Thong Ah Fat *v* Public Prosecutor
[2011] SGCA 65

Case Number	: Criminal Appeal No 13 of 2010 (Criminal Case No 17 of 2010)
Decision Date	: 30 November 2011
Tribunal/Court	: Court of Appeal
Coram	: Chao Hick Tin JA; Andrew Phang Boon Leong JA; V K Rajah JA
Counsel Name(s)	: Boon Khoon Lim and Chua Siow Lee Dora (Dora Boon & Company) for the appellant; Siva Shanmugam and Samuel Chua (Attorney-General's Chambers) for the respondent.
Parties	: Thong Ah Fat — Public Prosecutor

CRIMINAL PROCEDURE AND SENTENCING – Appeal – procedure

CRIMINAL PROCEDURE AND SENTENCING – Appeal – retrial

CRIMINAL PROCEDURE AND SENTENCING – High Court – irregularities in proceedings

[LawNet Editorial Note: This was an appeal from the decision of the High Court in [2010] SGHC 227.]

30 November 2011 Judgment reserved.

V K Rajah JA (delivering the judgment of the court):

Introduction

1 This is an appeal brought by Thong Ah Fat ("the Appellant") against the decision of the trial judge ("the Judge") in *Public Prosecutor v Thong Ah Fat* [2010] SGHC 227 ("the Judgment"). The Appellant was charged with committing the following offence:

That you, **THONG AH FAT** ,

> on 12 January 2009, at or about 4.55 p.m., at the Woodlands Checkpoint Green Channel Arrival Car Zone 100% Inspection Pit, Singapore, did import into Singapore a controlled drug that is specified in Class "A" of the First Schedule to the Misuse of Drugs Act, Chapter 185, to wit, by driving into Singapore a car bearing Malaysian registration number JKQ 7274 with drugs containing not less than 142.41 grams of Diamorphine, without authorisation under the said Act or the Regulations made thereunder, and you have thereby committed an offence under section 7 and punishable under section 33 of the Misuse of Drugs Act, Chapter 185.

The Judge, in a brief judgment of five paragraphs, explained why he found the Appellant guilty of the charge and upon convicting him, sentenced him to suffer the mandatory death penalty. To facilitate the understanding of our grounds, we think it will be helpful to set out the Judgment in full:

> 1 The accused was a 32-year old Malaysian. He drove to Singapore on 12 January 2009 and arrived at the Woodlands Checkpoint about 4.55pm. His car JKQ 7274 was searched and 142.41g of diamorphine were found in ten packets wrapped in plastic. Five of the packets were found

under the driver's seat and another five were found in the haversack found on the floorboard behind the driver's seat.

2 The prosecution adduced evidence to show that the ten packets contained 142.41g of diamorphine. The accused did not challenge the scientific evidence and the defence was that the accused thought that he was carrying "ice", the colloquial term for methamphetamine, which is a different drug from diamorphine.

3 The prosecution adduced one contemporaneous statement by the accused and recorded by Senior Staff Sergeant Koh Yew Fie ("SSSgt Koh") on 12 January 2009, and six other statements recorded by Woman Inspector Wong Jin Shan Agnes on 14 January 2009, 15 January 2009, 16 January 2009 (two statements) and 16 September 2009. The accused only challenged the admissibility of the statement recorded by SSSgt Koh. He claimed that the statement was not voluntarily given because SSSgt Koh falsely induced him to admit that he knew that he was carrying diamorphine. The statement referred to the diamorphine as "Beh Hoon", the common term for heroin, but the accused denied knowing that. ***I disbelieved him and his account of what happened between him and SSSgt Koh because it was neither convincing nor coherent.*** Furthermore, the accused claimed that he gave the statement after he was told by SSSgt Koh "*if you want to enjoy you must live with the consequences*". ***His testimony did not convince me that this led to a weakening of his resolve such that he gave answers to SSSgt Koh's questions which he would not have done so otherwise*** . He was also inconsistent as to when this remark by SSSgt Koh was made. The accused's second assertion was that SSSgt Koh told him that he (SSSgt Koh) would speak to the judge and get the court to sentence the accused to "8 to 10" years imprisonment only. ***The evidence of the accused on this point was weak, and even if I found that this was true*** , he admitted that such a statement was only said once and that it was made after he had already given the answers. Consequently, I admitted the statement as I was satisfied that it was not made under any threat, inducement, or promise.

4 The accused's defence was that he had no knowledge that the ten packets contained heroin. He asserted that only one packet was opened and he had no idea that the other nine contained the same white powdery substance. He claimed that he believed he was carrying "ice", a different drug from diamorphine. He said that he used to smoke "ice" in Malaysia and he had been enticed into smoking it by his supplier. Counsel for the accused submitted that [t]he accused was a gullible person. He did not, however, seem so to me. ***The evidence given by the accused was very thin and did not raise any doubt in my mind that he knew that he was carrying diamorphine*** . Additionally, he failed to give a reasonable explanation as to why he did not say in his s 122(6) statement that he thought he was carrying diamorphine. Instead, he said that he had nothing to say.

5 For the reasons above, I was satisfied that the accused knew that he was carrying diamorphine in the ten packets seized from him on the day of his arrest. I therefore found him guilty as charged and sentenced him to suffer death.

[emphasis in original in italics; emphasis added in bold italics]

The substantive issue arising from the appeal

2 The Appellant did not dispute that he knew he was importing controlled drugs into Singapore without authorisation at the material time. What was disputed at trial and on appeal was the Appellant's knowledge pertaining to the nature of drugs found in his possession. The crux of the

Appellant's defence was that while he knew he was importing controlled drugs into Singapore, he thought that he was transporting methamphetamine and not diamorphine.

3 In *Tan Kiam Peng v Public Prosecutor* [2008] 1 SLR(R) 1 ("*Tan Kiam Peng*"), this Court observed that there are two possible interpretations of the requisite *mens rea* under s 7 of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) ("MDA"). The first is that it suffices that the accused only had knowledge that the drug concerned is a controlled drug ("the first interpretation"): see *Tan Kiam Peng* at [80] and [83]–[89]. The alternative interpretation is that the requisite knowledge is knowledge that the drug concerned is not only a controlled drug but also the specific drug, which it turns out, the accused was in possession of ("the second interpretation"): see *Tan Kiam Peng* at [81] and [90]–[91].

