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14. CRIMINAL LAW

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I. Introduction

14.1 This review is in four parts. These will examine cases relating to the general part of the criminal law, and cases involving offences under the Penal Code,[2] the Misuse of Drugs Act[3] ("MDA"), and other statutes respectively.

II. General part of criminal law

A. Causation

14.2 In *Seah Lei Sie Linda v Public Prosecutor*,[4] the Court of Appeal considered the scope of causation in the context of maid abuse offences.

14.3 The applicant ("Seah") was charged with and convicted on six charges for abusing her domestic helper. Three of these charges were framed in terms of Seah having abetted her domestic helper to voluntarily

1 Any views expressed in this chapter are the authors' own views, and do not represent the views of the Attorney-General's Chambers.
2 Cap 224, 2008 Rev Ed.
3 Cap 185, 2008 Rev Ed.
4 [2020] 1 SLR 974.

cause hurt to herself, by instructing her to commit acts of self-harm, including pouring hot water on herself.

14.4 Seah appealed against her conviction and sentence. On appeal, the High Court amended the three abetment charges, removing references to abetment and reframing the charges in terms of Seah having voluntarily caused hurt to her helper by instructing the latter to commit acts of self-harm. The High Court convicted Seah on the amended charges, and imposed the same sentence meted out at first instance.

14.5 Seah then sought leave to bring a criminal reference to the Court of Appeal, in respect of the following questions:

> (a) Question 1: Whether the offence of voluntarily causing hurt under s 323 of the Penal Code can be committed by a person (the "first person") who instructs a second person to carry out acts which form the *actus reus* of the said offence, if such acts are carried out by the second person in consequence of the said instructions?
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> (b) Question 2: If the answer to Question 1 is in the affirmative, whether the said offence under s 323 of the Penal Code is made out if the second person has, in consequence of the first person's instructions, performed the said acts on himself?

14.6 The Court of Appeal held that the answers to these questions were "clearly and obviously 'yes'"; thus, the questions were not questions of law of *public interest* that could be the subject of a criminal reference.[5]

> (a) The court observed that if Seah had poured the hot water on the victim, there would have been no issue of causation. Alternatively, if Seah had procured someone else to pour the hot water on the victim, there would also have been no question of causation, as Seah would have been liable for abetting the offence by instigation. The analysis could not differ simply because the victim was instructed to inflict the harm to herself, given that the victim had no real choice in the matter. When Seah instructed the victim to cause hurt to herself, she had every reason to believe that her instructions would be carried out, because the victim had no real choice to speak of. Thus, there was no doubt that Seah had caused hurt to the victim.[6]
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> (b) The court noted that the view that Seah had caused hurt to the victim was consistent with s 39 of the Penal Code, which

5 *Seah Lei Sie Linda v Public Prosecutor* [2020] 1 SLR 974 at [18].
6 *Seah Lei Sie Linda v Public Prosecutor* [2020] 1 SLR 974 at [14].

> states that "[a] person is said to cause an effect 'voluntarily' when he causes it by means whereby he intended to cause it". Here, the relevant "effect" was the hurt to the victim, the intended means was Seah's instruction to the victim to inflict that hurt on herself, and the hurt inflicted, pursuant to Seah's instruction, was precisely what Seah intended.[7]

14.7 The above sufficed to dispose of Seah's application for leave to bring a criminal reference. However, the court proceeded to consider the High Court decision of *Chua Chye Tiong v Public Prosecutor*[8] ("*Chua Chye Tiong*"). In *Chua Chye Tiong*, the offender was the manager of a branch of a car trading company. An unknown person drove a de-registered car stationed at the offender's branch. The offender was charged and convicted of an offence under s 29(1) of the Road Traffic Act[9] for *causing* a vehicle to be used without a licence. On appeal, the High Court upheld the conviction, holding that the offender's "endorsement of [a] lax practice", which led to the removal of the car from the branch premises, fell within the meaning of "cause".[10]

14.8 The Court of Appeal held that *Chua Chye Tiong* had adopted "an incorrect and unduly expansive view of causation".[11] Causation "denotes an *active act* that is within the control of the causative actor; the omission in *Chua Chye Tiong* could not have … come within this definition". At best, the offender in *Chua Chye Tiong* was negligent or had "permitted" the unlicensed car to be used.[12] The court endorsed Lord Goddard CJ's definition of causation in the similar case of *Shave v Rosner*,[13] where the offender was charged with causing a van to be used on the road in a dangerous condition: "'causes' involves a person, who has authority to do so, ordering or directing another person to use it". On this definition, the offender in *Chua Chye Tiong* could not be said to have caused the use of the unlicensed car, albeit the conviction might have stood on the basis that he had permitted the car to be used.[14]

14.9 The court concluded by noting that the issue of causation arises in different contexts: as part of the *actus reus* of an offence, in the context of sentencing, or in an inquiry into the damages caused by a tort. Where

7 *Seah Lei Sie Linda v Public Prosecutor* [2020] 1 SLR 974 at [16]–[17].
8 [2004] 1 SLR(R) 22.
9 Cap 276, 1997 Rev Ed.
10 *Chua Chye Tiong v Public Prosecutor* [2004] 1 SLR(R) 22 at [29].
11 *Seah Lei Sie Linda v Public Prosecutor* [2020] 1 SLR 974 at [21].
12 *Seah Lei Sie Linda v Public Prosecutor* [2020] 1 SLR 974 at [21].
13 [1954] 2 All ER 280.
14 *Seah Lei Sie Linda v Public Prosecutor* [2020] 1 SLR 974 at [24].

causation was an element of an offence, it should be understood more strictly because of the potential penal consequences.[15]

14.10 The court's observation that causation requires an active act within the agent's control should be read in the light of the facts of *Chua Chye Tiong*. It is trite that illegal omissions – omissions that are offences, prohibited by law, or which furnish grounds for a civil action – can be offences.[16] But in *Chua Chye Tiong*, the offender's omission does not appear to have been illegal. Thus, the offender could not be said to have caused the unlicensed car to be used without an active act on his part.

B. Common intention

(1) Permissibility of differing common intention charges

14.11 In *Public Prosecutor v Aishamudin bin Jamaludin,*[17] the Court of Appeal considered whether the Prosecution may charge accused persons who participate in the same criminal enterprise with differing common intention charges (that is, charges based on a common intention between the accused persons, but of differing severity).

14.12 The respondent ("Aishamudin") was tried in the High Court with two co-accused persons ("Azli" and "Roszaidi"). The Court of Appeal issued a separate judgment for Azli's and Roszaidi's appeals – this is discussed below.[18] The key facts relevant to Aishamudin were as follows: Aishamudin and his colleague ("Suhaizam") were truck drivers, who delivered goods from Malaysia to Singapore. In carrying out deliveries, Aishamudin would also deliver drugs he received from drug suppliers to recipients in Singapore and, before his arrest, had worked together with Suhaizam to deliver drugs. On the day of his arrest, Aishamudin collected drugs including a capital quantity of diamorphine from his supplier, and then agreed with Suhaizam that they would deliver the drugs to recipients in Singapore. The pair entered Singapore in a truck driven by Suhaizam. Upon reaching a specified location, Aishamudin handed the bag containing the drugs to Roszaidi. All parties involved in the delivery and collection of the drugs were then arrested by the Central Narcotics Bureau ("CNB").

14.13 Aishamudin was charged, under s 5(1)(*a*) of the MDA and s 34 of the Penal Code, with a capital charge of trafficking in not less than *32.54g*

15 *Seah Lei Sie Linda v Public Prosecutor* [2020] 1 SLR 974 at [26].
16 See ss 32 and 43 of the Penal Code.
17 [2020] 2 SLR 769.
18 See paras 14.64–14.76 below.

of diamorphine, by delivering the said drugs to Roszaidi in furtherance of his common intention with Suhaizam. Suhaizam faced a similar charge, but the quantity of diamorphine in his charge was stated to be not less than *14.99g* of diamorphine. Suhaizam's charge was thus a non-capital charge, and he pleaded guilty to it and was convicted accordingly.

14.14 The High Court considered that it was logically unsound for the Prosecution to have charged Aishamudin and Suhaizam with a common intention to traffic in different amounts of diamorphine.[19] Thus, the High Court amended Aishamudin's charge such that it referred to not less than 14.99g of diamorphine and convicted him on the amended charge. The Prosecution appealed against the High Court's decision to amend the charge. The Court of Appeal allowed the Prosecution's appeal and convicted Aishamudin on the original charge, for the reasons below.

