# Public Prosecutor *v* Khartik Jasudass and another
# [2015] SGHC 199

**Case Number** : Criminal Case No 22 of 2015

**Decision Date** : 03 August 2015

**Tribunal/Court** : High Court

**Coram** : Hoo Sheau Peng JC

**Counsel Name(s)** : Eugene Lee, Ong Luan Tze, Teo Lu Jia (Attorney General's Chambers) for the prosecution; Eugene Thuraisingnam, Cheong Jun Ming Mervyn (Eugene Thuraisingnam LLP) and Lim You Yu Benson (WongPartnership LLP) for the first accused; Amolat Singh (Amolat & Partners) and Liang Hanwei Calvin (Tan Kok Quan Partnership) for the second accused.

**Parties** : Public Prosecutor — Khartik Jasudass and another

*Criminal Law – Statutory offences – Misuse of Drugs Act – Presumption of knowledge*

*Criminal Law – General exceptions – Duress*

*Criminal Procedure and Sentencing – Statements – Admissibility*

3 August 2015 Judgment reserved.

**Hoo Sheau Peng JC:**

1 The first accused is Khartik Jasudass ("the first accused"), a 22-year-old male Malaysian citizen. The second accused is Puniyamurthy A/L Maruthai ("the second accused"), a 30-year-old male Malaysian citizen. The accused persons are cousins. They each claimed trial to a charge of trafficking in a controlled drug, namely diamorphine, in furtherance of their common intention, an offence under s 5(1)(*a*) read with s 5(2) of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) ("MDA") and read with s 34 of the Penal Code (Cap 224, 2008 Rev Ed) ("Penal Code"). The charges state that on 27 August 2012 at about 6.20pm, in the vicinity of Block 221 Yishun Street 21, Singapore, the accused persons had in their possession for the purpose of trafficking two packets of granular or powdery substances weighing a total of 454.6g which were analysed and found to contain not less than 26.21g of diamorphine. The Prosecution applied for a joint trial of the accused persons under s 143(*a*) of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) ("CPC"). The accused persons did not object to this, and were tried jointly.

**The Prosecution's case**

***The arrest of the accused persons***

2 By and large, the evidence led by the Prosecution was not disputed. At 6.10pm on 27 August 2012, officers from the Central Narcotics Bureau ("CNB") spotted the accused persons meeting up with three men at one of the staircase landings of Block 230, Yishun Street 21. A short while later, the accused persons and the three men parted ways. The accused persons headed to a nearby carpark where their motorcycle which bore a Malaysian registration number JML 607 ("the Motorcycle") was parked. The first accused rode the Motorcycle out of the carpark, with the second accused as his pillion passenger.

3 The CNB officers tailed the accused persons into another carpark at Block 221, Yishun Street 21. There, the second accused remained on the Motorcycle, carrying a black haversack, while the first accused walked towards the void deck of Block 221. At this point, the CNB officers moved in and arrested them separately.

4 After the arrest, the accused persons were escorted into a CNB vehicle ("the CNB vehicle"). At about 6.50pm, Woman Staff Sergeant Norizan binte Merabzul ("W/SSgt Norizan") entered the CNB vehicle and proceeded to question the accused persons in Malay. Initially, the questions were posed to both the accused persons generally. As the second accused began answering the questions first, a statement was taken from the second accused. Subsequently, W/SSgst Norizan also took a statement from the first accused. These statements were recorded in the Special Task Force field diary.

5 At about 7.05pm, Senior Staff Sergeant Tay Cher Yeen Jason ("SSSgt Tay") conducted a search on the accused persons. He seized, among other things, the black haversack which was carried by the second accused at the time of his arrest. Two black bundles were found in this black haversack.

6 Following the search, from about 7.30pm to 8.05pm, W/SSgt Norizan recorded another statement from the second accused inside the CNB vehicle. During this time, the first accused was seated on the ground outside the CNB vehicle. From about 8.10pm to 8.38pm, W/SSgt Norizan took another statement from the first accused inside the CNB vehicle. The accused persons spoke in the Malay language, which W/SSgt Norizan interpreted into and recorded in writing in English.

7 The accused persons were then brought to their workplace at Senoko Avenue, as well as the Woodlands Checkpoint for further investigations to be conducted. After that, they were brought back to the CNB's Headquarters at the Police Cantonment Complex.

***Handling and analysis of the exhibits***

8 At about 12.23am on 28 August 2012, SSSgt Tay brought the seized exhibits to the Exhibit Management Room in CNB's Headquarters, and handed them over to Woman Inspector Michelle Sim ("IO Sim") for photograph taking. The accused persons were present in an adjoining room from which they viewed the process.

9 The black haversack was marked "A" and the two black bundles found therein were marked "A1" and "A2" respectively. Each black bundle was found to contain one packet of granular or powdery substance. These were then marked "A1A" and "A2A" respectively ("suspected drug exhibits"). DNA swabs were also taken from the exhibits. Once an exhibit was labelled, photographed and swabbed for DNA, Sergeant Jasveer Singh Gill ("Sgt Jasveer") repacked each exhibit into a separate plastic bag. After the photograph-taking process, Sgt Jasveer handed all the exhibits over to IO Sim.

10 IO Sim then weighed the suspected drug exhibits, and recorded their weights in her investigation diary. The accused persons were invited to sign against these entries, which they did. Thereafter, IO Sim placed the suspected drug exhibits into a plastic bag and carried them to her office for safekeeping.

11 On 30 August 2012, at about 1.51pm, IO Sim handed to Hu Yiling Charmaine ("Ms Hu"), a Health Sciences Authority ("HSA") analyst, *inter alia*, the suspected drug exhibits for analysis. Upon analysis, Ms Hu found that the exhibit marked "A1A" contained 229.5g of granular or powdery substance with

not less than 13.08g of diamorphine, and the exhibit marked "A2A" contained 225.1g of granular or powdery substance with not less than 13.13g of diamorphine. In total, there was therefore no less than 26.21g of diamorphine in exhibits "A1A" and "A2A". These results were not challenged by the accused persons at trial.

12 On 31 August 2012, blood specimens were obtained from each accused person. The specimens were then sealed and deposited in a locked metal security box which was placed at the Criminal Registration Office Counter. On 3 September 2012, Mr Poh Beng Kiong, an employee of Access Express Courier Pte Ltd, a company which provides courier services, collected the locked metal security box and handed it over to the DNA Database Laboratory of the HSA.

13 On 3 September 2012, IO Sim submitted the DNA swabs taken from the exhibits (see [9] above) to the DNA Profiling Laboratory for DNA analysis. The accused persons' DNA was found on the exterior surface of the plastic taped with tapes covering the exhibit marked "A2A". These DNA results were similarly not challenged by the accused persons at trial.

***Statements made by the first accused***

14 The Prosecution relied on the statements taken from the first accused by W/SSgst Norizan (see [4] and [6] above which will be referred to as the "oral statement" and "contemporaneous statement" respectively). In addition, the Prosecution also relied on four other statements made by the first accused, namely the statement recorded by IO Sim under s 23 of the CPC on 28 August 2012 ("the cautioned statement"), and three other statements recorded under s 22 of the CPC on 31 August, 2 September 2012 and 13 February 2013 respectively (each to be referred to as a "long statement", and two or more as "long statements"). The first two long statements were recorded by IO Sim, while the last was recorded by Inspector Nathaniel Sim ("Insp Sim").

15 The first accused did not challenge the voluntariness of all these statements, although two matters were disputed. First, in the oral statement taken by W/SSgt Norizan, the first accused was recorded as stating that there were "two *packets* of *batu brown* colour" [emphasis in original] inside the black haversack. When questioned by the Prosecution, the first accused stated that he did not mention the colour. To my mind, this is not a material point. In my analysis below of the first accused's evidence, I do not rely on this aspect of the oral statement. I shall not say more of this. Second, it is submitted that the third long statement recorded on 13 February 2013 by Insp Sim is inadmissible as it forms "without prejudice" communications. I shall return to the contents of the third long statement at [52], and discuss the objection at [103]–[104].

16 For now, I set out the critical portions of the various other statements. In the oral statement, the first accused said that he had something to "surrender", being the two packets of drugs in the bag. In relation to the drugs, he explained that he was "[t]o send and collect money". In the contemporaneous statement, the first accused stated that he used the black bag together with the second accused. He knew that the bundles in the black bag contained drugs, but that he did not know "*what drugs*" [emphasis added]. They were waiting for a phone call so as to find out who "to send" the bundles to.

