how much evidence he will bring before the Court. He is bound to produce all the evidence in his favour directly bearing upon the charge. It is *primâ facie* his duty, accordingly, to call witnesses who prove their connection with the transactions in question, and also must be able to give important information. The only thing that can relieve the prosecutor from calling such witnesses is the reasonable belief that, if called, they would not speak the truth. If such witnesses are not called without sufficient reason being shown (and the mere fact of their being summoned for the defence seems to us by no means necessarily

a sufficient reason), the Court may properly draw an inference adverse to the prosecution.

There is ***no corresponding inference against the accused. He is merely on the defensive, and owes no duty to any one but himself. He is at liberty, as to the whole or any part of the case against him, to rely on the witnesses of the case for the prosecution, or to call witnesses, or to meet the charge in any other way he chooses; and no inference unfavourable to him can properly be drawn, because he takes one course rather than another.*** In the present case, these considerations apply with peculiar force. If the witnesses referred to by the learned Judge are thought by the prosecution to be trustworthy men, the prosecution was bound to call them. If they are thought not to be so, it seems to us specially unreasonable to reproach the accused with not calling them.

[emphasis added in bold italics]

41 Indeed, *Kazi* was itself cited in the Federation of Malaya Court of Appeal decision of *Goh Ah Yew v Public Prosecutor* [1949] MLJ 150 ("*Goh Ah Yew*"), where Spenser-Wilkinson J, delivering the judgment of the court, observed thus (at 153):

Before finally disposing of this appeal, however, there are various points which were raised in the course of the argument at the trial (some of which were mentioned before us) upon which we feel that we ought to express an opinion. In the course of a long address to the Assessors the Deputy Public Prosecutor who conducted the trial in the Court below put forward various propositions of law which were quite untenable. In the first place, he invited the Assessors to draw an inference against the appellant by reason of his failure to call a certain witness who was present in Court and available. He relied upon paragraph (g) of section 114 of the Evidence Enactment [*ie*, s 116(g)] as showing that a presumption arose that the evidence of this witness would not have corroborated that of the appellant. ***No such inference, however, can be drawn against an accused in a criminal trial. There is no duty upon an accused to call any evidence. He is at liberty to offer evidence or not as he thinks proper and no inference unfavourable to him can be drawn because he adopts one course rather than the other.*** *Emperor v. Dhunno Kazi* and see *Woodroffe* on Evidence 9th Edition at page 813; *Sarkar* on Evidence 5th Edition 865. [emphasis added in bold italics]

42 The principle in *Goh Ah Yew*, as set out in the preceding paragraph, has also since been applied in numerous decisions in both Singapore as well as Malaysia (see, by way of a brief sample only, the Singapore District Court decisions of *Goh Eng Hock v Public Prosecutor* [2001] SGDC 298 at [57]; *Public Prosecutor v Harvey Chong* [2007] SGDC 29 at [112]; and *Public Prosecutor v Foo Chee Ring* [2008] SGDC 298 ("*Foo Chee Ring*") at [205], [208] and [220]; the Singapore High Court decision of *A b u Bakar v Regina* [1963] MLJ 288 at 289; the Malaysian High Court decision of *Gunasegaran a/l Singaravelu v Public Prosecutor* [2009] 7 MLJ 761 at [21]; the Malaysian Court of Appeal decisions of *Tay Kok Wah v Public Prosecutor* [2012] 4 MLJ 502 at [26] and [27] and *Azmer bin Mustafa v Public Prosecutor* [2014] 3 MLJ 616 at [45]; as well as the Malaysian Supreme Court decision of *Illian & Anor v Public Prosecutor* [1988] 1 MLJ 421 at 424 (this last-mentioned case related, in fact, to charges of drug trafficking)).

43 It should be noted that Yong Pung How CJ did observe, in the Singapore High Court decision of *Public Prosecutor v Nurashikin bte Ahmad Borhan* [2003] 1 SLR(R) 52 ("*Nurashikin*"), as follows (at [24]):

24 In my opinion, the respondent's failure to call Natasha to the stand should have resulted in an adverse inference being drawn against her under illustration (g) to s 116 of the Evidence Act.

