**IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE**

**[2020] SGCA 25**

Criminal Appeal No 40 of 2018

Between

Muhammad Nabill bin Mohd Fuad

… *Appellant*

And

Public Prosecutor

… *Respondent*

In the matter of Criminal Case No 61 of 2018

Between

Public Prosecutor

And

Muhammad Nabill bin Mohd Fuad

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# JUDGMENT

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[Administrative Law] — [Natural justice]
[Criminal Law] — [Statutory offences] — [Misuse of Drugs Act]
[Criminal Procedure and Sentencing] — [Disclosure]

# Muhammad Nabill bin Mohd Fuad
# v
# Public Prosecutor

**[2020] SGCA 25**

Court of Appeal — Criminal Appeal No 40 of 2018
Sundaresh Menon CJ, Judith Prakash JA and Steven Chong JA
19 August, 23 December 2019

31 March 2020 Judgment reserved.

**Sundaresh Menon CJ (delivering the judgment of the court):**

## Introduction

1 The appellant, Muhammad Nabill bin Mohd Fuad ("the Appellant"), claimed trial to two capital charges of trafficking in a controlled drug under s 5(1)(*a*) read with s 5(2), and punishable under s 33(1) of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) ("MDA"). The first charge was for having in his possession for the purpose of trafficking 64 packets containing 1,827.21g of granular/powdery substance, which was analysed and found to contain not less than 63.41g of diamorphine ("the diamorphine"). The second charge was for having in his possession for the purpose of trafficking nine blocks containing not less than 2,251.90g of vegetable matter, which was analysed and found to be cannabis ("the cannabis").

2 At the trial, the Appellant disputed all the elements for both charges. The High Court judge ("the Judge") convicted the Appellant of both charges. She also found that the Appellant was not a courier, and in any case, the Public Prosecutor had not issued a Certificate of Substantive Assistance. Accordingly, she imposed the mandatory death sentence on the Appellant: see *Public Prosecutor v Muhammad Nabill bin Mohd Fuad* [2018] SGHC 268 ("GD") at [2].

3 The Appellant has appealed against his conviction as well as his sentence. On appeal, the Appellant does not dispute that he had possession of the diamorphine and that he knew what it was. The sole issue in relation to the first charge is whether the Appellant possessed the diamorphine for the purpose of trafficking. As for the second charge, the Appellant accepts that he was in possession of the cannabis, but contends that he did not have the requisite knowledge of the nature of the drugs; nor did he possess the cannabis for the purpose of trafficking.

4 In the present case, an issue which is of central importance is the Prosecution's duty in relation to witnesses who can be expected to confirm or, conversely, contradict an accused person's defence in material respects ("material witnesses"). Given the Prosecution's overarching duty of fairness, we were troubled that statements recorded from four such witnesses were not disclosed to the Defence in the present case; neither were these witnesses called by the Prosecution to rebut the Appellant's defence *if*, indeed, their accounts of the events supported the Prosecution's case. At the end of the hearing of this appeal, we therefore directed the parties to tender further submissions on what, if anything, was the Prosecution's duty in these circumstances.

5 This appeal also presents us with the opportunity to examine the issue of excessive judicial interference in the specific context of criminal proceedings, as that was a further point taken by the Appellant. We are satisfied, having reviewed the record of the proceedings and considered the entirety of the context, that the complaint of excessive judicial interference is not made out. Nonetheless, we take this opportunity to examine and reiterate the need for judges to exercise especial prudence, caution and restraint in criminal proceedings, where the consequences of excessive judicial interference on an accused person's life and liberty may be severe indeed.

## Background facts

### *The events leading to the Appellant's arrest*

6 We begin our narrative by setting out the events leading to the Appellant's arrest. In doing so, we largely use the account given by the Appellant at the trial, which was generally consistent with the contents of the last four of his ten statements to the Central Narcotics Bureau ("CNB"). The Appellant admitted that the account reflected in his first six statements, in which he referred to the involvement of someone called "Danish", was essentially untrue, a point to which we will return below (at [83]–[88]).

7 At the material time, the Appellant lived with his wife, Mashitta binte Dawood ("Mashitta"), their children and their domestic helper ("the Helper") in their flat at Fernvale Link ("the Flat"). The Appellant's cousin, Sheikh Sufian bin Sheikh Zainal Abidin ("Sufian"), also stayed with them in the Flat. The Appellant and Mashitta occupied the master bedroom, the children and the Helper occupied one bedroom, while Sufian occupied another bedroom ("Bedroom 1").

8 The Appellant would smoke methamphetamine in the Flat daily. Sometimes he would do so alone, and several times a week, he would do so with other individuals in Bedroom 1. These individuals included Sufian and two of the Appellant's friends, Muhammad Faizal bin Mohd Shariff ("Faizal") and Mohammad Khairul bin Jabar ("Khairul"). Faizal, in particular, provided the Appellant with his supply of methamphetamine.

9 On 26 January 2016, at around 8.20pm, Faizal brought a trolley bag ("the trolley bag") to the Flat, and the Helper let him into the Flat. The Appellant claimed that unknown to him at the time, the trolley bag was placed in the storeroom of the Flat by the Helper.

10 A key issue that was raised in this case was whether the Appellant knew that Faizal would be bringing the trolley bag to the Flat on 26 January 2016, and that the trolley bag contained drugs. The Prosecution's case is that the Appellant knowingly received the trolley bag, which contained both the diamorphine and the cannabis, from Faizal. The diamorphine was found in Bedroom 1 after the Appellant's arrest, while the cannabis was found in the trolley bag (see [16]–[17] below).

11 The Appellant, however, testified that he did not know that Faizal would be bringing the trolley bag to the Flat on 26 January 2016. He claimed that he had been asleep from about 7.00pm until about 10.00pm on the night of 26 January 2016, and after he woke up, he left the Flat with Faizal at about 10.20pm. It was only on the next day, 27 January 2016, that he discovered the diamorphine and the trolley bag in the Flat. According to the Appellant, on 27 January 2016, at about 2.00pm, he noticed several packets of diamorphine laid out on the bed in Bedroom 1. He got into a quarrel with his wife, Mashitta, who was angry that the Appellant allowed people to come to the Flat to "do

'drugs'" and "make use of [him]". The Appellant then placed the packets of diamorphine into an "Akira" fan box ("the Akira box") which was in Bedroom 1. He suspected that it was Sufian, the occupier of Bedroom 1, who had laid out the diamorphine on the bed.

12 Shortly thereafter, at about 4.00pm, the Appellant discovered the trolley bag in the storeroom. He was informed by Mashitta, who in turn had been told by the Helper, that Faizal had brought the trolley bag to the Flat. According to the Appellant, the diamorphine must have been taken out of the trolley bag as there had been no drugs in the Flat on the previous day, apart from some drugs in the master bedroom which were for his own consumption.

13 On the same afternoon, the Appellant called Sufian and Faizal and asked them to return to the Flat to "clear the stuff". They both agreed to do so. The Appellant testified that he called Faizal "straightaway" upon discovering the trolley bag. While the Appellant initially suspected that the trolley bag might contain drugs, Faizal apparently informed him that it contained cigarettes instead, and the Appellant did not check whether this was true. He evidently trusted Faizal. He claimed that Faizal had previously left drugs of various types and in various quantities, as well as cigarettes, in the Flat. On those occasions, the Appellant would call Faizal to ask him to retrieve the relevant items and he would do so.

14 The Appellant's iPhone call records were not referred to at the trial to identify the phone calls that he claimed he had made to Sufian and Faizal on the afternoon of 27 January 2016 after discovering the trolley bag and the diamorphine in the Flat. On appeal, we were referred to these call records, which corroborated the Appellant's claim. These call records showed that on 27 January 2016, the Appellant called Sufian at 4.38pm (for 53 seconds),

5.10pm (for 34 seconds) and 5.20pm (for 61 seconds). The Appellant also called Faizal at 5.47pm (for 47 seconds). While the Appellant testified that he called Faizal "straightaway" after discovering the trolley bag at around 4.00pm, nothing turns on this slight discrepancy in timing, especially given that the Appellant was never referred to his call records either in the course of the investigations or at the trial.

***The events following the Appellant's arrest***

15 On the night of 27 January 2016, at around 7.00pm, CNB officers began observing the Flat because of the Appellant's suspected involvement in drug activities. At that time, the Appellant, Mashitta, their children, the Helper and Khairul were in the Flat. The Appellant was arrested at about 8.00pm as he was leaving the Flat.

16 The CNB officers proceeded to search the Flat in the Appellant's presence, beginning with Bedroom 1. From Bedroom 1, Staff Sergeant Richard Chua Yong Choon ("SSgt Chua"), assisted by Sergeant Muhammad Farhan bin Sanusi ("Sgt Farhan"), seized the 64 packets of diamorphine that formed the subject matter of the first charge. Sixty-three packets were found in the Akira box, and the last packet was found in a "Mintek" bag ("the Mintek bag") on the bed. The search of Bedroom 1 concluded at around 8.40pm.

17 Later, at around 9.45pm, Senior Staff Sergeant Ika Zahary bin Kasmari ("Senior SSgt Ika") asked the Appellant a question. The precise terms of the question were disputed and will be discussed later. In response to the question, the Appellant answered "storeroom". Senior SSgt Ika then escorted the Appellant to the storeroom, and SSgt Chua seized the trolley bag, which contained all the nine blocks of vegetable matter constituting the cannabis that

was the subject matter of the second charge. He also seized a black plastic bag containing 40 cartons of contraband cigarettes which, according to the Appellant, had been placed in the storeroom a few days earlier. There were other drugs and drug paraphernalia seized from the Flat which, unless referred to below, are not material to the present appeal.

**The parties' respective cases at the trial**

18 At the trial, the Prosecution only called the relevant CNB officers and those involved in the CNB's investigations as its witnesses. The Appellant gave evidence in his own defence but did not call any other witnesses. This meant that no evidence was led from Sufian, Faizal, Mashitta and the Helper. Plainly, they were material witnesses as they could have confirmed or, conversely, contradicted material aspects of the specific account of events given by the Appellant which we have set out above.

19 Significantly, statements were recorded from each of these four individuals. The defence counsel who represented the Appellant at the trial had requested the Prosecution to make available the statements taken from Sufian, Faizal and the Helper. However, this request was not acceded to. The learned deputy public prosecutor ("DPP"), Mr Lau Wing Yum, told us that the Prosecution took this position because it was of the view that these statements neither undermined its case nor strengthened the Defence's case, and therefore did not fall within its disclosure obligations as set out in *Muhammad bin Kadar and another v Public Prosecutor* [2011] 3 SLR 1205 ("*Kadar*").

***The Prosecution's case***

20 At the trial, the Prosecution's case was, first, that in respect of both charges, it had proved that the Appellant had both possession and knowledge of

the nature of the drugs. The Prosecution then relied on the presumption of trafficking under s 17 of the MDA.

21 The Prosecution's alternative case was that in respect of both charges, it would rely on the presumption of possession under s 18(1) and the presumption of knowledge under s 18(2) of the MDA, and in all the circumstances, it could safely be inferred that the Appellant had possession of the drugs for the purpose of trafficking.

***The Appellant's defence***

22 For both charges, the Appellant generally disputed that he had possession of the drugs, and in particular, physical control of the drugs. He also disputed that he knew the nature of the drugs. The Appellant contended that the drugs were not his but Sufian's and/or Faizal's. In relation to the second charge of trafficking in the cannabis, the Appellant submitted that he thought that the trolley bag contained cigarettes. For both charges, the Appellant also disputed that he had possession of the drugs for the purpose of trafficking, on the basis that he had not brought the drugs to the Flat, and on discovering them there, had told Sufian and Faizal to remove them.

**The decision below**

23 The Judge found the Appellant guilty of both charges. In relation to the first charge, the Judge made the following findings. First, the Appellant had possession of the diamorphine since he had physical control of the Akira box and the Mintek bag, which together contained the 64 packets of diamorphine. Second, the Appellant, by his own evidence, knew at the material time that those 64 packets contained diamorphine. Third, the Appellant had not rebutted the presumption of trafficking under s 17 of the MDA. The Judge rejected the

Appellant's evidence that he had merely been holding the diamorphine pending its retrieval by Sufian and/or Faizal. The Judge reasoned that the Appellant's evidence as to the intended purpose of the diamorphine was "inextricably linked to his wider story" about how the drugs came to be present in the Flat without his knowledge. Rejecting his assertions, the Judge found that the Appellant knew that Faizal would be delivering the drugs to the Flat on 26 January 2016. The Judge also noted the large quantity of diamorphine in the Appellant's possession, more than four times the amount which mandated the imposition of capital punishment (see GD at [89]–[91]). Having rejected the Appellant's primary case as to how he came to be in possession of the diamorphine, the Judge had no difficulty finding that the Appellant had failed to rebut the presumption of trafficking.

24 On the Prosecution's alternative case, the Judge was satisfied that the Appellant had failed to rebut the presumptions of possession and knowledge under ss 18(1) and 18(2) respectively of the MDA. The Judge was also satisfied that the Prosecution had proved that the Appellant had possession of the diamorphine for the purpose of trafficking. The sheer quantity of the diamorphine, the Appellant's possession of four weighing scales seized from Bedroom 1 and the presence of the Appellant's DNA on the exterior surface of a group of ten mini packets of diamorphine (F1D3A) showed that he was involved in packing the diamorphine. Further, his attempts to distance himself from the drugs through the fabrication of elaborate accounts about Danish showed that he was determined to conceal his involvement (see GD at [92]–[94]).

25 Turning to the second charge, the Judge made the following findings. First, the Appellant had possession of the cannabis since he had physical control of the trolley bag in which the cannabis was contained. Second, the Appellant

knew at the material time that the trolley bag contained cannabis, and not cigarettes. Third, the Appellant had failed to rebut the presumption of trafficking under s 17 of the MDA, for similar reasons as those in relation to the first charge. In this regard, the Judge noted that the trolley bag contained more than twice the amount of cannabis which mandated the imposition of capital punishment (see GD at [89]–[91]). The Prosecution's alternative case was also accepted, for essentially the same reasons as those given for the first charge.

26 In coming to her decision, the Judge rejected the Appellant's submission that the Prosecution should have disclosed the statements recorded from Sufian, Faizal and Mashitta. She noted that under s 259(1) of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) ("CPC"), statements made by any person (other than an accused person) in the course of any investigations into an offence were generally inadmissible, and pointed out that the Appellant had not attempted to show how the statements of Sufian, Faizal and Mashitta could be admitted pursuant to one of the exceptions set out in ss 259(1)(*a*) to 259(1)(*e*) of the CPC. Neither had the Appellant shown how these statements could be said to come within the ambit of the Prosecution's disclosure obligations as set out in *Kadar* ([19] *supra*) (the "*Kadar* obligations"). The Judge also held that it was immaterial that the Prosecution had refused to produce the Helper's statement as the Helper's evidence would not have impacted her reasons for finding that the Appellant knew that Faizal would be bringing the trolley bag to the Flat on 26 January 2016 (see GD at [85]–[86]).

