This judgment is subject to final editorial corrections approved by the court and/or redaction pursuant to the publisher's duty in compliance with the law, for publication in LawNet and/or the Singapore Law Reports.

Mohd Suief bin Ismail
v
Public Prosecutor

[2016] SGCA 6

Court of Appeal — Criminal Appeal No 2 of 2015
Chao Hick Tin JA, Andrew Phang Boon Leong JA and Tay Yong Kwang J
2 October 2015

Criminal law — Statutory offences — Misuse of Drugs Act

Criminal procedure and sentencing — Appeal — Adducing fresh evidence

26 January 2016 Judgment reserved.

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

Introduction

1 This is an appeal against the decision of the High Court Judge ("the Judge") in *Public Prosecutor v V Shanmugam a/l Veloo and another* [2015] SGHC 33 ("the Judgment"). The appellant in Criminal Appeal No 2 of 2015, Mohd Suief bin Ismail ("Suief"), is a 48-year-old Singaporean who was convicted of trafficking in diamorphine in furtherance of a common intention with V Shanmugam a/l Veloo ("Shanmugam"), the appellant in Criminal Appeal No 3 of 2015. When both appellants (collectively referred to as "the Appellants") were convicted at first instance, the Judge found that their

involvement was probably restricted to the acts described in s 33B(2)(a)(*i*) of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) ("MDA"), namely, the transporting, sending or delivering of the drugs in question. The Public Prosecutor certified that Shanmugam had substantively assisted the Central Narcotics Bureau ("CNB") in disrupting drug trafficking activities within or outside Singapore. Shanmugam was thereafter sentenced to the mandatory life imprisonment and to 15 strokes of the cane under s 33B(1)(*a*) of the MDA. The Public Prosecutor did not issue a certificate of substantive assistance as regards Suief. Having also failed to adduce any psychiatric evidence to establish that he was suffering from an abnormality of mind at the time of the offence, the alternative sentencing regime under s 33B of the MDA was inapplicable and Suief was sentenced to suffer the penalty of death.

2 We dismissed Shanmugam's appeal against his sentence given that the Judge had already imposed the mandatory *minimum* sentence allowed under s 33B(1)(*a*) of the MDA, which is a term of imprisonment for life and 15 strokes of the cane. In so far as Suief's appeal against his conviction and sentence were concerned, we reserved judgment after hearing arguments from the parties. We now deliver our judgment on Suief's appeal and the reasons for our decision.

The facts

3 On 28 October 2011, Shanmugam, on the instructions of one Puni ("Puni"), drove a Perodua Kenari, with the registration number JLT 8467, from Malaysia to Singapore. It appears that Shanmugam and Suief had arranged to meet at a bus stop outside Haw Par Villa. Based on the evidence before the court, Shanmugam and Suief were introduced to each other through Puni. Before 28 October 2011, they had only met each other once at the carpark of the McDonald's outlet located at West Coast.

Version No 1: 16 Dec 2021 (20:13 hrs)

4 The Appellants gave differing reasons for meeting each other on 28 October 2011. Shanmugam said that he was instructed by Puni to hand over the car to Suief, before collecting it thereafter to drive the car back to Malaysia. It appears that prior to this, Shanmugam was already in an arrangement with Puni, where he would drive the car from Malaysia to Singapore, hand it over to Puni's friend, and then drive the car back to Malaysia after Puni's friend returned the car. In his long statement, Shanmugam stated that he was offered RM$7,000 per month for carrying out the aforementioned arrangement. In contrast, Suief gave evidence that they were only meeting casually and that Shanmugam had offered to buy him lunch.

5 It appears that CNB officers were already on surveillance at that point in time when Suief was spotted carrying a haversack on his way to the bus stop outside Haw Par Villa. After Suief boarded the car, Shanmugam continued driving. It is not disputed that the car made several turns, stopped by a hilltop car park at the National University of Singapore, before arriving at an Esso petrol station along Pasir Panjang Road. The Prosecution's case is that the Appellants were aware of CNB officers tailing them and had deliberately driven around in a random manner in an attempt to lose the CNB officers. This was, however, denied by the Appellants in the course of the trial.

6 At the Esso petrol station, Shanmugam stopped the car next to the air pump machine. At this juncture, one of the Appellants went to the convenience store of the petrol station to purchase drinks. Both Shanmugam and Suief each claimed that *he* was the one who had gone into the convenience store. In this respect, one of the CNB officers who had been tailing the Appellants at that point in time, Inspector Sea Hoon Cheng, testified that it was Suief who had gone into the convenience store. Shanmugam, however, maintained that *he* was the one who went to purchase drinks from the convenience store. In any event,

Version No 1: 16 Dec 2021 (20:13 hrs)

it appears that the Appellants subsequently returned to the car, where the black wrapped bundles containing diamorphine were then placed in Suief's haversack. From the evidence, it appears that the Appellants were both involved in placing the black wrapped bundles into Suief's haversack.