17 In the first accused's cautioned statement, he admitted to the charge. He had surrendered to the CNB officers when questioned whether he was "doing any illegal work". The first accused stated that he did not know the punishment for committing the crime. He was in financial difficulties, and needed money.

18 In the first accused's first long statement recorded on 31 August 2012, again, he explained that

he and the second accused had become involved in delivering drugs because of financial difficulties. Sometime in the middle of July 2012, they had met a man named "Raja" in Johor Bahru, Malaysia. Upon hearing that the accused persons were jobless, Raja offered both of them a job. Raja did not give any details about the job except that it would be "a dangerous job" that could earn them "*a lot of money*" [emphasis added]. Raja gave them time to think about whether they wished to accept the job. The first accused then stated:

> 17 … At that point of time, I *was already suspecting that the job Raja was referring to have got something to do with delivery of drugs*.
>
> 18 Two days later, Raja called [the second accused] on his handphone and requested to meet us at a restaurant. Both [the second accused] and I met up with him and he bought us dinner. He also asked us if we had thought about the job. We told him that the job was *too dangerous* and we were not prepared to do the job. We further informed him that we do not have a motorcycle for the job. Raja then told us that to start with, he would arrange a job for us and also provide a motorcycle to do the job. Raja further explained to us about the job details. He said that they would pack food into the motorcycle and we are to ride the motorcycle into Singapore. After that, we are to open up the motorcycle to retrieve the food and then deliver it to somebody whom they would let us know. *By 'food', Raja actually meant drugs*. *However, both [the second accused] and I do not know what type of drugs they were and Raja also did not inform us*. *Raja said that we would be paid 1000 ringgit per trip to Singapore for the drug delivery and both of us could share the amount.* Initially, both [the second accused] and I *did not want to do the job* and we told Raja that *we were scared to do it*. Raja then told us that we could try it out for one time first and keep the money for our expenses. *He also assured us that we need not worry about it and that he would take care of everything.* Both of us then agreed to do the job. … [emphasis added]

19 Continuing on, the first accused stated that since 1 August 2012, the second accused and he had been employed by a company in Senoko Way, Singapore, and would travel to Singapore to work every morning. They did not wish to continue with the job of delivering drugs. However, Raja told them if they refused to continue, their "families would be in trouble". They protested that Raja had cheated them, as he had said they needed to do the job only once. Raja stated that these were his instructions from "higher authorities". Subsequently, Raja paid the deposit for the Motorcycle, and registered it under the second accused's name. Raja arranged for the balance sum to be paid by the accused persons. For accommodation, Raja also rented out a room in a house to the accused persons.

20 Before his arrest, the first accused stated that he had done about six to seven drug deliveries with the second accused using the Motorcycle. The first accused explained that the drugs would be placed in the Motorcycle, but that he did not know who placed the drugs in the Motorcycle, or when they did so. Whenever a delivery was to be made, Raja or one of his men would call the accused persons to inform them that the drugs had been placed in the Motorcycle for delivery.

21 On 27 August 2012, the accused persons left Malaysia for Singapore on the Motorcycle, with the knowledge that the drugs were concealed inside the Motorcycle. Upon clearing the Woodlands Checkpoint, the first accused called Raja to inform him that they had reached Singapore. They then went to work. After they had finished work for the day, the first accused contacted Raja, who instructed them to take the drugs out of the Motorcycle, and to wait for a call for details on the delivery of the drugs.

22 Accordingly, the accused persons retrieved three bundles of drugs from within the body of the

Motorcycle. Following further instructions, they proceeded to Block 230 Yishun Street 21, delivered one bundle of drugs to the three men at the staircase landing, and collected $2,500 in exchange. Thereafter, they left. The other two bundles of drugs were also meant for delivery, and they were "supposed to call Raja back and find out where to go to do the next delivery". Shortly after, they were arrested at Block 221 Yishun Street 21.

23 In the second long statement recorded on 2 September 2012, the first accused reiterated that they were "threatened into doing the drug deliveries by Raja", and were warned by Raja or his men "not to meddle with the drugs or open up to check". The first accused also claimed that he has not been involved in drugs, and has not consumed drugs before whilst in Malaysia.

***Statements made by the second accused***

24 The Prosecution also relied on six statements made by the second accused, including, the two statements taken by W/SSgst Norizan (see [4] and [6] above which will be referred to as the "oral statement" and "contemporaneous statement" respectively). Further, the Prosecution adduced a statement recorded by IO Sim under s 23 of the CPC on 28 August 2012 ("the cautioned statement"), and three statements on 30 August, 1 September 2012 and 13 February 2013 respectively (each of which is to be referred to as a "long statement", and two or more as "long statements"). The first two long statements were taken by IO Sim, while the third long statement was recorded by Insp Sim. Like the first accused, the second accused did not challenge the admissibility of any of these statements. I set out the salient portions of each of these statements, save for the contents of the third long statement recorded on 13 February 2013 which I shall deal with at [52].

25 In the oral statement, the second accused said that he would like to surrender his "bag" which contained two bundles of "drugs", as well as money amounting to about "two thousand plus". In the contemporaneous statement, the second accused stated that he used the bag together with the first accused. There were drugs in the two bundles in the bag, which he was supposed "to give people". He did not know "what is it [*ie*, *the drugs*] called". He admitted to sending drugs to people on "three" occasions. In the cautioned statement, he further admitted to the charge, explaining that he was "in desperate need of money".

26 In the first long statement recorded on 30 August 2012, the second accused described how Raja had befriended them and offered them a job of delivering "food". Specifically, he stated:

> 13 Both [the first accused] and I decided to deliver drugs *because we were facing poverty and were in financial difficulties*. Both of us had been jobless since June 2012. … Sometime in early July 2012, both of us met Raja at a gaming shop … We started chatting and he asked where we were staying and working. We then told him that we had been jobless for more than a month and is finding it very difficult to sustain ourselves as we had no money for food. Raja then gave us 50 ringgit and asked us to have food. Raja further told us that there was a job available and if we can do it, *we can earn lots of money.* When we asked him what the job was about, Raja told us that we have to bring some food to Singapore and deliver it to people. *At that time, both [the first accused] and I did not know what Raja meant by food and we did not ask him*.
>
> 14 Two days later, Raja called to find out whether we were prepared to do the job. … *I then asked Raja why should he pay money for delivery [of] food to Singapore and I asked him what he meant by food. Raja then explained that delivering food meant delivering drugs*. … *Initially, both [the first accused] and I did not want to do the job and we told Raja that we were scared to do. Raja then assured us that we need not worry about it and that he would take care of everything.* Both of us then agreed to do the job. [emphasis added]

27 According to the second accused, the first accused and he had made two deliveries in July 2012, using a motorcycle supplied by Raja. Prior to the arrest in August 2012, they had made about six deliveries. On 27 August 2012, the accused persons rode the Motorcycle to work in Singapore, with three bundles of drugs concealed in the Motorcycle. After they had finished work, they retrieved the bundles of drugs from the Motorcycle, and placed them in the black haversack. They knew that they were to deliver the bundles of drugs, but they "d[id] not know what type of drugs they were". Upon receiving instructions, they proceeded to Block 230 Yishun Street 21, delivered one bundle of drugs and collected the sum of $2,500. They were arrested shortly thereafter.

28 In his second long statement dated 1 September 2012, the second accused explained that after commencing work at Senoko Way in Singapore, they did not wish to continue delivering drugs for Raja. However, Raja said they had to continue, and that they could not leave after only doing one delivery job. He threatened the accused persons by saying that he would send men to beat them up and that he would "cause trouble" to their family members. Raja also instructed them not to inform anyone about the deliveries and "threatened that he would harm [them] if he [came] to know about it". Thus, they did not tell their family members.

29 When they gave Raja the excuse that they did not have a motorcycle so to get out of the job, Raja paid the deposit for the Motorcycle, and made them pay the instalment payments. The accused persons had accomplished four deliveries in August 2012 using the Motorcycle, prior to being arrested on the fifth delivery. Apart from these dealings, the second accused said he has not dealt with drugs in Malaysia, and has not consumed drugs before. Raja also rented a house in which the accused persons stayed, and made them pay RM200 per month to stay there.

**Close of the Prosecution's case**

30 At the close of the Prosecution's case, I found that the Prosecution had made out a *prima facie* case on the respective charges against the first and second accused. I called for the defence. Both elected to give evidence.