## The parties' respective cases on appeal

### *The Appellant's case*

27 As we mentioned at [3] above, the Appellant is appealing against his conviction and his sentence on both charges. We briefly set out his position on appeal.

28 In relation to the first charge, the Appellant no longer disputes that he had possession and also knowledge of the diamorphine (see [3] above). He contends, however, that he did not have the diamorphine, which did not belong to him, in his possession for the purpose of trafficking, but only for the purpose of returning it to Sufian and/or Faizal, who had left it at the Flat. This would not constitute trafficking, as we held recently in *Ramesh a/l Perumal v Public Prosecutor and another appeal* [2019] 1 SLR 1003 ("*Ramesh*") at [110].

29 In relation to the second charge, the Appellant does not dispute that he had possession of the cannabis (see [3] above). However, he contends that he did not know that the trolley bag contained the cannabis. The Appellant claims that he was informed by Faizal that the trolley bag contained cigarettes, and he genuinely believed Faizal. The Appellant further submits that, in any event, he did not have the cannabis in his possession for the purpose of trafficking because the trolley bag was to be retrieved by Faizal, who had left it at the Flat.

30 In addition, the Appellant argues, in relation to both charges, that the Judge failed to appreciate in particular the significance of the non-availability of the statements of Sufian, Faizal and the Helper. Finally, while there is no allegation of bias, the Appellant contends that the Judge's conduct and her questioning of the witnesses at the trial amounted to excessive judicial interference and gave rise to the impression that her judgment had been clouded.

***The Prosecution's case***

31 In contrast, the Prosecution's position on appeal is that none of the Judge's findings were plainly wrong or against the weight of the evidence, and therefore, they should not be disturbed.

**The issues to be determined**

32 The issues that arise in this appeal are as follows.

33 First, we consider what, if anything, is the Prosecution's duty in relation to a material witness in the sense defined at [4] above.

34 Second, we analyse the charges before us. This requires us to consider:

(a) for the first charge concerning the diamorphine, whether the Appellant has rebutted the presumption of trafficking under s 17 of the MDA; and

(b) for the second charge concerning the cannabis, whether the Appellant has rebutted the presumption of knowledge under s 18(2) of the MDA, and if not, whether the Prosecution has proved that the Appellant possessed the cannabis for the purpose of trafficking.

35 Third, and finally, we consider whether the Appellant's complaint of excessive judicial interference is made out, and if so, what consequences ought to follow.

**Issue 1: The Prosecution's duty in relation to material witnesses**

36 We begin with our decision on the question in respect of which we had directed the parties to tender further submissions at the end of the hearing of this appeal (see [4] above). We framed this question ("the Question") as follows:

> Where a witness has had a statement taken from him by the police or the CNB and where the defence can be expected to be confirmed or contradicted in material respects by such a witness, is there a duty on the Prosecution either to call such a witness or to make available to the Defence copies of any statement that has been taken from that witness or both?

37 In our judgment, this raises a broader question as to the proper ambit of the Prosecution's role. It is helpful to begin with first principles. The Prosecution acts at all times in the public interest. In that light, it is generally unnecessary for the Prosecution to adopt a strictly adversarial position in criminal proceedings. As we stated in *Kadar* ([19] *supra*), "the Prosecution owes a duty to the court and to the wider public to ensure that only the guilty are convicted, and that all relevant material is placed before the court to assist it in its determination of the truth" [emphasis in original omitted] (at [200]). Pursuant to this duty, under the *Kadar* obligations (at [113]):

> … [T]he Prosecution must disclose to the Defence material which takes the form of:
>
> > (a) any unused material that is likely to be admissible and that might reasonably be regarded as credible and relevant to the guilt or innocence of the accused; and
> >
> > (b) any unused material that is likely to be inadmissible, but would provide a real (not fanciful) chance of pursuing a line of inquiry that leads to material that is likely to be admissible and that might reasonably be regarded as credible and relevant to the guilt or innocence of the accused.
>
> This will not include material which is neutral or adverse to the accused – it only includes material that tends to undermine the Prosecution's case or strengthen the Defence's case. …

38 In the subsequent analysis, we propose to address the Question in the following manner:

(a) first, we consider whether the Prosecution has a duty to *disclose* a material witness's statement to the Defence; and

(b) second, we consider whether the Prosecution has a duty to *call* a material witness. The Prosecution's evidential burden to rebut an accused person's claim and the role of adverse inferences will also be discussed.

### *Issue 1(a): Whether the Prosecution has a duty to disclose a material witness's statement to the Defence*

39 Where the first of the two aforesaid sub-issues is concerned, both parties accept that the Prosecution ought to be under a duty to *disclose* a material witness's statement to the Defence. We agree. For convenience, we will refer to this duty as the "additional disclosure obligations".

40 We state at the outset that, as with the *Kadar* obligations, the additional disclosure obligations are laid down pursuant to s 6 of the CPC, which provides as follows:

> **Where no procedure is provided**
>
> **6.** As regards matters of criminal procedure for which no special provision has been made by this Code or by any other law for the time being in force, such procedure as the justice of the case may require, and which is not inconsistent with this Code or such other law, may be adopted.

As we stated in *Kadar*, the reference to what "the justice of the case may require" includes "procedures that uphold established notions of a fair trial in an adversarial setting where not already part of the written law" (at [105]).

41 We should point out two key differences between the *Kadar* obligations and the additional disclosure obligations:

(a) The first difference is that where the additional disclosure obligations are concerned, it does not matter whether the statement in question is: (a) favourable (and so triggers the *Kadar* obligations); (b) neutral; or (c) adverse to the accused person. If appropriate, and if there are valid reasons, the Prosecution can apply to the court for the redaction of those portions of the statement that have nothing to do with the accused person's defence, relevance to the defence being the factor that renders the statement a *material* statement in the first place.

(b) The second difference is that the additional disclosure obligations do not require the Prosecution to carry out a prior assessment of whether a material witness's statement is *prima facie* credible and relevant to the guilt or innocence of the accused person. Such an assessment is required for material that is disclosed pursuant to the Prosecution's *Kadar* obligations because we were concerned in *Kadar* to reasonably limit the amount of unused material that the Prosecution would have to disclose. This concern does not arise in relation to the statements of material witnesses because the number of such statements will in most cases be limited. The burden to disclose such statements would not be onerous on the Prosecution in most cases, and hence, there would be no need for the Prosecution to undertake any wide-ranging review or assessment of *prima facie* credibility and relevance before disclosing such statements.

42 For the avoidance of doubt, we should add that neither the *Kadar* obligations nor the additional disclosure obligations affect the operation of any ground for non-disclosure recognised by law.

*The basis for the Prosecution's additional disclosure obligations*

43 We turn to the basis for finding a duty on the part of the Prosecution to disclose a material witness's statement to the Defence.

44 First, the Prosecution candidly acknowledged that there might be instances where "[t]he Prosecution may not, despite acting in good faith, fully appreciate the defence the accused is running or intends to run". In such circumstances, the Prosecution contemplated that it might "inadvertently" fail to disclose statements which might tend to support the defence. In our judgment, it would be an intolerable outcome if the court were deprived of relevant evidence that might potentially exculpate the accused person simply because the Prosecution made an error in its assessment of the significance of certain evidence. The fact that such an error is made in good faith does not change the analysis.

45 Second, as also accepted by the Prosecution, an accused person ought to have access to all relevant information in order to make an *informed choice* in deciding whether or not to call a material witness. Both parties in fact agree that while the Defence always has the right to call a material witness, it is at a *distinct disadvantage* in deciding whether or not to do so when it is not aware of what the witness has previously said in the course of the investigations into the offence alleged against the accused person (see *Harven a/l Segar v Public Prosecutor* [2017] 1 SLR 771 at [70]). Further, as the Appellant submitted, the practical difficulties of eliciting self-incriminating evidence from a material

witness might be insurmountable. For instance, in the present case, if the Appellant had called Faizal as a witness, the Appellant would have had to elicit from Faizal an admission that Faizal was involved in drug trafficking activities and intended to return to the Flat to retrieve the drugs, at a time when Faizal might have been involved in discussions with or making representations to the Prosecution in connection with his potentially being charged in relation to the drugs. In such circumstances, if the Appellant had been unsuccessful in eliciting an admission to this effect from Faizal, he might well have ended up having to apply to impeach Faizal, and yet, he would have had to do so without having Faizal's statements if those statements had not been disclosed by the Prosecution pursuant to its *Kadar* obligations. Any such attempt by the Appellant would likely have been doomed from the outset.

46 There is a further dimension to the disadvantage faced by the Defence in such circumstances. Suppose, in this case, the Defence had interviewed Faizal, and Faizal had confirmed the Appellant's defence that he had called Faizal on the afternoon of 27 January 2016 to ask Faizal to retrieve the drugs from the Flat, and Faizal had agreed to do so. It would ordinarily seem sensible and logical for the Appellant to then call Faizal as a defence witness to corroborate his defence. The Appellant might, however, have yet been faced with a real dilemma as to whether or not to do so. The Appellant would be aware that the Prosecution had access to whatever statements Faizal had previously made, and that those statements were thought by the Prosecution not to be subject to disclosure pursuant to its *Kadar* obligations. In considering the possible reasons why the Prosecution considered that Faizal's statements did not fall within the ambit of its *Kadar* obligations, the Appellant would have had to contemplate at least the following scenarios: (a) Faizal's statements were in fact adverse to him, contrary to what Faizal might have told him; (b) Faizal's statements were

neutral to both parties; or (c) possibly, as the Prosecution recognised in its submissions, the Prosecution had wrongly assessed that Faizal's statements did not undermine its case or strengthen the Defence's case. Thus, in deciding whether or not to call Faizal as a defence witness, the Appellant would have had to consider the risk that Faizal's statements might contradict his defence and likely end up being used to undermine his credibility as a witness, all of which might ultimately harm his case at the trial.

47 In our judgment, leaving an accused person in a situation where he chooses not to call a material witness because of the dangers arising from his not being aware of what that witness has previously said in his statements to the investigating authorities does not reflect a satisfactory balance between ensuring fairness to the accused person on the one hand, and preserving the adversarial nature of the trial process on the other. As we have noted, the duty on the Prosecution to disclose a limited amount of unused material to the Defence (of which the *Kadar* obligations are a part) is premised on the Prosecution's duty to the court and to the public to ensure that only the guilty are convicted, and that all relevant material is placed before the court to assist it in its determination of the truth (see [37] above). The court's fundamental objective in criminal trials is to arrive at a just outcome through a fair process. This is what our decision in this case seeks to advance.

48 Further, it bears emphasis that where there is any doubt over whether a particular statement is subject to disclosure, whether under the *Kadar* or the additional disclosure obligations, the Prosecution ought to err on the side of disclosure. This is because the consequences of non-disclosure could be severe. As we stated in *Kadar* ([19] *supra*) at [120]:

> … [T]here is no reason why a failure by the Prosecution to discharge its duty of disclosure in a timely manner should not

> cause a conviction to be overturned if such an irregularity can be considered to be a material irregularity that occasions a failure of justice, or, put in another way, renders the conviction unsafe …

49 We turn to the remaining points where there was some disagreement between the parties. These relate to:

(a) when the Prosecution should be required to disclose to the Defence the statement of a material witness; and

(b) whether that statement would be subject to disclosure if the material witness is called as a prosecution witness.

50 In our judgment, the Prosecution ought to satisfy its additional disclosure obligations when it files and serves the Case for the Prosecution on the accused person (if the statutory disclosure procedure applies), or at the latest, before the trial begins (if the statutory disclosure procedure does not apply). These are the same timelines as those that apply in respect of the Prosecution's *Kadar* obligations (see *Kadar* at [113]). Like the *Kadar* obligations, the Prosecution's additional disclosure obligations constitute a continuing obligation which only ends when the proceedings against the accused person (including any appeal) have been completely disposed of. Thus, if the relevance of a particular material witness's evidence only becomes apparent *after* the accused person has testified at the trial, then that witness's statement should be disclosed to the Defence at that juncture. As for whether the Prosecution is required to disclose the statement of a material witness who is a prosecution witness, we leave this issue open for determination on a future occasion. The issue does not arise here as none of the material witnesses in the present case was a prosecution witness. We elaborate on each of these points in turn below.

*The time of disclosure*

51 While the Appellant contended that a material witness's statement should be disclosed to the Defence *before* the trial, the Prosecution submitted that the statement ought to be disclosed only *after* the accused person has testified for two principal reasons. First, the Prosecution suggested that if a material witness's statement were disclosed to the Defence at an earlier stage, the accused person might tailor his defence to bring it in line with that witness's account. Second, the Prosecution suggested that the accused person might seek to influence that witness into giving evidence favourable to the Defence's case, or otherwise retracting or neutralising his evidence.

52 With respect, we think that these concerns are overstated. This is because the triggering of the additional disclosure obligations is itself a response to a defence which the accused person has *already* alluded to in his statements to the investigating authorities. If the concern is that the accused person might further "tailor" his defence at the trial after having had sight of the relevant material witnesses' statements, it is open to the Prosecution to challenge that defence by, for instance, taking further statements from the relevant material witnesses and calling them as rebuttal witnesses to contradict any new contentions that the accused person might put forth. If the Prosecution fails to do so, it may well be that the accused person is simply speaking the truth, rather than tailoring his defence. It should be emphasised that there is no principle of law that the evidence of an accused person must be treated as inherently incredible or being of suspect value merely because it advances his defence and is, in that sense, self-serving. If the presumption of innocence means anything at all, it must mean that an accused person who testifies to exonerate himself may be telling the truth. The assessment of whether or not he is doing so must, in the final analysis, depend on the totality of the evidence. And it should not be

overlooked that courts are entirely capable of assessing the credibility of the claims made by witnesses, that being among the most basic aspects of fact-finding, which is a core judicial task.