7 The car left the petrol station at about 12.12pm and went along Pasir Panjang Road and West Coast Highway. It finally stopped at a car park located at Block 405 Pandan Gardens ("Blk 405"). Suief was seen leaving the car and walking towards Blk 405. He was spotted carrying a black plastic bag with a golden logo. After Suief left the car, the CNB officers moved in to arrest Shanmugam, who was still in the car at that point in time. Suief's haversack, with three black bundles inside, was found on the floor mat of the front passenger seat. Two black plastic bags and one newspaper wrapped bundle were also found in the haversack.

8 Meanwhile, Suief was arrested outside unit #13-34 of Blk 405, which turned out to be his mother's flat. The black plastic bag with a golden logo was, however, not with him when he was arrested. The CNB officers combed the entire block and eventually found it among some flower pots on the staircase landing between the seventh and eighth floors. Three newspaper wrapped bundles containing diamorphine were found in the black plastic bag.

9 All the drug exhibits were subsequently sent to the Health Sciences Authority, where they were analysed and found to contain not less than 28.5g of diamorphine.

The charge

10 The Appellants were charged for trafficking in diamorphine in furtherance of the common intention of both parties. Given that the actual

Version No 1: 16 Dec 2021 (20:13 hrs)

charge was not reproduced in the Judgment, for ease of reference, the respective charges are set out as follows:

> **YOU ARE CHARGED** at the instance of [the PP] and the charge against you is:
>
> That you, [V SHANMUGAM A/L VELOO / MOHD SUIEF BIN ISMAIL],
>
> on the 28th day of October 2011, at or about 12.06 p.m., together with one [Mohd Suief Bin Ismail/V Shanmugam A/L Veloo …], and in furtherance of the common intention of you both, did traffic in a controlled drug specified in Class A of the First Schedule to [the MDA], to wit, by transporting from the Esso Station along Pasir Panjang Road to the carpark of Block 405 Pandan Garden, inside a motorcar bearing registration number JLT8467, ten (10) packets containing 4497.7 grams of granular/powdery substance, which was analysed and found to contain **not less than 28.50 grams of diamorphine,** without authorization 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 (Cap, 224, 2008 Rev Ed) and punishable under section 33 and 33B of [the MDA].
>
> [emphasis in original]

The decision in the court below

11 At the conclusion of the Prosecution's case, the Judge observed that the identity of the two persons in the car was not disputed (see the Judgment at [10]). He found that the Prosecution had established the fact that the diamorphine in question was in the possession of the Appellants when they were in the car and that they had transported the diamorphine from the Esso petrol station to Pandan Gardens with the common intention of trafficking in the drugs (see the Judgment at [10]). The Appellants were therefore called upon to enter their defence.

12 Before the Judge, the Appellants denied having any knowledge that the bundles contained drugs and claimed that they had no common intention of

Version No 1: 16 Dec 2021 (20:13 hrs)

trafficking in drugs. Each appellant attempted to pin the blame on the other appellant. Their defence was rejected by the Judge, who found that the Appellants had failed to rebut the presumption of trafficking in the drugs found in their possession (see the Judgment at [14]).

13 After hearing the evidence, the Judge was satisfied that the Appellants knew that the black plastic bags contained diamorphine and that they had acted with the common intention of trafficking in them in the manner of Suief dropping part of them (*ie*, the three bundles in the black plastic bag) off at Blk 405 (see the Judgment at [20]). The Appellants were therefore found to be guilty and were convicted as charged.

14 On the issue of sentencing, the Judge found that the involvement of the Appellants fell within the scope of s 33B(2)(a)(*i*) of the MDA. The Public Prosecutor granted a certificate of substantive assistance to Shanmugam, but not Suief. As a result, Shanmugam was sentenced to life imprisonment and 15 strokes of the cane, while Suief was sentenced to suffer the penalty of death.

The arguments

Suief's arguments

15 It will be recalled that Suief's defence at first instance was an outright denial of knowledge that the black plastic bags contained diamorphine. In the present appeal, however, the primary argument was that Shanmugam and Suief did not share a *common intention* to traffic in *all ten bundles* of diamorphine. Counsel for Suief in the present appeal, Mr Ramesh Tiwary ("Mr Tiwary"), submitted that the evidence adduced in the course of the trial supported Suief's account that he was going for his Friday prayers after dropping by his mother's house and that he had no intention of returning to the car.

Version No 1: 16 Dec 2021 (20:13 hrs)

16 In this regard, Mr Tiwary highlighted that the only evidence which demonstrates that Suief had intended to return to the car came from Shanmugam. It was submitted that Shanmugam's evidence in this regard was "so inconsistent and contradictory" that it was insufficient to establish the element of common intention beyond reasonable doubt. In support of this proposition, Mr Tiwary relied on a number of inconsistencies and contradictions in Shanmugam's evidence, both in court and out of court (for example, the police statements that were given by Shanmugam). It was also argued that Shanmugam's evidence was clearly self-serving as he had repeatedly tried to distance himself from the drugs in question by attempting to pin the entire blame on Suief.

17 To this end, Mr Tiwary submitted that the Prosecution's case, taken at its highest, only demonstrated that Suief had intended to deal with the three bundles that were subsequently recovered from Blk 405. As highlighted above, it was argued that Shanmugam's evidence that Suief had intended to return to the car after dropping off the three bundles should be disbelieved. Mr Tiwari also submitted that there was no other evidence to show that Suief had anything to do with the seven bundles left in the car.