**The first accused's defence**

31 Counsel for the first accused, Mr Eugene Thuraisingam ("Mr Thuraisingam"), stated that the first accused was relying on the contents of his statements. Accordingly, there was no further need to introduce the facts by way of evidence-in-chief. Thus, the examination-in-chief of the first accused was a brief affair. In the main, the first accused stated that before he met Raja, he did not have any involvement in drugs. He had not consumed drugs before. In fact, he has not even seen drugs, in particular diamorphine, prior to his arrest. Therefore, he did not know what heroin (the street name for diamorphine) looked like before his arrest.

32 In cross-examination, the first accused accepted that he was in possession of the two black bundles found in the haversack which the second accused was carrying at the time of the arrest. They were waiting for instructions to deliver them. The first accused also stated that while he knew he was supposed to deliver drugs, he did not know what type of drugs he was to deliver. He took up the job because he needed the money. In respect of the inquiries the first accused tried to make as to the type of drug he was transporting, his evidence in cross-examination was as follows:

> Q: …when Raja first offered you the job, you already knew that by "food", he actually meant drugs, right?
>
> A: *I had a suspicion that it may be drugs.*

Q: Okay. Yes, and that's why both you and [the second accused] were scared to do it at first, right?

A: Yes, Your Honour.

Q: Because you know that delivering drugs is dangerous, isn't it?

A: Yes, Your Honour.

Q: So you suspected that "food" actually meant drugs. You didn't ask---or rather, did you ask Raja at this point, when he was offering you the job, what the type of drugs it was?

A: We asked, but he asked us not to ask questions.

Q: Okay. After he gave you that answer, did you try to further find out what type of drugs it was?

A: No, Your Honour.

…

Q: And before you entered Singapore on the 27th of August, that was the day you were arrested, all right, did you at any point in time try to further find out what type of drugs you were delivering?

A: No, Your Honour.

[emphasis added]

33 The first accused also agreed with the Prosecution that although he did not know what type of drug he was to deliver, he was still willing to do so:

Q: Okay. And you were still willing to deliver the drugs for [Raja] even though you didn't know what type of drugs it was, right?

A: Yes, Your Honour.

Q: And that is because---would you agree that you actually didn't care what type of drugs it was?

A: Yes, Your Honour.

Q: And that was because you needed the money, that's why you agreed to do the job, right?

A: Yes, Your Honour.

34 The first accused testified that Raja threatened them. Raja said that he knew where his parents stay in Penang. In relation to the second accused's elder sister and her family who live in Johor Bahru, Raja said that "*they won't be alive*" [emphasis added]. While living in Raja's house, they needed permission to leave home. Raja also said that he has "men" in Singapore. Once when they were in Singapore, they had a tyre puncture and stopped by the road to check the tyre. At that point, Raja called to ask what they were doing. Although he has not seen them before, he believed

Raja has "men" in Singapore. Raja has shown him a video clip in which Raja and others were beating someone up. Raja also scolded them often. However, the first accused also agreed that on 27 August 2012, after they left the house to come to Singapore to work, they were out of Raja's reach.

35 In re-examination, the first accused testified that before his arrest, he did not know much about drugs. Specifically, he did not know the different names of types of drugs, or that some drugs were more dangerous than others. He did not know that there were different consequences for bringing different kinds of drugs into Singapore.

**The second accused's defence**

36 In his examination-in-chief, the second accused gave the following account. The second accused moved from Penang to Johor Bahru about a year before his arrest. In a game shop in Johor Bahru, Raja approached the accused persons, and initiated a conversation. The second accused informed Raja that he was jobless and facing financial difficulties. Shortly afterwards, Raja offered the second accused a delivery job which, in view of his financial difficulties, he agreed to. The second accused testified that at the time of the first delivery, he did not know what he was required to deliver, as this was hidden in the motorcycle which he was to ride into Singapore.

37 The second accused stated that after the first delivery, he did not want to do further deliveries. However, Raja "scolded and threatened" him, and said that he would "beat them and kill them". By "them", Raja was referring to his elder sister and her family. The second accused believed that the threats of harm and death to his elder sister were real as Raja was able to tell the second accused where his elder sister resided. Raja also showed him a video clip in which Raja was beating someone up with a group of people. The second accused also explained that at the material time, he was living in Raja's house because Raja told him to stay there. There, he lacked freedom of movement. He explained that he and the first accused tried to "run to Penang" but were prevented by Raja's men from doing so. Raja's men told them that they had to stay, and could not go anywhere. The second accused could not confirm how many prior deliveries they had completed before they were arrested. His answers varied from one to three prior occasions.

38 The second accused was referred to para 14 of his first long statement of 30 August 2012 (set out at [26] above), where he stated that in July 2012, when Raja told him that he was delivering "food" in Singapore, he knew that he was in fact delivering drugs. The second accused accepted this, except that he maintained that he did not know the type of drug which he was delivering. The second accused further testified that he has not consumed any illicit drugs before. He has not seen any illicit drugs, such as heroin, before his arrest, and hence did not know what heroin looked like before his arrest. He also did not know what the punishment for dealing with drugs is in Singapore.

39 In cross-examination, the second accused stated that had tried to ask Raja what type of drugs was in the two bundles, and was told that the bundles contained "food". After this, he did not inquire further as he was "scared to try". The second accused maintained that he did not know the type of drug that was in the two black bundles which were in his possession. In this connection, the second accused testified in cross-examination as follows:

Q: …you didn't know the different type of drugs, right?

A: Yes, Your Honour.

Q: So whatever drugs it was, you would still have brought it into Singapore on the 27th of August, right?

A: Yes, Your Honour.

40 While the second accused did the first delivery of drugs for money, he made the subsequent deliveries of drugs because he was "threatened using his elder sister". He did not want harm to come to his elder sister. He admitted to being in possession of the two bundles of drugs in the haversack at the time of his arrest, and that they were meant to be delivered to other persons.

**The legal provisions**

41 The first and second accused were charged with trafficking under s 5(1)(*a*) read with s 5(2) of the MDA and s 34 of the Penal Code. Sections 5(1)(*a*) and 5(2) of the MDA provide:

> **Trafficking in controlled drugs**
>
> **5.**—(1) Except as authorised by this Act, it shall be an offence for a person, on his own behalf or on behalf of any other person, whether or not that other person is in Singapore —
>
> (*a*) to traffic in a controlled drug;
>
> …
>
> (2) For the purposes of this Act, a person commits the offence of trafficking in a controlled drug if he has in his possession that drug for the purpose of trafficking.

Under s 2 of the MDA, "traffic" is defined as:

> **Interpretation**
>
> …
>
> (*a*) to sell, give, administer, transport, send, deliver or distribute; or
>
> (*b*) to offer to do anything mentioned in paragraph (*a*),
>
> otherwise than under the authority of this Act, and "trafficking" has a corresponding meaning[.]

42 Section 18 of the MDA contains presumptions regarding the possession and knowledge of controlled drugs. The relevant sub-sections of s 18 read:

> **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;
>
> …
>
> 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.

…

(4) Where one of 2 or more persons with the knowledge and consent of the rest has any controlled drug in his possession, it shall be deemed to be in the possession of each and all of them.

43 For completeness, s 34 of the Penal Code provides:

**Each of several persons liable for an act done by all, in like manner as if done by him alone**

**34.** When a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if the act were done by him alone.

44 Accordingly, before an accused may be convicted for the offence of trafficking under s 5(1)(*a*) read with s 5(2) of the MDA and s 34 of the Penal Code, the accused must have in his possession a controlled drug for the purpose of trafficking in furtherance of the common intention of himself and a co-accused to do so. Next, each accused must know the nature of the drug in his possession. With regard to the latter, the Court of Appeal has held in *Nagaenthran a/l K Dharmalingam v Public Prosecutor* [2011] 4 SLR 1156 ("*Nagaenthran*") that the "nature" of the controlled drug under s 18(2) refers to the *actual controlled drug* (at [24]; see also *Tan Kiam Peng v PP* [2008] 1 SLR(R) 1 ("*Tan Kiam Peng v PP*") at [95])).