4 Because the parties in *Tan Kiam Peng* did not make any detailed argument with respect to which of these two interpretations was correct, no definitive conclusion on this point was expressed by this Court then. This Court based its eventual decision on the second interpretation to give the accused person there the benefit of the doubt.

5 For completeness, we should mention that since this appeal was heard, an important decision of this Court, *Nagaenthran a/l K Dharmalingam v Public Prosecutor* [2011] SGCA 49 ("*Nagaenthran*"), has clarified the position on this issue. In *Nagaenthran*, this Court stated that (at [23]):

> In our view, while there may be a conceptual distinction between [the first interpretation] (that the knowledge in s 18(2) of the MDA refers to knowledge that the drug is a controlled drug) and [the second interpretation] (that the knowledge in s 18(2) of the MDA refers to knowledge that the drug is a specific controlled drug, *eg*, heroin or "ice"), ***the distinction has no practical significance for the purposes of rebutting the presumption of knowledge of the nature of the controlled drug*** . ***To rebut the presumption of knowledge, all the accused has to do is to prove, on a balance of probabilities, that he*** *did not know* ***the nature of the controlled drug referred to in the charge.*** The material issue in s 18(2) of the MDA is *not* the existence of the accused's knowledge of the controlled drug, *but* the *non-existence* of such knowledge on his part. [emphasis in original in italics; emphasis added in bold italics]

Evidence adduced

6 Given our determination that there should be a retrial in this case, we will confine the scope and detail of our discussion of the evidence to that necessary to explain our decision.

7 The Defence relied on certain events and circumstances which allegedly existed and caused the Appellant to form his mistaken belief that he was carrying methamphetamine. These allegations included:

(a) several occasions where the Appellant consumed drugs at his drug supplier's place in Malaysia, where only methamphetamine was involved ("the Consumption Incidents");

(b) a prior trafficking incident ("the First Trafficking Incident") which he carried out for the aforementioned drug supplier, one Wong Chan Hoong ("Ah Hong") and allegedly learnt that the trafficked drugs would be methamphetamine;

(c) the fact that he did not check the contents of the packets on the occasion which resulted in his arrest; and

(d) his own gullibility.

8 The Prosecution adduced a statement which was recorded from the Appellant shortly after his arrest ("the contemporaneous statement"), a cautioned statement which was recorded pursuant to s 122(6) of the Criminal Procedure Code (Cap 68, 1985 Rev Ed) ("CPC") and various long statements which were recorded during the course of subsequent investigations, pursuant to s 121 of the CPC.

9 The contemporaneous statement contained several questions put to the Appellant and his replies to those questions. Its admissibility was challenged by the Defence. The Appellant's reply to the charge and warning, as recorded in the cautioned statement, was that he had nothing to say. Its admissibility was unchallenged. The long statements revealed the Appellant's background, his supplier of controlled drugs for consumption and trafficking (namely Ah Hong), Ah Hong's associates, the particulars of the Consumption Incidents, the particulars of the First Trafficking Incident and the events which took place on the day of his arrest. The admissibility and veracity of the long statements were also unchallenged. The nature and relevance of all these statements will be further discussed where they are germane.

The Judge's findings of fact and reasoning

10 The Judge made the following findings of fact. He disbelieved the Appellant's account of the recording of the contemporaneous statement because "it was neither convincing nor coherent" (at [3] of the Judgment). Pursuant to a *voir dire*, the Judge held that the contemporaneous statement was voluntarily given and therefore admitted it.

11 The other findings of fact were encapsulated within a paragraph (at [4] of the Judgment). The Judge found that the Appellant "did not … seem" to be a gullible person, as Defence counsel had submitted. The implication of this finding was unclear from the context of the Judgment. This finding seemed to be made in rebuttal to the Appellant's assertion that he believed himself to be carrying methamphetamine instead of diamorphine at the material time, due to the Consumption Incidents in Malaysia. However, the Judge made no finding on or mention of the First Trafficking Incident at all. The Judge did, however, go on to observe that the Appellant's evidence was "very thin" and did not raise any doubt in his mind that the Appellant knew that he was carrying diamorphine (at [4] of the Judgment).

12 The Judge also held that the Appellant "failed to give a reasonable explanation as to why he did not say in his [cautioned statement] that he thought he was carrying ***diamorphine*** " [emphasis added] (at [4] of the Judgment). We pause to note that this was an incorrect statement. It should have read "methamphetamine" in place of "diamorphine". In addition, it appears from the Judge's language that an adverse inference was drawn against the Appellant with respect to this omission to give a reasonable explanation. As a consequence of the Appellant's "very thin" evidence and his failure to give a reasonable explanation with respect to the omission in his cautioned statement, the Judge was satisfied that the Appellant knew that he was carrying diamorphine in the ten packets seized from him on the day of his arrest (at [4]–[5] of the Judgment).

13 With respect, the Judge's findings are problematic and his reasoning is unclear. Before we set out our reasons for ordering a retrial of this matter, we think it will be helpful to set out the scope of the judicial duty to give reasoned decisions, as it is our view that this duty has not been adequately discharged in the present matter.

14 We emphasise that this crucial judicial duty to give reasons prevails in both civil and criminal cases. Although this duty is not expressly stated under the Criminal Procedure Code 2010 (Act 15 of

2010) ("CPC 2010") or the CPC, which is the applicable statute in this case, it is a duty which is inherent in our common law, at least since the Privy Council's decision in *Lai Wee Lian v Singapore Bus Service (1978) Ltd* [1984] 1 AC 729 ("*Lai Wee Lian*") (see below at [18]). The significance of this duty, it cannot be gainsaid, is even starker in capital cases where detailed reasoning and grounds justifying the outcome ought to be given by the trial judge as a matter of course. Unfortunately, this was not the case here for reasons that we explicate below. We will turn to examine the following aspects of the basis and scope of the judicial duty to give reasons *seriatim*:

(a) the nature of and rationale for imposing a duty to give reasons;

(b) how appellate intervention in relation to the duty to give reasons differs from appellate intervention in relation to a trial judge's findings of fact;

(c) the scope of the duty to give reasons;

(d) the content of the statement of reasons; and

(e) the standard and scope of explanation.