18 In the course of the hearing before us, Mr Tiwary confirmed that Suief was prepared to be convicted of trafficking in the three bundles of drugs in the black plastic bag that was recovered from Blk 405. He conceded that based on the evidence led at first instance, the defence of ignorance, which was relied upon by Suief at the trial below, was almost inevitably bound to fail. To that end, he submitted that we should set aside Suief's present conviction and convict Suief of the amended charge of trafficking in the three bundles of drugs in the black plastic bag. Under the amended charge, Suief would not be liable

Version No 1: 16 Dec 2021 (20:13 hrs)

for the death penalty given that the amount of diamorphine in the three bundles did not justify the imposition of the death penalty.

The Prosecution's arguments

19 The Prosecution relied on two main arguments in response to Suief's case. First, Mr Lau Wing Yum ("Mr Lau"), who appeared on behalf of the Prosecution, highlighted that the charge was in relation to the transportation of *all ten bundles* of diamorphine "from the Esso Station along Pasir Panjang Road to the carpark of [Blk 405], inside a motorcar bearing registration number JLT8467". On this basis, it was immaterial whether Suief had intended to return to the car after leaving the three bundles of diamorphine at Blk 405, in so far as the Appellants had the common intention to traffic the drugs from the Esso station to Blk 405. The Prosecution also cited the decision of this court in *Syed Feisal bin Yahya v Public Prosecutor* [1992] 1 SLR(R) 853 for the proposition that where a person transferred drugs from one place to another for the purpose of ultimate distribution and not for personal consumption, even if he did not part with or transfer possession of the drugs to another person, the act of conveyance amounted to trafficking by *transportation*.

20 Second, Mr Lau also relied on the following evidence in support of the Judge's finding that the Appellants had the common intention to traffic the drug exhibits by transporting them from the Esso petrol station to Blk 405:

> (a) There was no discernible reason for Shanmugam and Suief to meet on the material date apart from transporting the drugs in question. The joint enterprise to transport the drugs in the present case could be inferred from Suief's agreement to meet Shanmugam and to remain in the car from the Pasir Panjang bus stop to the Esso petrol station, and finally to Blk 405.

Version No 1: 16 Dec 2021 (20:13 hrs)

(b) The common intention to traffic the drug exhibits could be inferred from Suief's active participation in the transferring of the bundles, starting from his decision to bring the haversack from his home to contain the drug exhibits, to his handling of the drug bundles in the car while parked at the Esso petrol station, and his agreement to help Shanmugam bring the black plastic bag with the golden logo from the car to the staircase landing between the seventh and eighth floor of Blk 405.

21 Apart from that, the Prosecution also referred to the decision of this court in *Wong Kok Men and another v Public Prosecutor* [1994] 3 SLR(R) 463, where the earlier decision (also of this court) of *Ong Ah Chuan v Public Prosecutor* [1979-1980] SLR(R) 53 (affirmed in *Ong Ah Chuan v Public Prosecutor* [1979-1980] SLR(R) 710) was cited for the proposition that the offence of trafficking will be made out if a quantity of drugs is transported from one place to another, and the transporter's purpose, whether it is achieved or not, is to part with possession of the drug or *any portion of it* to some other person whether already known to him or a potential purchaser whom he hopes to find. It was further argued that there was no evidence to suggest that the drugs in question were for Suief's personal consumption. The Prosecution also pointed out that Suief did not make any such assertion and that he had tested negative for any illicit drugs including diamorphine.

The issue

22 The central issue in the present appeal centres on the fact that Suief is advancing a different legal defence on appeal. More importantly, this different defence is *inconsistent with* the defence he had proffered in the court below. Put simply, he is arguing that there was no common intention between the parties

Version No 1: 16 Dec 2021 (20:13 hrs)

to traffic in *all ten bundles* (as opposed to his defence of ignorance that was relied upon in the court below).

23 As we have highlighted above, Mr Tiwary conceded (correctly, in our view, and for the reasons set out by the Judge in the Judgment) that the appeal was bound to fail based on the defence that Suief had run in the court below (*viz*, a blanket denial of knowledge that the bundles contained the drugs concerned (*viz*, diamorphine)). As a result, Mr Tiwary ran a *completely different case* before this court. Put simply, the Appellant's case was that, whilst he did indeed know that the bundles contained drugs, he had *no common intention* with Shanmugam to traffic in *all ten bundles* of drugs. He submitted that he only had the (*individual*) *intention* to traffic in the *three bundles* of drugs he had taken out of the car with him in the black plastic bag and which he had, in fact, placed behind the flower pots at the staircase landing between the seventh and eighth floors of Blk 405. It was argued that on this basis, Suief should be liable only for trafficking in *three bundles* of drugs, which was a *non*-capital offence in so far as the amount of diamorphine in the three bundles fell below the minimum statutory amount for the death penalty to be imposed (*ie*, 15g of diamorphine, with reference to the Second Schedule of the MDA).

24 We note, at the outset, that Suief is now running a case before this court which is ***inconsistent with*** that which he had run before the trial court. It would be appropriate to first set out the applicable principles with regard to a situation where an accused person attempts, in the course of ***an appeal***, to rely upon a defence that had ***not*** *been advanced in* ***the trial court***.

