

IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2020] SGCA 98

Criminal Appeal No 1 of 2020

Between

Beh Chew Boo

... Appellant

And

Public Prosecutor

... Respondent

In the matter of Criminal Case No 30 of 2019

Between

Public Prosecutor

And

Beh Chew Boo

JUDGMENT

[Criminal Law — [Statutory offences] — [Misuse of Drugs Act]

TABLE OF CONTENTS

FACTUAL BACKGROUND	2
THE EVIDENCE	4
DNA ANALYSIS.....	4
BEH’S STATEMENTS	4
BEH’S ORAL EVIDENCE DURING TRIAL AND THE DEFENCE’S OBJECTIONS TO CERTAIN MESSAGES	9
AH HUAT’S EVIDENCE.....	13
THE OFFICERS’ EVIDENCE.....	14
OTHER DEFENCE WITNESSES	15
ARGUMENTS AT TRIAL.....	16
DECISION OF THE HIGH COURT.....	17
ARGUMENTS ON APPEAL.....	19
ISSUES ON APPEAL AND LEGAL FRAMEWORK.....	20
OUR DECISION	22
OBSERVATIONS REGARDING THE TEXT MESSAGES.....	22
EVIDENTIAL BURDEN.....	25
<i>Beh’s account was not inherently incredible</i>	25
<i>The Prosecution’s failure to call Lew</i>	28
OTHER ISSUES	30
CONCLUSION.....	31

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Beh Chew Boo
v
Public Prosecutor

[2020] SGCA 98

Court of Appeal — Criminal Appeal No 1 of 2020
Sundaresh Menon CJ, Tay Yong Kwang JA and Steven Chong JA

8 September 2020

13 October 2020

Judgment reserved.

Tay Yong Kwang JA (delivering the judgment of the court):

1 The appellant (“Beh”) faced five charges of unauthorised importation of controlled drugs on the same occasion. The Prosecution proceeded on only the first charge which involved the death penalty. The other four charges were stood down. Beh claimed trial and was convicted by the High Court (“the Judge”) on the charge of importing into Singapore not less than 499.97g of methamphetamine, an offence under s 7 of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) (“MDA”). The Prosecution relied on the presumptions of possession and knowledge under ss 21 and 18(2) of the MDA respectively. The sole issue before the Judge was whether Beh knew that the items which were found to be drugs were in the storage compartment of the motorcycle that he had borrowed and which he rode into Singapore with a female pillion rider.

2 Beh’s defence was that he did not know about the existence of the drugs in the motorcycle. The Judge found that Beh could not rebut the presumption of knowledge of the presence of the drugs under s 21 of the MDA and therefore found him guilty as charged. Although the Judge held that Beh was a “courier” within the meaning of s 33B(2)(a) of the MDA, the Public Prosecutor did not issue a certificate of substantive assistance under s 33B(2)(b). The mandatory death penalty therefore applied and Beh was sentenced accordingly.

3 Beh appealed against his conviction and sentence. We reserved judgment after hearing the parties and now deliver our decision. In the unique circumstances of this case, which we explain below, we are of the view that the Prosecution was unable to prove the charge of importation against Beh. Accordingly, we acquit Beh on this charge.

Factual background

4 The circumstances leading to Beh’s arrest, the discovery of the bundles of drugs, their analysis, and the investigation statements given by Beh were not disputed. These were set out in a seven-page Agreed Statement of Facts.

5 Beh is a 38-year-old male Malaysian. At the time of the incident in the charge, he was 34 years old. On 26 October 2016, at about 5.20am, he entered Singapore from Malaysia at the Woodlands Checkpoint riding a Malaysian-registered motorcycle with registration number JRN177 (“the Motorcycle”). The registered owner of the Motorcycle was Lew Shyang Huei (“Lew”), Beh’s friend and ex-colleague. Beh’s girlfriend, Ting Swee Ling (“Ting”), was riding pillion on the Motorcycle.

6 Beh was stopped at the checkpoint for a routine check by Police Constable Israel Rajan (“PC Rajan”). He was instructed by PC Rajan to lift up

the Motorcycle's seat. In the storage compartment under the seat, a blue plastic bag ("A1"), stored beneath a black jacket, a rain-coat and rain-pants, was found, together with a power bank and a set of car keys. The power bank belonged to Yeo Kim Huat Mervin ("Ah Huat"), Beh's friend. The car keys were for Beh's Malaysian-registered car. Upon opening A1 and finding several bundles of substance inside, PC Rajan activated the Immigration and Checkpoints Authority ("ICA") Task Force.

7 Sergeant Dave Ong Kah Huat ("Sgt Ong") from the ICA Task Force arrived at the motorcycle checking bay, together with Staff Sergeant Ganesh s/o Amarthalingam ("SSgt Ganesh"), Senior Staff Sergeant Muhammad Khairul bin Khairudin ("SSSgt Khairul") and Staff Sergeant Razif bin Rahim ("SSgt Razif") from the Central Narcotics Bureau ("CNB"). SSSgt Khairul and SSgt Razif opened and examined the contents of the bundles in the presence of Beh and Ting. There were four bundles inside A1. The biggest bundle contained, among other things, three black bundles. One of the three black bundles ("A1A4") contained several blister packages of Erimin-5 tablets. The second of the four bundles was wrapped in plastic ("A1E") and contained 20 silver packages. The third of the four bundles contained a black bundle which in turn contained ten silver packages. The last of the four bundles was wrapped in a plastic bag and cling wrap ("A1D") and contained, among other things, two black bundles ("A1D5" and "A1D6" respectively), one of which was opened and found to contain several silver packages.

8 The seized drug exhibits contained not less than 742.82g of crystalline substance, which was analysed and found to contain not less than 499.97g of methamphetamine. The analysis of the drug exhibits, the HSA results and the chain of custody of the various drug exhibits were not disputed.