**The parties' closing submissions**

***Prosecution's closing submissions***

45 According to the Prosecution, it is not disputed that the accused persons were in possession of the two bundles of drugs containing diamorphine, and that they were in possession of this for the purposes of trafficking by delivery. More importantly, the Prosecution submits that the accused persons have not rebutted the presumption of knowledge under s 18(2) of the MDA which the Prosecution relies on. To summarise, the accused persons knew that they were carrying drugs which were highly valuable. However, they made minimal effort to find out the type of drugs they were carrying. Essentially, the accused persons did not care about the specific type of drugs they were carrying. Further, the accused persons were only concerned about being paid for the deliveries. Hence, the Prosecution contends that the accused persons have failed to prove on a balance of probabilities that they did not know or could not reasonably be expected to have known that the two bundles of drugs contained diamorphine. The Prosecution also argues that the accused persons were not acting under duress at the material time, so as to be able to avail themselves of the defence within s 94 of the Penal Code.

***The first accused's closing submissions***

46 Mr Thuraisingam submits that the heart of the issue in the present case is whether the first accused has rebutted, on a balance of probabilities, the presumption of knowledge under s 18(2) of the MDA. Mr Thuraisingam submits that the first accused has rebutted the presumption for these reasons:

(a) The first accused did not know, at the time of the offence, that different types of drugs

existed, and did not know the type of drugs they were delivering. It thus follows that the first accused could not have known that he was in possession of, specifically, diamorphine.

(b) The first accused was a truthful and credible witness. He was also fully cooperative during investigations. Further, as assessed by the Institute of Mental Health ("IMH"), the first accused has an intelligence quotient of "borderline to low average range of functioning". The first accused was of a simple and meek nature. Given the first accused's consistent denial of the knowledge of the exact nature of the drugs in his statements and in court, there is no reason to reject the first accused's testimony that he did not know the exact nature of the drugs.

(c) Also, the first accused was not wilfully blind to the fact that the two black bundles contained diamorphine. Wilful blindness is only established by showing that the inference of knowledge is *irresistible* and is the only rational inference available on the facts. When the first accused attempted to find out from Raja the type of drug he was transporting, Raja threatened him. As the first accused admitted that he was out of Raja's reach when he entered Singapore on 27 August 2012, such threats do not constitute the defence of duress. Nonetheless, in the light of the threats, the failure to inquire further was not a deliberate refusal to inquire in order to avoid confirming the suspicion that the bundles contained diamorphine.

(d) Additionally, it would be artificial to require the first accused to take further steps to ascertain the nature of the drugs given the first accused's lack of knowledge about drugs generally. Thus, it would have been pointless for the first accused to inquire further, since he did not even know what diamorphine was to begin with.

47 Separately, Mr Thuraisingam also submits that the first accused's third long statement recorded on 13 February 2013 is inadmissible as it was made "without prejudice", or alternatively, that no weight should be placed on it in assessing the first accused's credibility.

***The second accused's closing submissions***

48 Counsel for the second accused, Mr Amolat Singh ("Mr Amolat"), also submits that the second accused did not have actual knowledge at the material time when he was arrested that the drugs in his possession specifically contained diamorphine. Mr Amolat points to the second accused's consistent testimony that he did not know the nature of drugs in his possession. This consistent testimony is further strengthened by the evidence of the CNB officers that the second accused "was being truthful", "upfront" and "was not evasive". Mr Amolat also submits that it is significant that neither the Prosecution nor the Prosecution's witnesses have disputed that the second accused is not a drug user, that he was not involved in the packing of the drugs into the two black bundles and subsequently concealing it in the Motorcycle, and that his role was limited to that of a courier.

49 It is further argued that the second accused was not wilfully blind. The second accused's state of mind was that he did not know anything about drugs, and that he did not know the different type of drugs. Mr Amolat submits that this is incompatible with wilful blindness, as wilful blindness presupposes a deliberate decision on the part of the accused to avoid confirming facts which he had cognisance of and had good reason to believe. Since the second accused did not have cognisance of the different type of drugs, it does not matter whether the second accused sought to find out the type of drug he was carrying. It would not have made a difference if the second accused had opened up the two bundles since he would not have been able to identify the substance inside – it would still be drugs to him and nothing more.

50 Lastly, Mr Amolat submits that the evidence shows that the second accused delivered the

drugs under duress.

**The issues**

51 The main dispute in the present case revolves around the presumption of knowledge under s 18(2) of the MDA, and whether the accused persons have rebutted the presumption on a balance of probabilities. Two further issues have been raised, namely (i) whether the second accused has proved on a balance of probabilities that he committed the offence under duress; and (ii) whether the first accused's third long statement recorded on 13 February 2013 is inadmissible as being "without prejudice" communication. Before delving into these issues, I will briefly address the question of whether the accused persons were in possession of two bundles of diamorphine, and if so, whether the possession was for the purpose of trafficking in furtherance of the common intention of both of them.

***Whether the accused persons were in possession of the two bundles of diamorphine for the purposes of trafficking***

52 Although the first and second accused had indicated to Insp Sim in their respective third long statements dated 13 February 2013 that they should be charged for trafficking in one bundle of drugs each, instead of both bundles of drugs, neither accused person challenged during trial or closing submissions that they were jointly in possession of both bundles of drugs at the time of their arrest. In fact, both the first and second accused accepted under cross-examination that they were both in possession of the two black bundles found in the haversack upon arrest. Both the first and second accused also accepted under cross-examination that at the time of their arrest, they were waiting for instructions regarding the delivery of the two bundles of drugs, and that if they had not been placed under arrest, they would have gone on to deliver the bundles as instructed (see [32] and [40]). These were also broadly their positions in their respective oral, contemporaneous, first and second long statements. Thus, I am satisfied that the Prosecution has proved beyond reasonable doubt that both accused persons were in possession of the two bundles of drugs containing not less than 26.21g of diamorphine for the purpose of trafficking in furtherance of their common intention to do so.

***Whether the accused persons have rebutted the presumption of knowledge under s 18(2) of the MDA***

*Actual knowledge, wilful blindness and the presumption of knowledge*

53 Turning to the *mens rea* of the offence, I begin by considering the relationship between actual knowledge, wilful blindness, and the presumption of knowledge under s 18(2) of the MDA. It is not disputed that the Prosecution may rely on any of these three to make out the *mens rea* element of the offence of trafficking. As stated above at [44], an accused's knowledge must relate to the *nature* of the drug, being the *actual controlled drug*.

54 Thus, if the Prosecution seeks to show that an accused had *actual knowledge*, the Prosecution must prove *beyond reasonable doubt* that the accused had actual knowledge of the nature of the drug in his or her possession. Alternatively, the Prosecution may also rely on the doctrine of wilful blindness. As has been stated in a number of judgments, wilful blindness is the legal equivalent of actual knowledge (see *Muhammad Ridzuan bin Md Ali v PP* [2014] 3 SLR 721 ("*Muhammad Ridzuan*") at [76]). In *Nagaenthran*, the Court of Appeal explained the concept of wilful blindness (at [30]):

> Wilful blindness (or "Nelsonian blindness") is merely "lawyer-speak" for *actual knowledge* that is *inferred* from the circumstances of the case. It is an indirect way to prove actual knowledge; *ie*,

> actual knowledge is proved because the inference of knowledge is *irresistible* and is the *only rational inference* available *on the facts* (see *Pereira v Director of Public Prosecutions* (1988) 63 ALJR 1 at 3). It is a subjective concept, in that the extent of knowledge in question is the knowledge of the *accused* and not that which might be postulated of a hypothetical person in the position of the accused (although this last-mentioned point may not be an irrelevant consideration) (*ibid*). Wilful blindness is not negligence or an inadvertent failure of make inquiries. It refers to the blindness of a person to facts which, in the relevant context, he *deliberately refuses* to inquire into. Such failure to inquire may sustain an inference of knowledge of the actual or likely existence of the relevant drug. **It must also be emphasised that where the Prosecution seeks to rely on actual knowledge in the form of wilful blindness, the alleged wilful blindness must be proved *beyond a reasonable doubt*** . [emphasis in original in italics; emphasis added in bold]

Therefore, if wilful blindness has been proved by the Prosecution *beyond a reasonable doubt*, the Prosecution need not rely on the presumption of knowledge under s 18(2) of the MDA.