53 In our judgment, requiring the Prosecution to disclose a material witness's statement to the Defence *before* the trial is also consistent with the twin rationales underlying the additional disclosure obligations which we have identified above and which the Prosecution accepts (see [44]–[45] above). Since one of the reasons for imposing the additional disclosure obligations is to address the Prosecution's difficulties in assessing whether a material witness's statement falls within its *Kadar* obligations, it follows that the respective timelines for disclosure should be aligned. Moreover, as we have stated above (at [45]–[47]), the disclosure of a material witness's statement is also meant to enable the Defence to make an informed choice in deciding whether or not to call the witness concerned in the specific circumstance where the Prosecution has chosen not to call that witness. We reiterate that an accused person should not be left in a position where he chooses not to call a material witness because of the possibility that that witness's statement may be adverse to him, when that may not in fact be the case. If a potential defence witness has provided a statement to the Prosecution that is inconsistent with what he has told the Defence, it is only fair for the Defence to have prior notice of this statement when deciding on the witnesses that it intends to call. In this connection, the Defence ought to be able to decide on the witnesses that it wishes to call *before* the trial and *before* the accused person has given evidence. This is contemplated by the statutory scheme for disclosure, which requires the Defence to list the names of its witnesses in the Case for the Defence (see ss 165 and 217 of the CPC). It is obvious that the decision on which witnesses to call is a crucial part of the Defence's preparation for trial and its assessment of the strength of its

case. The latter may be a relevant consideration in deciding whether the accused person himself should testify, or, even more fundamentally, whether he should contest the charge against him. For these reasons, we are satisfied that the risks and concerns identified by the Prosecution, even assuming their validity, would in any event be outweighed by the need to ensure that the Defence is able fairly to prepare for trial and assess the strength of its case.

*Whether the statement of a material witness who is a prosecution witness is subject to disclosure*

54 We next address the Prosecution's submission that it should not be obliged to disclose a prosecution witness's statement to the Defence, even if that witness is a material witness. As we mentioned at [50] above, this issue falls outside the scope of the Question because we are concerned here with a situation where none of the material witnesses in question was called by the Prosecution. We therefore leave open for another time, when the issue is squarely raised, the question whether the statement of a material witness who is a prosecution witness is subject to the additional disclosure obligations set out here. That said, if a prosecution witness has provided a statement that is *inconsistent* with his testimony at the trial, we see no reason why that statement ought not to be disclosed to the Defence as part of the Prosecution's *Kadar* obligations. The Defence ought to have that statement for the purposes of cross-examination and impeachment of the witness's credit if appropriate.

55 We also observe that the "Code of Practice for the Conduct of Criminal Proceedings by the Prosecution and Defence", jointly issued by the Attorney-General's Chambers and the Law Society of Singapore, states as follows at para 41:

> Where a witness called by the Prosecution gives evidence on a material issue in substantial conflict with a prior statement

> made by the witness to justify impeachment proceedings under the Evidence Act, the Prosecution should disclose the prior statement to the Defence Counsel, in accordance with the law.

56 With these observations, we leave this issue for detailed consideration on a future occasion.

***Issue 1(b): Whether the Prosecution has a duty to call a material witness***

57 We turn to the second part of the Question, which is whether the Prosecution has a duty to *call* a material witness (who, as we stated at [4] above, can be expected to confirm or, conversely, contradict an accused person's defence in material respects). Here, both parties agreed that the Prosecution has no *duty* (in the sense of a *legal* duty) to call any witness, including a material witness. The Appellant, however, suggested that the Prosecution does not have an unfettered discretion, and that it should call witnesses who are "necessary to the unfolding of the narrative".

58 We agree with the broad proposition that the Prosecution has no *duty* to call particular individuals as witnesses. We have previously stated that "the Prosecution has a discretion whether or not to call a particular witness, provided that there is no ulterior motive and the witness, who is available to, but not called by, the Prosecution, is offered to the Defence" (see *Lim Young Sien v Public Prosecutor* [1994] 1 SLR(R) 920 ("*Lim Young Sien*") at [35]). In this connection, we have also previously noted that "[t]here may be many legitimate reasons why the Prosecution may not wish to call a particular person as a witness, examples of which would be the lack of credibility of his evidence and/or the immateriality of his evidence (despite its apparent credibility)" (see *Yong Vui Kong v Public Prosecutor* [2012] 2 SLR 872 at [30]).

59 In this regard, it is helpful to briefly refer to the position in other common law jurisdictions.

60 The position in Malaysia is set out in the decision of the Federal Court of Malaysia in *Siew Yoke Keong v Public Prosecutor* [2013] 3 MLJ 630 (see also *Ghasem Hozouri Hassan v Public Prosecutor* [2019] 6 MLJ 231 at [28]). There, the Federal Court stated as follows at [42]:

> … It is well settled that in a criminal case, the prosecution, provided that there is no wrong motive, has a discretion as to what witnesses should be called by it … However, *that prosecutorial discretion must be subject to the most basic limitation that it has to produce all the necessary evidence to prove the case against the accused beyond reasonable doubt* … [emphasis added]

61 As for the English position, both parties referred us to the decision of the Privy Council in *Adel Muhammed El Dabbah v Attorney-General for Palestine* [1944] AC 156, where it was said at 168:

> … [T]he prosecutor has a discretion as to what witnesses should be called for the prosecution, and the court will not interfere with the exercise of that discretion, unless, perhaps, it can be shown that the prosecutor has been influenced by some oblique motive. …

62 We note further that in England and Wales, the Prosecution's discretion is guided by the principles set out in the decision of the English Court of Appeal in *R v Russell-Jones* [1995] 3 All ER 239 ("*Russell-Jones*") (see also *R v Dania (Jordan)* [2019] EWCA Crim 796 at [37]). We set out some of these principles below (see *Russell-Jones* at 244–245):

> The principles which emerge from the authorities and from rules of practice appear to be as follows.
>
> …

> (2) The prosecution enjoy[s] a discretion whether to call, or tender, any witness it requires to attend, but the discretion is not unfettered.
>
> (3) The first principle which limits this discretion is that it must be exercised in the interests of justice, so as to promote a fair trial …
>
> …
>
> (4) The next principle is that the prosecution ought normally to call or offer to call all the witnesses who give direct evidence of the primary facts of the case, unless for good reason, in any instance, the prosecutor regards the witness's evidence as unworthy of belief. …
>
> …
>
> (5) It is for the prosecution to decide which witnesses give direct evidence of the primary facts of the case. A prosecutor may reasonably take the view that what a particular witness has to say is at best marginal.
>
> (6) The prosecutor is also … the primary judge of whether or not a witness to the material events is incredible, or unworthy of belief. …
>
> (7) A prosecutor properly exercising his discretion will not therefore be obliged to proffer a witness merely in order to give the defence material with which to attack the credit of other witnesses on whom the Crown relies. …

63 Finally, we turn to the Australian position, which requires the Prosecution to call *both* witnesses who are favourable *and* witnesses who are unfavourable to its case. The High Court of Australia summed up the position as follows in *Diehm and another v Director of Public Prosecutions (Nauru)* (2013) 303 ALR 42 at [63]:

> It is well established that the prosecutor in a criminal trial conducted under the adversarial system of criminal justice must act "with fairness and detachment and always with the objectives of establishing the *whole* truth in accordance with the procedures and standards which the law requires to be observed and of helping to ensure that the accused's trial is a fair one". The objective of a fair trial requires the prosecutor to call all available witnesses unless there is some good reason not to do so. ***Mere apprehension that [the] testimony of a***

> ***particular witness will be inconsistent with the testimony of other prosecution witnesses is not a good reason for not calling that witness. Nor is it a good reason that the witness is regarded as "in the camp of" the accused.*** [emphasis in original in italics; emphasis added in bold italics]

64 We pause to note that the Australian position is to some extent shaped by s 38 of the Australian Evidence Act 1995 (Act No 2 of 1995) (Cth), which permits the Prosecution to cross-examine its own witness if the evidence given by the witness is "unfavourable" to it. In other words, it is not necessary to show that the witness has turned "hostile", for example, by departing from an earlier statement given to the Prosecution (see *Bianca Shandell Santo v R* [2009] NSWCCA 269 at [26]–[27]).

65 In this regard, s 156 of our Evidence Act (Cap 97, 1997 Rev Ed) ("EA") states that "[t]he court may, in its discretion, permit the person who calls a witness to put any questions to him which might be put in cross-examination by the adverse party". The Prosecution contended that leave may only be granted if the witness has been shown to be hostile. As against this, we note that in *Public Prosecutor v BAU* [2016] 5 SLR 146, Woo Bih Li J observed at [24] that:

> … [T]he discretion of the court under … s 156 is absolute and is independent of any question of hostility or adverseness. … The court has a wide discretion although such a discretion must be exercised carefully, otherwise it will be used liberally to circumvent the general rule that a party may not cross-examine his own witness. …

66 It is not necessary for the purposes of this appeal to arrive at a concluded view on the proper interpretation of s 156 of the EA. Nevertheless, given the general rule that a party may not cross-examine its own witness, in our judgment, the Australian position ought not to apply in our context. Nor do we think it necessary to set out detailed principles to guide the Prosecution in the exercise

of its discretion in calling witnesses, as is the English position. It is also unhelpful to state, as the Appellant suggested, that the Prosecution is required to call witnesses who are "necessary to the unfolding of the narrative" as this expression is vague and bears no legal meaning.

67 In our judgment, it suffices to highlight that the Prosecution has no *duty* to call a material witness. However, in appropriate circumstances, the failure to call a material witness might mean that the Prosecution has failed to discharge its evidential burden to rebut the defence advanced by an accused person. In addition, the court may in certain circumstances be entitled to draw an adverse inference pursuant to s 116, Illustration (*g*) of the EA that the evidence of a material witness who could have been but was not called by the Prosecution would have been unfavourable to the Prosecution. Our reasons are as follows.

*The Prosecution's evidential burden and the drawing of adverse inferences*

68 The principles relating to the Prosecution's burden of proof were the subject of our recent decision in *Public Prosecutor v GCK and another matter* [2020] SGCA 2 ("*GCK*"). There, we explained that embedded within the concept of proof beyond a reasonable doubt is the Prosecution's *legal* burden to prove the charge against the accused person beyond a reasonable doubt and its *evidential* burden to adduce sufficient evidence to address facts that have been put in issue (see *GCK* at [130] and [132]). The latter burden might also rest on the Defence, depending on the nature of the defence and the fact in issue that is being raised (see *GCK* at [133]).

69 As regards the evidential burden, it is well established that this is a burden which can *shift* between the parties. This burden was explained in

*Britestone Pte Ltd v Smith & Associates Far East, Ltd* [2007] 4 SLR(R) 855 at [58] as follows:

> … [The evidential burden] is more accurately designated the evidential burden to produce evidence since, whenever it operates, the failure to adduce some evidence, whether in propounding or rebutting, will mean a failure to engage the question of the existence of a particular fact or to keep this question alive. As such, this burden can and will shift.

70 In our judgment, the Question in the present case squarely engages the Prosecution's evidential burden to adduce sufficient evidence to rebut a defence raised by the accused person that has properly come into issue. We are concerned here with the narrow situation where an accused person has advanced a *specific* defence which identifies *specific* material witnesses and the Prosecution, despite having had access to these witnesses, has chosen not to call them.

71 In this specific situation, it seems obvious to us that the Prosecution ought to call the material witnesses in question if it is necessary to do so in order to discharge its evidential burden. To be clear, the Prosecution would not need to call these witnesses if it is satisfied that it can rely on other evidence to discharge its evidential burden, such as, for example, close-circuit television ("CCTV") records which directly contradict the accused person's defence. Neither would there be any question of the Prosecution having to discharge its evidential burden by calling these witnesses if the accused person's defence is patently and inherently incredible to begin with. Subject to these obvious limitations, the Prosecution runs a real risk that it will be found to have failed to discharge its evidential burden on material facts in issue if the Defence has adduced evidence that is not inherently incredible and the Prosecution fails to call the relevant material witnesses to rebut that evidence.

72 In addition, it is well established that the Prosecution's failure to a call a material witness may justify the court drawing an adverse inference against it. In *Public Prosecutor v Muhammad Farid bin Mohd Yusop* [2015] 3 SLR 16 ("*Muhammad Farid*") at [45], we endorsed the following observations of the High Court in *Mohamed Abdullah s/o Abdul Razak v Public Prosecutor* [2000] 1 SLR(R) 922 ("*Mohamed Abdullah*") at [41]:

> … 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. …

73 In the present context, where the Prosecution has had access to a material witness whose evidence would be directly relevant to discharging its evidential burden and is in possession of a statement from that witness, the failure to call that witness to refute the evidence led by the Defence on a fact in issue may more readily justify an inference being drawn against the Prosecution that that witness's evidence, if led, would have been adverse to it on that fact in issue. However, at the risk of stating the obvious, we stress that the drawing of an adverse inference must, in the final analysis, depend on the circumstances of each case. That is to say, while the Prosecution is *always* required to discharge its evidential burden whenever a defence raised by the accused person has properly come into issue, it does not inevitably follow that an adverse inference will be drawn against the Prosecution for its failure to call a material witness to testify on that defence. Nonetheless, in the context of absent witnesses, we note that it may be useful to refer to the following principles which were set out in *Sudha Natrajan v The Bank of East Asia Ltd* [2017] 1 SLR 141 ("*Sudha Natrajan*") at [20]:

> … With specific regard to absent witnesses, [the] broad principles governing the drawing of an adverse inference … may be summarised as follows:
>
> (a) In certain circumstances the court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in the matter before it.
>
> (b) If the court is willing to draw such inferences, these may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.
>
> (c) There must, however, have been some evidence, even if weak, which was adduced by the party seeking to draw the inference, on the issue in question, before the court would be entitled to draw the desired inference: in other words, there must be a case to answer on that issue which is then strengthened by the drawing of the inference.
>
> (d) If the reason for the witness's absence or silence can be explained to the satisfaction of the court, then no adverse inference may be drawn. If … a reasonable and credible explanation is given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or annulled.

74 We should also mention the following principles which are applicable to the drawing of adverse inferences generally (see *Sudha Natrajan* at [21], [23] and [26]):

(a) first, an adverse inference ought not to be drawn where the failure to produce evidence is reasonably attributable to reasons other than the merits of the case;

(b) second, in drawing the relevant inference, the court must put its mind to the *manner* in which the evidence that is not produced is said to be unfavourable to the party who might reasonably have been expected to produce it; and

(c) third, applying the best evidence rule, an adverse inference should not be drawn unless it can be said that the evidence that is withheld is superior to the evidence already adduced.

75 Returning to the Question in the present case, we are satisfied that the Prosecution's failure to call a material witness may result in the court finding that it has thereby failed to discharge its evidential burden in respect of a material fact in issue and/or may justify the court drawing an adverse inference if the Prosecution is unable to satisfy the court that it had good reason not to call that witness.

76 In this regard, it may not suffice for the Prosecution to justify its failure to call a material witness on the basis that that witness's prospective evidence seemed to be "neutral" if, clearly, that witness would have been in a position to either *confirm* or, conversely, *contradict* the accused person's defence *in material respects*. In the present case, given that the statements of the material witnesses concerned – namely, Sufian, Faizal, Mashitta and the Helper –were *not* disclosed to the Defence pursuant to the Prosecution's *Kadar* obligations, and these witnesses were also *not* called by the Prosecution to discharge its evidential burden, the logical conclusion is that their statements must have been neutral in the sense that they did not speak on the matters put in issue by the Appellant.