The applicable principles

25 The question of whether an accused person is allowed, in the course of an appeal, to rely upon a defence that has not been advanced at first instance has

Version No 1: 16 Dec 2021 (20:13 hrs)

been considered in a number of local decisions. In *Mohamed Kunjo v Public Prosecutor* [1977-1978] SLR(R) 211 ("*Mohamed Kunjo*"), a decision of the Privy Council on appeal from the Singapore Court of Criminal Appeal, the appellant was accused of causing the death of the victim by striking the latter on the head a few times with an exhaust pipe. The High Court found the appellant guilty of murder and sentenced him to death. On appeal, his conviction was upheld by the Court of Criminal Appeal. Before the Privy Council, the appellant sought to rely on the defence of sudden fight, which had not been raised either during the course of the trial or before the Court of Criminal Appeal. Hence, the question that arose was whether the defence of sudden fight could be raised for the first time before the Privy Council, given that it had not been mentioned in the judgments of the High Court or the Court of Criminal Appeal. The Privy Council made the following instructive observations (at [19]–[20]), which we find useful to reproduce in full as follows:

> 19 Where trial has been by jury and the burden of proof is upon the Prosecution to negative the defence, it is settled law that the judge must put to the jury all matters which upon the evidence could entitle the jury to return a lesser verdict than murder. And, if the judge fails to do so, the Board will intervene, even if the matter was not raised below. For otherwise there would be the risk of a failure of justice. In *Kwaku Mensah v R* [1946] AC 83, Lord Goddard, giving the reasons of the Board for allowing the appeal, said, at 94:
>
> > The principles on which this Board acts in criminal cases are well known and need no repetition, but when there has been an omission to place before the jury for their consideration a matter of such grave importance that they were never led to consider whether in this respect the prosecution had discharged the onus which lay on them of proving murder as distinct from manslaughter, their Lordships think that they can properly entertain the appeal. They would add that it must be seldom that they consider a matter which was not only not mentioned in the courts below, but was not included in the reasons given by the appellant in his case.

Version No 1: 16 Dec 2021 (20:13 hrs)

> 20 Although different considerations arise where, as here, the burden of proving the defence or exception is upon the defendant and trial is by judge (or judges) alone, Mr French for the Public Prosecutor has not contended either that s 105 of the Evidence Act, or the mere fact of trial being by judge alone, precludes the Board from considering a defence not raised below. But he does raise the point that it does not follow from a judge's silence as to a possible defence that he has ignored it. He may have thought the matter too plain for argument – more especially, if it has not been raised by the Defence. Moreover it would not, in our judgment, assist the administration of criminal justice if there were to be cast upon the High Court the duty of reciting in judgment only to reject every defence that might have been raised but was not. *Nevertheless there will be cases in which justice requires the Board to consider matters not mentioned in the court below.* It is to be noted that in India, where there is also no trial by jury and the burden of proving the exception of "sudden fight" is upon the defendant, the Supreme Court of India has considered and given effect to the exception, substituting a verdict of culpable homicide for one of murder, although the exception had not been relied on at trial: see *Chamm Budhwa v State of Madhya Pradesh* AIR 1954 SC 652. *In our judgment a defence based upon an exception which the defendant has to prove may be raised for the first time before the Board, if the Board considers that otherwise there would be a real risk of failure of justice. The test must be whether there is sufficient evidence upon which a reasonable tribunal could find the defence made out. If there be such evidence, the court of trial should have expressly dealt with it in its judgment and the Judicial Committee will deal with it on appeal, even though it has not been raised below.*
>
> [emphasis added]

It therefore appears that a defendant is, strictly speaking, not precluded from relying upon a defence that is raised for the first time on appeal. On the facts of *Mohamed Kunjo*, however, the Privy Council was of the view that the evidence led was such that *the High Court* could *not* have reasonably concluded that the defence of sudden fight was made out. The appeal was therefore dismissed on that basis. This last-mentioned point underscores an extremely important (and closely related) point which ought to be emphasised – in ascertaining whether or not an alternative defence raised by an accused person for the first time on appeal ought to be considered, the appellate court ***will have regard only to the***

Version No 1: 16 Dec 2021 (20:13 hrs)

evidence which had been led <u>at the trial itself</u> in order to ascertain whether ***<u>that defence</u>*** was ***<u>reasonably available on the evidence</u>*** before the court ***<u>at the trial</u>***. The importance of this point cannot be overstated. Let us elaborate.

26 Indeed, whilst the courts afford maximum flexibility to accused persons in establishing their respective defences (particularly in capital cases), this does not mean that they can "reserve" arguments that they can resort to on appeal. It is incumbent that *all* parties proffer *all* the arguments which they wish to rely upon at the trial itself. This is consistent with, for example, the substance and spirit of the rule underlying (albeit in a slightly different (but not wholly unrelated) context) the duty of disclosure placed on the *Prosecution* in the decision of this court in *Muhammad bin Kadar v Public Prosecutor* [2011] 3 SLR 1205. However, no system is perfect and hence it is possible that there could be *alternative defences* that could *also* have been reasonably available and therefore relied upon by the accused person based upon *the evidence adduced* ***at the trial itself***. In fairness to the accused person, he or she should *not* be precluded from raising such an alternative defence *on appeal* if it was ***reasonably available on the evidence*** before the court ***at the trial itself***. Indeed, it is important to reiterate a point already noted in the preceding paragraph – that, in *Mohamed Kunjo*, the evidence led *at the trial* itself was such that *the trial court* could *not* have reasonably concluded that the defence of sudden fight (raised for the first time on appeal before the Privy Council) was made out.