9 It appears from court records that Lew, the owner of the Motorcycle that Beh rode into Singapore, was subsequently arrested in Singapore for some charges under the MDA which were unrelated to the charge here against Beh. On 20 July 2018, Lew was sentenced by the District Court to seven years' imprisonment (with effect from 29 April 2017) and five strokes of the cane for drug importation and possession of drug-related utensils. Lew was serving his imprisonment term here when the trial against Beh proceeded from July 2019. Lew is still serving his sentence.

The evidence

DNA analysis

10 Beh's DNA was not found on any of the drug exhibits. However, Lew's DNA was found on:

- (a) the interior surface of the plastic bag marked "A1";
- (b) the exterior surface of the taped bundle marked "A1A4";
- (c) the exterior surface of the plastic bag and cling wrap marked "A1D";
- (d) the swabs taken from the exterior of the taped bundle marked "A1D5";
- (e) the swabs taken from the cling wrap marked "A1E"; and
- (f) the interior and exterior surfaces of the plastic bags which were marked "A1F".

Beh's statements

11 The following statements were recorded from Beh:

- (a) a statement recorded on 26 October 2016 at around 7.04am after Beh was served with a notice under s 33B of the MDA concerning the mandatory death penalty and the possible sentencing alternative (“MDP statement”);
- (b) two contemporaneous statements under s 22 of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) (“CPC”), recorded on 26 October 2016 at about 7.34am and 10.15am (“first contemporaneous statement” and “second contemporaneous statement”);
- (c) a cautioned statement under s 23 of the CPC, recorded on 27 October 2016 at about 1.56am (“cautioned statement”); and
- (d) four statements under s 22 of the CPC of the CPC, recorded on 31 October 2016, 1 November 2016, 2 November 2016 (“first”, “second” and “third long statement”) and 5 October 2017. The last statement was mentioned in the Agreed Statement of Facts but was not adduced in evidence by the Prosecution.

12 Beh gave his MDP statement in the Chinese language (interpreted by Sgt Ong and recorded by SSSgt Khairul). “Ah Siang” refers to Lew:

The bike is not mine. I borrowed the bike from ‘Ah Siang’ as I don’t want to use my car and pay \$35 to enter Singapore. I only used to bike to send a power bank to ‘Ah Huat’ at Fernvale Sengkang Blk 473. I do not know anything regarding the contents in the bike.

13 The first contemporaneous statement was likewise given by Beh in the Chinese language (interpreted by Sgt Ong and recorded by SSSgt Khairul). When Beh was asked about the blue plastic bag containing the bundles of drugs and whom they belonged to, he replied, “I don’t know”. Beh said he did not know the blue plastic bag was in the Motorcycle as he did not check. His reason

for riding the Motorcycle into Singapore was to return a power bank to Ah Huat at Fernvale Block 473. Beh provided Ah Huat's mobile phone number.

14 The second contemporaneous statement was given by Beh in the Malay language and recorded by SSgt Rozaiman bin Abdul Rahman. Beh identified Ah Huat from a photo-board and said Ah Huat was his supervisor from October 2015 to August 2016 when he worked as a mover with KNT Movers (S) Pte Ltd ("KNT"). Beh denied having any drug dealings with Ah Huat.

15 The cautioned statement was given by Beh in the Chinese language and recorded by IO Quah. Beh stated in response to the original charge (which alleged joint importation of drugs with Ting), "I don't plead guilty. I have nothing further to say".

16 The first long statement was given by Beh in the Chinese language with the assistance of an interpreter, Mr Wong Png Leong ("Mr Wong"). It was recorded by IO Quah. Beh claimed to own a Honda Accord and a Kawasaki motorcycle, neither of which was registered in his name. He also said he met Ting on 29 June 2016 and they began dating soon thereafter. Beh stated that he could not speak English and would normally communicate in Mandarin and in Hokkien.

17 The second long statement was given by Beh in the Chinese language, interpreted by Mr Wong and recorded by IO Quah. Beh made the following material points:

- (a) He called Lew from his home on 26 October 2016 at around 1am to ask if he could borrow the Motorcycle to enter Singapore. He had

borrowed the same from Lew before to travel to Singapore. Lew agreed and requested Beh to top up his prepaid telephone card.

(b) After calling Lew, Beh called Ting and told her he would pick her up. As it was raining, Beh drove the Honda Accord to Ting's house and picked her up at around 3.45am. While driving towards Johor Bahru ("JB") customs, Ting told Beh that she did not think it would rain later and this made Beh decide to use the Motorcycle to enter Singapore. He drove to Lew's house and parked his car outside before collecting the Motorcycle's key from Lew personally at around 4.20am. He rode the Motorcycle to his car, unlocked the Motorcycle's seat upon reaching his car and saw only a black jacket in the storage compartment. He did not check what was underneath the jacket. He placed his car keys and a power bank on top of the black jacket. He and Ting then rode the Motorcycle to JB customs.

(c) After clearing JB customs, he and Ting arrived at the Woodlands Checkpoint immigration counter at around 5am. He opened the Motorcycle's seat for inspection and recalled an officer taking out the power bank, the black jacket and some raincoats. The officer then took out a plastic bag and removed a black bundle wrapped in black sticky tape from it. It was explained to Beh that the items could be illegal drugs, upon which Beh "knew [he] [was] in trouble". He was "very confused" when questioned about the drugs and could only recall telling the officers "the motorcycle is not mine, the drugs inside the motorcycle is not mine and I don't know there are drugs inside the motorcycle".

(d) He had borrowed the Motorcycle from Lew many times to enter Singapore as the toll fees were cheaper than if he were to drive a car. He

had never driven his car into Singapore. He was not riding his own motorcycle on the day he was arrested because its lubricating device was faulty.

18 The third long statement was given by Beh in the Chinese language, interpreted by Mr Wong and recorded by IO Quah. Beh made the following material points:

(a) Lew was a “very good friend” and “senior” who guided him at KNT. Beh was “very confused” why the drugs were found in the Motorcycle and was not sure whether the drugs had anything to do with Lew. Beh provided Lew’s phone number.