I do not mean to suggest that a defendant's failure to call a material witness will always result in an adverse inference being drawn against him. Illustration (g) to s 116 provides that:

The court may presume that evidence which could be and is not produced would if produced be unfavourable to the person who withholds it.

As apparent from the wording of the provision, it allows, but does not compel, the court to draw adverse inferences even if available evidence is not produced in court. In fact, the general rule is that the burden lies on the Prosecution to prove its case and no adverse inference can be drawn against the Defence if it chooses not to call any witness: see *Goh Ah Yew v PP* [1949] 1 MLJ 150 and *Abu Bakar v R* [1963] 1 MLJ 288. ***There is however an important qualification to this general rule: if the Prosecution has made out a complete case against the defendant and yet the defence has failed to call a material witness when calling such a witness is the only way to rebut the Prosecution's case, illustration (g) to s 116 of the Evidence Act then allows the court to draw an adverse inference against the defendant:*** *Choo Chang Teik v PP* [1991] 3 MLJ 423 and *Mohamed Abdullah s/o Abdul Razak v PP* [2000] 1 SLR(R) 922. ***This is based on the commonsense notion that if the only way for the Defence to rebut the Prosecution's case is to call a particular witness, then her failure to do so naturally raises the inference that even that witness's evidence will be unfavourable to her.***

25 This was exactly the case in the present appeal. The circumstantial evidence adduced by the Prosecution was strong enough to amount to a complete case against the respondent. The respondent had no other available means of rebutting the Prosecution's strong circumstantial evidence against her except through calling Natasha to the stand. Yet she failed to do so without good reasons. Natasha was clearly an available witness. In fact, she was in court during the trial hearing. In such circumstances, the judge should have drawn an adverse inference against the respondent under illustration (g) to s 116 of the Evidence Act that Natasha's evidence would be unfavourable to her.

[emphasis added in bold italics]

44 The above observation has been cited in numerous decisions, including the Singapore District Court decisions of *Public Prosecutor v Sim Teck Meng David* [2004] SGDC 71 at [108]; *Public Prosecutor v Muhammad Hafiz bin Sapeh* [2007] SGDC 243 at [45]; *Public Prosecutor v Deng Xiaohong* [2008] SGDC 23 at [58]; *Public Prosecutor v Jayasangar s/o G Packirisamy* [2009] SGDC 41 ("*Jayasangar*") at [41]; and *Koh Young Lyndon v Masao Lim Zheng Xiong* [2010] SGDC 309 at [33]; as well as the Singapore High Court decisions of *Han Yung Ting v Public Prosecutor* [2003] SGHC 268 at [46]; *Loo See Mei v Public Prosecutor* [2004] 2 SLR(R) 27 at [53]–[54]; and *Valentino Globe BV v Pacific Rim Industries Inc* [2009] 4 SLR(R) 577 at [69].

45 Most importantly, we note the following observations by Yong Pung How CJ in the Singapore High Court decision of *Mohamed Abdullah s/o Abdul Razak v Public Prosecutor* [2000] 1 SLR(R) 922 ("*Mohamed Abdullah*") (at [41]–[44]) (a decision that was, not surprisingly, also relied upon by Mr Singh):

41 What effect should be attributed by the court to the appellant's failure to call material witnesses? In criminal matters, it is well established that where the Prosecution fails to call a material and essential witness, the court has the discretion to draw an adverse presumption against it under s 116 illus (*g*) of the EA. In deciding whether it is appropriate to draw such an adverse presumption against the Prosecution, all the circumstances of the case will be considered, to see whether its failure to call that material witness left a gap in its case, or

whether such failure constituted withholding of evidence from the court. ***In contrast, due to the allocation of the burden of proof in criminal matters, great caution should be exercised*** when applying s 116 illus (*g*) EA to ***the defence's failure to call a material witness*** . Whereas the Prosecution has the burden to prove its case beyond reasonable doubt, the defendant has no such burden to prove his innocence. Instead, all that he has to do, is to cast a reasonable doubt on the Prosecution's case. Even if the defendant has failed to call a material witness, and there are gaps in his defence, the court must still consider whether he has nevertheless succeeded in casting a reasonable doubt on the Prosecution's case. In the Malaysian cases of *Illian v Public Prosecutor* [1988] 1 MLJ 421 and *Tan Foo Su v Public Prosecutor* [1967] 2 MLJ 19, it was held that the failure of the Defence to call a witness should not be made subject to adverse comment by the court, and that s 114 illus (g) of the Malaysian Evidence Act (*in pari materia* with Singapore's s 116 illus (*g*) EA) should not be invoked against the accused person.