77 This suggests, and indeed, leads to the inference that questions on material aspects of the Appellant's defence were not posed to these material witnesses when their statements were being recorded. In this regard, two important aspects of the Appellant's defence which emerged from his last four statements to the CNB (the account given by the Appellant in his first six statements being, as we noted at [6] above, essentially untrue) were that: (a) he

did not know that Faizal would be bringing the trolley bag to the Flat on 26 January 2016 and had been asleep when Faizal arrived at the Flat with the trolley bag; and (b) he only discovered the trolley bag and the diamorphine in the Flat the following afternoon. It would appear that Faizal might not have been asked questions relating to his purpose of bringing the trolley bag to the Flat on 26 January 2016 and whether he had handed the trolley bag to the Appellant or to the Helper. It would also appear that the Helper might not have been asked whether she was the one who had placed the trolley bag in the storeroom and what the Appellant had been doing when Faizal arrived at the Flat with the trolley bag. If that was indeed the case, then, with respect, regardless of whether Faizal's and the Helper's statements were recorded before or after the Appellant's last four statements to the CNB, we cannot see any justification for the Prosecution not having asked Faizal and the Helper these questions, which would have confirmed or, conversely, contradicted the two aforesaid aspects of the Appellant's defence in material ways. If the statements of Faizal and the Helper had been recorded *before* the Appellant's last four statements to the CNB, further statements could have been taken from them in relation to the questions outlined above had their initial statements been neutral to the Appellant. This would likewise be the position if the two aforesaid aspects of the Appellant's defence had only emerged *at the trial*, even though this might conceivably have necessitated an adjournment of the trial. After all, returning to first principles, the Prosecution is duty-bound to place before the court all relevant material to assist it in its determination of the truth. In our judgment, it would be quite unfair to expect the Defence, *in place of* the Prosecution, to pose to material witnesses questions which may confirm or, conversely, contradict the accused person's defence in material ways. The accused person might not have the ability or resources to mount a reasonably robust investigation to find out what evidence a material witness might give. Further, as a practical matter, it might be difficult

for the Defence to elicit evidence from a material witness if such evidence would necessarily incriminate the witness.

78 We turn to address some other submissions made by the Prosecution.

79 The Prosecution submitted that the court should not draw an adverse inference against it for failing to call a material witness where the witness has been offered to the Defence or where the Defence is able on its own to trace the witness to testify (citing *Lim Young Sien* ([58] *supra*) at [35] and *Yoganathan R v Public Prosecutor and another appeal* [1999] 3 SLR(R) 346 at [37] respectively). However, we are presently concerned with a situation where the accused person has made a specific claim and *the evidential burden falls on the Prosecution to rebut that claim*. That being the case, it is for the Prosecution to call a material witness whose evidence may rebut that claim; the mere fact that the witness has been offered to the Defence or that the Defence can on its own trace the witness to testify does not change the analysis in any way. In such circumstances, if the Prosecution fails to call the witness, it may simply be found to have failed to discharge its evidential burden. There may be no need for the court to go further and draw an adverse inference as to what the missing evidence might have revealed.

80 Finally, the Prosecution submitted that if we were to hold that it has a duty to disclose a material witness's statement to the Defence in circumstances where it has chosen not to call that witness, then the court should "impose a *stricter* duty on the Defence to call that witness" [emphasis in original]. This would mean that the court would more readily draw an adverse inference *against the Defence* if the Defence, having seen that witness's statement, fails to call that witness without providing a satisfactory explanation.

81 We do not accept this submission. We reiterate that the additional disclosure obligations seek (among other things) to *assist* the Defence in assessing whether or not to call a material witness by requiring the Prosecution to disclose that witness's statement, and *not thereby to compel the Defence to call* that witness as a defence witness. It is apposite to refer to the following observations of the High Court in *Mohamed Abdullah* ([72] *supra*), which we endorsed in *Muhammad Farid* ([72] *supra*) at [45], in relation to the drawing of adverse inferences against the Defence for failing to call a material witness:

> 41 … 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 contrast, due to the allocation of the burden of proof in criminal matters, *great caution should be exercised when applying s 116 illus (*g*) [of the] EA to the [D]efence'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. …
>
> 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.
>
> …
>
> 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.* …
>
> [emphasis added]

82 Aside from this, there is simply no basis at all for the submission that an adverse inference should be drawn against the Defence for failing to call a material witness when it is the Prosecution's evidential burden that is in issue. The Prosecution cannot seek to discharge that burden by relying on the Defence not calling particular evidence from a material witness to advance its case, regardless of whether or not the Defence has access to statements previously given by that witness to the investigating authorities.

**Preamble to Issue 2: Inconsistencies in the Appellant's ten statements to the CNB**

83 Before turning to the charges before us, we make a preliminary point concerning the inconsistencies in the Appellant's ten statements to the CNB, which we alluded to earlier (see [6] above). The contents of these statements were set out by the Judge at [25]–[34] of the GD. In brief terms, the Appellant's initial account in his first six statements was that it was Danish who had left "things" in the Flat in the early morning of 27 January 2016. The Appellant claimed that Danish then sent him a text message informing him that someone would come to collect the "things", but that did not happen despite the Appellant repeatedly calling Danish later that day. The Appellant claimed that he knew the "things" were drugs only after he was arrested. The Appellant's account of Danish was elaborate and included details as to how he had first met Danish as

well as how Danish would stay over at the Flat regularly almost every weekday since October 2015.

84 It is not disputed that the Appellant fabricated or at least embellished his account of Danish in the original version of the events that he gave in his first six statements. In his ninth statement, the Appellant admitted that Danish had never been to the Flat before, and that he had in fact never seen Danish before. At the trial, the Appellant testified that he had given this fictitious account of Danish in his defence to the two capital trafficking charges for a few reasons, including the following: he felt that he had to provide an answer to the charges; he was suffering from drug withdrawal symptoms; he was confused, in fear, in shock and not in the right state of mind; he knew that Danish was the ultimate supplier of the drugs; and he deliberately made up the story concerning Danish. Evidently, some of these reasons were conflicting.

85 The Judge found the Appellant to be "an untruthful and unreliable witness, who kept changing his story along the way". She also concluded that he had made up stories about Danish in his first six statements "to hide the fact that he knew that Faizal had come to the Flat on 26 January 2016 with [the trolley bag]" and "to disassociate himself from the drugs" in the Flat (see GD at [82]). This seems to us to be a significant part of the Judge's reasoning that led her to conclude that the Appellant was guilty of both trafficking charges.

86 It is useful to set out the basic principles concerning the corroborative effect of lies told by an accused person. In this regard, an accused person's lies can only amount to corroboration of guilt under carefully prescribed conditions. One such condition is that the lies must relate to a *material issue* (see *Public Prosecutor v Ilechukwu Uchechukwu Chukwudi* [2015] SGCA 33 at [60]). Further, even where lies which can amount to corroboration of guilt are

established, they can only be employed to support *other evidence* adduced by the Prosecution and cannot by themselves make out the Prosecution's case (see *GCK* ([68] *supra*) at [141], citing *Public Prosecutor v Chee Cheong Hin Constance* [2006] 2 SLR(R) 24 at [92]).

87 In this regard, the Appellant submitted that his lie about the involvement of Danish in the events of 26 and 27 January 2016, when it was in fact Faizal who had been involved, was a lie as to the *identity* of the person who had brought the diamorphine and the cannabis to the Flat. The Appellant contended that this was not a *material issue*; rather, it was a *non-issue* because, first, the identity of that person was in no way relevant to the criminality that was inherent in the situation, and, second, there was, in any case, independent evidence, in particular, CCTV records, establishing that Faizal was the one who had brought the trolley bag (which contained the diamorphine and the cannabis) to the Flat. We agree. The fact of the matter is that the trolley bag was not already in the Flat prior to the events of 26 and 27 January 2016, and it was brought to the Flat by a third party on the night of 26 January 2016. This much cannot seriously be disputed. The substance of the Appellant's defence in all his ten statements to the CNB *remained* that when he discovered the trolley bag and the diamorphine in the Flat on the afternoon of 27 January 2016, he sought to return them to whoever had left them at the Flat, which, by the original account in his first six statements, was Danish (or someone acting on Danish's instructions and behalf). We are unable to see how, in lying that Danish, rather than Faizal, had been involved, the Appellant could be said to have disassociated himself from the drugs, as the Judge thought. In particular, we do not see how this lie could be said to be a lie that somehow corroborated his guilt in respect of the charges that he faced, even if it damaged his trustworthiness.

88 At the same time, it should be emphasised that this lie *does not necessarily mean that the Appellant lied about other matters as well*. This too would have to be considered in the round in the light of all the evidence.

89 In that light, we turn to the two charges before us.

**Issue 2: The charges**

90 In relation to the first charge, the sole issue, as we mentioned at [3] above, is whether the Appellant possessed the diamorphine for the purpose of trafficking. There is no dispute that the Appellant had possession and knowledge of the diamorphine. The Prosecution is entitled to rely on the presumption of trafficking under s 17 of the MDA, and we thus consider whether the Appellant has rebutted that presumption.

91 As for the second charge, there are two issues, it being common ground that the Appellant had possession of the cannabis (see [3] and [29] above). The first issue is whether the Appellant knew that the trolley bag contained the cannabis. In this regard, since the Prosecution has relied on the presumption of knowledge under s 18(2) of the MDA, we will have to consider whether the Appellant has rebutted that presumption. If the presumption of knowledge is not rebutted, it will then become necessary to consider the second issue, which is whether the Appellant possessed the cannabis for the purpose of trafficking.

92 In considering whether the Appellant has rebutted the relevant presumptions, we bear in mind the inherent difficulties of proving a negative, and therefore, that the burden on an accused person to rebut a presumption which operates against him should not be so onerous that it becomes virtually impossible to discharge (see *Gopu Jaya Raman v Public Prosecutor* [2018] 1 SLR 499 ("*Gopu Jaya Raman*") at [2] and [24]).

***Issue 2(a): The first charge of trafficking in the diamorphine***

93 In concluding that the Appellant possessed the diamorphine for the purpose of trafficking, the Judge made the following findings (see GD at [94]):

(a) First, the Judge rejected the Appellant's evidence "that he had nothing to do with how the drugs came to be found in the Flat" and "that he intended to return the drugs to Faizal or Sufian".

(b) Second, the Appellant's DNA was found on the exterior surface of F1D3A, a group of ten mini packets of diamorphine (see [24] above), which showed that he was involved in packing the diamorphine.

(c) Third, the sheer quantity of the diamorphine made an inference of trafficking "irresistible".

(d) Fourth, it was not the Appellant's case that the diamorphine was intended for his personal consumption.

(e) Fifth, the Appellant did not deny that the four weighing scales seized from Bedroom 1 were in his possession and were used by him (although he claimed that he used them only to ascertain the weight of the methamphetamine that he obtained for his own consumption).

(f) Sixth, the Appellant's fabrication of elaborate accounts to distance himself from the drugs showed that he was concerned to conceal his involvement.

94 We develop our subsequent analysis in the following sequence:

(a) We begin by considering whether the Appellant's account of the events was inherently incredible. If it was not, it was incumbent on the

Prosecution to adduce sufficient evidence to discharge its evidential burden to rebut the Appellant's defence (see [68]–[71] above).

(b) In that regard, we then consider whether the Judge erred in: (i) rejecting the Appellant's evidence that he did not know about the trolley bag and the diamorphine until 27 January 2016, the day after Faizal brought these items to the Flat; and (ii) rejecting the Appellant's evidence that after discovering these items on the afternoon of 27 January 2016, he called Faizal and Sufian that same afternoon to ask them to return to the Flat to "clear the stuff", and they agreed to do so.

(c) Thereafter, we consider whether the presence of the Appellant's DNA on the exterior surface of F1D3A showed that he was involved in packing the diamorphine.

95 In our judgment, in the context of the particular facts that are before us, if we find that the Judge erred in these material respects, the Appellant would have rebutted the presumption of trafficking. The fact that there was a large quantity of diamorphine in the Appellant's possession would be beside the point, as would be the fact that he did not possess the diamorphine for his personal consumption. This is because the Appellant's case is that he never wanted to come into possession of the drugs, and once he found the drugs, he tried to return them to those whom he thought owned them. Further, although the Appellant admitted that he possessed the four weighing scales seized from Bedroom 1, he explained, in respect of the two weighing scales that he was questioned on, that he had only used them to measure the weight of the methamphetamine that he obtained for his own consumption. We note too that in the Appellant's first statement to the CNB, he had explained that the weighing scales were used by Sufian or Danish for packing drugs and that he was not involved in packing

drugs. So far as Sufian is concerned, this would not be an incredible assertion, given that he was the occupier of Bedroom 1. The Prosecution could have led evidence from Sufian to confirm or, conversely, contradict the Appellant's claim as to the use of the weighing scales, but it did not do so. Accordingly, if we accept the Appellant's account of the events, the fact that he possessed the four weighing scales seized from Bedroom 1 would not in itself be sufficient to displace the conclusion that he had rebutted the presumption of trafficking.

96 We turn to consider whether the Appellant's account of the events was inherently incredible, and if not, whether it shifted the evidential burden to the Prosecution.

*The Appellant's account of the events*

97 We first set out the key assertions made by the Appellant in claiming that he did not possess the diamorphine for the purpose of trafficking. In so doing, we also identify in parentheses the statements in which these assertions were first made.

(a) The trolley bag was brought to the Flat by Faizal on the night of 26 January 2016 (seventh statement). This fact is no longer disputed and is confirmed by the CCTV records. The Appellant explained that it was "[n]ot possible" that the diamorphine could have been from somewhere other than the trolley bag as there were "no drugs" in the Flat the day before (tenth statement). It is similarly not disputed that the diamorphine was indeed initially contained in the trolley bag, although it was found in Bedroom 1 during the search of the Flat after the Appellant's arrest.

(b) The Appellant was asleep when Faizal brought the trolley bag to the Flat. The trolley bag was placed in the storeroom by the Helper while the Appellant was asleep (eighth statement).

(c) The Appellant did not know about the diamorphine until he saw it laid out on the bed in Bedroom 1 at around 2.00pm on 27 January 2016 (tenth statement). Similarly, the Appellant did not know about the trolley bag until he saw it in the storeroom on the afternoon of 27 January 2016. He did not open the trolley bag (tenth statement). While the Appellant initially said that he saw the trolley bag at around 2.00pm, he later clarified at the trial that he saw it at around 4.00pm. We do not think that anything turns on this slight discrepancy in timing given that the Appellant's statements were recorded months after the relevant events.