(b) Beh recognised an individual known to him as “Ah Fei” from the photographs shown to him and described Ah Fei as “merely [an] acquaintance” and his wife’s ex-colleague.

(c) Beh described Ah Huat as his “mentor” and friend. On the day of his arrest, his intention in coming into Singapore “was solely to return the power bank to Ah Huat”. He had asked Ting to accompany him as he intended, after returning the power bank, to bring Ting to “eat some nice food” before returning to Malaysia.

(d) Beh had borrowed the power bank from Ah Huat two days before his arrest (*ie*, on 24 October 2016). On that day, he had entered Singapore around 5am, also riding the Motorcycle. He was to meet Ah Huat for a job interview as Ah Huat had recently set up a new mover company which Beh was supposed to join. He met Ah Huat at the coffee-shop near his block at 6-plus am for a meeting that lasted about two hours. They discussed when Beh could start work. During this

meeting, Beh borrowed the power bank from Ah Huat. Beh told him that he would return the power bank “later at his work location” as he had not finished charging his handphone. Beh did not meet Ah Huat again that day to return the power bank as he had urgent family matters.

(e) Beh recognised the drugs seized on the day of his arrest as “Yao Tou Yuan”, “5 Zai” and “Bing Du” as these were common in Malaysia and he had seen them before. He consumed “Yao Tou Yuan” and “Bing Du” on 22 October 2016 at a party hosted by Lew. However, Beh denied that the drugs found in the Motorcycle’s storage compartment were his and claimed he had never seen them before his arrest and did not know what was in the packages until they were unwrapped.

Beh’s oral evidence during trial and the Defence’s objections to certain messages

19 In his examination in chief, Beh explained that around 20 to 23 October 2016, he was getting anxious because the work that Ah Huat had promised did not materialise. He was therefore excited about an upcoming job that was to last from 27 to 29 October 2016 (“the upcoming job”). Beh did not return the power bank to Ah Huat on 24 October 2016 because Beh needed to meet a Malay man at Tan Tock Seng Hospital to recruit him for the upcoming job.

20 As for the events on 26 October 2016, around midnight or 1am, Lew called Beh to ask Beh to top up his telephone card for him. Beh agreed and asked to borrow the Motorcycle. Before picking Ting up on 26 October 2016, Beh had asked Ting to fill in the immigration card with the Motorcycle’s registration number, JRN177, because “[t]he night before I had already borrowed the motorcycle from [Lew]” and he intended to ride the Motorcycle into Singapore. Ting allegedly told Beh while in his car not to ride the

Motorcycle as it was raining. On the way to JB customs, Ting then suggested that they change to a motorcycle because the rain had stopped. This would save them money as they need not pay the toll for the car and they would also save time as they would not be caught in a traffic jam on the way back.

21 At the Woodlands checkpoint, when the plastic bag was discovered, Beh told the officers that this item was left behind by the Motorcycle's owner and that Beh's motive for coming into Singapore was to return the power bank to Ah Huat. Beh claimed to have stated the following to the officers there: (a) he had borrowed the Motorcycle from a Chinese man in Malaysia by the name of Lew Shyang Huei; (b) Lew's telephone number and address; and (c) he asked them to call Lew "to prove [Beh] was unaware of all this" and "suggested to them that they could return to Malaysia to crack the case".

22 After Beh testified but before he was cross-examined by the Prosecution, the Defence raised objections to the Prosecution's intended questioning in respect of certain text messages that had been extracted from Beh's mobile phone and set out in a forensic examination report that had already been adduced in evidence as part of the Prosecution's case. These comprised:

- (a) messages sent by Beh to one Lee Wei Jye on 13 and 19 October 2016 ("first category") (the Prosecution only found out shortly before the trial that Ah Fei was Lee Wei Jye as Beh had claimed in his statement that Ah Fei was a mere acquaintance whose full name he did not know);
- (b) messages sent by Beh to an unknown person on 1 October 2016 ("second category");
- (c) messages on 23 October 2016 between Beh and an unknown person referred to as "Boss" in the messages ("third category"); and

(d) messages exchanged between Beh and Ah Fei shortly before Beh's arrest on 26 October 2016 ("fourth category").

23 The Defence accepted that the fourth category of messages was relevant but objected to the remaining three categories on two grounds. The first was that the messages were similar fact evidence which would be used to establish propensity. The second objection was that relying on them would be an impermissible back-door attempt by the Prosecution to introduce wilful blindness into the equation. The Prosecution argued that the messages would assist the court in determining the question whether Beh could rebut the presumptions in the MDA. As for the second objection, the Prosecution's case was that Beh had actual knowledge of the drug bundles and there was therefore no reliance on wilful blindness.

24 The Judge accepted the first objection in part. He allowed the Prosecution to cross-examine Beh on the first category of messages because they provided context for the court to assess the true nature of the arrangement on 26 October 2016. The Judge disallowed cross-examination on the second category as the Prosecution had not shown any connection between the messages on 1 October 2016 and the events surrounding the alleged offence on 26 October 2016 (GD at [17]). The messages also "did not clearly speak to drug importation" (GD at [18]) and were not "proximate in time" to the events of 26 October 2016 (as stated by the Judge in his oral ruling during the trial). The Judge allowed cross-examination on the third category for the limited purpose of addressing Beh's claim that his sole source of income in October 2016 was his salary as a pub waiter in JB and hence his credibility (GD at [19]). He did not allow the Prosecution to rely on the messages to imply an ongoing business of drug importation that included the offences for which Beh was charged or to assess Beh's state of mind in relation to the same.

25 During cross-examination, Beh asserted that the first category of messages (the messages between him and Ah Fei on 13 and 19 October 2016) concerned a “normal”, “[n]ot important” and “casual” meet-up that would involve stopping for a cigarette and talking about where they would have their meals together. Beh’s apparent anxiety in the messages about Ah Fei’s location was because he did not want to wait too long for Ah Fei. He likewise characterised the 19 October meeting as “a normal meet up”, arranged casually since he had said that he would be entering Singapore and Ah Fei was also entering Singapore.