27 Returning to the relevant case law, the Privy Council decision of *Mohamed Kunjo* was subsequently cited by this court in *Public Prosecutor v Mas Swan bin Adnan and another appeal* [2012] 3 SLR 527 ("*Mas Swan*"). This last-mentioned decision is not only a recent authority but is also important in illustrating (as does *Mohamed Kunjo*) how the general principles set out above apply in concrete fact situations.

Version No 1: 16 Dec 2021 (20:13 hrs)

28 In *Mas Swan*, two accused persons, Mas Swan and Roshamima, were jointly charged with importing diamorphine into Singapore from Malaysia after they were apprehended at the Woodlands Checkpoint with three bundles of diamorphine concealed inside the front left door panel of the vehicle they were travelling in. At first instance, Mas Swan's defence was that he knew the three bundles contained controlled drugs, but believed them to be ecstasy pills because Roshamima had told him so. Meanwhile, Roshamima's defence was that she did not know of the *existence* of the three bundles concealed in the front left door panel. The trial judge accepted Mas Swan's defence and acquitted him of the charge of importing diamorphine. The trial judge convicted Roshamima of the offence of importing diamorphine after finding that she had knowledge of the three bundles containing controlled drugs in the front left door panel of the vehicle. The trial judge also found that Roshamima had not discharged the burden of rebutting the presumption of knowledge under s 18(2) of the MDA.

29 On appeal, this court found that the trial judge had erred in law in not considering the possibility that Roshamima might also have believed that the three bundles contained ecstasy pills as this was what she had told Mas Swan. It was held that the fact that Roshamima had adopted an "all or nothing" defence (*ie*, denial of any knowledge of the existence of the three bundles concealed in the left front door panel) should not have deprived her of any other available defence (such as the defence that she had believed the three bundles to contain ecstasy pills) that could reasonably be made out on the evidence available at the trial itself. It was further observed that it was not unreasonable of Roshamima *not* to rely (at least more vigorously) on the alternative defence at the trial itself because relying on that defence would inevitably have impacted the cogency or strength of her primary defence, which, if successful, would have resulted in her being acquitted of the capital charge (it should be noted that counsel for Roshamima *did*, in fact, refer to the alternative defence at the trial, although, in

Version No 1: 16 Dec 2021 (20:13 hrs)

the words of this court, he "failed to advance [the alternative defence] in a more dogged manner" and "appeared to have retreated from pursuing this defence after persistent questioning by the [trial judge] regarding the logic of his position in the light of Roshamima's "all or nothing" defence" (see *Mas Swan* at [23])). As a result, given that it was impossible to say what the Judge's decision would have been if he had considered the alternative defence, it was held that Roshamima had to be given the benefit of the doubt arising from the trial judge's omission to consider that defence. Roshamima's original conviction was set aside on that basis, and she was thereafter convicted of an amended charge that reflected her belief that the three bundles contained ecstasy pills. In arriving at this outcome, this court made the following observations (at [75]–[76]) with regard to the earlier decision of *Mohamed Kunjo*:

> This principle is well-illustrated by [*Mohamed Kunjo*], a Privy Council decision on an appeal from Singapore. In that case, the appellant did not raise the defence of sudden fight to a charge of murder either at his trial or on appeal to the Court of Criminal Appeal. The question was whether the defence could be raised before the Privy Council for the first time. Consistent with the line of authorities which we referred to earlier, the Privy Council reasoned that in a jury trial, the trial judge must put to the jury all matters which might reasonably entitle the jury to return a lesser verdict (see *Mohamed Kunjo* at [19]). If the trial judge failed to do that, the Privy Council would intervene. The Prosecution in *Mohamed Kunjo* did not suggest that this principle was inapplicable where there was a bench trial or where the burden was on the accused to establish his defence (which was the position in *Mohamed Kunjo* by reason of the Evidence Act (Cap 5, 1970 Rev Ed)). The Privy Council also referred to an Indian decision involving a bench trial in which the Supreme Court of India substituted a verdict of culpable homicide for one of murder because it found that the special exception of sudden fight was made out notwithstanding that this special exception was not raised during the trial (see *Chamru Budhwa v State of Madhya Pradesh* AIR 1954 SC 652). On the facts of *Mohamed Kunjo*, the Privy Council considered that the evidence was such that the trial judges could not have reasonably concluded that the defence of sudden fight was made out. This was because the accused had taken undue advantage of the victim (see *Mohamed Kunjo* at

Version No 1: 16 Dec 2021 (20:13 hrs)

> [21]). Accordingly, the Privy Council held that the trial judges did not err in failing to refer to that defence in their judgment.