42 Therefore, it is clear that s 116 illus (*g*) of the EA ***does not apply with the same vigour to the Defence as to the Prosecution. Otherwise, it would be tantamount to placing a duty on the Defence to call every material witness, and to prove the defendant's innocence. When faced with a situation where the Defence has failed to call a material witness, the court should bear in mind that such failure on the part of the Defence does not add anything to the Prosecution's case, in that it does not operate to raise any presumption which would help the Prosecution to prove its case beyond reasonable doubt when it has otherwise failed to do so. Instead, the Defence's failure to call a material witness will only affect its own ability to cast a reasonable doubt on the Prosecution's case.*** Section 116 illus (*g*) of the EA does not change this fundamental principle. In every case, the court will ask, in view of all the facts and evidence before it, whether the Defence has succeeded in casting a reasonable doubt on the Prosecution's case despite its failure to call a material witness.

43 In *Choo Chang Teik v Public Prosecutor* [1991] 3 MLJ 423, the Supreme Court of Malaysia distinguished the previous cases of *Illian v Public Prosecutor* and *Tan Foo Su v Public Prosecutor*, and drew an adverse inference against the accused under s 114 illus (g) of the Malaysian Evidence Act. Mohamed Yusoff SCJ, delivering the judgment of the court, stated that where the Prosecution had made out a complete case against the accused person, and had adduced rebuttal evidence against the accused's evidence, and the case disclosed that there was evidence that could be produced by the accused to negate the charge against him, then the natural conclusion flowing from the accused's failure to offer such evidence was that the evidence, if produced, instead of rebutting would sustain the charge. In my view, this was really another way of saying that the Defence had failed to cast a reasonable doubt on the Prosecution's case. Section 114 illus (g) of the Malaysian Evidence Act was simply used by the Malaysian Supreme Court to draw the "natural conclusion", from the facts of that case, which ordinary prudence required them to draw.

44 ***Thus, when the Singapore court is faced with a situation where the Prosecution has made out a complete case against the defendant, or has adduced rebuttal evidence against the Defence, and the case discloses that the Defence has failed to call a material witness*** , s 116 illus (*g*) of the EA ***merely allows the court, where appropriate, to draw the natural conclusion that the evidence which could have been adduced but was not would have been unfavourable to the defendant. If such a natural conclusion can indeed be drawn, then it would go towards the court's consideration of whether the Defence has cast a reasonable doubt on the Prosecution's case. However, in deciding whether it is appropriate to draw this conclusion, all the facts and circumstances of the case will be considered. For example, if the witness could not be located despite reasonable efforts, no such "natural conclusion" can be drawn.***

[emphasis added in bold italics]

The last paragraph in the quotation above is noteworthy and ought to be read with Yong CJ's subsequent observations in *Nurashikin* as to what constitutes an important qualification to the general rule (see above at [43]).

46 At this juncture, it is important to note that the principle laid down by Yong CJ in *Mohamed Abdullah* (as quoted in the preceding paragraph) is clear law in the Singapore context and has been cited in numerous decisions since (see, to take but a small sampling of only some of the latest decisions, the Singapore High Court decision of *Nurashikin* at [24], as well as the Singapore District Court decisions of *Public Prosecutor v Jaya d/o Gopal* [2007] SGDC 189 at [80]; *Public Prosecutor v Bijabahadur Rai s/o Shree Kantrai* [2008] SGDC 174 at [88]; *Foo Chee Ring* at [206], [207] and [208]; *Jayasangar* at [42]; and *Public Prosecutor v NYH* [2014] SGDC 432).