26 When further cross-examined on an exchange of messages between Beh and Lew arising from Beh having passed “the wrong thing” to an Indian man on 24 October (subsequent to Beh’s meeting with Ah Huat), Beh insisted repeatedly that he could not recall what this was about. However, he also asserted that “we didn’t break the law” and that the transaction on 24 October 2016 was “a different matter” which was “unrelated” to the events of 26 October 2016. The Prosecution put to Beh that he did not mention running errands for Lew on 24 October because he did not want to reveal that his purpose for entering Singapore on 24 October was to do so. Beh disagreed.

27 During cross-examination, Beh mentioned for the first time that he intended to introduce the Malay man whom he had allegedly met to Ah Huat on 26 October 2016. However, he could not name this Malay man.

28 In response to the Prosecution’s question whether Beh thought Lew had “set [him] up”, Beh replied “I don’t believe so”. Beh claimed to be “very scared” and “emotional” when arrested.

29 Beh was also cross-examined on his claims that he told the officers at the Woodlands checkpoint that the blue plastic bag had been left behind by the owner of the Motorcycle and that he had given the officers Lew’s phone number and address. When asked why he did not ask the officers to write down this information when the statement was read back to him, Beh asserted that:

There were various problems. Some of them said it was a question and answer, some of them said they didn’t have the power to do this, to do that. So they kept pushing things around and they just asked me to be there quietly.

When asked why the officers, who recorded Ah Huat’s phone number and address, would not record Lew’s information, Beh stated that the officers were more interested in identifying the supposed recipient of the drugs in Singapore.

30 In re-examination, Beh clarified that he had assumed that because he took the Motorcycle from Lew and the drugs were found in the Motorcycle, the drugs belonged to Lew. There was no other basis for him to say this. Moreover, Lew’s phone number, which he supplied in his third long statement, was the same number he supplied when he was being interviewed by SSSgt Khairul but which was not recorded by him.

Ah Huat’s evidence

31 Ah Huat was called as a Prosecution witness. Ah Huat was unsure whether Beh was to enter Singapore around 22 to 24 October 2016 to meet with a Malay man who was a worker at KNT. He was also unsure whether Beh intended to bring Ah Fei to meet him. Ah Huat agreed that it was “possible” that Beh would “kill two birds with one stone” by going on 26 October 2016 to talk about the upcoming job and to return the power bank. He also agreed that it “would not be surprising” if Beh turned up near his house in the morning to return the power bank.

The officers' evidence

32 The Prosecution also called PC Rajan, SSSgt Khairul, SSgt Razif, SSSgt Ganesh, Sgt Ong and IO Quah as its witnesses.

33 PC Rajan's evidence was that he had chosen to inspect the Motorcycle because its model, a Honda Future, was one he "regularly check[ed]" because this was a vehicle of choice for smuggling contraband. He did not recall Beh saying that the plastic bag belonged to the owner of the Motorcycle.

34 SSSgt Khairul was in charge of the CNB team that arrested Beh. When SSSgt Khairul arrived at the scene, Beh and Ting looked "normal, nothing out of the ordinary" as opposed to being frightened or flustered. Beh and Ting said they did not know what the bundles were. SSSgt Khairul could not recall if they said anything else. Beh did not provide Lew's phone number or tell SSSgt Khairul to call Lew or request that he be allowed to call Lew. SSSgt Khairul denied pressing Beh for information on whom Beh was delivering the drugs to "downstream".

35 SSgt Razif testified that he was surprised at the very large amount of drugs. These were simply hidden underneath the Motorcycle's seat and not concealed. He could not recall if Beh asked to call Lew.

36 SSgt Ganesh was not involved in recording the MDP statement or the contemporaneous statements.

37 Sgt Ong was the only one who testified that he recalled that Beh asked SSSgt Khairul to call Lew although Lew's contact number was not provided. He could not remember whether Beh also offered to accompany the officers to JB to sort things out or whether Beh asked to be allowed to call Lew.

Other defence witnesses

38 The Defence originally intended to call Beh, Lew, Ting and the motorcycle mechanic who repaired Beh’s Kawasaki motorcycle but eventually only Beh testified in his own defence in court.

39 Lew was the most significant witness as his DNA was found on the drug exhibits. As mentioned earlier, Lew was serving his sentence in prison here for an unrelated offence. The Prosecution elected not to call Lew to testify but offered him as a witness to Beh. The Defence had interviewed Lew and issued a subpoena for him to testify at Beh’s trial. However, it decided not to call him after Beh concluded his testimony in court. The Defence did not change its mind or apply to reopen its case after the Prosecution served on it a copy of Lew’s investigation statement a few days before the exchange of written closing submissions.

40 Neither the Prosecution nor the Defence could locate Ting, the pillion rider on the Motorcycle. She was arrested on 26 October 2016 with Beh and was held in custody in Singapore before she was eventually given a discharge not amounting to an acquittal (“DNAQ”). As stated earlier, she was named in Beh’s original charge during the recording of his cautioned statement as having been involved jointly in the importation of the drugs.

41 The Defence also could not locate the motorcycle mechanic. He would presumably have testified that Beh’s motorcycle was faulty and therefore could not be used during the relevant period.

Arguments at trial

42 The Prosecution relied on the presumptions in ss 21 and 18(2) of the MDA to support its case that Beh was aware of the drug bundles in the Motorcycle and was aware of the nature of the contents. The Prosecution made two main submissions. First, the Prosecution postulated three possible scenarios arising from Beh's denial of knowledge of the drug bundles in the Motorcycle. The possibilities were that: (a) Beh was an unwitting courier of drugs for Lew, (b) Lew had forgotten that the drugs were in the Motorcycle's storage compartment when he agreed to lend the Motorcycle to Beh, or (c) Lew had deliberately placed the drugs in the Motorcycle's storage compartment to sabotage Beh. The Prosecution submitted that all three scenarios were not plausible on the facts. Second, the Prosecution submitted that Beh was not a credible witness. Since Beh was not credible, his claim that he did not know about the presence of the drugs in the Motorcycle's storage compartment should be disbelieved and the presumptions would stand un rebutted.