55 If the Prosecution chooses to rely on s 18(2) of the MDA instead, the burden is placed on an accused instead to prove, *on a balance of probabilities*, that he or she did not know or could not reasonably be expected to have known, the nature of the controlled drug found in his or her possession (see *Dinesh Pillai a/l Raja Retnam v PP* [2012] 2 SLR 903 ("*Dinesh Pillai*") at [18]). In this regard, the Court of Appeal in *Muhammad Ridzuan* has recently summarised the law as follows (at [75]):

> In order to rebut the presumption of knowledge under s 18(2) of the MDA, an accused person has to adduce sufficient evidence to demonstrate, on a balance of probabilities, that he or she did not know the nature of the drug, *ie*, the actual controlled drug proven or presumed to be in the accused person's possession … . In *Dinesh Pillai*, this court further refined the principles applicable to the rebuttal of the presumption of knowledge (at [18]):
>
> > … As s 18(2) has been triggered in the present case, the appellant bears the burden of proving on a balance of probabilities that he did not know *or could not reasonably be expected to have known* the nature of the controlled drug that was found inside the Brown Packet. … [emphasis added]
>
> The court in *Dinesh Pillai* accepted that an accused (here, Ridzuan) would not be able to rebut the presumption by a mere assertion of his lack of knowledge had he been wilfully blind as to the nature of the drugs.

56 In *Dinesh Pillai*, the accused was asked by one "Raja" to deliver "food" wrapped in brown packets to Singapore. The accused claimed that when he had asked about the contents of the brown packet, he was simply told that it was a "secret". The accused admitted that he did not ascertain the contents of the brown packet despite having a suspicion that it did not contain food. The Court of Appeal held that an accused will not be able to rebut the presumption of knowledge under s 18(2) of the MDA if the accused made no effort to find out what he was bringing into Singapore in circumstances that would have alerted a reasonable person that he was being asked to do something illegal (see also *Dinesh Pillai a/l K Raja Retnam v Public Prosecutor* [2012] 4 SLR 772 at [11]).

57 Notably, the Court of Appeal stated in *Dinesh Pillai* at [21] that:

> In our view, the appellant has failed to rebut the s 18(2) MDA presumption on a balance of probabilities because he turned a blind eye to what the Brown Packet contained despite

> suspecting that it contained something illegal. … ***In using the expression "turning a blind eye" in this context, we do not mean to say that the appellant had actual knowledge that the Brown Packet contained diamorphine.*** *In the context of s 18(2) of the MDA, it is not necessary for the Prosecution to prove wilful blindness as a means of proving actual knowledge on the appellant's part of the nature of the controlled drug in the Brown Packet as the Prosecution has no such burden.* Instead, it is for the appellant to prove on a balance of probabilities that he did not know or could not reasonably be expected to have known that the Brown Packet contained diamorphine. In our view, the appellant has failed to rebut the s 18(2) MDA presumption by his mere general assertions that he did not know what was in the Brown Packet as: (a) the nature of the controlled drug in that packet could easily have been determined by simply opening the packet; and (b) there was no evidence to show that it was not reasonably expected of him, in the circumstances, to open the packet to see what was in it. *In short, the appellant has failed to prove the contrary of what s 18(2) of the MDA presumes in the present case as he neglected or refused to take reasonable steps to find out what he was asked to deliver to Ah Boy on 19 December 2009 in circumstances where* ***a reasonable person having the suspicions that he had*** *would have taken steps to find out* (*viz*, by simply opening the Brown Packet to see what was in it). [emphasis added in italics and in bold italics]

It may be seen from this extract that the Court of Appeal in *Dinesh Pillai* did not find that the accused was "wilfully blind" in the legal sense (*ie*, as the legal equivalent of actual knowledge). Rather, the Court of Appeal was of the view that *because the accused had turned a blind eye* to the contents of the "Brown Packet", he failed to prove *on a balance of probabilities* the contrary of what s 18(2) of the MDA presumes.

58 Admittedly, there will often be many similarities and overlapping considerations between the issue of wilful blindness, and the issue of whether an accused could reasonably be expected to have known the nature of the drug in his or her possession. However, I reiterate the crucial differences between the two matters. I do so because in the closing submissions, both defence counsel have focused on the former, and not fully addressed the latter. Wilful blindness, as "lawyer-speak" for actual knowledge inferred from the circumstances, must be proved by the Prosecution *beyond a reasonable doubt*. As stated in *Nagaenthran* at [30], a finding of wilful blindness must be "an irresistible inference" and "the only rational inference available on the facts". Furthermore, a decision not to make specific inquiries must be a *deliberate* one and assessed subjectively. In contrast, to rebut the presumption under s 18(2) of the MDA, the accused bears the burden of showing that *on a balance of probabilities* he or she did not know or *could not reasonably be expected to have known* the nature of the drug in his or her possession. As stated in *Dinesh Pillai* at [21], this depends on whether in the circumstances, *a reasonable person having the same suspicions as the accused* would have taken steps to find out its nature. In other words, the accused's conduct is measured against that of a *reasonable person* in his or her shoes. With that, I turn to analyse the evidence and set out my findings in relation to the first and second accused respectively.

*Findings with respect to the first accused*

59 I note that the first accused has consistently maintained that while he knew that the two bundles contained drugs, he did not know the exact type of drugs he was transporting. He is not a drug user. Also, he is certified by IMH as having "borderline to low average" intelligence. In cross-examination by Mr Thuraisingam, W/SSgt Norizan agreed that both accused persons were "co-operative" and "came clean and admitted that there were drugs in the bag". Similarly, IO Sim also agreed with Mr Thuraisingam that there was no reason to disbelieve the first accused's evidence that he did not know the type of drug he was transporting. Given the above, I accept that there is *a reasonable doubt* as to whether the first accused knew or was wilfully blind to the nature of the

drugs that he was trafficking. However, the crucial question is whether the presumption under s 18(2) of the MDA has been rebutted on a balance of probabilities by the first accused.

60 I begin by considering the first accused's knowledge of drugs and drug dealings at the material time. When Raja first approached the first accused with the job, the first accused already suspected that it had something to do with the delivery of drugs. This was despite Raja not giving the first accused any details about the job at that time, except to say that it would be dangerous (see para 17 of the first accused's first long statement dated 31 August 2012 reproduced at [18] above). The fact that the first accused suspected that the job which Raja was offering him involved the delivery of drugs only on the basis that the job was a "dangerous" one shows that from the outset, he was not as innocent and naïve about drugs and drug dealings as claimed.

61 Secondly, the first accused asserted that prior to meeting Raja, he did not have any involvement in drugs. That may well be so. However, what is critical is that after meeting Raja, the first accused has been delivering drugs for about two months. In his first long statement of 31 August 2012, the first accused admitted to about six to seven deliveries of drugs using the Motorcycle (see [20] above). The first accused collected substantial amounts from persons they delivered the drugs to, and would have known that the drugs were valuable. He was told by Raja that he could earn a lot of money from the dangerous job (see [18] above).

62 Thirdly, while the first accused denied knowledge that there were different consequences for dealing with different types of drugs, what is more telling is that the first accused clearly knew that drugs were illicit items. In his oral statement, when asked whether he had anything to surrender, the first accused confessed that there were two packets of drugs in the black haversack (see [16] above). He also knew that the drugs had to be concealed in the Motorcycle before the trips into Singapore. It is plain from these facts that the first accused knew that, in delivering drugs, he was involved in illegal transactions.

63 More importantly, contrary to the submission of Mr Thuraisingam, I find that an irresistible inference to be drawn is that the first accused clearly *knew* that different types of drugs existed. In his contemporaneous statement, he said that he knew that the bundles contained drugs, but did not know "*what drugs*" (see [16] above). In para 18 of his first long statement recorded on 31 August 2012, again, he said he did not know *what type of drugs* they were (see [18] above). In cross-examination, the first accused also gave evidence that he had tried to ask Raja what type of drugs he was to deliver, but Raja had told him not to ask questions and simply do the delivery (see the extracts quoted above at [32]–[33]). The very fact that the first accused was able to ask Raja what *type* of drug he was to carry into Singapore, and also state that he did not know "what drugs" he was in possession of reveal that in the first place, the first accused had knowledge that different types of drugs existed.

64 From the analysis above, the picture that emerges is that the first accused knew that delivering drugs is dangerous, that drugs are illegal, that the drugs are worth substantial amounts, that he would be paid well for the deliveries and that there are different types of drugs. I am not persuaded that the first accused was as ignorant of drugs and dealings in drugs as claimed.