The judicial duty to give reasons

15 About two centuries ago, Lord Mansfield reportedly gave to a general who had to sit as a judge the following advice : "[N]ever give your reasons; for your judgment will probably be right, but your reasons will certainly be wrong": see Lord Campbell, *The Lives of the Chief Justices of England* vol 3 (James Cockcroft & Co, 1874) at p 481. Today, such advice even from a jurist as eminent as Lord Mansfield, would be regarded as judicial heresy and inimical to sound judicial practice. Judicial decisions that are bereft of reasoning are, of course, impervious to scrutiny and challenge, effectively making judges unaccountable for their decisions. This is plainly unacceptable in any modern society. We note that historically, as the role of juries in fact-finding declined, it has been acknowledged in all mature common law jurisdictions as an elementary principle of fairness that parties are not only to be given a fair opportunity to be heard, but also apprised of how and why a judge has reached his decision. Lord Denning, with his inimitable clarity, incisively pointed out more than half a century ago that (Alfred Denning, *The Road to Justice* (Stevens, 1955) at p 29):

> [I]n order that a trial should be fair, it is necessary, not only that a correct decision should be reached, but also that it should be seen to be based on reason; and that can only be seen, if the judge states his reasons.

It is now settled law that a judge must ordinarily give adequate reasons for any decision made, subject to any peculiar circumstances that may prevail. This is not only the case where the decision is on a matter involving questions of law; the trial judge who sits as a fact-finder also has a duty to give reasons for decisions on matters of fact: see H L Ho, "The Judicial Duty to Give Reasons" (2000) 20 Legal Studies 42 (Ho, "The Judicial Duty to Give Reasons") for a useful overview of the duty under discussion.

16 Before evaluating the content and scope of the duty to give reasons, it will be useful, at this juncture, to consider the function of a legal decision. A legal decision may operate on several levels. It can declare the institutional fact of guilt/liability or non-guilt/non-liability, assert propositions of facts underlying or constitutive of the alleged guilt or liability and/or ascribe legal character to the facts as found: see H L Ho, "What Does a Verdict Do? A Speech Act Analysis of Giving a Verdict" (2006) 4(2) International Commentary on Evidence 1 (Ho, "What does a Verdict Do?"). In this regard,

we agree with Professor Ho that (Ho, "What does a Verdict Do?" at 26):

> A verdict can be assessed on many dimensions corresponding to the things that it does; indeed, we should insist that it be *defensible on each of those fronts*. As a declarative, it can be *evaluated* as valid or not, and as an assertive, it can be *judged* as true or false. Further, a verdict can be *assessed* in terms of right and wrong in its ascription of legal character to the facts of the case. [emphasis added]

17 A legal decision will therefore be deprived of many of its illocutionary forces if no sufficient reason is stated, simply because there can then be no ground for one to stand on to defend its correctness. A *legal* judgment today cannot be justified solely by the judge's statement of belief that it is right, without providing any explanation as to why it is so. The days when it sufficed for a judge to say "Because I say so" are well behind us. The legal cogency and coherence of a decision must therefore also be demonstrated to justify it.

18 In *Coleman v Dunlop Limited* [1998] PIQR 398 ("*Coleman*"), a decision of the English Court of Appeal, Henry LJ neatly summarised the position on the duty to give reasons in the following terms (at 403):

> It is true that, in relation to matters in these courts, there is no statutory duty on the judge to give reasons. It is also true that for a long time it has been contended that the common law imposed no such duty. But the common law is a living thing, and it seems to me that the point has now come where the common law has evolved to the point that the judge, on the trial of the action, must give sufficient reasons to make clear his findings of primary fact and the inferences that he draws from those primary facts and sufficient to resolve the live issues before him, explaining why he has drawn those inferences.

The Australian courts have been even more explicit on this issue. It has been declared that the issue no longer is whether judicial officers owe a duty to state reasons for their decisions, but the extent of that obligation: see *Waterson v Batten* (13 May 1988, unreported) (New South Wales Court of Appeal) ("*Waterson*") (*per* Kirby P). Henry LJ could also have profitably referred to the English Court of Appeal's decision of *Craven v Craven* (1957) 107 LJ 505 as authority for introducing a requirement for trial judges to give judgments which are reasoned to the extent of stating the findings of fact on which they rely. In Singapore, the Privy Council had, in the context of an appeal from Singapore, emphatically underscored the requirement to state reasons at the end of a trial in the following words (*Lai Wee Lian* at 734):

> The need for a judge to state the reasons for his decision is no mere technicality, nor does it depend mainly on the rules of court. *It is an important part of a judge's duty in every case, when he gives a final judgment at the end of a trial, to state the grounds of his decision, unless there are special reasons, such as urgency, for not doing so.* [emphasis added]

Nature and rationale for such a duty

19 In Australia, the duty is construed as one aspect of the general duty to act judicially. For instance, it was stated in *Pettitt v Dunkley* [1971] 1 NSWLR 376 at 387–388 that there is as much a judicial duty:

> to give reasons in an appropriate case as there is otherwise a duty to act judicially, such as to hear arguments of counsel and hear evidence and admit relevant evidence of a witness.

In other words, it is now considered an indivisible incident of the judicial process: see, for example, *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247 ("*Soulemezis*") at 279 and *Public Service Board of New South Wales v Osmond* (1986) 63 ALR 559 ("*Public Service Board of NSW*") at 566. Likewise, in England, the Court of Appeal held in *Flannery and Another v Halifax Estate Agencies Ltd (trading as Colleys Professional Services)* [2000] 1 WLR 377 ("*Flannery*") at 381 that the duty is "*a function of due process, and therefore of justice"* [emphasis added].

20 There are several reasons for recognising a duty to give reasons. The English Court of Appeal in *Coleman* identified three such reasons. First, Henry LJ said (at 403):

> Giving reasons is a salutary discipline to all whose judgments may adversely affect their fellow citizens. The giving of reasons ensures that the parties' relevant submissions are confronted and not avoided.