47 However, as the facts of each case can vary so vastly, we hesitate to lay down a blanket rule that an adverse inference can *never* be drawn against an accused person even in a context where the failure to call a material witness was primarily motivated by the concern that it would be in that witness's self-interest to give evidence that is prejudicial to the defence. That having been said, the drawing of an adverse inference by the court in a fact situation such as the present would likely, in the nature of things and given the general tenor of the case law cited above, to be extremely rare and would stem in all probability from an exceptional fact situation, if at all. We pause to note that this is the case, even taking into account Yong CJ's observations in *Nurashikin* (quoted above at [43]) – having regard to what would be the usual fact situation in cases such as the present (as to which, see above at [39]). Of course, our remarks should not be understood to mean that an accused person has no general duty in all situations to call defence witnesses. There are, for example, presumptions in the Act which make it incumbent on the accused to "prove" facts in order to rebut the presumptions on a balance of probabilities. In situations where the presumptions apply, an adverse inference could well be drawn against the accused for his failure to call a material witness who is available. Suffice it to state that, on the facts of the present case, it was not, in our view, appropriate to draw an adverse inference against the Respondent.

Manufactured defences

48 Our second observation pertained specifically to the defence raised by the Respondent, *ie*, that he did not know the *weight* of the Ice in his possession. This was an issue which was encapsulated in the following observations by this court in *Khor Soon Lee* (at [29]):

> As a result of our finding above, and given the *particular factual matrix* set out above, it would also follow that the Appellant has succeeded in rebutting, on a balance of probabilities, the presumption of knowledge under s 18(2) of the Act. It bears emphasising that each case will, of course, depend on its own precise facts. The facts of the present appeal, it might be observed, are rather unusual: in particular, the consistent pattern of conduct referred to above (which centred on dealing in drugs which did *not* involve the death penalty) was admitted by the Prosecution, and, further, the testimony of a significant witness (Tony) was not available (for which we have therefore assumed that such testimony, if given, would have buttressed the Appellant's case). In the circumstances, a strong cautionary note ought to be sounded. Given the finely balanced set of facts in the present appeal, nothing in this case sets a precedent for future cases (which ought, in any event, to turn on their own particular facts). Still less will future courts countenance accused persons seeking to "manufacture defences" in order to effect a similar fact pattern. [emphasis in original]

49 Put simply, the concern is that accused persons may attempt to "*manufacture defences*", particularly through carefully rehearsed statements (both written and/or oral) which are intended to rebut the presumptions under the Act, thus enabling the accused person concerned to escape capital punishment as mandated under the relevant provisions of the Act. That is why this court was at pains to emphasise "the finely balanced set of facts" in *Khor Soon Lee* which were also described as being "rather unusual" (see *Khor Soon Lee* at [29], reproduced in the preceding paragraph). Indeed, in *Khor Soon Lee*, there was (as alluded to above at [33]) a consistent pattern of conduct centring on the dealing in drugs which did not involve the death penalty. In addition, this consistent pattern of conduct was admitted by the Prosecution. It should be further noted that the court in that case assumed that the testimony of a significant witness (who was not available) would have been in the accused person's favour. The danger of abuse is clear: accused persons might henceforth (as alluded to at the outset of this paragraph) rehearse contrived statements intended to pull the proverbial wool over the eyes of the judge in the trial court by claiming that *they thought* that they were dealing in a drug which did *not* involve the death penalty. Indeed, in the present case, there was yet another *variation* on this particular theme inasmuch as the Respondent claimed that there was a consistent pattern of dealing in a drug which did potentially involve the death penalty, but which weight carried during each dealing or transaction was carefully calibrated so as not to be of a weight which attracted the death penalty upon conviction. We must admit that we had some difficulty with this particular argument, at least when it was viewed at first blush.