65 Given such knowledge of the first accused, I turn to consider what *a reasonable person* in his shoes would have done to find out the nature of the drugs. It bears reminding that in his first long statement recorded on 31 August 2012, the first accused stated that he was initially afraid to do the job, and only agreed to do so after Raja's assurances that he would "take care of everything" (see [18] above). In cross-examination, he testified that he had tried to find out the nature of the drugs from Raja, but was simply told not to ask questions. Besides the above, there is no evidence of any

other checks or inquiries made by the first accused.

66 In this regard, Mr Thuraisingam's submission is that the lack of further inquiries must be viewed in the light of the first accused's "borderline to low average" intelligence, as well as the threats which Raja made about the second accused's family. Although Mr Thuraisingam accepts that the threats do not constitute the defence of duress, he argues that the threats show that the first accused's failure to make further inquiries did not constitute wilful blindness. Further, Mr Thuraisingam points out that it would be artificial to require the first accused to take further steps to check on the nature of the drugs. The first accused has never seen drugs or diamorphine before, and has not even heard of diamorphine.

67 In my opinion, the inquiries made by the first accused of Raja fell far short of what would be expected of a reasonable person. Unlike the accused in *Khor Soon Lee v Public Prosecutor* [2011] 3 SLR 201 ("*Khor Soon Lee*") (a case referred to by parties) who sought assurances from a dealer whom he had "a close and personal relationship" with, the first accused admitted under cross-examination that he had no reason to trust Raja. In fact, in light of Raja's threats and his alleged refusal to disclose the nature of the drugs, I find that there is no basis for the first accused to rely on Raja's assurances. It was incumbent on the first accused to make the appropriate inquiries.

68 I observe that the first accused might have had at least one possible avenue to seek information about the nature of drugs he was dealing with, the different types of drugs and the consequences of transporting such different types of drugs into Singapore. Given that he was working in Singapore, the first accused might have approached his colleagues or persons whom he came into contact with at his workplace. He had been employed for about a month before his arrest. I am not satisfied that, on a balance of probabilities, the *only* means of finding out more information about the drugs was through Raja.

69 I further observe that the first accused had more than ample time and opportunity to make such inquiries. It was not disputed that the accused persons were arrested after various trips to deliver drugs to Singapore. In fact, the first accused was only arrested at the end of his workday on 27 August 2012. While there appeared to be threats and intimidation by Raja, the first accused admitted that he was out of Raja's reach when he went to work on 27 August 2012. Up to the day of the arrest, the first accused could have taken steps to ascertain the nature of the drugs.

70 As for the first accused's evidence that he has not seen drugs or diamorphine before, I note that the first accused testified under cross-examination that he could have opened packaging of the bundles to inspect its contents, but did not do so:

> Q: … These are two black bundles found in the haversack. Would you agree—well, these are taped---two plastic bags---bundles which are wrapped around with a black plastic bag, okay? Would you agree with me that you could have opened these bundles if you had wanted to?
>
> A: Yes, Your Honour.
>
> Q: But you didn't, right.
>
> A: Yes, Your Honour.

Mr Thuraisingam submits that the MDA does not impose a "positive duty" on an accused person to inspect and determine what he or she is in possession of. That may well be so. However, I am not

convinced that it advances the first accused's defence to say that he has not seen drugs or diamorphine before when it was his *deliberate* decision not to open up the packages so as to check on such drugs or diamorphine, or to make any other inquiries.

71 On all the surrounding facts and circumstances, I find that a reasonable person in the shoes of the first accused would have grave suspicions about the nature of the drugs which he was being asked to deliver, and would have taken steps to inquire further. In the face of Raja's threats and alleged secrecy, a reasonable person would not have merely relied on Raja's assurances alone. In assessing the evidence, I am mindful that the first accused is of an intelligent quotient of "borderline to low average range of functioning". Nonetheless, with what the first accused already knew of the transactions he was involved in, it is evident to me he was not incapable of making further inquiries about the nature of the drugs, and the possible consequences for carrying the drugs. I am unable to agree with Mr Thuraisingam's contention that it was "artificial" to expect him to do so. Moreover, there was no evidence that he even *attempted* to do so.

72 In failing to check further despite having more than sufficient time and opportunity to do so, the first accused effectively turned a blind eye to the nature of the drugs. Indeed, the first accused's evidence under cross-examination was that he "did not care" about the type of drugs he was being asked to transport, and that he agreed to do the job for Raja for money. While threats and intimidation by Raja were mentioned in his various statements, he also alluded to the fact that he was motivated to deliver drugs for the money. Accordingly, I find that the first accused has not proved on a balance of probabilities that he could not reasonably be expected to have known the nature of the drugs found in his possession. He has failed to rebut the presumption of knowledge under s 18(2) of the MDA.

*Findings with respect to the second accused*

73 Like the first accused, the second accused's consistent position was that he did not know the type of drugs he was transporting. It is also not disputed that he is not a drug user. Once again, I accept that the Prosecution has not proved beyond reasonable doubt that the second accused knew or was wilfully blind to the nature of drug that he was trafficking.

74 I turn to consider whether the second accused has rebutted on a balance of probabilities the presumption within s 18(2) of the MDA. Similarly, my evaluation starts with what the second accused knew. Firstly, when told that he would be paid "lots of money" for the delivery of "food", the second accused suspected that something was amiss. This prompted him to question Raja further, which led to his discovery that by "food", Raja actually meant drugs (see the extracts of the second accused's first long statement dated 30 August 2012 quoted above at [26]). From the outset, the second accused knew that he was being asked to deliver drugs for substantial monetary rewards.

75 Next, from the same extracts of his first long statement dated 30 August 2012, the second accused stated that when he found out that "food" in fact meant drugs, "both [the first accused] and I did not want to do the job and we told Raja we were scared to do [it]". Therefore, the second accused knew that it was a dangerous activity. Further, he also knew that the undertaking was an illegal one. He knew that the drugs had to be concealed in the Motorcycle. When asked by W/SSgt Norizan after his arrest whether he had anything to surrender, in his oral statement, he confessed that he had money and drugs to surrender (see [25] above).

76 Third, although the second accused said that he has not been involved in other drug dealings in Malaysia, the second accused has been involved in the delivery of drugs to Singapore for about two months. In this regard, he prevaricated on how many prior deliveries he has carried out before his

arrest. In his first long statement recorded on 30 August 2012, the first accused said that they did two deliveries in July 2012, and then six deliveries in August 2012 on the Motorcycle (see [27] above). In his second long statement recorded on 1 September 2012, he said that they did four deliveries in August 2012 on the Motorcycle. In cross-examination, he admitted to at least a few deliveries. What is clear is that in the course of such work, the second accused collected substantial amounts from persons they delivered the drugs to. A sum of $2,500 was collected on the day of the arrest for the delivery of *one* bundle of drugs. Thus, he knew the substantial worth of the drugs.

77 Contrary to Mr Amolat's submission, the evidence demonstrated that the second accused knew that different types of drugs existed. In his first long statement recorded on 30 August 2012, he said:

> 4 …Both of us knew that we were going [to Block 230 Yishun] to handover the black bundles containing drugs. However, we do not know *what type* of drugs they were.
>
> …
>
> 10… [During the photograph taking session, when] the officers removed the black plastic from the bundle, I saw that it contains a plastic packet of brown granular substances. I know the brown granular substances were drugs but *I do not know what type of drugs it was*. [emphasis added]

Further, in the second accused's second long statement recorded on 1 September 2012, he explained how the drugs were placed in the motorcycle prior to the making of the first delivery saying:

> 21 … Raja told us to observe how his men were placing the drugs inside the motorcycle. I do not remember the registration number. There were about 2 or 3 of Raja's men. [The first accused] and I then saw them placing 2 bundles of food in the side body cover of the motorcycle. *We knew the 2 bundles of food were actually drugs but we did not know what type of drugs they were*. … [emphasis added]

78 Then, in cross-examination, the second accused stated that he had tried to find out what *type* of drug Raja asked him to deliver:

> Q: Do you agree that you never asked Raja what type of drug was in the---were you--- you were supposed to delivery?
>
> A: I asked, Your Honour. He said it is food.
>
> Q: Okay. You asked and he said it is food. And did you try to further find out what type of drug it was after that?
>
> A: I did not try but---
>
> Q: Yes.
>
> A: ---I was scared to try.