43 The Defence accepted that the ss 21 and 18(2) presumptions applied. It did not lead evidence to rebut the s 18(2) presumption and focused solely on arguing that Beh did not have knowing possession of the drugs as they were hidden in the Motorcycle's storage compartment without Beh's knowledge. The Defence argued that Beh had legitimate reasons for entering Singapore on 26 October 2016 and also that "it is more likely than not that Lew was the owner of the drugs and had intended not to export it into Singapore, but to distribute it in Malaysia". This theory (that Lew had left the drugs in the Motorcycle by accident) was characterised as a "hypothesis" that was "not central" to the case for the Defence.

Decision of the High Court

44 The Judge found that Beh could not rebut the presumptions of possession and knowledge and convicted him accordingly. Since the Prosecution did not issue a certificate of substantive assistance, the mandatory death penalty had to be imposed (GD at [112] and [118]).

45 In respect of the presumption of possession, Beh maintained in his statements and in oral testimony that he did not know that the drugs were in the Motorcycle's storage compartment and that they were not his. However, this claim was a bare assertion, with no direct evidence either way, making Beh's credibility crucial. The Judge found that Beh was not a truthful witness and rejected his account for the following reasons:

(a) The Judge did not believe that Beh entered Singapore to discuss the upcoming job with Ah Huat or to return the power bank to him. He also did not accept Beh's evidence that he wanted to introduce Ah Fei and a Malay man to Ah Huat. Even if Beh intended to spend a day in Singapore with Ting, the mere fact that Beh might have an additional innocent reason for entering Singapore did not detract from the fact that he entered Singapore with the intention of importing the drugs.

(b) Beh was untruthful when he attempted to characterise his request to borrow the Motorcycle from Lew as opportunistic and in his explanation of why he intended to ride the Motorcycle into Singapore rather than drive his car.

(c) The Judge did not accept that Beh: (i) told the officers the drugs belonged to Lew, as he claimed to have done; (ii) gave the CNB officers Lew's number and asked them to call Lew to prove he was not aware of

the drugs when the MDP statement and the first contemporaneous statements were recorded; or (iii) told IO Quah during the recording of his third long statement that Lew had left the drugs in the Motorcycle's storage compartment. These were not recorded in Beh's statements. Moreover, point (ii) was put to SSSgt Khairul, SSgt Razif and Sgt Ong who all did not say Beh provided them with Lew's number.

(d) Beh's responses during cross-examination when asked about the events of 24 October 2016 were "deliberately unhelpful and even deceptive".

46 In determining whether Beh had rebutted the presumption of possession, the Judge also considered Beh's explanations as to why Lew might have left the drugs in the Motorcycle's storage compartment without Beh's knowledge. The Judge agreed with the Prosecution's submissions, finding that there was no reason Lew would plant the drugs to set Beh up, that it was implausible that Lew had intended to use Beh as an unwitting courier and that it was also implausible that Lew had forgotten to take the drugs out of the Motorcycle's storage compartment considering their street value of S\$89,000 and the implications for Beh and himself if the drugs were discovered.

47 The Judge did not draw any adverse inference from the decision of both parties not to call Lew despite "the central role Lew appeared to play in the alleged offence". It was unnecessary to draw any adverse inference as he was satisfied that the Defence had not discharged its burden to rebut the statutory presumptions on a balance of probabilities. He observed in passing that Lew was clearly a material witness whose evidence could have corroborated the Defence's hypothesis that the drugs were intended for distribution in Malaysia and were left mistakenly in the Motorcycle's storage compartment when Lew

lent the Motorcycle to Beh. The Judge also saw no need to express any view on the Defence's description of the Prosecution's offer of Lew as a defence witness as a "poisoned chalice" (GD at [107], [110] and [111]).

Arguments on appeal

48 Counsel for Beh, Mr Wong Siew Hong ("Mr Wong"), made two main arguments before us.

49 First, he contended that the Judge failed to appreciate how the evidential burden had shifted to the Prosecution to rebut Beh's account of events, such account not being inherently incredible. The Defence's version of events was that the only realistic possibility was that Lew had forgotten that the drugs were in the Motorcycle's storage compartment, while the Prosecution's case theory was that Beh was a drug courier for Lew. Lew's DNA was found on the drug exhibits but Beh's DNA was not, and Lew was also the Motorcycle's owner. Lew was, in Mr Wong's words, the central character who could have shed light on which version of events was correct and the Prosecution could and should have called Lew who was in custody here. As the Prosecution did not do so, it has not discharged its evidential burden. Alternatively, the Defence submitted that the Prosecution's failure to call Lew warranted the drawing of an adverse inference under s 116 of the Evidence Act (Cap 97, 1997 Rev Ed) that if Lew had been called, he would have confirmed that Beh did not know that the drugs were in the Motorcycle because Beh was not working for Lew.

50 Second, Mr Wong argued that the Judge erred in convicting Beh purely on the basis of assessing his credibility. Regardless of whether Beh lacked credibility in relation to other aspects of his evidence, this did not go towards his knowledge of the existence of the drugs in the Motorcycle's storage

compartment. Those other aspects of Beh’s evidence were either of limited significance or did not pertain to the matters for which Beh was charged.

51 For the Prosecution, Mr Mark Jayaratnam (“Mr Jayaratnam”) submitted that the Judge was correct in holding that Beh had not rebutted the presumption of possession. He contended that there was no gap in the Prosecution’s evidence despite its decision not to call Lew. Based on what Lew said in his statement, the Prosecution assessed that there was no utility in calling Lew to testify. Mr Jayaratnam also argued that the Judge was correct in finding Beh to lack credibility on key issues and in rejecting Beh’s bare assertion that he did not know the drugs were in the Motorcycle’s storage compartment.