He quoted Lord Donaldson MR in *Tramountana Armadora SA v Atlantic Shipping Co SA* [1978] 2 All ER 870 at 872, who said that "[h]aving to give reasons concentrates the mind wonderfully." The recognition of a duty to give reasons, it is hoped, will lead to increased care in the dealing with submissions and analysis of evidence, giving rise to sounder decisions. As Meagher JA stated in *Beale v Government Insurance Office of NSW* (1997) 48 NSWLR 430 ("*Beale*") at 442, "[t]he requirement to provide reasons can operate prophylactically on the judicial mind, guarding against the birth of an unconsidered or impulsive decision." As the fact-finder is reminded through the exercise of stating his reasons that he is accountable for how he decides, mis-analysis of the evidence will be more readily avoided. In short, it has a "self-educative" value, hones the exercise of judicial discretion and encourages judges to make well-founded decisions: see Doron Menashe, "The Requirement of Reasons for Findings of Fact" (2006) International Community L Rev 223 at 230.

21 Secondly, the duty ensures that when the parties leave the court, after having had their day in court, they know why they have won or lost: see *Coleman* at 403. From a broader perspective, the legal profession and the community may ordinarily have legitimate interests in knowing these reasons. It enables practitioners, legislators and members of the public to ascertain the basis upon which like cases will probably be decided in the future. It was also observed in *Beale* at 442 that since "[d]ecisions of courts usually influence the way in which society acts … it is better to understand why one should act [or not act] in a particular way."

22 Thirdly, the duty to give reasons ensures that the appellate court has the proper material to understand, and do justice to, the decisions taken at first instance: see *Coleman* at 403. The appellate court should not "be left to speculate from collateral observations as to the reasoning upon which a critical decision is made, when the trial judge can and ought directly to reveal it": see *Wright v Australian Broadcasting Commission and Another* [1977] 1 NSWLR 697 at 701. In *Pettitt v Dunkley*, Moffitt JA supported this third reason in rather different terms. He observed that the first instance judge not only has a duty to determine and enforce the rights of parties at a trial, but also a duty to, within limits, preserve and facilitate any right of appeal from his decision which a party may have (*Pettitt v Dunkley* at 388). Unlike Henry LJ in *Coleman*, Moffitt JA grounded the duty to give reasons entirely on the right of appeal, and held that there was no judicial duty to give reasons except where such a duty could be related to a right of appeal. But his narrow view was repudiated in *Soulemezis* at 269 and *Housing Commission of New South Wales v Tatmar Pastoral Co Pty Ltd and Penrith Pastoral Co Pty Ltd* [1983] 3 NSWLR 378 ("*Housing Commission of NSW*") at 386. We prefer the view of Henry LJ, who took a broader view of the policies underlying the duty, to that of Moffitt JA in *Pettitt v Dunkley*. The duty ordinarily applies even where there can be no appeal against that decision.

23 Additionally, a fourth reason was provided by Kirby P in his celebrated dissenting judgment in *Soulemezis* at 258. Kirby P penetratingly observed that the requirement for judges to give reasoned decisions which can be debated, attacked and defended acts as an important constraint on the judiciary's exercise of power. The duty to articulate reasons is a means of curbing arbitrariness, and is a facet of judicial accountability: see *Beale* at 442 (*per* Meagher JA).

24 Judicial accountability is associated with the notion of open justice. Hence, another foundation of the duty to give reasons is the principle that justice must not only be done but it must be seen to be done: see *Soulemezis* at 278 (*per* McHugh JA). Where the reasons for an adverse ruling are not revealed, the litigant may think that the judge has not really understood his case, and the public may form the same opinion. The withholding of reasons may therefore affect the legitimacy of the decision. In our view, the requirement to give reasons beneficially increases the transparency of the judicial system.

2 5 *Regina v Harrow Crown Court, Ex parte Dave* [1994] 1 WLR 98 ("*Ex parte Dave*") exemplifies the importance of having reasons adequately stated. The applicant brought an appeal to the Crown Court against her conviction by justices for an offence of assault. The appeal was dismissed. The Crown Court simply stated: "[o]ver the course of three days we have had ample opportunity to hear and to assess the witnesses. It is our unanimous conclusion that this appeal must be dismissed" (*Ex parte Dave* at 102H). The applicant sought judicial review to quash the decision of the Crown Court. The application was granted by the Queen's Bench Division, which held that, in principle, enough must be said "to demonstrate that the court has identified the main contentious issues in the case and how it has resolved each of them" (*Ex parte Dave* at 107A). Although "[e]laborate reasoning was not required" (*Ex parte Dave* at 107B), the statement made by the Crown Court was clearly inadequate because effectively no reason was given. Against the holding of the Crown Court, one may argue that it was implicit in the dismissal of the applicant's appeal that there was a finding by the Crown Court that it accepted the evidence of the Prosecution's witnesses. But this argument is clearly flawed, because if it is taken to its logical conclusion, no reason needs ever be stated, since it would be implicit in every decision that the judge has accepted the evidence adduced by the party he has ruled in favour of.

How appellate intervention in relation to inadequacy of reasons differs from appellate intervention in relation to a trial judge's findings of fact

26 An appellate court's treatment of a case where the issue relates to an inadequacy of reasons is different from the approach the appellate court will apply when asked to assess findings of fact made by the trial court. In relation to overturning or modifying findings of fact, it trite that the appellate court will exercise restraint in recognition of the trial judge's advantage in observing the evidence directly: see, for example, *ADF v Public Prosecutor and another appeal* [2010] 1 SLR 874 at [16]. Be that as it may, appellate intervention on this basis is still justified under certain circumstances, for example, when the inferences drawn by a trial court were not supported by the primary or objective evidence on record: see *Jagatheesan s/o Krishnasamy v Public Prosecutor* [2006] 4 SLR(R) 45 at [34]–[43]. An extreme scenario was posited in *Watt or Thomas v Thomas* [1947] AC 484, where Lord Thankerton made his classic statement on when an appellate court may intervene notwithstanding the trial judge's advantage (at 488):

> The appellate court … because it unmistakeably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court.

Whilst an error of this degree must be rare, it has been recorded in *Choo Kok Beng v Choo Kok Hoe*

and others [1983–1984] SLR(R) 578.