14.15 The Court of Appeal first reviewed the prevailing law on the Prosecution's entitlement to charge participants in a criminal enterprise with different offences, and distilled two principles from the cases (none of which involved differing common intention charges). First, the Prosecution could charge participants in a criminal enterprise with different offences, so long as the prosecutorial decisions were unbiased, not based on irrelevant considerations, and did not breach Art 12(1) of the Constitution of the Republic of Singapore[20] ("the Constitution"). Second, the relevant issue was not the seeming inconsistency between differing charges, but whether the Prosecution was able to prove all the elements of the more serious charge.[21]

14.16 The court then turned to consider whether the position should be different where common intention charges were involved. The court observed that the text of s 34 of the Penal Code was of critical importance and anchored the analysis. Section 34 did not refer to the *charge(s)* or *offence(s)* arising out of a criminal act, nor purport to make each party to the criminal act *liable in the same manner*. Instead, it made an offender liable even for acts carried out by others pursuant to a shared common intention, as if the offender carried out those acts. There was therefore nothing in the language of s 34 that mandated the Prosecution to bring identical charges against all persons charged pursuant to a common intention to do a criminal act.[22]

19 *Public Prosecutor v Aishamudin bin Jamaludin* [2020] 2 SLR 769 at [3].
20 1999 Reprint.
21 *Public Prosecutor v Aishamudin bin Jamaludin* [2020] 2 SLR 769 at [35].
22 *Public Prosecutor v Aishamudin bin Jamaludin* [2020] 2 SLR 769 at [40], [44] and [45].

14.17 That said, an accused person might challenge differing common intention charges on the following two well-established bases:[23]

(a) He might raise a challenge under Art 12(1) of the Constitution.

(b) He might seek to raise a reasonable doubt over the elements of the charge. In this regard, the Prosecution was required to prove every element of each charge against all the co-offenders said to share in the common intention reflected in the charge, notwithstanding that they might not individually face the same charges.

14.18 Further, an accused might raise a wider objection against inconsistent cases to challenge differing common intention charges. There were two strands to this objection:

(a) The first strand pertained to the need to ensure *procedural fairness* in criminal proceedings. It was generally incumbent on the Prosecution to advance a consistent case, whether in single or separate proceedings, so that the accused knew the case he had to meet. Where the Prosecution failed to do so, and this prevented the accused from understanding and being fully prepared to meet the Prosecution's case, the latter might simply be acquitted.[24]

(b) The second strand concerned the need to avoid prejudicial outcomes. Such outcomes could arise when the Prosecution secured convictions or sentences against different accused persons based on contradictory factual premises.[25] On the facts, it was unnecessary for the court to conclusively decide what prejudicial outcomes involved, and what recourse was available to accused persons faced with such outcomes.[26] However, the court provided a tentative framework for the objection against inconsistent cases based on prejudicial outcomes, making the following observations:

(i) The law's primary concern was that accused persons were not *prejudiced* by inconsistent outcomes, and not the mere fact of the inconsistency. If the inconsistent outcome was an unduly lenient outcome,

23 *Public Prosecutor v Aishamudin bin Jamaludin* [2020] 2 SLR 769 at [53].
24 *Public Prosecutor v Aishamudin bin Jamaludin* [2020] 2 SLR 769at [55(a)] and [59].
25 *Public Prosecutor v Aishamudin bin Jamaludin* [2020] 2 SLR 769 at [55(b)].
26 *Public Prosecutor v Aishamudin bin Jamaludin* [2020] 2 SLR 769 at [76].

this was not necessarily objectionable in the way that an unjustifiably harsh outcome would be.[27]

(ii) Besides the outcome of earlier proceedings, the precise findings of fact made in those proceedings might also be relevant.[28]

(iii) Where this objection arose, it might be resolved in two ways: First, the court might find that the Prosecution had not proved its case in the subsequent trial beyond reasonable doubt. Second, an objection based on the doctrine of abuse of process might be available.[29] In the latter scenario, there appeared to be at least two avenues open to the Prosecution. First, the Prosecution could seek a revision or review of the earlier proceedings. Second, the Prosecution could seek to satisfy the court in the subsequent proceedings that the outcome of the earlier proceedings remained safe on some other basis.[30]

14.19 In determining whether the Prosecution had run inconsistent cases, the court should engage in the following inquiry: when all the facts and arguments material to establishing the Prosecution's case against each of the accused persons were spelled out, would it be possible for all of these facts and arguments to be cumulatively true? The analysis was concerned with whether the Prosecution's cases were capable of constituting part of a single coherent world of facts.[31]

14.20 More specifically, in the context of differing common intention charges, the Prosecution could advance inconsistent cases in two ways:

(a) The Prosecution would advance inconsistent cases if it preferred "inconsistent charges". Inconsistent charges arose if there was some inconsistency in holding that all the elements of all the charges were cumulatively established. Inconsistent charges were thus inconsistent *on their face*: the inconsistency was evident even before the proceedings began. Inconsistent charges could involve legal inconsistencies, factual inconsistencies or inconsistencies of mixed law and fact.[32]

27 *Public Prosecutor v Aishamudin bin Jamaludin* [2020] 2 SLR 769 at [77].
28 *Public Prosecutor v Aishamudin bin Jamaludin* [2020] 2 SLR 769 at [83].
29 *Public Prosecutor v Aishamudin bin Jamaludin* [2020] 2 SLR 769 at [85] and [87].
30 *Public Prosecutor v Aishamudin bin Jamaludin* [2020] 2 SLR 769 at [88].
31 *Public Prosecutor v Aishamudin bin Jamaludin* [2020] 2 SLR 769 at [68].
32 *Public Prosecutor v Aishamudin bin Jamaludin* [2020] 2 SLR 769 at [69] and [71].

(b) The inconsistencies in the Prosecution's cases could arise *in the course of the proceedings*, due to inconsistencies in the evidence adduced or in the case theories advanced.[33]

14.21 Applying the law to the facts, the Court of Appeal found that the Prosecution had not advanced inconsistent cases against Aishamudin and Suhaizam:

(a) The original charge against Aishamudin and Suhaizam's charge were not inconsistent charges. The differing elements of the charges – the *actus reus* of the quantity of diamorphine trafficked and the *mens rea* of the quantity intended to be trafficked – were entirely consistent with each other. Both charges were capable of constituting part of a single coherent world of facts, namely, one in which Suhaizam and Aishamudin both shared the common intention to traffic in 32.54g (or more) of diamorphine.[34]

(b) Further, the Prosecution did not run inconsistent cases against Aishamudin and Suhaizam in the course of the proceedings. In this case, such an inconsistency could only have arisen if Suhaizam's plea of guilt was made on the basis that he intended to traffic in *only* 14.99g of diamorphine. However, based on the statement of facts Suhaizam admitted to, there was no basis to conclude that he intended to traffic in anything less than the entire quantity of diamorphine contained in the bag possessed by Aishamudin.[35]

14.22 The Court of Appeal made two further observations:

(a) If Suhaizam had only intended to traffic in 14.99g of diamorphine, the High Court should have amended the original charge against Aishamudin by deleting the reference to common intention, leaving it as a simple trafficking charge. There was no doubt that such a charge was made out.[36]

(b) Where there was a clear distinction between primary offenders and secondary offenders whose involvement was more peripheral, as in the case at hand, it might be conceptually and practically more desirable to charge the secondary offenders for abetment or joint possession under s 18(4) of the MDA.[37]

33 *Public Prosecutor v Aishamudin bin Jamaludin* [2020] 2 SLR 769 at [69].
34 *Public Prosecutor v Aishamudin bin Jamaludin* [2020] 2 SLR 769 at [74].
35 *Public Prosecutor v Aishamudin bin Jamaludin* [2020] 2 SLR 769 at [92] and [95].
36 *Public Prosecutor v Aishamudin bin Jamaludin* [2020] 2 SLR 769 at [109].
37 *Public Prosecutor v Aishamudin bin Jamaludin* [2020] 2 SLR 769 at [110].

14.23 Aishamudin did not challenge the original charge against him under Art 12(1) of the Constitution.[38] Further, the court was satisfied that the Prosecution had proved the original charge against him beyond reasonable doubt.[39] Accordingly, none of the objections to differing common intention charges were fulfilled. The Court of Appeal therefore allowed the Prosecution's appeal and convicted Aishamudin on the original charge against him. As the requisite requirements under s 33B(2) of the MDA were met, the court exercised its discretion under s 33B(1)(*a*) of the MDA to sentence Aishamudin to life imprisonment and 15 strokes of the cane.[40]

(2) Permissibility of common intention charges where participants in criminal enterprise have different mens rea with respect to criminal act

14.24 In *Imran bin Mohd Arip v Public Prosecutor*[41] ("*Imran bin Mohd Arip*"), the Court of Appeal considered whether common intention charges may be established against participants in the same criminal enterprise if the participants have different *mens rea* – in particular, actual knowledge and wilful blindness.

14.25 Imran bin Mohd Arip received a white plastic bag containing two packets containing not less than 19.42g of diamorphine from Pragas Krissamy ("Pragas") and Tamilselvam a/l Yagasvranan. Imran was charged under s 5(1)(*a*) read with s 12 of the MDA, for abetment by conspiracy with Pragas and Tamil to traffic the drugs. Pragas and Tamil were each charged under s 5(1)(*a*) of the MDA read with s 34 of the Penal Code for delivering the drugs to Imran.