50 However (and this brings us to the next and important point), much depends, in the final analysis, on an assessment of the credibility of the accused person (see also the decision of this court in *Tan Kiam Peng v Public Prosecutor* [2008] 1 SLR(R) 1 at [131]) and, consistent with established legal principles as well as common sense, the appellate court would be very reluctant to interfere with the findings in this regard by the trial judge (which are, in effect, findings of fact). This does not, of course, mean that the appellate court can never interfere with a trial judge's findings of fact – particularly if they are, having regard to all the facts (including oral *as well as* documentary evidence) and circumstances of the case, plainly against the weight of the evidence.

51 Returning to the facts of this case, as already mentioned above, we were of the view that the Judge had assessed the credibility of the Respondent in some detail and we did not see any ground to interfere with his findings and decision. That having been said, we do want to re-emphasise the fact that, in assessing the credibility of accused persons in the context of the application of the presumptions found in the Act, trial judges should be extremely wary of carefully rehearsed defences which have been manufactured with a view to escaping the death penalty.

The applicable law on appellate intervention

52 This leads us to our final point, which is that despite our reservations, we dismissed the appeal because the threshold for appellate intervention had not been crossed. This appeal was primarily against the findings of fact made by the Judge, and in this regard, it bears repeating the principles governing appellate intervention *vis-à-vis* findings of fact by a trial judge. This court, in *Sandz Solutions (Singapore) Pte Ltd and others v Strategic Worldwide Assets Ltd and others* [2014] 3 SLR 562 (at [37]), cited with approval the following passage in its earlier decision of *Tat Seng Machine Movers Pte Ltd v Orix Leasing Singapore Ltd* [2009] 4 SLR(R) 1101 (at [41]):

> ... The appellate court's power of review with respect to finding[s] of facts is limited because the trial judge is generally better placed to assess the veracity and credibility of witnesses, especially where oral evidence is concerned (*Seah Ting Soon v Indonesian Tractors Co Pte Ltd* [2001] 1 SLR(R) 53 at [22]). However, this rule is not immutable. *Where it can be established that the trial judge's assessment is plainly wrong or against the weight of the evidence, the appellate*

court can and should overturn any such finding (see *Alagappa Subramanian v Chidambaram s/o Alagappa* [2003] SGCA 20 at [13] and *Jagatheesan s/o Krishnasamy v PP* [2006] 4 SLR(R) 45 at [34]-[36]). Furthermore, where a particular finding of fact is not based on the veracity or credibility of the witness, but instead, is based on an inference drawn from the facts or the evaluation of primary facts, the appellate court is in as good a position as the trial judge to undertake that exercise (*Tan Chin Seng v Raffles Town Club Pte Ltd* [2003] 3 SLR(R) 307 at [54] and *Ho Soo Fong v Standard Chartered Bank* [2007] 2 SLR(R) 181 at [20]). In so doing, the appellate court will evaluate the cogency of the evidence given by the witnesses by testing it against inherent probabilities or against uncontroverted facts (*Peh Eng Leng v Pek Eng Leong* [1996] 1 SLR(R) 939 at [22]). [emphasis added]

53 As alluded to in the passage above, we have now come to recognise a difference between findings of fact based on the veracity or credibility of witnesses and inferences of fact. Going one step further, it has also been accepted by this court (see *Thorben Langvad Linneberg v Leong Mei Kuen* [2013] 1 SLR 207 at [13], affirming the decision of the Singapore High Court in *Public Prosecutor v Wang Ziyi Able* [2008] 2 SLR(R) 61) that an appellate court is in as good a position as a trial judge to assess a witness's credibility if his assessment is based on inferences drawn from:

(a) the internal consistency in the content of the witness's testimony; and

(b) the external consistency between the content of the witness's evidence and the extrinsic evidence.

54 In view of the principles set out above, when faced with an appeal against a judge's findings of fact, an appellate court should first seek to discern whether the finding of fact appealed against is one based on the credibility of the witness, or an inference of fact based on objective evidence. In the latter scenario, an appellate court should look at the objective evidence before the court and then question whether the trial judge's assessment was *plainly against the weight of the objective evidence*. In the former scenario, the appellate court should assess whether the trial judge's findings on the credibility of the witness, and hence any acceptance of that particular witness's evidence, are *plainly wrong*. This can be done by examining the internal and external consistency of the witness's evidence as mentioned in the two categories above.