27 The principles discussed in these cases apply to a decision which is defective because of certain mistakes in observation and inference, *ie*, errors in fact-finding. This presupposes that the deliberative process of the trial judge is known and should be distinguished from a case, such as the present, where the issue relates to the inadequacy of the statement of reasons. There is a difference between the failure to *make the correct findings* and the failure to *state reasons for the findings*, which must not be confused. The latter failure appears to be characterised by the English Court of Appeal in *Flannery* as being of a more fundamental nature, in the following terms (at 381H):

> *Where because no reasons are given it is impossible to tell whether the judge has gone wrong on the law or the facts, the losing party would be altogether deprived of his chance of an appeal unless the court entertains an appeal based on the lack of reasons itself.* [emphasis added]

There may be a connection between these two categories of errors, in so far as both categories could arise in the same case. However, it is certainly not necessary that one entails the other.

Scope of the duty to give reasons

28 The duty to give reasons must not be overstated, for it does not refer to the burden of reasoning *per se* but the burden of setting out the reasons, since we already expect judges in every case to arrive at decisions through proper reasoning. Therefore, what the duty requires is that the judge sets out what has passed in his mind.

29 This requirement to set out reasons may increase costs and result in delays. Such consequences are a real concern. The Supreme Court of Canada noted in *MacDonald v The Queen* (1976) 29 CCC (2d) 257 at 262–263 that "the volume of criminal work makes an indiscriminate requirement of reasons impractical". It would indeed be undesirable if considerations of form rather than of substance required unnecessary time to be spent in writing rather than in judging. Similarly, the Australian courts, which have imposed such a general duty, are aware of these concerns militating against it. Even while upholding the duty, they recognise the heavy court load and the constraints faced by first instance judges: see, for example, *Beale* at 444 and *Soulemezis* at 259.

30 We think that the correct response to these concerns is to have a standard of explanation *which corresponds to the requirements of the case* rather than to reject the duty totally. The key is to strike an appropriate balance. While such anxieties do not warrant outright rejection of the duty altogether, they have been taken into account quite rightly in dispensing with reasons in certain cases and matters (see below at [32]–[33]), in accepting the appropriateness of abbreviated oral reasons in some situations, and in adjusting the level of detail required of the statement of reasons to suit the circumstances in other cases.

31 At this juncture, we would caution against equating the duty to give reasons with a duty to issue a written judgment or provide oral grounds of decision in every case. Where a judge hears a large number of cases during a sitting (for example, a sentencing court making routine sentencing decisions based on benchmark sentences) it would be impractical and unrealistic to expect him or her to issue written judgments or even give oral grounds of decision for every case that is dealt with. In addition, we would echo Kirby P's pertinent reminder in *Waterson* that under the pressure of today's court lists, there is no time for fastidious precision in the drafting of reasons. He quite rightly cautioned against treating a judgment "as if its language had been honed in countless hours of reflection and revision", emphasising that a "*practical standard* must be adopted" [emphasis added]. Similarly, Nygh J in *In the Marriage Of: John Christopher Towns Appellant/Husband and Deborah Jane*

Towns Respondent/Wife [1990] FamCA 129 stated that (at [18]):

> [the Full Court of the Family Court of Australia] has, on numerous occasions, displayed a considerable amount of latitude towards judges at first instance being mindful that they are often sitting in busy lists and have to deliver their judgments on an extemporary basis which may not make it possible for them to express themselves with the directness and clarity that an appellate tribunal and litigants might wish.

32 Additionally, there are exceptions to this duty to provide reasons. Thus, in certain instances, a judge may not be in error when he fails to state reasons. In *Sun Alliance Insurance Ltd v Massoud* [1989] VR 8 ("*Sun Alliance*"), Gray J pragmatically stated that (at 19):

> The simplicity of the context of the case or the state of the evidence may be such that a mere statement of the judge's conclusion will sufficiently indicate the basis of a decision … In such cases, the foundation for the judge's conclusion will be indicated as a matter of necessary inference.

The same was stated in *Brittingham v Williams* [1932] VLR 237 at 239 and *Public Service Board of NSW* at 566. But this approach must be confined to very clear cases and in relation to specific and straightforward factual or legal issues. Otherwise, the exceptions would seriously undermine the duty to give reasons.

33 We also note that the duty has been held not to apply to certain matters of lesser significance. For example, there are some types of interlocutory applications, mainly those with a procedural focus, which a judge can properly make an order without giving reasons: see *Capital and Suburban Properties Ltd v Swycher and Others* [1976] 1 Ch 319 at 325–326 (*per* Buckley LJ) and *Knight and Another v Clifton and Others* [1971] 1 Ch 700 at 721. Buckley LJ had in mind instances where the judge is asked to exercise his discretion on relatively insignificant questions, such as whether a matter should be expedited or adjourned or extra time should be allowed for a party to take some procedural step, or possibly whether relief by way of injunction should be granted or refused. Neither are reasons normally to be expected when a judge exercises his discretion on costs, unless it involves an unusual award: see *Eagil Trust Co Ltd v Pigott-Brown and another* [1985] 3 All ER 119 at 122. It appears that many of these exceptions involve a large element of discretion. However, we do not think that it is their discretionary nature *per se* which justifies the dispensation of any explanation. Rather, it seems that these exceptions are allowed because they are not decisions that bear directly on substantive matters. For example, even in matters of practice and procedure, where the decision will effectively decide the rights of the parties finally, reasons must be given: see *Glen Rees T/as Glynmar Pastoral Co v Walker* (13 December 1988, unreported) (New South Wales Court of Appeal) (*per* Kirby P). However, we would caution against equating non-substantive cases as being necessarily insignificant. The court's assessment of the significance of a decision should take into account the circumstances of the case, and its importance should not be judged simply by categorising the decision as being substantive or procedural in nature. As a rule of thumb, *the more profound the consequences of a decision are, the greater the necessity for detailed reasoning.*

Content of the statement of reasons

34 Where the duty to state reasons applies, the statement of reasons should ideally adopt the following structure (see also H L Ho, "The judicial duty to give reasons" at 56–60). We must stress, however, that the ordering that follows is to be viewed as providing a useful *and general* guide, and that each case should be explained on its own facts. *First, the statement ought to set out in summary form all the key relevant evidence*. Not all the detailed evidence needs to be referred to.