14.26 The High Court convicted the three accused persons. The High Court found that Imran and Tamil had actual knowledge of the nature of the drugs, while Pragas was wilfully blind to the same.[42] All three accused persons appealed.

14.27 The Court of Appeal first addressed Imran's case on appeal. The court found that six statements provided by Imran were voluntarily given and thus admissible, and rejected Imran's defence that he had only

38 *Public Prosecutor v Aishamudin bin Jamaludin* [2020] 2 SLR 769 at [23] and [92].
39 *Public Prosecutor v Aishamudin bin Jamaludin* [2020] 2 SLR 769 at [108].
40 *Public Prosecutor v Aishamudin bin Jamaludin* [2020] 2 SLR 769 at [111]–[112].
41 [2020] SGCA 120.
42 The High Court's decision that Pragas was wilfully blind to the fact that the bundles contained diamorphine was reviewed in 2019: see (2019) 20 SAL Ann Rev 370 at 380, paras 13.31–13.34.

intended to order one rather than two pounds of heroin.[43] The court then discussed whether the Prosecution had proved that Pragas and Tamil had delivered the drugs to Imran. The court found that the Prosecution had done so, relying on, among other things, the statements provided by Imran.[44]

14.28 The Court of Appeal then turned to consider Pragas's appeal. On appeal, Pragas repeated his defence, *inter alia*, that he believed that he was delivering two cartons of contraband cigarettes. The court overturned the High Court's ruling that Pragas was wilfully blind to the nature of the drugs, finding that the Prosecution had failed to prove that Pragas had a clear, grounded and targeted suspicion that what he was told or led to believe about the items in the white plastic bag was untrue.[45] This aspect of the decision is discussed below.[46] Thus, Pragas's conviction was set aside.

14.29 The court proceeded to consider whether common intention charges premised on different mental states were legally permissible. The court held that such charges were not permissible. The essential element of a common intention charge was that both accused persons must have a similar intention with respect to the primary criminal act. The "common" intention must be premised on the accused persons harbouring a similar *mens rea*. It would not suffice if one accused person's mental state fell short of the other's mental state.[47]

14.30 Wilful blindness, whilst being the legal equivalent of actual knowledge, fell short of actual knowledge. The underlying factual basis which supported a finding of wilful blindness was different from the factual basis which supported a finding of actual knowledge. Thus, the common intention charges against Pragas and Tamil could not be sustained as they were premised on different mental states. The element of common intention was therefore not proved.[48]

14.31 The court reiterated its observation in *Public Prosecutor v Aishamudin bin Jamaludin*[49] that it might be conceptually and practically more desirable to frame charges against secondary offenders based either on abetment or joint possession under s 18(4) of the MDA, instead of

43 *Imran bin Mohd Arip v Public Prosecutor* [2020] SGCA 120 at [37]–[53].
44 *Imran bin Mohd Arip v Public Prosecutor* [2020] SGCA 120 at [56]–[79].
45 As established in *Gobi A/L Avedian v Public Prosecutor* [2020] SGCA 102 at [79]: see para 14.59(a) below.
46 See para 14.63 below.
47 *Imran bin Mohd Arip v Public Prosecutor* [2020] SGCA 120 at [132]–[133] and [135].
48 *Imran bin Mohd Arip v Public Prosecutor* [2020] SGCA 120 at [132]–[136].
49 See para 14.11 above.

common intention.[50] This would avoid the legal difficulty inherent in a common intention drug trafficking charge, namely, that co-accused persons must share the same underlying *mens rea* in relation to the nature of the drugs in question.[51]

14.32 In conclusion, the court acquitted Pragas of the charge against him and invited the Prosecution to submit on the appropriate amendments to the charges against Imran and Tamil.[52]

C. Impossible attempts

14.33 In *Han Fang Guan v Public Prosecutor*,[53] the Court of Appeal revisited the law on impossible attempts, setting out a two-stage framework for such cases.

14.34 The appellant ("Han") ordered drugs from his supplier in Malaysia. Han's accomplice ("Khor") collected seven drug bundles from Han's supplier, and brought them into Singapore. At Woodlands Checkpoint, Khor was stopped and searched by officers from the CNB and the drug bundles were found in his possession. The CNB duly arrested Khor and seized the drug bundles from him. Upon his arrest, Khor agreed to assist the CNB in follow-up operations. During these operations, Han's supplier called Khor and instructed him to deliver one yellow bundle of drugs to one "T", adding that he would ask "T" to call Khor.

14.35 Critically, none of the seven drug bundles were yellow (although all the bundles had yellow stickers on them). Four bundles (three of which contained capital amounts of diamorphine) were wrapped in black tape, and three bundles were wrapped in transparent tape. Khor did not, however, clarify with Han's supplier which bundle he was to deliver to "T" – the CNB did not instruct him to do so.

14.36 Han subsequently called Khor and introduced himself as "T". The pair then arranged to meet. A CNB officer assumed Khor's place and travelled to the meeting location in a taxi. Once Han had arrived at the scene, and the CNB had confirmed Han's identity, Han was arrested accordingly.

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50 *Public Prosecutor v Aishamudin bin Jamaludin* [2020] 2 SLR 769 at [110]. See para 14.22(b) above.
51 *Imran bin Mohd Arip v Public Prosecutor* [2020] SGCA 120 at [137].
52 *Imran bin Mohd Arip v Public Prosecutor* [2020] SGCA 120 at [139]–[140].
53 [2020] 1 SLR 649.

14.37 Han was charged with attempting to possess a bundle of diamorphine for the purpose of trafficking, under s 5(1)(*a*) read with ss 5(2) and 12 of the MDA. The Prosecution's case was that Han had attempted to possess one of the three black bundles of diamorphine (endeavouring to be fair to Han, the Prosecution framed Han's charge by reference to the bundle containing the smallest quantity of diamorphine). Han's defence, in gist, was that he had ordered ketamine and methamphetamine, and not diamorphine, from his supplier. He had therefore not attempted to possess diamorphine for the purpose of trafficking.

14.38 The High Court convicted Han on the charge. On appeal, however, the Court of Appeal found that there was a reasonable doubt over whether Han had intended to possess diamorphine, for the following reasons:

> (a) In the call between Khor and Han's supplier, the latter had repeatedly referred to the bundle that Han was to receive as a "yellow bundle". Yet the bundle forming the subject of the charge was a black bundle.[54] There were two plausible reasons for this: (i) Han's supplier/his associates had failed to give the yellow bundle meant for Han to Khor ("Scenario 1"); and (ii) the bundle meant for Han was a black bundle, but Han's supplier mistakenly described it as a "yellow bundle" ("Scenario 2"). Scenario 2 reflected the Prosecution's case. However, the Prosecution had failed to dispel the reasonable possibility that Scenario 1 was the truth, for two principal reasons.[55]
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> > (i) First, the Prosecution's case for Scenario 2 was based on how a CNB officer, who had been present during Khor's call with Han's supplier, had interpreted Han's supplier's instructions. The said officer had chosen not to instruct Khor to clarify with Han's supplier what he meant when he referred to a yellow bundle. Instead, the officer had *presumed* what Han's supplier had meant, and the CNB proceeded on that basis. This was far from satisfactory.[56] Further, during the call, Han's supplier had referred to three "yellow bundles", two of which were to be delivered to one "99" and the other meant for "T". The Prosecution's case was that the three bundles of diamorphine were the three "yellow bundles" that Han's supplier referred to. Yet the Prosecution failed to call

54 *Han Fang Guan v Public Prosecutor* [2020] 1 SLR 649 at [38].
55 *Han Fang Guan v Public Prosecutor* [2020] 1 SLR 649 at [40].
56 *Han Fang Guan v Public Prosecutor* [2020] 1 SLR 649 at [44], [47] and [48].

> "99" to testify that he had ordered diamorphine, even though it was well within the Prosecution's control to do so, given that "99" had been arrested by the CNB during their follow-up operations.
>
> (ii) Second, Han consistently stated that he had not ordered diamorphine, but instead ordered other drugs (ketamine and methamphetamine). Han said this even before he knew of the objective evidence supporting his defence.[57]

14.39 For these reasons, the court acquitted Han of attempting to possess diamorphine for the purpose of trafficking. There then arose the issue of whether Han should be convicted for attempting to possess ketamine and methamphetamine for the purpose of trafficking (given that according to Han, he had ordered these drugs from his supplier). Significantly, on the facts, there had been no possibility of Han committing the primary offence of possessing ketamine and methamphetamine for the purpose of trafficking. This was because the seven bundles did not contain the amount of ketamine and methamphetamine that Han claimed to have ordered.[58] It was in this context that the court turned to consider the law on impossible attempts.