52 In its written submissions, the Defence also argued that the statements of Ting and of Ah Fei should have been disclosed. The Prosecution’s position was that it had satisfied its additional disclosure obligations under the principles set out in *Muhammad Nabill bin Mohd Fuad v Public Prosecutor* [2020] 1 SLR 984 (“*Nabill*”). The additional disclosure obligations did not arise in relation to Ting or Ah Fei. Ting was not a material witness, while no statements were recorded from Ah Fei as there was no indication before the trial that Ah Fei entered Singapore with Beh on 26 October 2016. Beh did not reveal that he and Ah Fei had coordinated their entry into Singapore when he was asked about Ah Fei in his third long statement.

Issues on appeal and legal framework

53 The relevant MDA provisions are ss 7, 18(2) and 21:

Import and export of controlled drugs

7. Except as authorised by this Act, it shall be an offence for a person to import into or export from Singapore a controlled drug.

Presumption of possession and knowledge of controlled drugs

18.—(1) Any person who is proved to have had in his possession or custody or under his control —

- (a) anything containing a controlled drug;
- (b) the keys of anything containing a controlled drug;
- (c) the keys of any place or premises or any part thereof in which a controlled drug is found; or
- (d) a document of title relating to a controlled drug or any other document intended for the delivery of a controlled drug,

shall, until the contrary is proved, be presumed to have had that drug in his possession.

(2) Any person who is proved or presumed to have had a controlled drug in his possession shall, until the contrary is proved, be presumed to have known the nature of that drug.

...

Presumption relating to vehicle

21. If any controlled drug is found in any vehicle, it shall be presumed, until the contrary is proved, to be in the possession of the owner of the vehicle and of the person in charge of the vehicle for the time being

54 To make out the importation offence under s 7, the Prosecution must prove that: (a) the accused person was in possession of the drugs; (b) the accused person had knowledge of the nature of the drugs; and (c) the drugs were intentionally brought into Singapore without prior authorisation. Possession requires both physical possession and the knowledge of the existence of the thing in question that turns out to be a drug: *Adili Chibuike Ejike v Public Prosecutor* [2019] 2 SLR 254 at [27] and [32].

55 The key issue is whether Beh has rebutted the presumption of possession under s 21 of the MDA by showing that he did not know of the existence of the

plastic bag (containing the bundles that turned out to be drugs) in the Motorcycle's storage compartment.

Our decision

Observations regarding the text messages

56 As mentioned earlier, the Judge ruled on the Defence's objection to cross-examination by the Prosecution in respect of certain text messages in Beh's phone records after Beh testified but before the Prosecution began asking Beh any questions. As such a pre-emptive objection may affect the evidence at trial significantly, we think it appropriate to give our views on it although this was not the subject of the submissions on appeal.

57 In our view, it would be more appropriate for a trial court to rule on such objections during cross-examination by disallowing specific questions as they are articulated unless the proposed line of questioning is so clearly irrelevant to the issues before the court. Making a blanket decision pre-emptively before cross-examination begins incurs the risk of shutting out evidence that may turn out to be highly relevant. Relevance may not always be apparent before questions are asked or clarifications sought. This is particularly the case in the context of text messages where all sorts of abbreviations, acronyms and jargon are used which are often unintelligible or appear cryptic to the outsider until clarification is obtained from the persons who use such terminology. Further, if drug deals or other illegal transactions are involved, it should surprise no one if the messages are coded and their true meaning can only be exposed by asking questions in cross-examination. Even if a ruling is made pre-emptively before cross-examination, the trial court should reconsider its decision if it transpires during cross-examination that questions should be asked on materials or matters that were excluded by the trial court earlier.

58 The Judge relied on proximity in time as a consideration for disallowing cross-examination in relation to the second category of messages (these being messages sent by Beh to an unknown person on 1 October 2016). While proximity in time may be a factor in the preliminary assessment of relevance, the more important consideration is the context of the messages and their apparent meaning. Even if proximity in time is the test for relevance, it is unclear to us why the messages of 1 October 2016 were considered too remote in time from the alleged offence on 26 October 2016. Messages exchanged over weeks or even months before an incident are potentially capable of establishing the state of mind and knowledge of the persons involved in the interaction. They could also show what sort of work the persons were doing and where their income was coming from. In Beh’s case, they could also be relevant in showing the reason(s) for his multiple trips to Singapore, most of which lasted only a few hours. Even if such evidence and the inferences that arise are finally insufficient to constitute proof beyond reasonable doubt, they cannot be said to be inadmissible or irrelevant from the start such that no cross-examination should be allowed.

59 The Judge also took into account the fact that the 1 October 2016 messages “did not clearly speak to drug importation”. As we have explained at [57], if the transaction involves doing something that is illegal, the messages are likely to be coded or would use jargon the meaning of which only the persons involved could understand. The MDA cases before the courts contained ample instances where drugs are referred to in messages or conversations simply as “things” or “barang” in the Malay language.

60 Several of the messages on 1 October 2016 would have been at least apparently relevant in the context of an allegation of drug importation. For

instance, in a message written in the Chinese language sent at 11.22am on 1 October 2016, Beh stated:

Today at the Singapore customs, are there police bringing (dog emoticon) dogs to smell if there are people bring things across the custom? We reached the custom but turned back to Johor Bahru! So there is no income today, most importantly keeping ourselves alive.

A subsequent message from Beh, also in Chinese, to the same unknown person that day stated:

Boss say: No matter what, the things must be delivered tomorrow, personally I feel very stressed.