79 In my view, the irresistible inference to be drawn from the fact that the second accused was able to consistently state in these statements that he did not know what *type* of drugs he was delivering is that he was aware that there are different types of drugs. Similarly, given that he tried to find out from Raja the type of drugs he was delivering indicated that he knew that different types of drugs existed. I note at this juncture that the Prosecution's suggestion in its closing submission

that the second accused knew that different type of drugs existed is at odds with the cross-examination of the second accused. Pertinent portions of the cross-examination have been set out above at [39]. In summary, the Prosecution asked the second accused if he "didn't know the different type of drugs" and the second accused agreed that he did not know. It is unsatisfactory for the Prosecution to have cross-examined the second accused on the basis that he "didn't know the different type of drugs" and yet suggest in its closing submissions that the second accused knew that different types of drugs existed. However, in evaluating the evidence, I find that the second accused's position that he did not know about the different types of drugs was contradicted by his long statements, and the other evidence in cross-examination set out above.

80 From the foregoing, at the material time, the second accused knew the dangerous nature of the enterprise, that drugs are illegal, the substantial worth of drugs, the fact that he would be paid "lots of money" for deliveries, and that different kinds of drugs exist. Like the first accused, the second accused is not quite as ignorant about drugs and the drugs trade as he portrayed himself to be.

81 In light of such circumstances, did the second accused act as a reasonable person in his shoes would have done? As stated in his first long statement of 30 August 2012, when he expressed reservations about taking on the job, Raja assured the second accused that he would take care of everything (see [26]). As stated in cross-examination, he also made one apparent attempt to find out more about the type of drugs from Raja. In my view, these efforts were woefully inadequate.

82 Just like the first accused, the second accused had no reason to trust Raja. In fact, Raja allegedly threatened harm to the second accused's elder sister if the second accused failed to comply. The second accused also stated in his second long statement dated 1 September 2012 that Raja had threatened harm to him and the first accused if they revealed to anyone that they were doing drug delivery jobs for Raja. Alarm bells should have been ringing in the second accused's mind as to what exactly he was dealing with, and he should have been concerned to find out more from other sources.

83 As in the case of the first accused, the second accused might have approached his colleagues or persons at his workplace. Further, while I appreciate that the second accused might have been hesitant about involving the second accused's elder sister and her family who lived in Johor Bahru, they remain parties which the second accused could have approached discreetly given the dangerous nature of the transactions.

84 Furthermore, I reiterate that the accused persons were arrested after a full day of work on 27 August 2012. Prior to the day of arrest, the second accused had carried out a number of deliveries. Undoubtedly, there was ample time and opportunity to make inquiries from sources other than Raja.

85 As for the nature of inquiries, the second accused could have opened up the bundles and sought to find out the nature of drugs he was carrying with the further information from such inspection. Knowing that there were different types of drugs, he could have generally sought to find out more information about the different types of drugs, and the consequences which flow from dealing with different types of drugs. However, there was no evidence that the second accused even *attempted* to make any such inquiries.

86 In this regard, Mr Amolat points out that it has not been shown that the second accused knew that diamorphine was one of the different types of drugs. In fact, the second accused has not heard of or seen diamorphine before. I do not accept these as points which strengthen the defence. Even if it is true that the second accused has not seen or heard of diamorphine before, this does not

inevitably mean that he would not have discovered, upon making further inquiries, that the drugs which Raja tasked him to deliver were diamorphine. As I stated in relation to the first accused, the second accused can hardly expect much weight to be placed on the fact that he has not seen or heard of diamorphine before as it was his conscious decision not to examine the contents of the packages, or find out about the contents.

87 I pause to comment on the credibility of the second accused. In my view, on certain material aspects, the second accused shifted his position, and changed his evidence in court. First, the second accused initially testified in examination-in-chief that when he did his first drug delivery for Raja, he did not know what he was delivering. This was contrary to the contents of his first long statement dated 30 August 2012. When Mr Amolat referred the second accused to the relevant portion of that statement, the second accused accepted the position in the statement. In view of this, as stated above at [74], I do not accept the second accused's testimony that he did not know what he was delivering when he did his first drug delivery for Raja. Secondly, as discussed above at [76], the second accused was evasive about the number of prior deliveries he had done. Thirdly, as I discuss below in relation to the defence of duress at [96]–[97], he also sought to embellish his evidence in relation to the nature of the threats made by Raja. I note that W/SSgt Norizan and IO Sim expressed the view that the second accused co-operated with the CNB officers, and was forthright and not evasive in giving his respective statements. Be that as it may, I find that in court, the second accused has sought to bolster his defence by tweaking his evidence.

88 In light of all the circumstances, I find that a reasonable person in the shoes of the second accused would have deep suspicions about the nature of the drug which he was being asked to deliver, and would have taken steps to inquire further, especially in the face of Raja's threats and alleged non-disclosure. Instead, the second accused turned a blind eye to the nature of the drug. He made no attempts to open up the bundles, to inquire about the nature of the drugs from other persons, to find out about the different types of drugs or the consequences of carrying different types of drugs. I am perturbed by his evidence in cross-examination that he would have brought any drug into Singapore on the day of his arrest (see [39]). Despite the threats and intimidation, his main motivation appeared to have been the money he would receive. In all these circumstances, and given that he has not been completely forthcoming in his evidence in court, I find that the second accused has not proved on a balance of probabilities that he could not reasonably be expected to have known the nature of the drugs. He has failed to rebut the presumption under s 18(2) of the MDA.

*Concluding remarks*

89 In closing on this issue, I discuss two cases cited by the parties. First, I return to *Khor Soon Lee.* There, the accused had assisted in transporting erimin, ketamine, ecstasy and ice on a significant number of occasions. He had sought assurances from his dealer that the drugs were not diamorphine as he was afraid of the penalty, and the dealer provided such assurances. The Court of Appeal noted that the accused had "a close and personal relationship" with his dealer and therefore trusted his dealer (at [25]). In the circumstances, there was basis for him not to check the package. Next, in *Public Prosecutor v Phuthita Somchit and another* [2011] 3 SLR 719, the accused denied knowing that the drug in her possession was diamorphine. Her case was that she believed that she was transporting a "not serious drug", and not diamorphine. Lee Seiu Kin J found that the accused was "a witness of truth" (at [31]) and found that the accused had a "*genuine belief* that the drugs she dealt with were 'not serious'" (at [39]) [emphasis added]. Lee J also held that the accused's failure to make further inquiries was a result of her trust in the co-accused, with whom she was in a relationship with, and was not a refusal to investigate further in order to avoid her suspicions being confirmed. These accused persons, who knew they were dealing with drugs but believed that the drugs in their possession were drugs *other than* diamorphine, were found to have rebutted the

presumption under s 18(2) of the MDA.

90 In contrast to the above, the first and second accused had *no qualms* about trafficking in *the particular drug* which was in their possession, and which they *knew* that they had in their possession, regardless of the ensuing consequences. Here, the observations by the Court of Appeal in *Tan Kiam Peng v PP* are apposite (at [130]):

> Situations such as that which exists on the facts of the present appeal underscore this point since the accused **already knows that he or she is carrying controlled drugs** and surely cannot rely *merely* on the fact that he or she had asked for assurances that the controlled drugs concerned were not of a nature which carried the death penalty. **If the accused chooses to take an enormous (indeed, deadly) risk and proceed without establishing the true nature of the drugs he or she is carrying, that constitutes, in our view, wilful blindness.** … It is also clear that the accused has a real choice to decide not to proceed if satisfactory answers are not forthcoming, especially where liberty or even life is at stake. [emphasis in original in italics; emphasis added in bold]

91 There is no evidence to show that first and second accused even *sought* any such assurances as to the consequences for carrying the drugs. They were content to carry whatever drugs came their way. By not seeking to verify the nature of the drugs further, the first and second accused have run an enormous and deadly risk. To the extent that the accused persons disregarded the specific nature of the drugs they were carrying, their assertions that they did not know the nature of the diamorphine in their possession are not sufficient, on a balance of probabilities, to rebut the presumption of knowledge under s 18(2) of the MDA.