Sometimes, the volume of evidence is so overwhelming that the judge must necessarily perform a legal triage before he can practicably present his reasons. In cases where conflicting evidence of a significant nature is given, both sets of evidence should be referred to. Otherwise, where a certain piece of evidence is important to the proper determination of the matter but it is not referred to by the trial judge, it will be hard for an appellate court to know whether the judge had considered it or not. With respect to the depth of reference, we agree with Meagher JA in *Beale* at 443, where he held that "[t]here is no need to refer to the relevant evidence in detail, especially in circumstances where it is clear that the evidence has been considered".

35 *Secondly, the statement should briefly set out the parties' opposing stances*, ***and*** *set out the facts found by the judge, both primary and inferential.* For example, in *Craven v Craven*, the English Court of Appeal ordered a new trial in a divorce case because the judge at first instance had dismissed the wife's charge of cruelty without making any finding as to whether, on a material occasion, she had been deliberately or accidentally hit by her husband.

36 *Thirdly, the statement should examine the relevant evidence and the facts found with a view to explaining the final outcome on each material issue.* However, we do not expect the trial judge to make an explicit ruling on each and every factual issue that arises. To place this burden on the trial judge would be both impractical and beyond the demands of justice. For instance, in an accident claim, the central question may simply be whether the defendant was on the wrong side of the road when the accident occurred. The portions of the witnesses' testimonies to be analysed may then be restricted to those answering the central issue, such as where exactly the debris was found and the position of any skid marks. Also, while the trial judge must relate the saliency of each piece of evidence which he relies on, the expectations of the depth and precision of the judge's account of his analysis must be realistic. We adopt the following holding of the New South Wales Court of Appeal in *John Strbak v Narelle Newton* [1989] NSWCA 202:

> [I]t is going too far to suggest that in every case a judge must submit the material before him or her to the most meticulous analysis and carry into judgment a detailed exposition of every aspect of the evidence and the arguments. What is necessary … is a basic explanation of the fundamental reasons which led the judge to his conclusion. There is no requirement, however, that reasons must incorporate an extended intellectual dissertation upon the chain of reasoning which authorises the judgment which is given.
>
> … *Trial judges must always endeavour to balance their duty to explain with their duty to be brief.*
>
> [emphasis added]

37 *Finally, the judge has to explicate how he has arrived at a particular conclusion*. Impressionistic statements are not helpful. In some cases, the bald statement that the evidence of a particular witness is accepted may be sufficient. Where the court is faced with two irreconcilable accounts given by two eye-witnesses, in the absence of other corroborating evidence, it may have little to say other than that one witness is more credible than the other. This approach may be acceptable in a straightforward factual dispute which resolution depends simply on which witness is telling the truth about events which he claims to recall. Where the decision is of a nature that has to be made as a matter of overall impression rather than by methodical reasoning, the judge will not be able to particularise the factors which had been taken into account and it would be meaningless to require the judge to do that which cannot be done realistically.

38 But the tolerance for "impressionistic" type of reasoning must be constrained by the Court's

wariness of arbitrariness, and it is also limited by the desire for open justice. Hence, the law ordinarily requires the trial judge to explain his assessment of the witness's testimony. Examples include where oral evidence is accepted even though it is contradicted by contemporaneous writing by the witness (*R v MacPherson* [1982] 1 NZLR 650 at 652) and generally, where only part of a witness's evidence is accepted (*Crowley v Willis* (1992) 110 FLR 194 at 200). We agree with Kirby P in *Soulemezis* at 259 that: "*Where nothing exists but an assertion of satisfaction on undifferentiated evidence the judicial obligation has not been discharged. Justice has not been done and it has not been seen to be done*" [emphasis added]. We should also add that the formulaic reliance on demeanour, without more, to justify a finding of credibility is today often questionable. Not infrequently, this is no more than subjectivity piled upon subjectivity. The courts are full of witnesses whose memory, as time passes, becomes more and more certain and less and less accurate: see J P O Barry, "The Methodology of Judging" (1994) James Cook U L Rev 135 at 142. Objective reasoning is therefore always preferred and it will be a rare case that is truly bereft of any objective evidence and turns entirely on the evidence of a single witness's recollection.

39 The constituents of judicial reasoning listed above are likely to overlap, and a judgment may be inadequate in relation to more than one constituent. For example, the judge may fail to explain why he prefers the evidence of one witness over another, and at the same time, leave unresolved many significant issues of fact which bear on the question of which of the conflicting testimonies ought to be accepted. In *NRMA Insurance Ltd v Tatt and Another* (1988) 94 FLR 339 ("*NRMA Insurance*"), the plaintiffs made an insurance claim after a fire destroyed their house. The defence was that the plaintiffs had deliberately set the fire. Both sides called experts who testified in favour of their respective parties' cases. The trial judge gave judgment for the plaintiffs on the primary ground that he believed that the plaintiffs were telling the truth when they denied having deliberately set fire to the house.

40 The majority of the New South Wales Court of Appeal allowed the appeal and ordered a retrial. The basis for allowing the appeal was not because the trial judge had committed an "error in making the wrong finding" but because of his "failure to make any findings on material issues" (*NRMA Insurance* at 351). The first instance decision was based largely on the credibility of the plaintiffs. But as the majority highlighted (*NRMA Insurance* at 353 (*per* Samuels JA)), "[i]t is … impossible for a judge to make a finding on credit in a vacuum, as it were, without relating the witness' evidence, demeanour and particular circumstances to the other material evidence in the case". The plaintiffs' credibility must be weighed against the strength of the other objective evidence and, in particular, the expert evidence that had been presented at the trial. But that evidence was not given explicit consideration in the analysis of the case and important issues raised by them were not resolved. The majority could not say *what view the judge took of the expert and other evidence*, and because of "his *failure to consider it to the point of conclusion*" [emphasis added] (*NRMA Insurance* at 353), the majority could not review the weight to be given to the finding of credibility.