14.40 The court undertook a detailed review of the law on impossible attempts in Singapore, England, Australia and India.[59] The court noted that s 12 of the MDA was silent on the issue of impossible attempts, and there was nothing in the text or origins of s 12 suggesting that s 12 should be interpreted differently from s 511 of the Penal Code, the general provision governing attempts to commit offences.[60] The court then set out a two-stage framework ("the Framework") for cases involving impossible attempts:[61]

> (a) Intention: At the first stage of the framework, the court had to consider whether there was a specific intention to commit a criminal act. At this stage, there are two key questions:
>
> (i) What was the act that the accused specifically intended to do?

57 *Han Fang Guan v Public Prosecutor* [2020] 1 SLR 649 at [50] and [54].
58 *Han Fang Guan v Public Prosecutor* [2020] 1 SLR 649 at [57].
59 *Han Fang Guan v Public Prosecutor* [2020] 1 SLR 649 at [59]–[97].
60 *Han Fang Guan v Public Prosecutor* [2020] 1 SLR 649 at [102]–[103].
61 *Han Fang Guan v Public Prosecutor* [2020] 1 SLR 649 at [108].

(ii) Was that intended act criminal, either on its face or by reason of some mistaken belief harboured by the accused?

(b) *Actus reus*: If the accused had a specific intention to commit a criminal act, the inquiry moved to the second stage. Here the key question was whether there were sufficient acts by the accused in furtherance of his specific intention to commit a criminal act. This inquiry focused on whether there were sufficient acts to reasonably corroborate the presence of the accused's intention and demonstrate substantial movement towards its fulfilment. The accused could only be convicted if the answer to this question was "yes".

14.41 The court observed that the Framework was consistent with the principle that an accused should be held liable for an attempt only if he intended to commit an act that in fact amounted to a crime. Further, the Framework provided a retributive rationale for criminalising impossible attempts, by only criminalising attempts where the accused specifically intended to commit an act that would, if carried to fruition, have been a recognised crime.[62]

14.42 Having set out the Framework, the court adjourned the matter for the Prosecution to make submissions on whether, in view of the Framework, Han should be convicted for attempting to possess ketamine and methamphetamine for the purpose of trafficking, and for Han to respond to the same.

III. Offences under Penal Code

A. Common intention in cases of murder

14.43 In *Public Prosecutor v Azlin bte Arujunah*,[63] the High Court discussed the elements of a charge for murder with common intention.

14.44 The accused persons, Azlin bte Arujunah ("Azlin") and Ridzuan bin Mega Abdul Rahman ("Ridzuan"), were the biological parents of the five-year-old male victim ("the Child"). Azlin and Ridzuan were charged for various acts of abuse against the Child, under the Children and Young Persons Act[64] and the Penal Code. The gravest of the acts committed by Azlin and Ridzuan was a series of four scalding incidents that took

62 *Han Fang Guan v Public Prosecutor* [2020] 1 SLR 649 at [110].
63 [2020] SGHC 168.
64 Cap 38, 2001 Rev Ed.

place within one week, causing the injury ("Cumulative Scald Injury") which resulted in the Child's death. For the first and third incidents, only Azlin was involved in scalding the Child with hot water. For the second incident, both Azlin and Ridzuan scalded the Child with hot water. For the last incident, Ridzuan scalded the Child with hot water with Azlin's acquiescence.[65] Azlin and Ridzuan were charged under s 300(*c*) read with s 34 of the Penal Code in relation to these four scalding incidents. This chapter will only address the charges in relation to these four scalding incidents, and not the other charges faced by the accused persons.

14.45 The accused persons argued that neither of them intended the Cumulative Scald Injury, nor did they share the common intention to cause the Cumulative Scald Injury. They further contended that the Cumulative Scald Injury was not the cause of death, nor was it sufficient in the ordinary course of nature to cause death.

14.46 The High Court first held, based on expert evidence, that the Cumulative Scald Injury caused the Child's death, and that it was sufficient in the ordinary course of nature to cause death.[66]

14.47 Turning to the issue of common intention, the High Court held that where an accused person was charged under s 300(*c*) read with s 34 of the Penal Code, the Prosecution had to prove the following three elements: (a) death had been caused by the criminal act in which both accused persons participated; (b) the bodily injury so caused was in the ordinary nature sufficient to cause death; and (c) both had the common intention to cause a "s 300(*c*) injury".[67] This last element meant that the fact that the injury was sufficient in the ordinary course of nature to cause death must be intended.[68] In ascertaining intention, it was important to consider the knowledge that the accused persons would have had, as the awareness of what kind of injury and the seriousness of the injury that would have been caused was very relevant for inferring the necessary common intention.[69] If common intention could be proved, then an accused person's ignorance of an incident forming the series of acts causing death would be irrelevant.[70]

65 *Public Prosecutor v Azlin bte Arujunah* [2020] SGHC 168 at [62]–[67].
66 *Public Prosecutor v Azlin bte Arujunah* [2020] SGHC 168 at [78] and [86].
67 *Public Prosecutor v Azlin bte Arujunah* [2020] SGHC 168 at [57].
68 *Public Prosecutor v Azlin bte Arujunah* [2020] SGHC 168 at [97].
69 *Public Prosecutor v Azlin bte Arujunah* [2020] SGHC 168 at [109].
70 *Public Prosecutor v Azlin bte Arujunah* [2020] SGHC 168 at [107].

14.48 On the facts, the High Court held that there was insufficient evidence upon which it could be inferred that Azlin and Ridzuan intended to inflict a s 300(*c*) injury:[71]

(a) There was no evidence of any pre-arranged plan regarding the extent of injury to be caused to the Child. The evidence showed that each incident was a reaction to a trigger.

(b) Any pre-arranged plan should have existed prior to or have been formed on the spot just before the first incident. Ridzuan did not participate in the first incident; his acquiescence after the fact could not ground an inference that a common intention was formed prior to or just before the fact.

(c) After the second incident, there was no agreement to scald the Child again, for Azlin and Ridzuan rinsed off the Child and Ridzuan told Azlin to "cool down". After the first two incidents, Azlin and/or Ridzuan applied medication to the Child, suggesting that each incident was a separate reactive response, and there was no intention to cause any aggregate injury that would be a s 300(*c*) injury.

(d) While both Azlin and Ridzuan were aware, after the second incident, that the other person might scald the Child again, foreseeability of another scalding incident was insufficient to ground the necessary inference that they had come to a common intention to continue scalding the Child to cause injury that was sufficient in the ordinary course of nature to cause death.

(e) The intention to inflict a s 300(*c*) injury could not be inferred from Azlin's or Ridzuan's participation in the individual acts of scalding, because a single act of scalding would be insufficient in the ordinary course of nature to cause death. The time gap between each incident suggested that each one was independent and it was not possible to infer an overarching intention to inflict a s 300(*c*) injury.

(f) Azlin's or Ridzuan's common intention to discipline the Child with scalding water was insufficient because it would not amount to a specific intention to inflict a s 300(*c*) injury.

(g) Azlin's or Ridzuan's act of bringing the Child to hospital pointed away from a common intention to inflict a s 300(*c*) injury.

71 *Public Prosecutor v Azlin bte Arujunah* [2020] SGHC 168 at [110].

14.49 The High Court further held that it was not appropriate to draw an adverse inference against the accused persons for remaining silent at trial in order to fill what was effectively a gap in the evidence.[72]

14.50 The Prosecution made two alternative charging proposals in respect of Azlin. First, to charge her under s 300(*c*) of the Penal Code, read with s 34 of the Penal Code for two of the four incidents; the two being those which Ridzuan also took part in. The Prosecution submitted that Azlin was legally liable for Ridzuan's acts in these two incidents as those were done in furtherance of their common intention to cause those specific scald injuries. This proposal was rejected by the High Court. In order for Ridzuan's acts to be attributed to Azlin, the two accused persons needed to share the common intention for the entire criminal act, which was the common intention to inflict a s 300(*c*) injury, rather than a common intention just to inflict hurt in two incidents. Section 34 of the Penal Code did not enable the proof of common intention only of component offences of a "criminal act". In the present case, the physical components of all four incidents that led to the Cumulative Scald Injury were the collective result of the actions of both Azlin and Ridzuan. It was legally impermissible to attribute the common intention for two of the incidents to Azlin and then import the common intention specific to those two incidents into the frame of the four incidents.[73]

14.51 The High Court agreed with the Prosecution's second alternative charging proposal, which was to charge Azlin for four charges of intentionally causing grievous hurt by dangerous means under s 326 of the Penal Code for each of the four incidents, with two of them read with s 34 of the Penal Code to reflect a common intention with Ridzuan.[74] Azlin was convicted on these four charges, and Ridzuan was convicted on two charges of s 326 read with s 34 of the Penal Code in relation to each of the two incidents of scalding he participated in. The High Court sentenced Azlin to a total of 27 years' imprisonment and an additional 12 months' imprisonment in lieu of caning, and Ridzuan to a total of 27 years' imprisonment and 24 strokes of the cane.