98 One material aspect of the Appellant's account of the events which did not emerge from his statements were the *phone calls* that he made to Faizal and Sufian upon discovering the trolley bag and the diamorphine in the Flat on the afternoon of 27 January 2016 and the *contents* of those phone calls. Nonetheless, it is not disputed that the Appellant *did* indeed call Faizal and Sufian that afternoon as this is evident from the call records (see [14] above). Given that Faizal and Sufian were not called by the Prosecution as witnesses, the only account of these phone calls came from the Appellant himself. In this regard, his evidence at the trial was as follows:

> Q: … Now, can you tell the Court what happened after you saw the drugs? You had a quarrel with your wife, okay, can you explain what happened after that?
>
> A: I had a big quarrel with my wife, Your Honour. And after I quarrel with my wife, then Yan, is my cousin Sufian, he left the house. After he left the house, I did make a phone call to Faizal and to Sufian to come back and clear the stuff, Your Honour.

> Q: *So you called both Sufian and Faizal and you asked both of them to clear the stuff.*
>
> A: Yes, Your Honour.
>
> Q: And when you called them, what did they say?
>
> A: As for I call Faizal, Your Honour, he didn't say anything. *When I asked him to come and collect and clear this stuff, he only replied "Yes". As for Sufian, I call him to come back and he say yes, he will come back. That's all, Your Honour.*
>
> [emphasis added]

99 In our judgment, this aspect of the Appellant's evidence at the trial could not be described as an afterthought. It should be emphasised that throughout *all* of his statements, the Appellant was consistent in maintaining that he did not possess either the trolley bag or the diamorphine for the purpose of trafficking. Based on the original account in the Appellant's first six statements, the person to whom these items were supposed to be returned was Danish; and based on the account in his last four statements, those persons were Sufian and/or Faizal. Seen in this light, the Appellant was therefore consistent in his defence that after he discovered the trolley bag and the diamorphine in the Flat, he sought to return these items to their actual owners rather than to distribute the drugs in the trolley bag onwards to third parties.

100 Significantly, the Appellant's claim that he was seeking to return the trolley bag and the diamorphine to their actual owners was also *not inconsistent* with his past interactions with Faizal in particular. The Appellant elaborated as follows in his ninth statement:

> Q24: Has Faizal left any drug items at your house before, apart from the Ice he gives you for free?
>
> A24: Yes.
>
> 40. He has left "Heroin", "cannabis", "ecstacy" and "erimin" at my house before. It is difficult to say the quantity because

> the drugs he left in my place is usually in a "sling bag", "bag", "paper bag" or "plastic bag", and I did not take out and see. I know that it is "Heroin", "cannabis", "ecstacy" or "erimin" because *when I called him and ask him, he said he will come back for the things.* Sometimes when he leaves my house, it is late at night and I have a feeling that he does not want to be caught with the "drugs" along the way. *When I notice that he left the things in my house, I will call him to come back and take.* Regardless of whether it is late at night or not, I will call him by phone and ask him to come back and take. However, sometimes I do not notice the things he left behind. Sometimes, [Sufian] who sleeps in the middle room, will tell me that there are things in the room. He will ask me "whose bag is this" when he arrives home, after Faizal has left. *When this happens, I will call Faizal and ask him to come and take his things but sometimes, Faizal will only come to take the next day.*
>
> [emphasis added]

101 Given this account of the Appellant's previous interactions with Faizal and the fact that the Appellant had informed the CNB that Faizal was the individual who had brought the trolley bag to the Flat, it is unclear why the Appellant was never asked, when his statements were being recorded, whether he had called Faizal to ask him to remove the trolley bag and the diamorphine from the Flat *on this particular occasion*. Had the Appellant been asked that question, it is possible that his claim that he had called Faizal and Sufian to ask them to remove the trolley bag and the diamorphine from the Flat and they had agreed would not have been made for the first time only at the trial.

102 In addition, had the records of the Appellant's phone calls to Faizal and Sufian on the afternoon of 27 January 2016 been referred to the Appellant in the course of the investigations, he might then have been able to provide his account as to the *contents* of these phone calls at an earlier stage.

103 In these circumstances, we are satisfied that the Appellant's defence had been properly put in issue. There was nothing inherently incredible about the Appellant's account of the events, and the evidential burden therefore shifted to

the Prosecution to rebut the Appellant's defence (see [68]–[71] above). We proceed to consider whether, in the light of the Prosecution's failure to call any evidence from the relevant material witnesses, this conclusion is affected either by the Judge's analysis or by the Prosecution's submissions.

*Whether the Appellant knew that Faizal would be bringing the trolley bag to the Flat on 26 January 2016*

104 The Appellant made two key assertions in his defence, both of which the Judge rejected. The first was that he did not know that Faizal would be bringing the trolley bag (which contained both the diamorphine and the cannabis) to the Flat on 26 January 2016, and only discovered the trolley bag and the diamorphine in the Flat the following day. If, contrary to this assertion, the Appellant had in fact known that Faizal would be bringing the trolley bag to the Flat on 26 January 2016, that would destroy his claim that he did not even know of the presence of the trolley bag and the diamorphine in the Flat until the following day, as well as his second key assertion, which was that on discovering these items, he tried to have them returned to their actual owners. Further, if these two key assertions by the Appellant were properly rejected, it would point to the conclusion that, contrary to the Appellant's defence, there was a pre-existing arrangement for the drugs to be handed to him, and since it was not his case that the drugs were for his personal consumption, he must have possessed them for the purpose of trafficking. We consider below the evidence relating to the first of these key assertions.

(1) The Prosecution's failure to call the relevant material witnesses

105 We begin with the Prosecution's failure to call the relevant material witnesses – namely, Faizal, Sufian and the Helper – to challenge the Appellant's first key assertion. The relevance of their evidence was as follows:

(a) Faizal could have explained why he had brought the trolley bag to the Flat on 26 January 2016, whether he had handed the trolley bag to the Appellant or to the Helper, and whether the Appellant had known that he would be bringing the trolley bag to the Flat on that day.

(b) Sufian could have confirmed whether he had used the Appellant's iPhone on the night of 26 January 2016. This was significant because while the Prosecution adduced records of the phone calls made from and received on the Appellant's iPhone to refute the Appellant's claim that he had been asleep when Faizal brought the trolley bag to the Flat that night, the Appellant provided the explanation that his iPhone had been in Bedroom 1 at the time and Sufian could have been using his iPhone.

(c) The Helper could have confirmed whether she had received the trolley bag from Faizal and placed it in the storeroom, and what the Appellant and Sufian had been doing when Faizal arrived at the Flat with the trolley bag.

106 The Judge was unmoved by the Prosecution's failure to adduce any of this evidence because she rejected the Appellant's evidence that he did not know that Faizal would be bringing the trolley bag to the Flat on 26 January 2016 and only discovered the trolley bag and the diamorphine in the Flat on 27 January 2016. In this regard, the Judge relied on: (a) what she thought was an admission by the Appellant in his ninth statement, read in the light of his explanation during cross-examination of what he had said in that statement, that he knew that Faizal would be bringing the trolley bag to the Flat on 26 January 2016; and (b) the phone calls made from and received on the Appellant's iPhone while he was supposedly asleep on the night of 26 January 2016 when Faizal arrived at

the Flat with the trolley bag. For reasons which we will shortly develop, we do not regard the Appellant's ninth statement as an admission. We are also satisfied that there was a reasonable explanation for the phone calls made from and received on the Appellant's iPhone while he was supposedly asleep.

107 It follows that, in our judgment, the Appellant's account of the events should not have been rejected without more, and it was therefore incumbent on the Prosecution to have called Faizal, Sufian and/or the Helper to discharge its evidential burden. The Prosecution could have relied on these witnesses' evidence to *directly challenge* the Appellant's account of the events. The Prosecution's failure to call any evidence from these witnesses left its evidential burden undischarged. Significantly, the Prosecution had access to and did record statements from these witnesses which were not disclosed to the Defence. In the circumstances, and absent any other explanation, it seems reasonable to infer that these witnesses' evidence, if adduced, would have been unfavourable to the Prosecution (see [72]–[77] above). We now elaborate on our analysis and reasons.

(2) The Appellant's ninth statement

108 Where the Appellant's ninth statement is concerned, if this statement did indeed amount to an admission by the Appellant that he knew that Faizal would be bringing the trolley bag to the Flat on 26 January 2016, we would have been prepared to accept that the Prosecution was entitled not to call any witnesses to rebut the first key assertion that the Appellant made in his defence. However, for the reasons that follow, we do not accept that the Appellant's ninth statement amounted to an admission.

109 We begin by setting out the relevant extracts from the Appellant's ninth statement:

> Q25. When Faizal came to your house in the evening of 26/01/16, was he there to collect things?
>
> A25. He came to put things.
>
> Q26. *Were you aware that he came to put things?*
>
> A26. *Yes.*
>
> Q27. Were you aware that the things are drugs?
>
> A27. No.
>
> Q28. *What were the things he put?*
>
> A28. *The trolley bag.*
>
> Q29. Did you ask him what was in the trolley bag?
>
> A29. Yes. He said cigarettes.
>
> 42. When Faizal came to put the bag, I was sleeping. I later woke up and took the lift down together with Faizal. Then we parted ways. I only realised that there were "drugs" inside the "trolley bag" after I was arrested. …
>
> [emphasis added]

110 The Appellant's ninth statement must be read in context. In his seventh statement, the Appellant had told the CNB officers that Faizal had brought the trolley bag to the Flat and that they could check the CCTV records to verify this. At the trial, the Appellant clarified that it was in fact his wife who had told him this piece of information, based on what the Helper had told her. It was this information that then prompted the Appellant to call Faizal on the afternoon of 27 January 2016 to ask him to remove the trolley bag from the Flat. Consistent with this, the Appellant said as follows in his eighth and tenth statements:

> [Eighth statement] … It was Faizal who bring up the trolley bag and I have been told by my maid. I didn't check the bag as my maid put the bag straight into the store. By bag, I mean the trolley bag that Faizal brought.

> [Tenth statement] … [O]n 26/01/16, I do not know if [Faizal] brought "drugs" to my house because I was asleep.

111 In his evidence-in-chief, the Appellant explained his answers in his ninth statement as follows:

> Q … Question 28:
>
> [Reads] "What were the things he put?"
>
> Answer 28:
>
> [Reads] "The trolley bag."
>
> *Okay? Now you had said that when he came up, you were asleep and that he did not tell you about the trolley bag. So can you explain this answer?*
>
> A *Your Honour, this statement was take[n] after I've seen the evidence that the IO [investigation officer] brought that Faizal was the one who brought up the bag. So when this statement was recorded, when the IO asked me, "What were the things he put", and that's the reason why I said it was the trolley bag, Your Honour.*
>
> Q Okay. Question 29:
>
> [Reads] "Did you ask him what was in the trolley bag?"
>
> Answer 29:
>
> [Reads] "Yes. He said cigarettes."
>
> Can you explain this as well since you had informed the Court that he did not tell you about the trolley bag?
>
> A Is then – was after the arrest, Your Honour. Sorry, after I fight – fight with my wife and then I did make a call to him, Your Honour.
>
> [emphasis added]

112 Later, during the Appellant's cross-examination, the learned DPP read to the Appellant the extract of his ninth statement which we reproduced at [109] above. The learned DPP then cross-examined the Appellant as follows:

> Q … So, okay, remember you informed the Court that, well, ***earlier Faizal had told you he'll bring cigarettes in a trolley bag. Do you remember?***

A No, Your Honour.

Q Only just now before lunch, ***do you recall telling the Court, yes, where you agree with your statement that on that day – that evening, Faizal have [sic] to bring a trolley bag to your house*** or are you going to change your testimony?

A I know that he came to bring my Ice, Your Honour.

Q Yes. So our follow-up question was – you may say that he came to deliver Ice to you, but the point is that in your statement is very clear which I can refer to you, yes, was that Faizal came on the evening on 26th of January and to put things in your house and that thing is what he told you was cigarettes. …

…

Q So, now ***do you maintain your testimony which you said during lunch just now*** or do you want to change your testimony now?

A *This is when after I called him on the 27th*, Your Honour.

…

Q Yes. Yes, and *you also know that day, he was bringing the trolley bag*?

A *Again, mm-hm.*

*Q You knew on that day, yes, he was bringing the trolley bag, right?*

*A Yah.*

Q Yes?

A On that day itself?

Q Yes.

A *Mm, mm.*

[emphasis added in italics and bold italics]

113 The Judge relied on the Appellant's ninth statement, read in the light of his explanation during cross-examination of what he had said in that statement, to find that he had admitted that he was "aware in advance" on 26 January 2016

that "Faizal was going to the Flat with the trolley bag and to deliver drugs" (see GD at [53]).

114 We are unable to agree with this and have two principal difficulties with this portion of the cross-examination. First, contrary to what the learned DPP suggested in the questions which we emphasised in bold italics at [112] above, the Appellant had *not* earlier told the court that what he meant in his ninth statement was that he was "aware in advance" that Faizal would be bringing the trolley bag to the Flat on 26 January 2016. In fact, this had been clarified in the extract from the Appellant's evidence-in-chief reproduced at [111] above. The learned DPP was mistaken in suggesting otherwise. This undermined any reliance being placed on the Appellant's ninth statement, read with the extract from his cross-examination set out at [112] above, as a supposed admission by the Appellant that he knew that Faizal would be bringing the trolley bag to the Flat on 26 January 2016. Second, the learned DPP, in his line of questioning directed at the Appellant's supposed knowledge of this, did not clearly frame his questions by reference to any specific time when the Appellant had such knowledge. This was a point of critical importance given what the Appellant had said in his seventh, eighth and tenth statements, as well as in his evidence-in-chief. In the circumstances, we are unable to accept that the Appellant's ninth statement, read in the light of his explanation during cross-examination of what he had said in that statement, amounted to an admission that he knew that Faizal would be bringing the trolley bag to the Flat on 26 January 2016, given that he had consistently maintained in his eighth and tenth statements and in his evidence-in-chief that he had no such knowledge and only learnt the next day (that is, on 27 January 2016) that Faizal had brought the trolley bag to the Flat.

(3) The phone calls made from and received on the Appellant's iPhone on the night of 26 January 2016

115 We next address the phone calls made from and received on the Appellant's iPhone while he was supposedly asleep on the night of 26 January 2016 when Faizal arrived at the Flat with the trolley bag at about 8.20pm. To challenge the Appellant's account that he was asleep at that time, the Prosecution led evidence that calls were made from and received on the Appellant's iPhone between 7.51pm and 10.05pm on 26 January 2016. The Appellant's response was that he did not answer or make those calls, and that his iPhone had been in Bedroom 1 then, so Sufian *could* have been the one who answered or made those calls.