30 The court had also observed thus (at [74]):

> The trial judge cannot shirk the responsibility of considering any *alternative defence* ***reasonably available on the evidence before the court*** even if the Defence has not relied on that defence, or even if the Prosecution and the Defence have agreed not to raise it. In a criminal trial, the court's duty and function should not be constrained by any agreement between the Prosecution and the Defence not to raise a particular defence before the court. [emphasis added in italics and bold italics]

The above observation embodies the *general principles* applicable to the present appeal (as to which see also above at [25]−[26]). *However*, some elaboration (or, rather, qualification) is, in our view, required in respect of the above observation from the words "or even if the Prosecution" (in the first sentence) to the end of the observation itself (hereinafter referred to as "the latter portion of the court's observation"). In particular, we would add that, if the parties have so agreed not to raise a particular defence, they should not be leading evidence pertaining to that defence anyway. If one party attempts to lead such evidence (inadvertently or otherwise), the other party would probably object or at least point out to the court that the evidence is irrelevant in the light of their agreement. In that situation, the court would certainly rule that the evidence is irrelevant. It would, therefore, be *extremely unlikely* that such evidence would be adduced, or, if inadvertently led but ruled irrelevant by the court, that it should still be considered by the court in relation to the agreed excluded alternative defence.

31 Further, however, if one party adduces evidence that is *contrary* to the agreement, the other party may decide not to raise any objection because it is obviously irrelevant in the light of their agreement. The other party may thereby be lulled into not challenging that evidence and finding no need to adduce any

Version No 1: 16 Dec 2021 (20:13 hrs)

evidence to the contrary because it believes that the evidence is irrelevant according to their agreement. In such a situation, it would, in our view, not be fair for an appellate court to find that the trial judge did not consider an alternative defence based on the evidence before the court because that would put the trial judge in an invidious position. To elaborate, if the trial judge considers an alternative defence based on the evidence, one party may submit that he is wrong because of the agreement and because it has been led to believe that the evidence was irrelevant and therefore did not challenge it. The trial judge would also not have heard any submissions on the alternative defence before he decided the issue because both parties have agreed not to raise it. However, if the trial judge does not consider the alternative defence, he would, in turn, be criticised by the other party and by the appellate court for not having done so.

32 We are therefore of the view that the latter portion of the court's observation has *overstated* the trial judge's duty and function.

33 This would be an appropriate juncture to apply the principles set out above to the facts of the present appeal.

Our decision

34 We begin by observing that the issue before this court is whether it is now open to Suief to invoke the *alternative* defence that he had no common intention with Shanmugam to traffic in all ten bundles of the drugs concerned (*viz*, diamorphine) and that he only had the (individual) intention to traffic in three bundles of drugs (which were recovered from the staircase landing between the seventh and eighth floor of Blk 405) instead (see also above at [23]). As we have already noted above, his (alternative) defence is, of course, wholly *inconsistent* with the defence which had been proffered in the court

Version No 1: 16 Dec 2021 (20:13 hrs)

below, *viz*, an outright denial of knowledge that all the black plastic bags contained the drugs. The key issue that arises for our decision in this particular regard is whether or not ***the alternative defence being proffered in the present appeal was reasonably available to Suief based upon the evidence at the trial itself***.

35 ***It is clear that Suief had not given any evidence in the course of the trial itself which could support the alternative defence presently being proffered in this appeal***. He had, instead, taken the position that he did not know that all the bundles contained diamorphine. As we have already noted, this last-mentioned defence was rejected by the Judge in the light of the evidence that had been led. Indeed, Suief's evidence ***at first instance*** was ***wholly inconsistent*** with his ***current*** position that he had intended to traffic in only three bundles of diamorphine. It is clear, in our view, that there was ***no evidence whatsoever in the court below which would lead to the conclusion that the alternative defence was reasonably available to Suief***.

36 It is, in fact, clear, in our view, that the (alternative) argument proffered by Suief is ***a mere afterthought***. It was a last-gasp, desperate, as well as opportunistic attempt to evade the death penalty by now confessing liability for only *part* of the ten bundles of drugs (*ie*, for the three bundles of drugs that he had taken out of the car in the black plastic bag at Blk 405). Let us elaborate.

37 First, we refer specifically to the evidence of Shanmugam. His evidence given *before and at the trial in the court below* would be of particular importance simply because he would ***not*** have been privy to Suief's ***current*** argument. It would therefore constitute (contrary to what Mr Tiwary had argued) an objective litmus test against which Suief's current argument can be tested. In this regard, we note especially the ***repeated*** evidence given by

Version No 1: 16 Dec 2021 (20:13 hrs)

Shanmugam in *both* his written statements ***and*** his oral testimony in the court below that *he had been* ***asked by Suief*** *to* ***wait in the car*** *for him* as he (*ie*, Suief) went up to his mother's flat with the black plastic bag containing the three bundles of drugs. There was, in the nature of things, no reason whatsoever for Shanmugam to lie or embellish the evidence in this particular regard. Indeed, it was a mere description of what had factually taken place and did not appear to even constitute the crux of Shanmugam's case in the court below. However (and this is the crucial point), it is ***dispositive*** of Suief's current argument. As Mr Tiwary himself candidly admitted (correctly, in our view) during oral submissions before this court, if it could be demonstrated that Suief would be *returning* to the car, that would *completely undermine* his argument to the effect that he had nothing to do with the remaining seven bundles of drugs and was only concerned with the three bundles in the black plastic bag which he had purportedly taken up to the thirteenth floor of Blk 405 (but which he had, in fact, hidden behind the flower pots at the staircase landing of that same block between the seventh and eighth floors).