Standard and scope of explanation

41 It is impossible (as well as unprofitable) to attempt to formulate a fixed rule of universal application. The particularity with which the judge is required to set out the reasons must depend on the *circumstances of the case before him* and the *nature of the decision he is giving*. The standard may vary in two cases involving the same type of issues. For instance, with respect to weighing the strength of and choosing between two conflicting testimonies, it was said in one case that this "may have to be a matter of judgment, not of detailed reasoning" (*Housing Commission of NSW* at 381 (*per* Hutley JA)), whereas in another case (*Lloyd Junior Beckford (An Infant by his Mother and Next Friend Tracy Alleyne) v Dr Trevor ET Weston* (22 June 1998, unreported) (English Court of Appeal) (*per* Lord Bingham)), it was said that the judge has "to give a detailed, reasoned judgment" and that it

was "his duty to give reasons which hold water".

42 Although it is not possible (or desirable) to formulate a rule which, when applied, enables one to decide whether the duty has been breached for each and every case, it is possible to specify some factors which determine the applicable standard and scope of explanation. The extent to which reasons have to be given: (a) is constrained by the legal system's ability to bear the burden which the duty imposes; (b) should be sufficient to serve the purposes for which the duty was created; and (c) is dependent on the nature of the decision and the decision-making process.

43 With respect to the first factor, it must be recognised that structural limitations such as jury trials and lay judges no longer exist in Singapore today. While this suggests that the first factor may be of less weight, on the other hand, we recognise that the duty to give reasons may increase costs and result in delays, and that judges are often expected to manage a heavy court list on a daily basis (see above at [29]). The extent of the duty to provide reasons must therefore always be tempered with the need to ensure that judicial time is used effectively and efficiently. This would entail achieving a balanced mix of time spent by a judge in hearings and in preparing reasons for his or her decisions.

44 In relation to the second factor, the purposes of the duty should be broadly understood, and care should be taken not to be fixated on a particular purpose, such as the duty to protect the effectiveness of the right to appeal. Otherwise, one might erroneously think that less elaborate reasons are required where legislation does not give a right of appeal. If so, strictly speaking, it would not be necessary for the highest courts to provide reasons for its decisions for the purpose of safeguarding one's right of appeal since there is none. However, the highest courts are not exempt from the duty. The need for justice to be done and seen to be done should not be dampened by the absence of an avenue for appeal. On the contrary, the inability to alter the decision may make it all the more compelling for the parties to understand how it was reached because, as cogently explained by the Supreme Court of Victoria in *Sun Alliance* at 18:

> [A litigant], having led a weighty body of incriminating evidence was entitled to have the evidence weighed by the Court and, if rejected, the grounds of its rejection expressed in reasoned terms. To have a strong body of evidence put aside without explanation is likely to give rise to a feeling of injustice in the mind of the most reasonable litigant.

Ordinarily, for an appellate court, it would be sufficient (when it is satisfied with the outcome and adequacy of the reasoning of the lower court) to simply state in affirming the earlier decision that it agrees with the reasons given in support of it. It is not obliged to reprise the reasons or give additional ones in a fresh judgment if it forms the view that this is not necessary. This must be a matter of judgment for the appellate court.

45 The nature of the decision is also highly relevant in determining the application and ambit of the duty. While reasons may perhaps be dispensed with if the decision is insignificant (see above at [32]–[33]), on the other hand, we would expect an important decision to be even more carefully explained. The latter category would include cases with significant consequences and/or those that result in changes to the law.

46 At this juncture, we would pause to make a few other observations about the duty to provide reasons. First, we repeat that the duty does not require judges to provide *written* decisions in every case; reasons can be provided orally where appropriate, and no reasons need be given in certain types of cases. Second, Judges are not expected to deliver lengthy judgments. Simplicity out of complexity is always a desirable objective. Third, we would observe that presently this duty to

provide reasons is almost always observed by the courts here.

Application of the duty to this case

47 Regretfully, we do not think that the judicial duty to state reasons has been satisfied in the present case. In our view, the nature of the case here, which involved a capital charge, necessitated detailed reasons, especially in relation to the findings of fact made and application of the law to such findings of fact. It would enable the Appellant, members of the profession and the public to understand the reasons for the decision. In addition, detailed reasons were necessary to enable this Court to understand the grounds for the Judge's decision and to appraise its correctness. There were no other countervailing policy grounds that would militate against the duty to provide detailed reasons here. With this in mind, we turn to consider the areas in which the reasons provided were insufficient.

48 First, we are unable to ascertain what the Judge held was the precise *mens rea* of the Appellant. We cannot discern from the Judgment whether the Appellant was held to have actual knowledge of or was wilfully blind to the nature of the drugs he possessed; or whether he was convicted because the presumption of knowledge under s 18(2) of the MDA was not rebutted. Although any one of these possibilities is sufficient to satisfy the *mens rea* element of the offence, it is important that the Appellant knows what his precise *mens rea* was held to be, in order to exercise his right of appeal effectively, as the corresponding primary facts necessary to satisfy this *mens rea* can then be scrutinised by the appellate court.

49 Secondly, while the Judge described the "evidence given by the accused [*ie*, the Appellant]" as being "very thin" (Judgment at [4]), we are unable to understand how this conclusion was arrived at. The Judgment does not shed light on whether the Appellant's evidence was disbelieved because of his demeanour when giving oral testimony in court, or because its content was inconsistent with extrinsic objective evidence or for some other reason. While some of the Appellant's submissions (*eg*, the Appellant's alleged consumption of methamphetamine in Malaysia and his alleged gullibility) were referred to in the Judgment in relation to the finding of "very thin" evidence, no analysis of the evidence that supported these submissions was apparent in the Judgment. This is plainly unsatisfactory given that there is undisputed objective evidence which supported the Appellant's contention that he was a methamphetamine consumer, and it is unclear if the Judge had considered this piece of evidence.

50 Thirdly, there are two ambiguities with respect to the Judge's treatment of the cautioned statement, *viz*, was an adverse inference drawn against the Appellant, and if an adverse inference was drawn, why was it drawn? With respect to the latter, Defence counsel had submitted at trial that the Appellant's response in the cautioned statement could be explained on the basis that the Appellant was in a highly soporific state at the time of recording that statement. Whilst we do not and are unable to express any views on the truth of the facts underlying such a submission, we note that there is evidence showing the timings at which the Appellant last consumed methamphetamine and last slept before recording that statement. Hence, if there was evidence which led the Judge to think otherwise, it had to be set out and evaluated. It is apposite to note, in this regard, that the exact *mens rea* that the Appellant is found to possess, or not possess, could possibly have a material bearing on the outcome of the case, especially in the light of this Court's decision in *Nagaenthran* (see above at [5]).