61 The apparent relevance of these messages of 1 October 2016 would become even more obvious when seen in the light of the ICA records of Beh's entries into and exits from Singapore. These records showed that on 1 October 2016, Beh entered Singapore at 5.25am on a motorcycle identified as belonging to Ah Fei and left Singapore 18 minutes later at 5.43am. Beh's explanation was that Ah Fei had lent him the motorcycle but decided that he wanted it back, so Beh turned around to return it. When the objective evidence in the ICA records is juxtaposed against the messages of 1 October 2016 set out at [60] above, it becomes patently obvious that the Prosecution ought to have been allowed to ask questions about those messages. In particular, surely the Prosecution would wish to and should have been allowed to explore Beh's seeming concern about the presence of police sniffer dogs at the checkpoint and how turning back to JB resulted in no income to Beh but kept him alive. Further, who was "Boss" and what were "the things" that Boss had directed to be delivered the next day and why would such a task cause Beh to be very stressed.

62 Nevertheless, as stated earlier, the Judge’s pre-emptive rulings on the text messages are not the subject of this appeal. We therefore deal with this appeal on the state of the evidence as adduced during the trial.

Evidential burden

63 It is well-established that while the legal burden remains on one party throughout, the evidential burden can shift to the opposing party once it has been discharged by the proponent. The opposing party must then call evidence or take the consequences, which may or may not be adverse: *Public Prosecutor v GCK and another matter* [2020] 1 SLR 486 at [132].

Beh’s account was not inherently incredible

64 Beh claimed that he did not know about the existence of the drugs in the Motorcycle’s storage compartment. While a bare denial would not suffice to rebut the statutory presumptions in the MDA or cause the evidential burden to shift to the Prosecution, there were some unique features in this case.

65 First, the Motorcycle belonged to Lew and Beh claimed that he borrowed it for his trip to Singapore. Second, Lew’s DNA was found on the drug exhibits but Beh’s DNA was not on any of the drug exhibits. We emphasise at this juncture that mere absence of DNA evidence would be a neutral fact by itself.

66 Third, not all of Beh’s reasons for entering Singapore were incredible. Beh mentioned from the outset (in his MDP statement and first contemporaneous statement) that he entered Singapore to return the power bank to Ah Huat and a power bank was found at the time of his arrest. Beh stated that he placed the power bank on top of the black jacket but it was unclear from the

Prosecution's evidence where exactly the power bank was found among the things in the storage compartment. This would have some relevance to the issue whether Beh saw the drug bundles when he was doing this. Beh also stated he wished to spend time with Ting and bring her for some good food in Singapore. Both of them did ride into Singapore together and their romantic relationship was not in dispute.

67 On the other hand, we agree with the Judge's findings in rejecting Beh's professed reasons of wanting to meet Ah Huat to discuss the upcoming job or to introduce Ah Fei or an unidentified Malay man to Ah Huat. We weigh the rejected reasons for entering Singapore against the apparently legitimate ones and accept that a person may have several reasons for travelling to Singapore, some legitimate and some unlawful, and that such reasons are not necessarily mutually exclusive.

68 Fourth, Beh's position in his statements and oral evidence was consistent overall that the Motorcycle belonged to Lew and that the authorities should ask Lew regarding the drugs. While he did not assert that the drugs belonged to Lew, his case was that he had no idea how the drugs came to be in the Motorcycle's storage compartment. It was not unreasonable for him to reason and assume, as he did in re-examination, that since the Motorcycle was borrowed from Lew that morning and the drugs were found in the Motorcycle's storage compartment, the drugs belonged to Lew.

69 Beh claimed that he asked the officers after his arrest at the checkpoint to follow up with Lew. Although the other officers testified that they could not remember whether Beh mentioned this or not, Sgt Ong recalled under cross-examination that Beh asked SSSgt Khairul to call Lew:

- Q: Right, and so now, I am instructed that there was a conversation. So if you say you cannot remember whether it took place or not, now I am instructed that my---ra---Khairul posed to my client a series of questions (indistinct) “Where did these drugs come from”, et cetera, and---or “Who is it---who are these drugs going to?” To which, my client responded, “I don’t know. The bike does not belong to me. I got it from my friend Ah Siang.” Can---so first thing that my client then made a number of suggestions, and I want you to see whether you recall my client saying these things. Okay? 1, he told Khairul, “Bike doesn’t belong to me. It belongs to my friend Ah Siang. Call Ah Siang.” Do you remember something like that?
- A: Yes, Sir.
- Q: He did say? My client did say to Khairul “Call Ah Siang”?
- A: Yes, Sir.
- Q: Right. Secondly, my client also suggested and he said, “Look, if you don’t believe me, we can---two of us or every---I can accompany you back to JB. We look for Ah Siang and then we sort this thing out.” Do you remember my client saying something to that effect?
- A: This one, I cannot remember.
- Q: Okay. Then, the third thing which my client had said was, “Look, let me call Ah Siang and let me clarify what’s happening.” Do you remember that?
- A: This one, I cannot remember.
- Q: But you do remember you said---asked that my client call---suggested to Khairul, “Please, go call Ah Siang.”
- A: Yes, Sir.

70 Sgt Ong performed the role of interpreter for some of Beh’s statements that were given in the Chinese language. If he remembered that some things were said by Beh, there was no reason to doubt his evidence. Beh’s assertion was significant because when he suggested that the officers call Lew, he could not have known then that only Lew’s DNA would be detected on the drug bundles. The Judge appeared to have overlooked the evidence on this point.

The Prosecution's failure to call Lew

71 Following from the above, several unique features in this case made it imperative for the Prosecution to call Lew to discharge the evidential burden that had shifted to it. Lew was linked inextricably to the drug bundles in the Motorcycle. Only his DNA was on the drug bundles, a fact which the Prosecution accepted as suggesting that Lew was the person who packed the drugs (GD at [107]). The Motorcycle belonged to Lew. It was a known fact that Lew was in prison in Singapore during Beh's trial. The nature of Lew's involvement was a central part of the Prosecution's case. The Prosecution postulated three possibilities (*ie*, "accident", "unwitting courier" and "sabotage") as to how the drugs ended up in the Motorcycle. All involved Lew's actions and intentions. It then sought to demolish these possibilities without calling Lew who was the best person to confirm or deny these possibilities or any other possibilities. The parties and the court were thus left to deal with the hypotheses by logical reasoning and inferences instead of considering direct evidence from Lew.