38 We would also add that even ***Suief's*** own evidence does *not* support the case now made before this court. It is, for example, undisputed that he had brought *a virtually empty haversack* along with him (it had only contained, and only in the front compartment of the haversack at that, a pen, an open box of cigarettes and a lighter). By the time, however, Shanmugam and Suief had arrived at Blk 405, the haversack *contained all ten bundles of drugs (three of which were taken out and placed in the black plastic bag which was then taken out of the car by Suief and subsequently hidden behind the flower pots at the staircase landing of Blk 405 between the seventh and eighth floors)*. Indeed, if, as Suief argued, his sole purpose was to take *only* the three bundles of drugs in the black plastic bag *and he had nothing to do with the remaining seven bundles of drugs, then why did he not simply put* ***the three bundles*** *of drugs* ***in his***

Version No 1: 16 Dec 2021 (20:13 hrs)

haversack *and leave the remaining seven bundles of drugs in the black plastic bag instead*? Whilst it could be argued that Suief had generously given the haversack to Shanmugam, this argument is weak at best. Indeed, as we have already held, the evidence (by Shanmugam) was that he (*ie*, Shanmugam) was ***waiting*** for Suief *to return to the car*. This would explain why the Appellant left his haversack containing the seven bundles of drugs in the car with Shanmugam.

39 It is also clear, in our view, that Suief was in fact ***Shanmugam's contact in Singapore***. If, as Suief has argued, his *sole* purpose was to meet Shanmugam in order to obtain the three bundles of drugs in the black plastic bag (and *no more*), that would have left Shanmugam with the remaining seven bundles of drugs *and no further instructions as to how he was to dispose of those remaining bundles of drugs*. We have, however, already held that the evidence demonstrates that Shanmugam was in fact ***waiting*** for Suief to return to the car, which is wholly consistent with the point just made that Suief was Shanmugam's Singapore contact and would assist in disposing of the seven bundles of drugs accordingly.

40 Turning to Suief's own *statements*, his statement dated 20 December 2011 (Exhibit P 141) is particularly instructive. In it, he specifically stated that "the *7 packets of drugs* do not belong to me" and that "I also do not know that the *7 packets* contained drugs at that point in time" [emphasis added]. Whilst it could be argued that Suief had not invoked the alternative defence now before this court at that particular point in time, it could at least *equally be argued* that Suief was indeed concerned with *all remaining seven bundles of drugs* at that particular point in time inasmuch as, instead of disassociating himself from them, he had actually mentioned them specifically. This last-mentioned point is of course now confirmed by our finding above to the effect that the evidence clearly demonstrates that Shanmugam had been ***waiting*** in the car for Suief to

Version No 1: 16 Dec 2021 (20:13 hrs)

return after he had left temporarily with three bundles of drugs in the black plastic bag at Blk 405. Indeed, as we have already emphasised, this is a crucial finding that completely undermines Suief's alternative argument before this court.

41 We also find Suief's *phone records* to be indicative of the fact that he was the Singapore contact who was responsible for communicating directly with Puni. Based on the evidence that has been led in the course of the trial, Puni appeared to be using the phone number +60164978192. It was stored in Suief's phone memory as "Boyz". For present purposes, we will focus on the incoming and outgoing calls that were made to and from Puni on the day Suief and Shanmugam were arrested, *ie*, 28 October 2011. In so far as the phone records that were obtained from Singtel were concerned, Suief had numerous short phone conversations with Puni prior to his arrest:

Incoming/Outgoing	Time	Duration
Incoming	08:40:35	00:00:17
Incoming	10:26:16	00:00:10
Outgoing	10:52:17	00:00:19
Outgoing	10:52:46	00:00:09
Incoming	10:54:05	00:00:18
Outgoing	10:55:58	00:00:16

Version No 1: 16 Dec 2021 (20:13 hrs)

Incoming	10:56:23	00:00:28
Incoming	10:59:15	00:01:20
Outgoing	11:02:46	00:00:09
Incoming	11:15:34	00:00:23
Incoming	11:36:39	00:00:07
Incoming	11:56:14	00:00:41
Incoming	11:58:11	00:00:08
Incoming	12:06:08	00:00:27

When Suief was cross-examined with regard to these phone calls that he had had with Puni, he was evasive with his answers, as can be seen in the exchange reproduced as follows:

> Q: You see the number 6016478192? That is Puni's number, isn't it?
>
> A: I think so, I cannot recall.
>
> …
>
> Q: So now your casual friend [referring to Puni] you are making this same day, so many calls, then at 8.40 again, there was another incoming call. On the 28th---now we go to the 28th [*ie*, the day of the arrest]. 8.40am, there was an incoming call from Puni to you. Can you see that?
>
> A: Yes.
>
> Q: Now we go to the first page---second page. At 10.26am, Puni makes a call to you.