116 The Appellant's specific identification of Sufian as the person who most likely used his iPhone at the material time on the night of 26 January 2016 could not be dismissed as mere speculation. The Appellant was not asked by the CNB, when his statements were being recorded, to explain the phone calls made to and from his iPhone that night, even though he had said in his eighth, ninth and tenth statements that he had been asleep at the material time on that night (see [109]–[110] above). It was only at the trial, more than two and a half years later, that the Prosecution first questioned him on this issue. In these circumstances, as the Appellant's counsel, Mr Andre Darius Jumabhoy, submitted, it was not surprising that the Appellant would have speculated as to who else could have used his iPhone at the material time since he was in no position to investigate the point himself.

117 It is obvious that the fact that phone calls were made from and received on the Appellant's iPhone on the night of 26 January 2016 does not actually show *who* made or received those calls. The Prosecution could easily have

called Sufian to rebut this aspect of the Appellant's defence, but it chose not to do so. It could also have called Faizal and/or the Helper to give their respective accounts to refute the Appellant's claim that he had been asleep when Faizal arrived at the Flat with the trolley bag, the materiality of which it would have been aware of, but it likewise chose not to do so. In these circumstances, we have no basis for rejecting the Appellant's explanation as to the use of his iPhone at the material time on the night of 26 January 2016, nor for rejecting, on this basis, his claim that he had been asleep at the time and was therefore unaware that Faizal had brought the trolley bag to the Flat until he learnt of this the next day at around 4.00pm.

118 It follows that, in our judgment, the Judge was wrong to reject the Appellant's account of how the trolley bag and its contents came to be in the Flat without his knowledge, and the failure of the Prosecution to address this left an evidential gap in its case against the Appellant.

*Whether the Appellant called Sufian and Faizal to ask them to remove the trolley bag and the diamorphine from the Flat*

119 We turn to the second key aspect of the Appellant's defence, namely, that when he discovered the trolley bag and the diamorphine in the Flat on the afternoon of 27 January 2016, he called Sufian and Faizal asking them to return to the Flat to remove these items, and they agreed. Again, the Prosecution failed to call any evidence to refute this claim. The Judge was unmoved by this, essentially because she thought that the "objective evidence", namely, the DNA evidence, rendered the Appellant's claim incredible (see GD at [95]). We turn to consider this.

(1) The Prosecution's failure to challenge the Appellant's assertion and call the relevant witnesses

120 For this aspect of the Appellant's defence, the relevant witnesses were Sufian and Faizal, who could have given evidence as to the *contents of the phone calls* that the Appellant made to them on the afternoon of 27 January 2016. In short, Sufian and Faizal could have rebutted the Appellant's claim that he called them that afternoon to ask them to remove the trolley bag and the diamorphine from the Flat, and they agreed. Even though this aspect of the Appellant's defence was raised for the first time only in his evidence-in-chief, the Prosecution could have called Sufian and Faizal as rebuttal witnesses pursuant to s 230(1)(*t*) of the CPC, but it failed to do so. Our analysis at [107] above on the Prosecution's evidential burden and the drawing of an adverse inference applies equally to this point.

121 This, however, was not the only difficulty we had with this issue. It seems to us that the contents of the phone calls made by the Appellant to Sufian and Faizal on the afternoon of 27 January 2016 were barely explored at the trial, notwithstanding the objective call records which showed that these calls were made. These phone calls ought to have been examined to at least the same extent as the phone calls made from and received on the Appellant's iPhone on the night of 26 January 2016 while the Appellant was supposedly asleep (see [115] above). However, the Appellant was never challenged, in clear and express terms, that *he did not in fact call Sufian and Faizal to ask them to remove the trolley bag and the diamorphine from the Flat, nor did they agree to do so*. Instead, the Appellant was only challenged by the learned DPP in the following general terms, and only in respect of *Faizal*:

> Q: Yes. So the point is – alright, at 2.00pm, you know there's this huge amount of heroin, right?

A: Yes, Your Honour.

Q: At 4.00pm, you discovered something in the trolley bag, which you did not check, but you know it's drugs. So you have –

Ct: Sorry, but you suspect it's drugs.

…

Q: Yes. And yet you just left the drugs there and waited for Faizal to come, is that your evidence?

A: Yes, Your Honour, I – I waited for him to come till 8.00pm.

Q: Yes. So are you saying that if let['s] say Faizal were to come at 12 midnight, you'll wait for him until 12 midnight?

A: At that point of time I – I will – I think I will wait till 12 midnight, Your Honour.

Q: Or if he comes the next day, you wait until the next day?

A: Usually he won't come to that – around that period of time.

Q: *No, so the point is that I put it to you that those drugs that were actually meant for you, you knew these were drugs and actually you knew these were meant for you.*

A: I disagree, Your Honour.

[emphasis added]

122 In these circumstances, on the evidence before us, there is simply *no contrary account* of the *contents* of the phone calls apart from that of the Appellant. His account would also not be inconsistent with his evidence as to his past interactions with Faizal (see [100] above).

123 Mr Jumabhoy, in fairness, suggested that the significance of the Appellant's defence, namely, that he was holding the trolley bag and the diamorphine intending only to return them to their owners, might not have been in the minds of the parties and the Judge at the trial, given that our judgment in *Ramesh* ([28] *supra*) was delivered around three months after the Judge had

convicted and sentenced the Appellant on the two trafficking charges. This, Mr Jumabhoy suggested, might explain why the Prosecution did not challenge the Appellant's evidence as to the purpose of his phone calls to Sufian and Faizal on the afternoon of 27 January 2016. As to this, we have two observations. First, by the same token, the Appellant and his counsel too would not have appreciated the legal significance of the point, and this lends credence to the Appellant's account of the events. But, second, if the overall narrative were accepted that the drugs were brought to the Flat by others, and that on discovering their presence, the Appellant called those whom he suspected were responsible to remove them, we fail to see how this could possibly have been thought *not* to be relevant.

(2) The DNA evidence

124 We next consider the DNA evidence and whether that pointed to the Appellant being involved in the *packing* of the diamorphine. If so, it would indicate that, contrary to what the Appellant claimed, he did not possess the diamorphine solely for the purpose of returning it to Sufian and/or Faizal. We first briefly describe the 64 packets of diamorphine which formed the subject matter of the first charge:

(a) Sixty-three packets of diamorphine were found in the Akira box (F1).

(i) The Akira box contained three large packets of diamorphine (F1A, F1B and F1C).

(ii) The Akira box also contained two plastic bags (F1D and F1E).

(A) Each plastic bag contained three medium-sized Ziploc bags (F1D1, F1D2 and F1D3, and F1E1, F1E2 and F1E3 respectively).

(B) In turn, the six medium-sized Ziploc bags each contained a group of ten mini packets of diamorphine (F1D1A, F1D2A, F1D3A, F1E1A, F1E2A and F1E3A). There were thus a total of *60* mini packets of diamorphine. F1D3A consisted of a *group* of ten mini packets of diamorphine.

(b) The remaining packet of diamorphine (G1A1) was contained in a plastic bag (G1A) in the Mintek bag (G1).

125 Of the 64 packets of diamorphine, the Appellant's DNA was found only on the exterior surface of F1D3A, which, we reiterate, was a *group* of ten mini packets of diamorphine. This leads to a particular ambiguity concerning the probative value of the DNA evidence which we address below. The Judge relied significantly on the presence of the Appellant's DNA on the exterior surface of F1D3A to find that he was involved in *packing* the diamorphine and, therefore, involved in trafficking. The Judge reasoned that there were multiple layers of external packaging before one could come into contact with F1D3A, and it was thus "very unlikely" that the Appellant's DNA could have been found on the exterior surface of F1D3A by "accidental touching" (see GD at [73] and [94]).

126 We respectfully disagree with the Judge's finding. In our judgment, the DNA evidence adduced at the trial was insufficient to show that the Appellant was involved in packing the diamorphine.

127 We state at the outset that although the Appellant's DNA was found on the exterior surface of F1D3A, it is unclear from the evidence before us whether his DNA was found on the exterior surfaces of *all* the ten mini packets of diamorphine that made up F1D3A. This is because the swabs from F1D3A that were sent to the Health Sciences Authority ("the HSA") for analysis were not swabs of the *individual* mini packets. Rather, as Mr Jumabhoy pointed out to us, ASP Peh Zhen Hao ("ASP Peh") testified that the ten mini packets constituting F1D3A were swabbed "collectively". In the circumstances, it is unsafe to conclude that the Appellant's DNA was found on the exterior surfaces of *all* the ten mini packets. It is equally possible that the Appellant's DNA was found only on the exterior surface of *one* of the ten mini packets. It is unclear to us whether the Judge appreciated this distinction in her analysis of the DNA evidence.

128 This point is a significant one when we consider whether there were *reasonable explanations* for the presence of the Appellant's DNA on the exterior surface of F1D3A, apart from his having been involved in the packing of the diamorphine. We accept that the *absence* of the Appellant's DNA on the exterior surfaces of the other packets of diamorphine does not conclusively prove that he was not involved in packing them (see *Gopu Jaya Raman* ([92] *supra*) at [82]). Nevertheless, this has to be considered as a whole in the context of the coherence of the case advanced by the Appellant. Here, the fact that there were no widespread traces of the Appellant's DNA on the exterior surfaces of the 64 packets of diamorphine weakens the inference that the Prosecution sought to draw, namely, that the Appellant was involved in packing the diamorphine. Further, the presence of the Appellant's DNA in an isolated area also increases the likelihood that there were other reasonable explanations for

this, apart from his involvement in the packing of the diamorphine. In our judgment, there were at least two other reasonable explanations.

129 The first was an explanation which was implicit in the account of the events given by the Appellant. In short, the Appellant testified that he saw the six medium-sized Ziploc bags laid out on the bed in Bedroom 1 at around 2.00pm on 27 January 2016 (see [11] above). As we have mentioned, F1D3A consisted of a group of ten mini packets of diamorphine which were contained in one of these Ziploc bags, F1D3. There was a single layer, not multiple layers, separating F1D3 and F1D3A. According to the Appellant, he got into a quarrel with his wife shortly after he saw the six medium-sized Ziploc bags. He then placed all six Ziploc bags, among other items, into the Akira box (see [11] above). It does not seem to us that any attention was directed to whether the Appellant's DNA could have come into contact with the *contents* of F1D3 then, for instance, if F1D3 was not entirely closed, especially given that the ten mini packets of diamorphine constituting F1D3A were packed tightly together in F1D3. It was incumbent on the Prosecution to prove that the presence of the Appellant's DNA on the exterior surface of F1D3A was consistent *only* with his having packed its contents, and not because he had handled the packets of diamorphine when he placed them into the Akira box. Yet, beyond simply putting it to the Appellant in a formalistic way that he must have packed the diamorphine because his DNA was found on the exterior surface of F1D3A, the Prosecution did not explore any of these points in any meaningful way when cross-examining the Appellant.

130 There was another even more plausible explanation as to why the Appellant's DNA was found on the exterior surface of F1D3A, which first requires an understanding of how the diamorphine was handled in the Flat by Sgt Farhan and SSgt Chua:

(a) Before us, the learned DPP, Mr Lau, explained that typically, during a search and seizure operation, the CNB officers would unpack the drugs found into their separate components to label and itemise the exhibits. This would be done at the location where the drugs were seized. Indeed, Sgt Farhan confirmed this "normal practice" under cross-examination, although he could not specifically remember if it was adhered to in the present case. Nonetheless, Mr Lau rightly acknowledged that there was nothing to indicate that the normal practice was not observed in this case.

(b) Thus, from the Akira box, the three large packets of diamorphine and the two plastic bags would have been taken out. From the two plastic bags, the six medium-sized Ziploc bags would have been taken out, and then ***so too would the 60 mini packets of diamorphine contained in the Ziploc bags have been taken out***.

(c) Throughout this process, both Sgt Farhan and SSgt Chua would have been wearing gloves. However, Sgt Farhan's DNA was found on the exterior surface of F1E3. When questioned, Sgt Farhan explained that there was a "probability" that his saliva had come into contact with the exterior surface of F1E3 as he could not recall whether he had been wearing a mask at the time. Sgt Farhan's DNA must have come into contact with the exterior surface of F1E3 *while he was at the Flat* as the drugs were subsequently sealed in separate tamper-proof bags and handed over to other CNB officers.

131 By parity of reasoning, it seems equally possible that the Appellant's DNA might have been accidentally deposited on the *exterior* surface of F1D3A ***while the CNB officers were in the Flat and in their presence***, particularly after

the contents of the various bundles were all unpacked. After all, the diamorphine was unpacked in the Flat, and traces of the Appellant's DNA could well have come into contact with the exterior surface of F1D3A innocently. For example, the very same explanation provided by SSgt Farhan, namely, the transmission of DNA through saliva, could have accounted for the presence of the Appellant's DNA on the exterior surface of F1D3A, especially considering that his contemporaneous statements were recorded in Bedroom 1 itself.

132 For these reasons, we are not satisfied that the presence of the Appellant's DNA on the exterior surface of F1D3A pointed irresistibly to the conclusion that he was involved in packing the diamorphine into the 64 packets. We pause to note that the Appellant's DNA, apart from being found on the exterior surface of F1D3A, was also found on the exterior surface of F1E3 (one of the six medium-sized Ziploc bags), the exterior surface of G1 (the Mintek bag) as well as the exterior and interior surfaces of G1A (the plastic bag in the Mintek bag). The presence of the Appellant's DNA on these exhibits was not directly probative of the fact that he was involved in packing the diamorphine because these exhibits did not themselves constitute any of the 64 packets of diamorphine that were the subject matter of the first charge, even though they contained some of the packets in question (see [124] above). Further, the presence of the Appellant's DNA on the exterior surface of F1E3 would be consistent with his claim that he had placed the six medium-sized Ziploc bags (along with other items) into the Akira box after getting into a quarrel with Mashitta, which contention the Judge rejected (see GD at [75]).

133 It is convenient here to deal with another point concerning F1D3A. The Prosecution produced a report from the HSA which stated that the mini plastic bags used to pack the mini packets of diamorphine constituting F1D3A were manufactured by the same machine as that which was used to manufacture

certain unused mini plastic bags which were seized from Bedroom 1 (J2A). Under cross-examination, the Appellant accepted that J2A belonged to him. Mr Lau submitted that the inference to be drawn from this was that the Appellant was involved in packing the diamorphine.