72 *Public Prosecutor v Azlin bte Arujunah* [2020] SGHC 168 at [112].
73 *Public Prosecutor v Azlin bte Arujunah* [2020] SGHC 168 at [118]–[124].
74 *Public Prosecutor v Azlin bte Arujunah* [2020] SGHC 168 at [125]–[133].

IV. Offences under Misuse of Drugs Act

A. Presumption in section 18(2) of Misuse of Drugs Act and doctrine of wilful blindness

14.52 In *Gobi A/L Avedian v Public Prosecutor*[75] ("*Gobi*"), the Court of Appeal clarified the law in respect of the presumption in s 18(2) of the MDA and how it should interact with the principles on wilful blindness set out in *Adili Chibuike Ejike v Public Prosecutor*[76] ("*Adili*").

14.53 The applicant, Gobi a/l Avedian, had claimed trial to a capital charge of importing not less than 40.22g of diamorphine under s 7 of the MDA. At the trial, the sole issue was whether he had rebutted the presumption of knowledge under s 18(2) of the MDA. The High Court accepted the applicant's claim that he had been led by the assurances of two acquaintances ("Vinod" and "Jega") to believe that the drugs were a mild form of "disco drugs" mixed with chocolate. The High Court accordingly found that the applicant had rebutted the presumption of knowledge in s 18(2), but convicted him of an amended charge of attempting to import a controlled drug listed in Class C of the First Schedule to the MDA.

14.54 On appeal, the Court of Appeal found that the applicant had failed to rebut the s 18(2) presumption. It convicted the applicant of the capital charge and sentenced him to death.

14.55 Subsequently, the applicant filed a criminal motion for the Court of Appeal to review its decision pursuant to the newly enacted s 394I of the Criminal Procedure Code.[77] The court found that there was sufficient material to review its earlier decision given the existence of legal arguments, arising from *Adili*,[78] which could not have been made with reasonable diligence at the time of the appeal, and which could render its earlier decision demonstrably wrong.[79]

14.56 The first issue was the interplay between the s 18(2) presumption and the doctrine of wilful blindness. The court held that:

75 [2020] SGCA 102.
76 [2019] 2 SLR 254.
77 Cap 68, 2012 Rev Ed.
78 See para 14.52 above.
79 *Gobi a/l Avedian v Public Prosecutor* [2020] SGCA 102 at [49].

(a) The knowledge that was presumed under s 18(2) was limited to actual knowledge of the nature of the drugs only, and did not encompass wilful blindness.[80] This was for two reasons:

(i) The s 18(2) presumption was an evidential presumption of a specific fact, whereas the question of whether an accused person was wilfully blind was a question of mixed law and fact involving a fact-sensitive inquiry covering diverse considerations. Such a question could not ordinarily be the subject of an evidential presumption. These points, which had been noted in *Adili* in the context of the s 18(1) presumption, applied with equal force to the s 18(2) presumption.[81]

(ii) It was important to keep the two inquiries (actual knowledge and wilful blindness) separate and distinct in order to ensure that the accused person knew the case he had to meet. This went towards ensuring procedural fairness in criminal proceedings.[82]

(b) The Prosecution could not invoke the s 18(2) presumption to presume that the accused person was wilfully blind to the nature of the drugs in his possession. The doctrine of wilful blindness should also not feature in the analysis of whether the s 18(2) presumption had been rebutted. Instead, where the Prosecution's case was that the accused person was wilfully blind to the nature of the drugs, it must prove this beyond reasonable doubt.[83]

(c) The court expressed the tentative view that it might be possible in principle for the Prosecution to run alternative cases of actual knowledge and wilful blindness, subject to there being no prejudice to the accused person, but left this issue open for determination in a future case.[84]

14.57 The second issue was how the s 18(2) presumption could be rebutted. The court held that:

(a) In order to rebut the presumption, the accused person was only required to establish that he did not know the nature of the drugs in his possession. This was ultimately a subjective

80 *Gobi a/l Avedian v Public Prosecutor* [2020] SGCA 102 at [53], [56] and [98(a)(i)].
81 *Gobi a/l Avedian v Public Prosecutor* [2020] SGCA 102 at [54].
82 *Gobi a/l Avedian v Public Prosecutor* [2020] SGCA 102 at [55].
83 *Gobi a/l Avedian v Public Prosecutor* [2020] SGCA 102 at [56].
84 *Gobi a/l Avedian v Public Prosecutor* [2020] SGCA 102 at [55].

inquiry, but the court would assess the veracity of his assertions against the objective facts, including his actions and conduct.[85]

(b) The accused person had to adduce sufficient evidence to disclose the basis upon which he claimed to lack knowledge of the nature of the drugs.[86] As a starting point, he should be able to give an account of what he thought the thing in his possession was. This broadly entailed either a belief that he was carrying something innocuous (even if he was unable to specify exactly what it was), or a belief that he possessed some contraband item or drug *other than* the specific drug in his possession.[87]

(c) Ultimately, the s 18(2) presumption would be rebutted where the accused person formed a positive belief that was incompatible with knowledge that the thing he was carrying was the specific drug in his possession.[88]

(d) Parliament did not intend for the s 18(2) presumption to be rebutted by an accused person whose defence was simply that he was indifferent to what he was carrying. Such a person would be unable to rebut the presumption because he would not have formed any view about what the thing was or was not. The court might infer indifference if the accused person had the ready means and opportunity to verify what he was carrying, but failed to take the steps that an ordinary reasonable person would have taken to establish its nature, and also failed to provide any plausible explanation for that failure.[89]

14.58 The court also explained that *Dinesh Pillai a/l K Raja Retnam v Public Prosecutor*,[90] correctly understood, was a case where the appellant had failed to rebut the s 18(2) presumption because he was indifferent to what was inside the packet he was delivering. References in that case to the accused person's burden of proving that he "could not reasonably be expected to have known" the nature of the drugs should henceforth be framed in terms of whether, on the facts, the accused person was indifferent to what he was carrying such that he could not be held to have rebutted the s 18(2) presumption.[91]

85 *Gobi a/l Avedian v Public Prosecutor* [2020] SGCA 102 at [57] and [98(b)(ii)].
86 *Gobi a/l Avedian v Public Prosecutor* [2020] SGCA 102 at [58].
87 *Gobi a/l Avedian v Public Prosecutor* [2020] SGCA 102 at [59] and [98(b)(i)].
88 *Gobi a/l Avedian v Public Prosecutor* [2020] SGCA 102 at [60].
89 *Gobi a/l Avedian v Public Prosecutor* [2020] SGCA 102 at [65], [66], [69] and [98(b)(iv)].
90 [2012] 2 SLR 903.
91 *Gobi a/l Avedian v Public Prosecutor* [2020] SGCA 102 at [72]–[75].

14.59 Third, in order for the Prosecution to prove that an accused person was wilfully blind as to the nature of the drugs, it had to prove three elements:

> (a) The accused person had a clear, grounded and targeted suspicion that what he was told or led to believe about the nature of the thing he was carrying was untrue.[92]
>
> (b) There were reasonable means of inquiry available to the accused person which, if taken, would have led him to discover the truth, namely, that his suspicion that he was carrying something other than what he was told the thing was or believed it to be was well-founded. In many cases, this would minimally require him to visually inspect the thing he was carrying.[93]
>
> (c) The accused person deliberately refused to pursue the reasonable means of inquiry available to him because he wanted to avoid any adverse consequences of being affixed with knowledge of the truth.[94]

14.60 Turning to the facts, the court found that the Prosecution had run its case at trial in such a way as to foreclose recourse to the s 18(2) presumption. This was because, having regard to the questions that the Prosecution put to the applicant and its response to questions from the judge, the Prosecution's case at trial was evidently one of wilful blindness in substance. To be precise, its case was that the applicant *ought not to have* trusted the assurances of his acquaintances Vinod and Jega (and not that he *in fact disbelieved* them).[95]

14.61 By contrast, the Prosecution's case *on appeal* was premised on actual knowledge. This prejudiced the applicant as he had never been squarely confronted with, and thus could not respond to, the case that he did not in fact believe Vinod and Jega's assurances about the drugs. Further, since the Prosecution's case at trial had been one of wilful blindness, it should not have had recourse to the s 18(2) presumption.[96]

14.62 The Court of Appeal's earlier decision to affirm the applicant's conviction had been premised on him failing to rebut the s 18(2) presumption. Since that could no longer form the basis of his conviction,