Version No 1: 16 Dec 2021 (20:13 hrs)

A: I think so but I cannot recall.

Q: Then at 10.52, you call Puni twice. 10.52 within a---30 seconds, you call Puni twice.

A: Yes, on that day, I did---I think---I think I did talk to him.

Q: Okay. Then at 10.53, there's an incoming call from Puni to you. Then at 10.55, there's an outgoing call from you to Puni. Then at 11.02---

A: We only had casual talks.

Q: So 11.02, there's another outgoing call from you to him. So within 10.55, 11.02, within 7 minutes you have made two calls to him.

A: I cannot recall.

Q: Now after this, at 11.03, you made an outgoing call to the accused, 1st accused [*ie*, Shanmugam]. But you have told the Court, the 1st accused call you. It was you who called the 1st accused. He never made a call to you.

A: That is not true, he was the one who called me, Your Honour.

…

Q: All right. We will now go back to the first page---we'll go to the first page. At 11.36, you made a call---you received a call from Puni, isn't it?

A: I think so but I cannot recall. Maybe---maybe I did talk to Puni but we didn't talk---

Q: What was that---

A: ---much.

Q: ---what was that you all were talking about?

A: We are friends, we jokes together.

Q: Okay.

A: So it's nothing for us to phone each other.

Q: Okay. Then you call again, he calls you at 11.56, within 20 minutes.

A: These calls are nothing. We joke around every day. He will call me, I will also call him so it's nothing.

Version No 1: 16 Dec 2021 (20:13 hrs)

> Q: Okay. Now, at 11.58---all this is while you are moving around in the car, isn't it? All these calls are while you are moving around with his car?
>
> A: Yes.
>
> Q: The final call is made at 12.06. So isn't that a coincidence, Mr Suief? 12.06 is the time the Kenari is supposed to have left the Esso station.
>
> ***A: I did talk to Puni and informed him that I was going for my Friday prayers. I didn't say anything else, that was what I told him.***
>
> Q: No, it is an incoming call. It's not you who called him, he called you.
>
> A: Yes. He called him.
>
> Q: So it is not you called him and told him about Fri---your Friday prayers, he called you. Why was there a frequent calls from 11.36 to 12.06 from Puni?
>
> ***A: It was nothing, Your Honour. We just had casual talks, I informed him that I was going for Friday prayer.***
>
> [emphasis added in bold italics]

Notwithstanding Suief's attempts at evasion, it is clear (as is evident from Suief's own responses during cross-examination) that he had in fact spoken with Puni. Examining the evidence as a whole, Suief's evidence that he merely had "casual talks" and was only joking with Puni appears to be implausible. In so far as the telephone records set out in the extract above are concerned, a total of *13 phone calls* were made between the parties in a short time span of under two hours. In fact, the duration of each phone call was relatively short, and most of the phone calls were under 20 seconds. In the circumstances, Suief's evidence that he and Puni were merely speaking casually and joking around simply does not make any sense. We are instead of the view that Suief had been communicating with Puni directly for the purposes of discussing the drug deal and potentially to receive instructions from Puni in that regard. This lends

Version No 1: 16 Dec 2021 (20:13 hrs)

further support to our finding above that Suief was responsible for distributing the drugs in Singapore.

42 In the final analysis, we are of the view that Suief's arguments in the present appeal were without merit in so far as they were not supported by the evidence led *in the course of the trial*. In fact, as we have explained above, the evidence available demonstrates ***the precise opposite*** inasmuch as it goes towards showing that Suief was the point of contact in Singapore, as opposed to Shanmugam (who was mainly responsible for transporting the drugs across the border from Malaysia to Singapore). The telephone records obtained from Singtel also demonstrate that Suief was continuously in contact with Puni throughout the entire morning of 28 October 2011, up until Shanmugam and Suief were both arrested by the CNB officers. In this regard, it is not disputed that Puni was the main contact point for the drug transaction and that he was responsible for introducing the Appellants to each other. Coupled with the evidence that demonstrates that Suief intended to return to the car after dropping off the black plastic bag (containing the three bundles of drugs) at Blk 405, we cannot accept Suief's argument that he had only intended to traffic in the three bundles of drugs. ***Indeed, the relevant evidence in the court below is completely contrary to this particular argument.***

Conclusion

43 For the reasons set out above, we dismiss Suief's appeal against his conviction. Given that the Public Prosecutor has not granted a certificate of substantive assistance to Suief, the alternative sentencing regime under s 33B of the MDA is inapplicable. Suief's appeal against his sentence must therefore fail, given that the amount of diamorphine involved requires the imposition of the mandatory death penalty.

Version No 1: 16 Dec 2021 (20:13 hrs)

Chao Hick Tin	Andrew Phang Boon Leong	Tay Yong Kwang
Judge of Appeal	Judge of Appeal	Judge

Ramesh Tiwary (Ramesh Tiwary) and Mahesh Rai s/o Vedprakash Rai (Drew & Napier LLC) for the appellant;
Lau Wing Yum, Jasmine Chin-Sabado and Eunice Lau (Attorney-General's Chambers) for the respondent.

Version No 1: 16 Dec 2021 (20:13 hrs)