72 As we pointed out during the hearing, there was a fourth possibility. Beh could have been working for and under the direction of Lew. This was in fact the Prosecution's case theory, as the Prosecution put to Beh during cross-examination that he was working at the direction of Lew and did not implicate Lew as the owner of the drugs after his arrest because he was working for Lew. This was the Prosecution's considered position in the light of the evidence available to it, including the DNA evidence and the statement(s) recorded from Lew. While the Prosecution has no duty to locate and to call witnesses to rebut wild or unsubstantiated allegations, the situation here concerned a witness who was readily available to testify, who was linked inextricably to the drug bundles and who featured as a central figure in the Prosecution's case theory. It is in the

light of all these unique features that it became incumbent on the Prosecution to call Lew to testify.

73 Mr Jayaratnam argued that Lew was not called as a witness because the charge against Beh was not a common intention or an abetment charge. Further, in his statement, Lew denied all involvement and the Prosecution would have to apply to cross-examine Lew if he had been called as a witness for the Prosecution. Essentially, calling Lew would not have advanced the Prosecution's case and it was likely that the Prosecution would have to treat Lew as a hostile witness.

74 Against these considerations, there is the Prosecution's role in the fair and impartial administration of criminal justice (see *Public Prosecutor v Lim Choon Teck* [2015] 5 SLR 1395 at [75]). The Public Prosecutor is duty bound to serve the public interest by assisting the court to establish the truth. That would include putting forth relevant evidence, especially where Lew was readily available and his denial of involvement in or knowledge about the drug bundles could be refuted immediately by the objective evidence of the presence of his DNA in them. Further, the presumption of possession in s 21 of the MDA also applies to Lew as the owner of the Motorcycle. Whether Lew's evidence would turn out to be a "poisoned chalice" (to use Mr Wong's words during the trial) for the Prosecution or for Beh, it was unsatisfactory that Lew was not called to testify despite being available and linked to the drug bundles through his DNA. We were not told why Lew was not charged despite the presence of his DNA. While the charge against Beh was not a common intention or an abetment charge, the fact remained that the Prosecution's case at the trial was that Beh was Lew's drug courier.

75 The Prosecution did try to be fair by offering Lew to the Defence as a witness. Initially, the Defence took up the offer, interviewed Lew and even issued a subpoena for him to testify in court. When the Prosecution put to Beh during cross-examination that he was working for Lew, that was done on the understanding that Lew would be called to testify in court. The Defence declined to call Lew only at the conclusion of Beh's testimony in court. Therefore, the Prosecution could not be faulted for putting such a case to Beh. However, in the unique circumstances of this case, we think that even at that stage, when the Defence changed its mind, the Prosecution could and should have applied to the Judge to be allowed to re-open its case by calling Lew to testify.

76 The Prosecution also acted fairly when it served on the Defence a copy of Lew's investigation statement a few days before the exchange of written closing submissions. This accorded with the principles on additional disclosure obligations stated in the Court of Appeal's decision in *Nabill* although that judgment was delivered on 31 March 2020, after the Judge had made his decision and given his written grounds. As noted earlier, the Defence did not change its position after receiving Lew's statement.

Other issues

77 In the petition of appeal, the Defence alleged that the Prosecution should have disclosed the statements of Ting and Ah Fei or called them as witnesses. We do not find any merit in these contentions. Ting and Ah Fei had been released from custody and were allowed to return to Malaysia. Their whereabouts are unknown.

78 Lee Wei Jye or Ah Fei was arrested on 3 December 2016 after being implicated in an unconnected case. He was given a DNAQ and repatriated to Malaysia and has not re-entered Singapore. Ah Fei was released with no statements taken because, as mentioned earlier, the CNB was not aware at the relevant time that Ah Fei was Lee Wei Jye as Beh did not disclose Ah Fei's actual name or his involvement. In any case, Beh did not argue that he was prejudiced by Ah Fei's absence from the trial.

79 Ting's statement or evidence would not have been material because the Judge accepted that even if there was a day trip on 26 October 2016 planned by Beh for both of them in Singapore, that would not exclude other purposes such as delivery of drugs.

Conclusion

80 In the unique circumstances here, as we are of the view that Beh's account was not inherently incredible on the state of the available evidence after the Judge's rulings on the text messages, the Prosecution should have applied to call Lew to testify after the Defence changed its mind about calling him. The Prosecution, in deciding not to call Lew, was not able to discharge its evidential burden after Beh's plausible defence that he had no knowledge of the existence of the drug bundles in the Motorcycle, coupled with the fact that the Motorcycle was borrowed from Lew and the objective evidence that only Lew's DNA was found on the drug bundles.

81 In the result, Beh has rebutted the presumption of possession in s 21 of the MDA. Accordingly, we allow the appeal and acquit Beh.

82 We note that four other charges were stood down at the commencement of the trial. At the conclusion of the trial, the Prosecution withdrew these four

charges pursuant to section 147(1) of the CPC. Under section 147(2), such withdrawal shall have the effect of an acquittal on the remaining charges withdrawn unless the conviction is set aside. Under section 147(3), where a conviction is set aside under subsection (2), and subject to any order of the court setting aside the conviction, the court may proceed with the trial of the charges previously withdrawn. These four charges arose out of the same incident. Subject to what the parties tell us after this, unless the Prosecution is able to indicate its position in respect of these four charges now, we think it would be fair to allow the Prosecution time to study this judgment, discuss with Defence counsel and then communicate its decision to the court and to Defence counsel in writing by 12 noon three days from today. If the Prosecution or the Defence requires any order within these three days, they are at liberty to apply in writing to the court. In the meantime, we propose to order that Beh remain in custody pending our further order which will be communicated to the parties by the Registry.

Sundaresh Menon
Chief Justice

Tay Yong Kwang
Judge of Appeal

Steven Chong
Judge of Appeal

Wong Siew Hong and Andy Yeo (Eldan Law LLP) for the appellant;
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Chambers) for the respondent.