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92 *Gobi a/l Avedian v Public Prosecutor* [2020] SGCA 102 at [79(a)], [87], [88] and [98(c)(i)].
93 *Gobi a/l Avedian v Public Prosecutor* [2020] SGCA 102 at [79(b)], [91]–[94] and [98(c)(ii)].
94 *Gobi a/l Avedian v Public Prosecutor* [2020] SGCA 102 at [79(c)], [95] and [98(c)(iii)].
95 *Gobi a/l Avedian v Public Prosecutor* [2020] SGCA 102 at [105] to [110] and [115].
96 *Gobi a/l Avedian v Public Prosecutor* [2020] SGCA 102 at [117], [120] and [121].

the Court turned to examine whether the applicant had been wilfully blind to the nature of the drugs. As this was not proved on the facts, the applicant's conviction could not stand and he was acquitted. The court reinstated his conviction on the amended charge, namely, attempting to import a controlled drug under Class C of the First Schedule to the MDA. The court also reinstated his original sentence of 15 years' imprisonment and ten strokes of the cane.[97]

B. *Application of* Gobi a/l Avedian v Public Prosecutor *in* Imran bin Mohd Arip v Public Prosecutor

14.63 The Court of Appeal applied its decision in *Gobi*[98] to the facts in *Imran bin Mohd Arip*,[99] in holding that the Prosecution had failed to prove that Pragas had a clear, grounded and targeted suspicion that what he was told or led to believe about the items in the white plastic bag was untrue, for the following reasons:

> (a) First, the court found that the three reasons provided by the trial judge – in finding that Pragas was wilfully blind to the nature of the drugs – differed entirely from the reasoning advanced by the Prosecution. The court opined that it was generally unsafe for a trial judge to reconstruct the Prosecution's case on wilful blindness and employ reasons not articulated by the Prosecution, in convicting an accused person. This was because an accused person should be given the opportunity to refute or address points used by the trial judge to convict him. Should a trial judge consider certain points to be material, he or she was to raise them with the accused person during trial, to provide him with an opportunity to respond.[100]
>
> (b) Second, the court disagreed that the three reasons provided by the trial judge substantiated a finding of wilful blindness:
>
> > (i) In relation to the sum of RM500 that Pragas was paid for three previous deliveries, which the trial judge found to be "gross overpayment" for assisting in the delivery of contraband cigarettes, Pragas had not been cross-examined on whether RM500 was disproportionate to the usual sale price of contraband cigarettes. Further, he testified that he did not know how

97 *Gobi a/l Avedian v Public Prosecutor* [2020] SGCA 102 at [121], [124], [125] and [133].
98 See para 14.52 above.
99 See para 14.24 above.
100 *Imran bin Mohd Arip v Public Prosecutor* [2020] SGCA 120 at [109]–[110].

much profit was made from one carton of contraband cigarettes. Moreover, no evidence was led on how much Pragas would be paid for the delivery in question to Imran.[101]

(ii) The difference in weight between two cartons of cigarettes and the drugs did not justify a finding of suspicion on the part of Pragas. The difference was marginal. Moreover, Pragas provided a reasonable explanation for his failure to detect the difference in weight.[102]

(iii) The court disagreed with the trial judge's holding that the surreptitious and elaborate system of delivery was wholly out of keeping with the delivery of contraband cigarettes. There was no evidence of the usual *modus operandi* of the delivery of contraband cigarettes in Singapore; contraband cigarettes were also illegal items. Further, Pragas was not cross-examined on this line of reasoning.[103]

(c) Third, the court disagreed with the Prosecution's primary argument on wilful blindness, which was that the departure from the usual *modus operandi* for Pragas's previous deliveries would have made Pragas suspicious that what he was told or led to believe (he was only delivering contraband cigarettes) was untrue:

(i) Pragas's evidence that he had delivered contraband cigarettes on three previous occasions was unchallenged. It was thus possible that Pragas was lulled into a false sense of security whilst operating under the mistaken belief that he was, as in the three previous occasions, only delivering contraband cigarettes.[104]

(ii) The differences between the modes of delivery were not significant. It was immaterial that Pragas received the white plastic bag from a Malay man, instead of a Chinese man. Although Pragas collected the white plastic bag in a manner different from his earlier three deliveries, Pragas had provided a reasonable explanation for this.[105]

101 *Imran bin Mohd Arip v Public Prosecutor* [2020] SGCA 120 at [112]–[114].
102 *Imran bin Mohd Arip v Public Prosecutor* [2020] SGCA 120 at [115]–[116].
103 *Imran bin Mohd Arip v Public Prosecutor* [2020] SGCA 120 at [117]–[118].
104 *Imran bin Mohd Arip v Public Prosecutor* [2020] SGCA 120 at [119].
105 *Imran bin Mohd Arip v Public Prosecutor* [2020] SGCA 120 at [120].

(d) Fourth, the following facts were material:[106]

(i) It was not proved that Pragas would have been able to see the contents of the white plastic bag from the outside of the bag.

(ii) Imran had never stated in his statements that he had dealt directly with Pragas. Imran did not suggest that Pragas knew that he was delivering heroin.

(iii) Tamil never implicated Pragas.

(iv) Pragas had consistently maintained that he believed the white plastic bag contained contraband cigarettes.

C. Section 18(4) of Misuse of Drugs Act

14.64 In *Mohammad Azli bin Mohammad Salleh v Public Prosecutor*,[107] the Court of Appeal considered s 18(4) of the MDA, which concerns joint possession of controlled drugs.

14.65 On the night in question, the first appellant ("Azli") drove the second appellant ("Roszaidi") to Bulim Avenue, where Roszaidi collected a red plastic bag from two other men in a trailer truck. Inside the red plastic bag were two packets containing 32.54g of diamorphine ("the Drugs") and three packets of methamphetamine. Azli then drove Roszaidi to Jurong West, where Roszaidi handed his wife a plastic bag containing the two packets of diamorphine and two of the packets of methamphetamine, with instructions to bring the bag up to their apartment.

14.66 Roszaidi was charged under s 5(1)(*a*) of the MDA for trafficking by giving the Drugs to his wife. Azli was charged under s 5(1)(*a*) read with s 12 of the MDA for abetting Roszaidi by intentionally aiding him – namely, by driving him to Bulim Avenue to collect the Drugs and then to Jurong West to deliver them to his wife. They were tried together with one of the men from the trailer truck ("Aishamudin"), whose case is discussed above.[108]

14.67 Azli and Roszaidi were convicted after trial. The judge found that Roszaidi failed to rebut the presumption in s 18(2) of the MDA. He also found that Azli had known that Roszaidi would be transporting drugs that night, and had consented to Roszaidi bringing into the car drugs of

106 *Imran bin Mohd Arip v Public Prosecutor* [2020] SGCA 120 at [123]–[125].
107 [2020] 1 SLR 1374.
108 See paras 14.11–14.23 above.

any nature. He rejected Azli's claim that he thought Roszaidi was only collecting methamphetamine. The judge therefore found Azli to be in joint possession of the Drugs with Roszaidi, under s 18(4) of the MDA. The judge further found that the s 18(2) presumption applied against Azli, and that Azli failed to rebut it. The judge sentenced both Azli and Roszaidi to death.

14.68 Azli and Roszaidi appealed against their conviction and sentence. The Court of Appeal dismissed Roszaidi's appeal against conviction, but remitted his appeal against sentence to the trial court for additional evidence to be taken. The court allowed Azli's appeal and acquitted him.

14.69 A key question in Azli's appeal was whether he knew the nature of the Drugs (this being an element of the offence with which he was charged). The parties took the following positions:

(a) Azli claimed that he did not suspect that Roszaidi had set out to collect drugs on the night in question, and thus neither knew of nor consented to Roszaidi bringing drugs into his car. Further, even if he did suspect that Roszaidi was collecting drugs, this would not amount to "knowledge and consent" for the purposes of finding that he was in joint possession of the drugs pursuant to s 18(4) of the MDA.

(b) The Prosecution sought to prove Azli's knowledge of the nature of the Drugs by two alternative routes: (i) proof of his actual knowledge beyond reasonable doubt; and (ii) invoking the presumption of knowledge under s 18(2) of the MDA by establishing Azli's joint possession of the Drugs under s 18(4) of the MDA.