51 Fourthly, we neither know what the Judge assessed the contemporaneous statement's nature to be nor the weight it was given. The contemporaneous statement's admissibility was subject to a *voir dire* which spanned one-third of the entire proceedings. The material part of the contemporaneous statement stated: [note: 1]

Question 1): What is this? (Recorders note: pointing to the 10 packets of granular substances)

Answer: Beh Hoon. (Recorder's note: Beh Hoon is Heroin) [The Appellant's mark]

Question 2) Who does it belongs [*sic*]?

Answer: It belongs to me. [The Appellant's mark]

Question 3) What are this [sic] drugs for?

Answer: Its [*sic*] to deliver to somebody else. [The Appellant's mark]

Question 4) How many occasions has [*sic*] you delivered drugs into Singapore.

Answer: This is my second time [The Appellant's mark]

52 Because the recorder of the statement was a Central Narcotics Bureau officer and not a police officer, it would appear that s 24 of the Evidence Act (Cap 97, 1997 Rev Ed) ("EA") was the applicable admissibility provision rather than s 122(5) of the CPC: see *Chai Chien Wei Kelvin v Public Prosecutor* [1998] 3 SLR(R) 619. Unlike s 122(5) of the CPC, s 24 of the EA *prima facie* applies to only "confessions" and not "admissions" – terms which carry different meanings under the EA (see s 258 of the CPC 2010 for the present position). Paradoxically, taking a strict interpretation of the EA alone, one *may* argue that an involuntary admission would nevertheless be admissible, and no *voir dire* was necessary. This is not an issue that we need to express any views on at present.

53 However, we are unsure if the Judge had undertaken such an exercise of statutory interpretation and arrived at the aforementioned position, which implies that he viewed the contemporaneous statement as a confession because there was a *voir dire*, or that he took the alternative position which requires both admissions and confessions to be voluntarily given even under the EA, in which case he may have viewed the contemporaneous statement as an admission that still called for a *voir dire*.

54 The larger problem lies in that after admitting the contemporaneous statement into evidence, no analysis of its significance in the context of the entire factual matrix was provided. This is a serious omission in the light of "Question 1" and its answer (which is probative evidence of the Appellant's knowledge of the nature of the drugs in the packets) (see above at [51]), and the Appellant's defence (which claims ignorance of the nature of those drugs). The possible significance of the answer to "Question 1" ranges from being exculpatory, in that the Appellant's knowledge was only acquired *ex post facto* by virtue of seeing the contents of the opened packet, to being highly inculpatory.

55 Fifthly, there was no reference at all to the Appellant's allegation that he had carried out a similar delivery in a prior trafficking transaction involving Ah Hong (*viz*, the First Trafficking Incident) where he allegedly ascertained the nature of the drugs to be methamphetamine. This was highly relevant evidence with respect to the Appellant's *mens rea* because he relied heavily on the particulars of the First Trafficking Incident as a justification for not checking the contents of the drug packets on the occasion for which he was arrested. However, we are unable to ascertain whether the Judge had considered it because no reference was made to it. The error that the Judge had apparently made at [4] of the Judgment in relation to the Appellant's *mens rea* (referred to at [12] above) is also, in the context of the other concerns we have raised, problematic.

56 Finally, there are some other anomalies in the Judgment which cannot be reflexively ignored by this court. There were altogether six long statements recorded from the Appellant over the course of the investigations which particulars were not fully set out in the Judgment (at [3]). Hence, we are unsure whether the Judge had sufficiently evaluated the contents of all those statements, which constitute a substantial and material part of both the Prosecution's and the Defence's cases.

57 It is also undisputed that, unlike what was implied in the Judgment (at [4]), only six out of the ten packets of drugs found in the Appellant's possession contained white granular substances. [note: 2] The packet which was first opened and which contents were first seen by the investigators and the Appellant in fact contained brown granular substances. [note: 3] This is of some significance since the white granular substances were analysed to contain more diamorphine per unit volume, and therefore each same-sized drug packet containing white granular substances contained a larger amount of diamorphine.

Summary

5 8 *A brief judgment is not necessarily an inadequate one. There is always merit in conciseness and no virtue in prolixity.* However, a judgment that does not explain the foundations for findings of facts and/or the basis for the determination of the witness's credibility on pivotal issues is *prima facie* inadequate to justify a judicial outcome and could be seen as flawed. For the reasons given above, we are unable to affirm or overrule the Judge's decision as we do not clearly understand how he arrived at certain primary findings of fact that led to his rejection of the Appellant's defence. We also do not think it is proper in this matter for this Court to scrutinise the evidence on record in a *de novo* manner in order to construct a case for the Prosecution or the Defence, much less to make definitive findings of fact without the benefit of observing the presentation of evidence and witnesses' testimony first-hand.

Conclusion

59 These proceedings, it bears emphasis, relate to a capital charge on which the Appellant was found guilty. The judicial duty to give full reasons is therefore even more compelling in such a matter. It is, of course, never a light matter to order a retrial. Much anxiety, inconvenience and even hardship is caused all round and sometimes the ultimate decision may not be different. However, given the lack of clarity in the Judgment and our inability as an appellate court to assess the credibility of the Appellant, we have no alternative but to direct that there shall be a retrial instead before another High Court Judge, who will have the opportunity to closely scrutinise afresh the Appellant's credibility in the context of all the relevant evidence. We would also emphasise that nothing in this Judgment should be taken as affecting any substantive determination in the subsequent trial and appeal, if any. Finally, we are also constrained to observe that we received little assistance from the Appellant's counsel in the present proceedings. Their submissions fell well short of the standard that we ordinarily expect from counsel in matters of this nature.

[note: 1] P37, ROP vol 2, pg 41.

[note: 2] Exhibits B2A, B4A, B5A, C1B1, C1C1 and C1E1.

[note: 3] ROP Vol 2, p 7: see P9, Exhibit B1.