***The defence of duress***

92 I now turn to the defence of duress which is provided under s 94 of the Penal Code as follows:

> **Act to which a person is compelled by threats**
>
> **94.** Except murder and offences against the State punishable with death, nothing is an offence which is done by a person who is compelled to do it by threats, which, at the time of doing it, reasonably cause the apprehension that instant death to that person or any other person will otherwise be the consequence:
>
> Provided that the person doing the act did not of his own accord, or from a reasonable apprehension of harm to himself short of instant death, place himself in the situation by which he became subject to such constraint.
>
> [explanations omitted]

93 To establish the defence of duress, an accused must prove on a balance of probabilities the following five ingredients (see *Public Prosecutor v Ng Pen Tine* [2009] SGHC 230 at [154] and *Public Prosecutor v Nagaenthran a/l K Dharmalingam* [2011] 2 SLR 830 ("*PP v Nagaenthran (HC)*") at [16]):

(a) the harm that the accused was threatened with was death;

(b) the threat was directed at the accused or other persons which would include any of his family members;

(c) the threat was of "instant" death;

(d) the accused reasonably apprehended that the threat will be carried out; and

(e) the accused had not, voluntarily or from a reasonable apprehension or harm to himself short of instant death, placed himself in that situation.

94 In *PP v Nagaenthran (HC)*, Chan Seng Onn J also stated:

> 17 … Duress under s 94 of the Penal Code must be "imminent, persistent and extreme", … with the word "imminent" suggesting that the threatened harm need not be carried out immediately or within a very short time span…
>
> …
>
> 28 … [I]n order for the defence to succeed, a threat must both be "imminent, persistent and extreme" in its character *and* capable of impressing upon the accused person (and did in fact impress or was still impressing upon the accused person at the time of the commission of the offence) a reasonable apprehension that "instant death" would otherwise be the consequence of the accused's failure to commit the crime. In other words, the requirement of "instant death" as contemplated by the accused governs the time permitted to elapse between the time at or by which an accused is supposed to commit the crime as instructed by the coercer … and the time at or by which the contemplated execution of the coercer's threat would have otherwise been consequence of the accused's failure to commit the crime as instructed … , whereas the requirement of "imminent, persistent and extreme" went towards the causality between the threat acting on the mind of the accused and the breaking of the law by the accused person. Where the accused person had a reasonable opportunity to escape from or neutralise the threat made by the coercer, the causation link would be broken and the defence of duress would then not be available to the accused. [emphasis in original]

95 Mr Amolat submits that the defence is made out on a balance of probabilities by the second accused. First, Raja had threatened to kill the second accused's elder sister's family if the second accused did not deliver the drugs. This evidence is credible as it was corroborated by the first accused. Secondly, the threat issued by Raja was "imminent, persistent and extreme" in character as Raja had backed up his threats by informing the second accused of his elder sister's address, tracking the whereabouts of the first and second accused even when they were in Singapore, and also by showing the first and second accused a video clip of many people, including Raja, beating someone up. Thirdly, Raja's threats *caused* the second accused to perform the deliveries. This was because Raja had cunningly entangled the second accused in a web of debts which led them to becoming not just Raja's employees, but also his debtors. They were saddled with the instalment payments on the Motorcycle, and had to pay Raja for room rental. Fourthly, there was no reasonable opportunity for the second accused to escape from or to neutralise Raja's threats. Crucially, the Prosecution neither put it to the second accused that there were reasonable opportunities of escape, or what those reasonable opportunities were.

96 Upon reviewing the totality of the evidence, I am not satisfied that the defence has been made out. For one, the evidence is equivocal as to whether the harm the second accused was threatened with was *instant death*. In this regard, the second accused only brought up Raja's threats in his second long statement recorded on 1 September 2012. Even then, all that was mentioned was that Raja had threatened to "cause trouble" to the first and second accused's family members. It was only at the trial that the second accused mentioned that the threat was to "beat them and kill them".

97 Insofar as the second accused relies on the first accused to corroborate his account, I should state that the first accused only brought up such threats in the first long statement recorded on 31 August 2012, and not in his oral or contemporaneous statements. Further, in the first long statement, the first accused stated that their "families would be in trouble". It was only during the trial that the first accused said that Raja threatened that their family "won't be alive". To me, it is noteworthy that prior to the trial, neither the first nor the second accused mentioned that Raja had made any threats which would lead to a reasonable apprehension that *instant death* would be caused to the second accused's family members. These appear to be embellishments at the trial. I do not accept that there were such threats of instant death.

98 Moreover, even if I were to accept that such threats of instant death existed, I am of the view that these were not "imminent, persistent and extreme". Rather, I accept the Prosecution's submission that the threats were not operating on the second accused's mind at the time of the offence. Firstly, if the threats had been "imminent, persistent and extreme", it is more likely than not that the second accused would have brought this up to the CNB officers at the earliest opportunity. However, no mention was made of any threats made by Raja in the second accused's oral, contemporaneous and cautioned statements. Instead, the second accused stated in his cautioned statement that he had committed the offence for money. The fact that the second accused was informed during the recording of the cautioned statement that the punishment for the offence which he committed was death, but failed to raise the defence of duress therein counts against him. Significantly, the second accused also made no mention of Raja's threats in his first long statement recorded on 30 August 2012 where he had described his relationship with Raja, and how he had come to know Raja, in detail.

99 Additionally, I note that the second accused was working before his arrest on 27 August 2012. The fact that the second accused was able to work despite the threats shows that the threats from Raja, if any, were not "imminent, persistent or extreme". Help could have been sought by the second accused from his fellow colleagues, but there was no evidence that this was done.

100 Indeed, the second accused was unable to recall *when* Raja had last threatened him, and *what* Raja had said. This shows that any threats which Raja had made were not "imminent, persistent and extreme". This exchange between the second accused and Mr Amolat during re-examination is pertinent:

> Q: … Now, before the 27th of August, that means before the day you were arrested, can you say how many more---how many days before that Raja had threatened you? Prior to 27th August.
>
> …
>
> A: He started threatening after my first delivery.
>
> Q: But in terms of number of days are you able to explain to Her Honour before the 27th when was the last time he threatened you?
>
> A: *I can't recall.*
>
> …
>
> Q: Right. Now, in your conversation on the 26th of August, did Raja threaten you?
>
> A: Threaten---threaten for?
>
> Q: Did Raja threaten you in the way you mentioned to threaten to harm you---

Court: In any way.

Singh: In any way, Your Honour. Obliged.

A: *Sometimes I tell him that I will not do it then that is when he will scold me.*

Court: We're asking about the 26th of August, right, the date before the arrest, the last time you spoke to Raja. What did Raja say to you?

Witness: *I can't recall Your Honour.*

[emphasis added]

101 It may well be true that Raja intimidated and threatened the first and second accused, and sought to control their movements. Also, the accused persons appeared to have landed themselves in an unfortunate plight of having to pay the instalment payments for the Motorcycle and room rental. However, the evidence did not go so far as to make out the ingredients of the defence of duress on a balance of probabilities.

102 While Mr Thuraisingam concedes that the first accused is unable to rely on this defence, for completeness, I set out my views on this issue. As stated above, I reject the evidence of both the accused persons that there were any threats of *instant death*. In any event, I note that the first accused admitted that when he came to work in Singapore on 27 August 2012, he was out of Raja's reach. The first accused's admission demonstrates that the threats, if any, did not operate on the first accused's mind at the material time of the offence. I agree with Mr Thuraisingam that the defence is not applicable.

***The admissibility of the first accused's long statement recorded on 13 February 2013***

103 I turn now to Mr Thuraisingam's submission that the first accused's third long statement recorded on 13 February 2013 is inadmissible. Mr Thuraisingam took objection because the Prosecution sought to establish during cross-examination that the first accused's "main purpose of giving this statement was to try to get the charge against [him] reduced to a non-capital one". By reason of the Prosecution's characterisation of the statement, it is submitted that the document is inadmissible as it is covered by the "without prejudice" privilege. Reliance was placed on *Public Prosecutor v Knight Glenn Jeyasingam* [1999] 1 SLR(R) 1165, *Ng Chye Huay and another v Public Prosecutor* [2006] 1 SLR(R) 157 and *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239. On the other hand, the Prosecution did not dispute that privilege attaches to representations, which form a crucial facet of Singapore's judicial system. However, the Prosecution submits that being an investigative statement, it is admissible under s 258 of the CPC.

104 In gist, the first accused stated in this statement that only half of the drugs with which he was charged belonged to him, and sought to be charged for trafficking in only those drugs instead. As stated above at [52], the first accused did not pursue this position at trial. In brief, I agree with the Prosecution's submission that this statement is admissible under s 258 of the CPC. In any case, I do not give the statement any weight as I do not find the contents of that statement crucial.

**Conclusion**

105 For the reasons given above, I find that the Prosecution has proved the respective charge against the first and second accused beyond a reasonable doubt. Accordingly, I find them guilty and

convict them of the respective charge. I will proceed to the sentencing of the accused persons.