14.70 The court began by analysing the nature of s 18(4) of the MDA with a view to determining whether Azli was in joint possession of the Drugs. The court held that s 18(4) was a deeming provision which had the effect of supplementing the means by which the element of possession might be established. Section 18(4) was engaged upon proof that the accused person *knew of and consented to* another person being in actual possession of the thing which turned out to be the drug. This was then treated as the legal equivalent of actual possession by the accused person himself. An accused person who fell within the scope of s 18(4) was treated, in the eyes of the law, as though he were in actual possession of the drug, even if he did not have physical possession, custody, or control thereof. Section 18(4) was a definitional provision and not a rebuttable

presumption, unlike s 18(1) of the MDA.[109] Once joint possession had been proved, the presumption of knowledge under s 18(2) would also apply.[110]

14.71 Next, the court analysed what it meant for someone ("the actual possessor") to possess a drug "*with the knowledge*" of other persons ("the joint possessors"), in the context of s 18(4) of the MDA. It considered, but rejected, the two following possibilities:

> (a) First, s 18(4) might require proof that the joint possessors knew *the nature of the drug* ("the broad conception"). If this were so, then once joint possession under s 18(4) of the MDA had been proved, the joint possessors would also by definition satisfy the elements of possession and knowledge in the offence of trafficking. There would thus never be a situation where s 18(4) and the s 18(2) presumption operated cumulatively (since the knowledge which was presumed by s 18(2) would itself be a prerequisite to the operation of s 18(4)).[111] The court rejected this possibility because it conflated the elements of possession and knowledge, whereas s 18(4) was concerned with only the former and not the latter. This interpretation was also inconsistent with the text of s 18(4), which was framed in terms of the actual possessor having a "controlled drug" in his possession with the knowledge and consent of the joint possessors.[112]
>
> (b) Second, s 18(4) might only require proof that the joint possessors *knew of the existence of the thing* that turned out to be the drug ("the narrow conception"). In that case, once joint possession under s 18(4) had been proved, the joint possessors would satisfy the element of possession – but not necessarily the element of knowledge – in the offence of trafficking.[113] The court rejected this possibility because merely knowing of the *existence* of a thing in another person's possession – without knowing any of its properties, for example that it was illegal – would not allow the putative joint possessor to meaningfully exercise the choice *not* to consent to that person's possession. For instance, any driver

109 *Mohammad Azli bin Mohammad Salleh v Public Prosecutor* [2020] 1 SLR 1374 at [51].

110 *Mohammad Azli bin Mohammad Salleh v Public Prosecutor* [2020] 1 SLR 1374 at [56] and [58].

111 *Mohammad Azli bin Mohammad Salleh v Public Prosecutor* [2020] 1 SLR 1374 at [53], [54] and [56].

112 *Mohammad Azli bin Mohammad Salleh v Public Prosecutor* [2020] 1 SLR 1374 at [55] and [67].

113 *Mohammad Azli bin Mohammad Salleh v Public Prosecutor* [2020] 1 SLR 1374 at [53] and [54].

> who allowed a passenger to enter his car, visibly carrying an item or package which turned out to contain controlled drugs, would bear the burden of proving that he did *not* know that they were drugs in order to escape a trafficking charge. This was plainly untenable.[114]

14.72 The court adopted a third view ("the intermediate conception"), namely, that s 18(4) required the joint possessors to know that the actual possessor was in possession of a controlled drug in general (without having to know what specific drug).[115] This was consistent with the aim of s 18(4) of the MDA, which was to fix with possession those who knew of and consented to another person being in possession of controlled drugs. It was only meaningful to say that one knew of and consented to another being in possession of an object if one had at least some relevant knowledge of the nature of that object. The intermediate conception brought joint possessors into (at least) a state of moral equivalence with the actual possessor, since they would know that they were getting involved in illicit drug activities by association with the actual possessor.[116]

14.73 The court then applied these principles to the facts of the case. For Azli to have been in joint possession of the Drugs under s 18(4) of the MDA, he must have (a) known that Roszaidi wanted Azli to drive him to transport controlled drugs; and (b) consented to doing so.[117] Both these elements were proved:

> (a) On the former point, it was clear from Azli's statements to the Police that he agreed to drive Roszaidi around despite knowing beforehand that the latter was going to collect controlled drugs, specifically "ice" (methamphetamine).[118]
>
> (b) On the latter point, Azli had appreciated that Roszaidi intended to collect controlled drugs when he agreed to drive Roszaidi around. Azli knew and consented to Roszaidi being in possession of a consignment of drugs (including the Drugs) while he was being transported in Azli's car. Azli was not a disinterested chauffer or taxi driver who was indifferent to his

114 *Mohammad Azli bin Mohammad Salleh v Public Prosecutor* [2020] 1 SLR 1374 at [63] and [65].

115 *Mohammad Azli bin Mohammad Salleh v Public Prosecutor* [2020] 1 SLR 1374 at [55] and [70].

116 *Mohammad Azli bin Mohammad Salleh v Public Prosecutor* [2020] 1 SLR 1374 at [66] and [68].

117 *Mohammad Azli bin Mohammad Salleh v Public Prosecutor* [2020] 1 SLR 1374 at [75].

118 *Mohammad Azli bin Mohammad Salleh v Public Prosecutor* [2020] 1 SLR 1374 at [77]–[84].

> passenger's plans or payload, and therefore whose involvement in the passenger's possession of any object collected during the journey could be said to be purely tangential.[119]

14.74 Since Azli was in joint possession of the Drugs, he was presumed by s 18(2) of the MDA to have known the nature of the Drugs. The court turned to consider whether he had rebutted the presumption, and found that he had, given the following facts:

> (a) In his contemporaneous statement, Azli was asked "What thing?" He responded, "*Sejuk* and *Panas*". However, Azli's statement was ambiguous as to *when* he acquired knowledge of the nature of the drugs. The court could not rule out the possibility that Azli only learned this after the acts of trafficking had concluded. Azli was never asked to clarify this point in his subsequent statements, nor did the Prosecution challenge Azli on the correct interpretation of his answer at trial. This ambiguity had to be resolved in Azli's favour.[120]
>
> (b) Though Roszaidi's statements at parts implicated Azli in the knowledge that the Drugs were heroin, Roszaidi had prevaricated on this. Roszaidi's evidence against Azli was simply unreliable.[121]
>
> (c) In Roszaidi's investigative statements, he recounted telling another person ("Mirwazy") that he was going to collect methamphetamine and heroin while they were in the back seat of Azli's car. However, this was not supported at trial by the testimony of Roszaidi, Mirwazy or Azli. It was therefore unsafe to conclude that Azli had overheard Roszaidi telling Mirwazy that he was going to collect heroin.[122]

14.75 The court accepted Azli's cautioned statement (which only mentioned collecting "ice") as evidence of what he knew at the material time. In the absence of any countervailing evidence showing that he in fact knew that Roszaidi would be involved in collecting or delivering diamorphine, the court held that the s 18(2) presumption was rebutted.

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119 *Mohammad Azli bin Mohammad Salleh v Public Prosecutor* [2020] 1 SLR 1374 at [87].

120 *Mohammad Azli bin Mohammad Salleh v Public Prosecutor* [2020] 1 SLR 1374 at [99]–[101].

121 *Mohammad Azli bin Mohammad Salleh v Public Prosecutor* [2020] 1 SLR 1374 at [102]–[105].

122 *Mohammad Azli bin Mohammad Salleh v Public Prosecutor* [2020] 1 SLR 1374 at [106].

Given its analysis of the evidence, there was no basis to find that Azli had actual knowledge of or was wilfully blind to the nature of the Drugs.[123]

14.76 For completeness, the court also observed that the Prosecution had failed to prove a third element of Azli's charge, namely, that he was aware that Roszaidi *intended to traffic* in the Drugs. The evidence demonstrated at best that Azli knew of Roszaidi's involvement in drug trafficking in general, but not that he knew of and agreed to assist Roszaidi in trafficking *in diamorphine* at the time of the offence.[124] In the circumstances, Azli was acquitted.

D. Definition of cannabis mixture, sentencing framework for cannabis mixture offences, and permissibility of Prosecution's charging practice in relation to compressed blocks of cannabis matter

14.77 In *Saravanan Chandaram v Public Prosecutor*,[125] the Court of Appeal revisited the definition of cannabis mixture and discussed the sentencing framework for cannabis mixture offences. The court also examined the legal permissibility of the Prosecution's then charging practice of preferring two charges in relation to the drugs found in a single compressed block of cannabis matter, namely: (a) a charge for cannabis contained therein as certified by the Health Sciences Authority ("HSA"); and (b) a charge for cannabis mixture in relation to the remaining fragmented vegetable matter containing tetrahydrocannabinol ("THC") and cannabinol ("CBN") ("Dual Charging Practice").

14.78 The appellant, Saravanan Chandaram, was found with ten wrapped bundles in his car which he had driven into Singapore from Malaysia. Each of these bundles were analysed by the HSA and found to contain both cannabis and cannabis mixture. The determination of the existence of cannabis mixture was made in line with the interpretation of the statutory definition of "cannabis mixture" that was laid down in *Public Prosecutor v Manogaran s/o R Ramu*[126] ("*Manogaran*"), On this basis, the Prosecution preferred one charge of importing cannabis ("Importation of Cannabis Charge") and one charge of importing cannabis mixture ("Importation of Cannabis Mixture Charge"), in respect of the ten bundles, against Saravanan.

123 *Mohammad Azli bin Mohammad Salleh v Public Prosecutor* [2020] 1 SLR 1374 at [78], [108] and [110].
124 *Mohammad Azli bin Mohammad Salleh v Public Prosecutor* [2020] 1 SLR 1374 at [112].
125 [2020] 2 SLR 95.
126 [1996] 3 SLR(R) 390.