134 However, it was not *put* to the Appellant that because the mini plastic bags used to pack the mini packets of diamorphine constituting F1D3A came from the "same stock" as the mini plastic bags constituting J2A, which belonged to him, it meant that he must have been involved in packing the diamorphine. This point was of such a nature and of such importance that, pursuant to the rule in *Browne v Dunn* (1893) 6 R 67, it should have been put to the Appellant to give him the opportunity to address it before it was made as a submission by the Prosecution, which Mr Lau rightly conceded at the hearing before us. This was a significant omission, especially because there was another plausible explanation as to why the diamorphine had been packed using mini plastic bags that belonged to the Appellant, which would have been entirely consistent with the Appellant's defence that (among other things) the diamorphine had been left in the Flat on 26 January 2016 without his knowledge – namely, the diamorphine had been packed by Sufian and/or Faizal in Bedroom 1 using the empty mini plastic bags constituting J2A, which were in Bedroom 1 to begin with.

*Our conclusion on the first charge*

135 In that light, we are left with the Appellant's account, which is that:

(a) He did not know that Faizal would be bringing the trolley bag to the Flat on 26 January 2016.

(b) When Faizal arrived at the Flat at about 8.20pm on 26 January 2016, he was asleep, and Faizal was let in by the Helper, who took the trolley bag from Faizal and kept it in the storeroom.

(c) Although phone calls were made from and received on his iPhone at the time he was supposedly asleep, his iPhone was in Bedroom 1 then and Sufian could have been using it.

(d) He discovered several packets of diamorphine on the bed in Bedroom 1 the following afternoon (that is to say, on the afternoon of 27 January 2016), and after a row with his wife, he put the packets into the Akira box. He also discovered the trolley bag in the storeroom that same afternoon.

(e) He then called Faizal and Sufian asking them to remove the trolley bag and the drugs from the Flat, and they agreed (see [97]–[98] above).

136 None of these aspects of the Appellant's defence was inherently incredible. Much of this account by the Appellant had already been put across in his statements to the CNB. In our judgment, this was sufficient to shift the evidential burden to the Prosecution. The Prosecution had access to each of the witnesses – Faizal, Sufian, Mashitta and the Helper – who were directly referred to in the Appellant's narrative and who could have confirmed or, conversely, contradicted that narrative in material respects. The Prosecution also had the statements that had been recorded from these witnesses. The Prosecution declined all the Appellant's requests for a number of these statements; it also failed to call these witnesses. In these circumstances, we are satisfied that the Prosecution failed to discharge its evidential burden to rebut the Appellant's defence (see [68]–[71] above).

137 We therefore accept the Appellant's assertion that he had the diamorphine in his possession solely for the purpose of returning it to Sufian and/or Faizal, and find that he has rebutted the presumption of trafficking under s 17 of the MDA where the first charge of trafficking in the diamorphine is concerned. In the circumstances, we set aside his conviction on this charge.

138 We had earlier directed the Supreme Court Registry to seek the confirmation of the parties that in the event that this court allowed the Appellant's appeal against his conviction on the first charge, they would agree to this court amending this charge to one of possession of the diamorphine under s 8(*a*) of the MDA. Mr Jumabhoy had intimated as much during the hearing before us. For the purposes of s 390 of the CPC, we also sought confirmation from the Appellant that if the first charge were amended as stated, he did not intend to offer a defence to the amended charge.

139 Having received the parties' agreement and the confirmation sought, we amend the first charge to one of possession of the diamorphine under s 8(*a*) of the MDA. The Appellant accepts that he had possession and knowledge of the diamorphine, and we thus convict him on the amended charge accordingly.

140 In considering the appropriate sentence to impose on the Appellant in respect of the amended charge, we take into account the fact that the Appellant knew that he was in possession of a large quantity of diamorphine (not less than 63.41g). Notwithstanding that he was waiting for Sufian and/or Faizal to remove the diamorphine from the Flat, he must have known that he was committing an act that was connected to the illicit circulation of drugs. He knew, in particular, that Faizal was a supplier of drugs, and he must have known that the drugs would be put back into circulation after they were removed from the Flat. At the same time, this was not a case where the Appellant was safekeeping the

diamorphine for Sufian and/or Faizal pursuant to an agreed plan. Instead, the diamorphine was left in the Flat without the Appellant's knowledge, and he called the relevant individuals to ask them to remove it as soon as possible once he discovered it. In all the circumstances, we consider that a sentence of eight years' imprisonment, backdated to the date of the Appellant's remand, would be appropriate, and we sentence the Appellant accordingly on the amended charge.

### *Issue 2(b): The second charge of trafficking in the cannabis*

141 We turn now to whether the Judge was right in finding that the Appellant was guilty of the second charge of trafficking in the cannabis. To reiterate, the Appellant's position on appeal is that he had possession of the trolley bag, but he believed that it contained cigarettes (instead of the cannabis), and he only had the trolley bag in his possession for the purpose of returning it to Faizal, who had left it at the Flat (see [29] above).

#### *The element of possession*

142 Turning, first, to the element of possession, the Appellant, as we have just mentioned, does not dispute this. In our judgment, he was right not to. The Appellant had physical possession, control or custody of the *substance* in the trolley bag that turned out to be the cannabis, and he knew of the existence of that *substance*, whatever it might eventually turn out to be (see *Adili Chibuike Ejike v Public Prosecutor* [2019] 2 SLR 254 ("*Adili*") at [31]).

#### *The presumption of knowledge under s 18(2) of the MDA*

143 The next question is whether the Appellant has rebutted the presumption of knowledge of the nature of the drugs under s 18(2) of the MDA. Where an

accused person denies such knowledge, it is incumbent on him to state what he thought *was* in his possession, and the court will assess the credibility and veracity of his claim against the objective facts and his actions relating to the item in question (see *Obeng Comfort v Public Prosecutor* [2017] 1 SLR 633 at [40]).

144 The Judge found that the Appellant knew that the trolley bag contained the cannabis (see [25] above). She rejected his defence that he thought the trolley bag contained cigarettes instead of drugs. In reaching this conclusion, there were two key findings that she made: first, the Appellant knew that Faizal would be bringing the trolley bag to the Flat on 26 January 2016; and second, the Appellant had directed the CNB officers to the storeroom after the diamorphine was seized from Bedroom 1 because he knew that there were drugs in the trolley bag, which was in the storeroom (see GD at [63] and [90]).

145 We address the second point below. As for the first point, we have dealt with this in the context of the first charge (see [104]–[114] above). In short, we see no reason to reject the Appellant's evidence that he did not know that Faizal would be bringing the trolley bag to the Flat on 26 January 2016, and only discovered the trolley bag in the Flat the next day. He did not open the trolley bag. Thereafter, he called Faizal (as well as Sufian) to ask him to remove the trolley bag from the Flat, and Faizal (and likewise Sufian) agreed.

146 For present purposes, we should stress that there is also no reason for us to disbelieve the Appellant's defence that he was told by Faizal that the trolley bag contained cigarettes. Indeed, Faizal had evidently left cigarettes in the Flat previously (see [13] above). In line with our analysis for the first charge, we note that the Prosecution could have called Faizal to rebut the Appellant's defence, but it failed to do so. The points concerning the Prosecution's

evidential burden and the drawing of adverse inferences (see [68]–[77] above) apply to the second charge equally.

*The evidence of the events which transpired in the storeroom*

147 We turn to the evidence in respect of the Appellant's directing the CNB officers to the storeroom after the diamorphine was seized from Bedroom 1. The Judge relied on this to reach the conclusion that the Appellant *knew* that the trolley bag contained drugs and not cigarettes (see GD at [63]).

148 We begin by setting out the salient facts.

149 The search of Bedroom 1, where the diamorphine was found, concluded at around 8.40pm on 27 January 2016. At around 9.45pm, Senior SSgt Ika asked the Appellant a question. The precise question asked was disputed. Senior SSgt Ika testified that he asked the Appellant "*ada lagi*" (which means "still some more?"). On the other hand, the Appellant provided three versions of the question that was asked: "*ada barang salah*" (which means "any illegal things?"), "*ada barang salah lagi*" (which means any "any more illegal things?") and "*ada barang lagi*" (which means "any more things?"). Whatever the precise question, the Appellant answered "storeroom" and was escorted there. The CNB officers thereafter found the cannabis in the trolley bag.

150 The Judge found that the Appellant's version of Senior SSgt Ika's question "kept evolving", whereas Senior SSgt Ika was "consistent in his testimony" as to the question asked (see GD at [63]). With respect, given that the particular issue of just what the Appellant was asked was only explored at the trial some two and a half years after the relevant events in the Flat, we do not think it is fair to fault the Appellant for not remembering the precise question asked by Senior SSgt Ika. In fact, Senior SSgt Ika himself was not absolutely

certain of the question asked. His precise evidence was that "I *think* it's '*ada lagi*' because I usually keep the questions short and simple" [emphasis added]. Further, it appears that the question was unfortunately not documented in Senior SSgt Ika's pocketbook as there would otherwise have been no need for Senior SSgt Ika to speculate about the precise question asked.

151 More importantly, regardless of the precise question asked, it is not disputed that Senior SSgt Ika did not *expressly* refer to drugs in his question. We are therefore content to proceed with the analysis on the assumption that the question asked was "*ada lagi*", although we note that there was nothing in the evidence to help resolve this ambiguity. The more pertinent point, in our judgment, is what the Appellant *understood* from Senior SSgt Ika's question. On this point, the Prosecution put it to the Appellant that he understood the question to mean "any more drugs" or "still some more drugs". The Appellant disagreed. His position, which he maintained consistently, was that he was directing the CNB officers to the contraband cigarettes in the storeroom. It is not disputed that contraband cigarettes were indeed seized from the storeroom by the CNB officers and thereafter handed over to Singapore Customs.

152 The Judge found that the context supported the inference that the Appellant understood Senior SSgt Ika to be asking whether there were any more drugs in the Flat. We disagree for the following reasons.

153 First, the Judge observed that Senior SSgt Ika asked the Appellant the question *after* Bedroom 1 had been searched and a large amount of diamorphine uncovered there. This, however, does not take into account the fact that Senior SSgt Ika's question was asked *more than an hour* after the diamorphine was seized. The inference that the Appellant understood Senior SSgt Ika to be asking whether there were any more drugs in the Flat might have been a more

compelling one if the Appellant had been asked the question *immediately* after the diamorphine was found. Further, there was little evidence as to what transpired during the intervening one hour, except for some evidence that the CNB officers had allowed the Appellant to call Sufian at around 9.31pm.

154 Second, the Judge also pointed out that the Appellant was aware that the officers were from the CNB and were conducting a raid for drugs rather than contraband cigarettes. With hindsight, it might seem logical to expect that the CNB would, in the course of a raid for drugs, focus on drugs and not contraband cigarettes. But this is hardly determinative of the issue. Indeed, as we have noted, the CNB officers did seize the contraband cigarettes that were found in the storeroom. But this is a distinct point from the one that is more pertinent to the facts before us, which is that since the Appellant knew that the CNB officers were conducting a raid for drugs, it would not have been unreasonable for him to think that he should come clean on other illegal items stored in the Flat.

155 Third, there was some dispute at the trial as to what, if anything, the Appellant had pointed to in response to Senior SSgt Ika's question. Whatever it was, when the CNB officers seized the trolley bag, they never asked the Appellant what was in it. The CNB officers had instead removed several blocks of vegetable matter from the trolley bag and asked the Appellant whether he knew what they were and whether they belonged to him. While the Appellant recognised that the blocks of vegetable matter were cannabis, he denied that they belonged to him.

156 In these circumstances, it seems to us that on no account can it be concluded, solely on the basis of the question asked by Senior SSgt Ika and the Appellant's response, that he knew that the trolley bag contained the cannabis. This is why the Judge's conclusion that the Appellant had the requisite

knowledge of the nature of the drugs rested in material part on her finding that he knew that Faizal would be bringing the trolley bag to the Flat on 26 January 2016. We have explained why we do not accept that finding.

*Our conclusion on the second charge*

157 What we are left with then is the Appellant's account of what had transpired in respect of Faizal's bringing the trolley bag to the Flat. That account included his assertion that he thought the trolley bag contained cigarettes, which was what Faizal had told him and which Faizal apparently did bring from time to time. This was not inherently incredible, and it shifted the evidential burden to the Prosecution, but nothing at all was led by the Prosecution in the way of evidence to discharge that burden. Accordingly, for the reasons set out above, we are satisfied that the Appellant has rebutted the presumption of knowledge under s 18(2) of the MDA where the second charge is concerned. The question of trafficking therefore does not arise in relation to this charge. In any event, the element of possession of the cannabis for the purpose of trafficking would not have been made out for the same reasons as those we have given in relation to the first charge.

158 In the circumstances, we allow the Appellant's appeal in relation to the second charge of trafficking in the cannabis and acquit him of it. To be clear, as the Prosecution has, in our judgment, failed to establish that the Appellant knew that the trolley bag contained the cannabis, he cannot be found guilty even of an offence of possession of the cannabis under s 8(*a*) of the MDA.

*Wilful blindness*

159 For completeness, we note that the Prosecution *did not* run an alternative case based on wilful blindness at the trial, neither did it seek to raise any

arguments concerning wilful blindness on appeal. Instead, the Prosecution's primary case was that it had proved that the Appellant had actual knowledge of the cannabis. In the alternative, the Prosecution submitted that the Appellant was presumed to have knowledge of the cannabis by virtue of s 18(2) of the MDA (see GD at [44]). It is thus not necessary to consider whether the Appellant was wilfully blind to the cannabis in the trolley bag in the present case.

160 However, our preliminary view is that the doctrine of wilful blindness would not have been engaged in the present case even if the Prosecution had run a case based on it.

161 There is nothing before us to suggest that the Appellant deliberately refused to check the contents of the trolley bag in the face of suspicion *in order to cheat the administration of justice* (see *Adili* ([142] *supra*) at [66]). Here, the evidence indicated that the Appellant *did* check with Faizal what was in the trolley bag and also told him to remove it from the Flat. Faizal informed the Appellant that the trolley bag contained cigarettes and also agreed to remove it from the Flat. There was no reason for the Appellant to disbelieve Faizal. On his case, the Appellant was not a courier who was transporting goods and who would therefore be bound to check what it was that he was transporting. We leave it at that since the point was not taken by the Prosecution.

**Issue 3: Excessive judicial interference**

162 We turn finally to the last issue, which is whether there was excessive judicial interference at the trial. The Appellant submitted that there were numerous examples of the Judge "descending into the arena" and "taking over the conduct of the questioning of witnesses", and the impression thus given was

that her vision had been "clouded by the dust of the conflict" (an expression taken from the decision of the English Court of Appeal in *Yuill v Yuill* [1945] P 15 ("*Yuill*") at 20). The Appellant submitted that the Judge did not merely ask clarificatory questions, but instead engaged in long and sustained bouts of questioning, and her interventions were at times at crucial points which interrupted counsel's line of questioning. Nevertheless, the Appellant did not suggest that the Judge was biased. Mr Jumabhoy also clarified that he was not seeking for the matter to be reheard before another judge. Rather, Mr Jumabhoy submitted that, in fairness to the Appellant, we should convict him only of what we were satisfied was safe to convict him of in all the circumstances, and that would be an amended charge of possession of the diamorphine under s 8(*a*) of the MDA. Mr Jumabhoy submitted that the Appellant should accordingly be acquitted of the two capital trafficking charges to which he had claimed trial.

163 For the reasons explained above, this indeed is the result we have been driven to, having examined the evidence. That makes it strictly unnecessary for us to consider and rule upon the issue of excessive judicial interference. We do not, in any event, accept Mr Jumabhoy's submissions as to the Judge's conduct of the trial. Nonetheless, we take this opportunity to set out the applicable principles in relation to a judge's conduct of criminal proceedings.

### *The general principles*

164 It is helpful to begin by reiterating that a complaint of *excessive judicial interference* ought not to be conflated with a complaint of *apparent bias*. We explained the distinction between the two concepts in *BOI v BOJ* [2018] 2 SLR 1156 ("*BOI*") in the following terms (at [112]):

> … [T]he resolution of a complaint of excessive judicial interference depends not on *appearances* or what *impressions* a fair-minded observer might be left with, but rather on whether

> the reviewing court is satisfied that the manner in which the challenged tribunal or judge acted was such as to *impair its ability to evaluate and weigh the case presented by each side*. [emphasis added]

165 Properly construed, the ground of excessive judicial interference is concerned with the failure of the court to observe its proper role and its duty not to descend into the arena (see *BOI* at [112]). At the same time, judges are fully entitled to pose questions to witnesses and counsel in order to *understand and clarify* the evidence and the issues in dispute. In this regard, we stated the following principles in *Mohammed Ali bin Johari v Public Prosecutor* [2008] 4 SLR(R) 1058 ("*Mohammed Ali*") at [175]:

> … [T]he judge is not obliged to remain silent, and can ask witnesses or counsel questions if (*inter alia*):
>
> > (i) it is necessary to clarify a point or issue that has been overlooked or has been left obscure, or to raise an important issue that has been overlooked by counsel; this is particularly important in criminal cases where the point or issue relates to the right of the accused to fully present his or her defence in relation to the charges concerned;
> >
> > (ii) it enables him or her to follow the points made by counsel;
> >
> > (iii) it is necessary to exclude irrelevancies and/or discourage repetition and/or prevent undue evasion and/or obduracy by the witness concerned (or even by counsel);
> >
> > (iv) it serves to assist counsel and their clients to be cognisant of what is troubling the judge, provided it is clear that the judge is keeping an open mind and has not prejudged the outcome of the particular issue or issues (and, a fortiori, the result of the case itself).

166 Thus, for excessive judicial interference to be established, it would generally be necessary to show that the situation was "an *egregious* one" [emphasis in original] (see *Mohammed Ali* at [175(g)]). Plainly, where a complaint of excessive judicial interference is made on appeal, the appellate

court will consider whether the court below *has in fact acted* in a manner that has resulted in *actual prejudice* to the relevant party; the relevant inquiry is not whether a fair-minded person would *reasonably suspect or apprehend* that the court below was biased (see *BOI* at [112]). Actual prejudice could, for instance, arise if a judge intervenes in the proceedings to such an extent that it prevents a party from presenting its case.

***Whether there was excessive judicial interference in the present case***

167 As to whether there was excessive judicial interference in the present case, having examined the record of the proceedings and considered Mr Jumabhoy's submissions most carefully, we are satisfied that there was not. While the Judge did direct a fair number of questions during the trial to various witnesses, including the Appellant, in our judgment, it was plain that she did so in an effort to *ensure* that she had correctly understood the evidence. This was especially warranted in this case, where the questions put by counsel who appeared at the trial were at times wanting in specificity and/or clarity.

168 We do not think it is necessary or helpful to list the various instances where it was suggested that the Judge interfered excessively. However, quite apart from his general contentions regarding excessive judicial interference, there was one distinct point made by Mr Jumabhoy that we think ought to be highlighted. This was the point that the Judge ought not to have required the Appellant to give advance notice of his case before he had been called to give his defence. In brief terms, when counsel was cross-examining ASP Peh on the swabbing process for F1D3A (see [127] above), the Judge intervened to ask what the Appellant's case was as to whether the Appellant had touched the ten mini packets of diamorphine constituting F1D3A. The Judge then asked counsel to take the Appellant's instructions as to where the various packets of

diamorphine were in Bedroom 1 and counsel did not object. While there was nothing objectionable about these questions in so far as they were asked by the Judge to *understand* the Appellant's defence, the issue was one of *timing*. With respect, the Judge ought to have asked these questions only after the Appellant had been called to give his defence following the close of the Prosecution's case. Even so, we are amply satisfied that this did not result in any actual prejudice to the Appellant so as to constitute impermissible or excessive judicial interference.

***Guidelines on judicial conduct in criminal proceedings***

169 Notwithstanding our view that there was no excessive judicial interference in this case, given the importance of this issue, we think it would be useful to provide some guidance on the applicable principles which ought to guide a judge's conduct *in the specific context of criminal proceedings*. These principles ought to apply with especial force in criminal matters, where the implications of excessive judicial interference on an accused person's life and liberty may be severe.

170 We highlight below six points that a judge must generally be mindful of and, more broadly, the need for a judge to exercise greater caution, prudence and restraint in conducting criminal proceedings as compared to civil proceedings. These points are, of course, not intended to be exhaustive.

171 First, in criminal proceedings, it is the Prosecution's burden to prove its case against the accused person beyond a reasonable doubt. As we have repeatedly emphasised in our recent decisions, it is for the Prosecution, and not the judge, to fill in any gaps in the Prosecution's case (see *Mohamed Affandi bin Rosli v Public Prosecutor and another appeal* [2019] 1 SLR 440 at [52];

*Ramesh* ([28] *supra*) at [1]–[2]). As we explained in *Mui Jia Jun v Public Prosecutor* [2018] 2 SLR 1087 ("*Mui Jia Jun*") at [76]:

> … The principle that the Prosecution must prove the guilt of the accused beyond reasonable doubt is a cornerstone of our criminal law. That principle implies that it is incumbent on the Prosecution, and not the court, to address any weakness in the evidence that the Prosecution adduces, failing which the Prosecution must accept the consequences that follow for its case against the accused.

172 This is not least because while the Prosecution is charged with a number of significant burdens (such as having to prove its case against the accused person beyond a reasonable doubt), it has access to the police, the investigating authorities, as well as witnesses and their statements, and is also armed with and assisted by various tools (such as statutory presumptions). It follows then that a judge should not ask questions that would reasonably be seen as having the effect of filling for the Prosecution gaps in its case. In this regard, we endorse Lee Seiu Kin J's observations in *Ng Chee Tiong Tony v Public Prosecutor* [2008] 1 SLR(R) 900 ("*Ng Chee Tiong Tony*") as follows at [22]:

> … [W]hile it is entirely proper for a trial judge to ask questions to clarify an unclear answer, or even to establish a crucial point (which I should add must be done with circumspection and in a neutral manner), what was done in the present case went past that. It is the duty of the Prosecution to bring out the evidence to prove its case; it is not the judge's duty to do so, and certainly not to take over the cross-examination to make up for any shortfall in the conduct of the case by the prosecutor. And it is certainly not for a trial judge to test the credibility of a witness by sustained questioning. …

173 Second, in criminal proceedings, there are strict rules of procedure which provide that it is for the Prosecution to first prove a *prima facie* case *before* the Defence may be called or even invited to set out material aspects of its position. Section 230(1)(*j*) of the CPC provides that the court may only call on an accused person to give his defence if it is satisfied that there is some

evidence which is not inherently incredible and which, if accepted, would satisfy each and every element of the charge against the accused person. In the course of the Prosecution's case, a judge should therefore *not* ask questions of the Defence which would require the accused person to give advance notice of his case before he is called to give his defence, given that at this stage, the Prosecution would have yet to discharge its burden to prove a *prima facie* case.

174 Third, we turn to the Prosecution's task of presenting its case at the trial. The court clearly does not have access to all the information that the police or other investigating authorities will have gathered over the course of the investigations, which information the Prosecution will have had access to. Accordingly, if the Prosecution chooses not to explore certain lines of inquiry with its witnesses or advance certain case theories, there might be good reasons for its choices, which the trial judge might not fully appreciate (see *Mui Jia Jun* at [77]). The judge should, for this reason, ordinarily refrain from exploring other lines of inquiry.

175 Fourth, we turn to the accused person and the giving of his evidence-in-chief at the trial. Unlike a party to a civil matter who gives his evidence-in-chief by affidavit, an accused person gives his evidence-in-chief orally at the trial. There are at least two reasons why a judge should exercise considerable restraint in intervening at this stage, as observed by the English Court of Appeal in *Regina v Gavin Inns, Emma Inns* [2018] EWCA Crim 1081 ("*Gavin Inns*"). The first is that it is not a judge's role to cross-examine an accused person. Rather, it is the Prosecution's role to do so, and that will, of course, be done *after* the accused person has finished giving his evidence-in-chief (see *Gavin Inns* at [36]). Second, an accused person should have the opportunity to give his account in the way that he would like his evidence to come out, "elicited though

questions from [his] own advocate", without constant interruptions that may prevent him from doing so (see *Gavin Inns* at [37]).

176 Moreover, as we have just noted, in criminal proceedings, parties do not set out their cases before the trial in the way that it is done in civil proceedings. In civil proceedings, the issues in dispute are typically set out in the pleadings and the contest is quite clearly defined. With the witnesses' evidence-in-chief given by affidavit, there is much less risk of a witness not having the opportunity to give his account in the manner that he wants to. It is thus important for a trial judge to be conscious of the need to exercise greater restraint in criminal proceedings when questioning an accused person during his evidence-in-chief.

177 Fifth, courts have repeatedly observed that witnesses generally tend to enter the witness box in a nervous state, and this would apply with greater force to an accused person whose life and liberty is at stake. The words of the English Court of Appeal in *R v Kolliari Mehmet Hulusi* (1973) 58 Cr App R 378 at 385, which we cited in *Mohammed Ali* ([165] *supra*) at [131], bear repetition:

> It is a fundamental principle of an English trial that, if an accused gives evidence, he must be allowed to do so without being badgered and interrupted. Judges should remember that most people go into the witness-box, whether they be witnesses for the Crown or the defence, in a state of nervousness. They are anxious to do their best. They expect to receive a courteous hearing, and when they find, almost as soon as they get into the witness-box and are starting to tell their story, *that the judge of all people is intervening in a hostile way*, then, human nature being what it is, they are liable to become confused and not to do as well as they would have done had they not been badgered and interrupted. [emphasis added]

178 We italicised a portion of the above extract because it is important for a judge to remember that he or she will most likely have a very different effect on a witness as compared to the cross-examining counsel. Citing *Yuill* ([162]

*supra*), Lee J made a similar observation in *Ng Chee Tiong Tony* ([172] *supra*) at [22]:

> … [I]t is well known that witnesses often respond differently to a judge as compared with cross-examining counsel. As Lord Greene MR pointed out in [*Yuill*] at 20:
>
> > [A]s everyone who has had experience of these matters knows, … the demeanour of a witness is apt to be very different when he is being questioned by the judge from what it is when he is being questioned by counsel[.]

179 In these circumstances, it would not be far-fetched to suggest that there might be a tendency for an accused person to present himself as agreeably as possible to the judge so as not to upset him or her. The Malaysian Court of Appeal in *Ahmad Norizan bin Mohamad v Public Prosecutor* [2017] 6 MLJ 326 made a similar point at [24]:

> … [C]ross-examination by a judge has a different effect on a witness as opposed to cross-examination by an advocate. A witness understands readily that the opposing advocate is an adversary unlike the judge who will be the decider of the dispute between the parties. There will always be huge pressure on a witness, and especially more so in the case where the witness is the accused person, when questioned by a judge as apart from being the decider of the truth in each case, the judge also commands great respect and deference in a courtroom. In such a setting, it is possible for an unsophisticated accused person to succumb to suggestions put forward by the judge so as not to appear disagreeable or even impolite.

180 Sixth, a judge should refrain from asking leading questions generally as it may help a party with the direct examination or cross-examination of a witness, especially a material witness. In *Ng Chee Tiong Tony*, the trial judge seemed to have taken a position and pursued it in her questioning of the appellant; she framed her questions from the position that the appellant was not telling the truth (at [23] and [25]); she asked almost as many questions as the prosecutor, and many of her questions were leading questions and/or in the nature of cross-examination (at [5], [8] and [24]); a number of points that she raised had not

been surfaced by the prosecutor in his cross-examination of the appellant; *based on the appellant's answers to her questioning*, she then made crucial adverse findings of fact in her grounds of decision, particularly in relation to the appellant's credibility as a witness (at [23]). In these circumstances, it was unsurprising that Lee J quashed the appellant's conviction.

181 The six points outlined above are not remarkable ones, and we have every confidence that trial judges in all our courts apply them each and every day in each and every case that they try. Nonetheless, we think a reminder to all those involved in criminal proceedings – judges, prosecutors and defence counsel – would not be out of place.

**Conclusion**

182 In summary, having examined the facts and the evidence before us, we allow the Appellant's appeal in relation to the first charge of trafficking in the diamorphine, and convict him on an amended charge of possession of the diamorphine under s 8(*a*) of the MDA. We sentence him to a term of eight years' imprisonment, backdated to the date of his remand, on the amended charge.

183 Further, we allow the Appellant's appeal in relation to the second charge of trafficking in the cannabis and acquit him of it.

184 We briefly mention one remaining matter.

185 At the hearing of the appeal, the Prosecution submitted that it would disclose to the Defence the statements of Sufian, Faizal, Mashitta and the Helper if we held that it was under a duty to do so. In that event, if the Defence decided to call these witnesses, it was suggested that the matter could be remitted to the Judge pursuant to s 390(1)(*b*)(i) of the CPC. To be clear, our judgment in this

appeal does not turn on the Prosecution's non-disclosure of these witnesses' statements. We have found that it was the *Prosecution*, and not the *Defence*, who ought to have called these witnesses, given its evidential burden to rebut the claims made by the Appellant. As the Prosecution has failed to prove that the Appellant is guilty of either of the two capital trafficking charges that it brought against him, there is simply no basis for this matter to be remitted to the Judge.

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|---|---|---|
| Sundaresh Menon<br>Chief Justice | Judith Prakash<br>Judge of Appeal | Steven Chong<br>Judge of Appeal |

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