14.79 The court upheld Saravanan's conviction on the Importation of Cannabis Charge, finding that he could not rebut the presumption of knowledge that the bundles he imported contained cannabis,[127] before turning to consider the various legal issues in relation to the Importation of Cannabis Mixture Charge.

14.80 The court first considered the definition of "cannabis". The court opined that the definition stated in s 2 of the MDA – "any part of a plant of the genus Cannabis, or any part of such plant, by whatever name it is called" – was clear on its face and included as cannabis any part of the cannabis plant. However, the HSA testified that once cannabis leaves, flowers and fruits were detached from the branches of a plant, neither the detached plant parts nor the bare branches would be classified as "cannabis", even if the HSA analyst subjectively believed they were entirely derived from the cannabis plant. While this did not cohere with the statutory definition of "cannabis", the issue in such cases was ultimately one of evidence and proof, for the Prosecution would not have evidence to satisfy the court that these plant parts were in fact cannabis.[128]

14.81 Turning to the definition of cannabis mixture, the court recognised that the term "cannabis mixture" was a creature of statute, and its existence as a drug was entirely due to its addition to the MDA in 1993. The term was defined as "any mixture of vegetable matter containing [THC] and [CBN] in any quantity" in the MDA. While the term "mixture" was not defined in the MDA, it should be interpreted in a way that gave effect to the intent and will of Parliament.[129] The court reasoned that there were three possible interpretations of "cannabis mixture",[130] and applied the steps of statutory interpretation set out in *Tan Cheng Bock v Attorney-General*[131] ("*Tan Cheng Bock*") to arrive at the right interpretation:

> (a) First, the court determined the ordinary meaning of the term "cannabis mixture". The court held that at the core of the meaning of "mixture" lay the commingling of two or more different components. Further, the term "cannabis" in "cannabis mixture" indicated that the mixture must necessarily be composed of some cannabis plant matter.[132]
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> (b) Second, the court determined the legislative purpose or object of s 2 of the MDA, which defined the term "cannabis

127 *Saravanan Chandaram v Public Prosecutor* [2020] 2 SLR 95 at [41].
128 *Saravanan Chandaram v Public Prosecutor* [2020] 2 SLR 95 at [79]–[81] and [105].
129 *Saravanan Chandaram v Public Prosecutor* [2020] 2 SLR 95 at [82]–[83].
130 *Saravanan Chandaram v Public Prosecutor* [2020] 2 SLR 95 at [84].
131 [2017] 2 SLR 850.
132 *Saravanan Chandaram v Public Prosecutor* [2020] 2 SLR 95 at [91] and [93].

mixture". The court opined that the long title of the MDA stating its general purpose did not advance the analysis materially. The court then turned to the speech of the Minister of Home Affairs upon the Second Reading of the Bill[133] which, upon enactment, introduced "cannabis mixture" into the MDA ("the 1993 Second Reading Speech"). The court held that the 1993 Second Reading Speech elucidated that "cannabis mixture" was included as a drug under the MDA to prevent traffickers from evading the severe penalties for trafficking in cannabis by adulterating it, through mixing broken-up cannabis with other vegetable matter such as tobacco. This confirmed the ordinary meaning of "cannabis mixture", *ie*, a mixture of cannabis and some other vegetable matter.[134]

(c) The court therefore concluded that "cannabis mixture" consisted of cannabis plant matter commingled with vegetable matter of indeterminate origin or known to be of non-cannabis origin.[135] In holding so, the court overruled its earlier judgment in *Manogaran*.[136]

14.82 The court noted that based on the evidence of the HSA, as a matter of scientific evidence, the fragmented vegetable matter in a compressed block of cannabis matter was of indeterminate origin. Accordingly, the block would be a combination of cannabis and other plant material of indeterminate origin, and provided that the other plant material contained THC and CBN, the entire block could be treated as cannabis mixture.[137]

14.83 The court then considered whether "cannabis mixture" should be confined to matter consisting of a mixture of components that *could not be easily distinguished or separated from each other*. In this regard, the court again applied the *Tan Cheng Bock* framework of statutory interpretation, noting the following points:[138]

(a) At the first step, there were two possible interpretations of "cannabis mixture": (i) "cannabis mixture" was confined to a mixture of components that could not be easily distinguished or separated; and (ii) "cannabis mixture" covered components that could be easily distinguished or separated. However, as a matter

133 See *Parliamentary Debates, Official Report* (10 November 1993) vol 61 (Prof S Jayakumar, Minister for Home Affairs).
134 *Saravanan Chandaram v Public Prosecutor* [2020] 2 SLR 95 at [98]–[100].
135 *Saravanan Chandaram v Public Prosecutor* [2020] 2 SLR 95 at [104].
136 See para 14.78 above.
137 *Saravanan Chandaram v Public Prosecutor* [2020] 2 SLR 95 at [105]–[107].
138 *Saravanan Chandaram v Public Prosecutor* [2020] 2 SLR 95 at [115]–[118].

of logic, where any plant matter that was of either indeterminate or non-cannabis origin could be easily and readily separated from cannabis plant matter, there was simply no reason to treat such plant matter as part of a cannabis mixture.

(b) At the second step, the specific purpose of criminalising "cannabis mixture" was to deter dealings in cannabis mixed with non-cannabis vegetable matter such as tobacco which, according to the HSA, was practically impossible to separate.

(c) Further, referring to extraneous material in the form of the 1993 Second Reading Speech, the court found it significant that in criminalising cannabis mixture, Parliament enacted the threshold weights for sentencing to be twice those applicable to cannabis. It would be illogical if cannabis mixture included non-cannabis material that could be easily separated from cannabis material since, in that situation, there would be no difficulty in proceeding against the offender for dealing in cannabis.

14.84 Thus, the court concluded that "cannabis mixture" meant cannabis plant matter commingled with vegetable matter of indeterminate origin or known to be of non-cannabis origin, where the components could not be easily distinguished or separated from each other.[139]

14.85 Turning to the sentencing framework for cannabis mixture offences, the court first held that cannabis mixture was a Class A controlled drug under the MDA based on a reading of relevant provisions in the MDA (this was relevant to the prescribed punishment provisions for cannabis mixture weighing less than 660g).[140]

14.86 The court then held that the *gross weight* of cannabis mixture should be used to calibrate the sentences for trafficking in, importing and exporting cannabis mixture, without regard to the concentration of THC and CBN in the cannabis mixture. In arriving at this holding, the court noted that under the statutory definition of "cannabis mixture", a mixture of vegetable matter was cannabis mixture as long as THC and CBN were present, regardless of their quantity. Further, the sentencing thresholds in relation to cannabis mixture in the MDA were all based on the gross weight of the same.[141]

14.87 The court further considered whether the sentencing framework for cannabis mixture offences would offend the constitutional guarantee

139 *Saravanan Chandaram v Public Prosecutor* [2020] 2 SLR 95 at [119].
140 *Saravanan Chandaram v Public Prosecutor* [2020] 2 SLR 95 at [121]–[139].
141 *Saravanan Chandaram v Public Prosecutor* [2020] 2 SLR 95 at [150]–[151].

of equality contained in Art 12(1) of the Constitution – an issue that arose because cannabis mixtures with different gross weights but containing the same amount of pure cannabis could conceivably attract different sentences. Before addressing this issue, the court considered the presumption of constitutionality. It held that the presumption in the context of the validity of legislation could be no more than a starting point that legislation would not presumptively be treated as suspect or unconstitutional; otherwise, relying on that presumption to meet an objection of unconstitutionality would entail presuming the very issue which was being challenged. The court emphasised that the determination of whether a law that was challenged was or was not constitutional lay exclusively within the ambit and competence of the courts.[142]

14.88 The court applied the "reasonable classification" test set out in *Lim Meng Suang v Attorney-General*[143] to determine if the sentencing framework offended Art 12. The court first held that the gross weight of cannabis mixture was an intelligible differentia.[144] The court then held that there was a rational relation between the differentia and the purpose and object of the MDA, for the following reasons:[145]

> (a) The purpose and object of the MDA was to prevent and deter distribution and consumption of illicit drugs, and the social evil caused by the trafficking, importation and exportation of addictive drugs which the MDA sought to prevent was broadly proportional to the quantity of drugs brought onto the illicit market. The specific purpose of the criminalisation of dealings in cannabis mixture was to deter trafficking in, importing or exporting cannabis mixture.
>
> (b) The concern over the potential unequal treatment of offenders due to different proportions of cannabis and non-cannabis plant material in cannabis mixtures of the same gross weight was largely theoretical. First, it was an inherent feature of cannabis mixture that the cannabis plant therein could not be easily distinguished or separated from the non-cannabis plant material. Thus, in reality, the proportions could not be quantified. Second, the sentencing framework based on gross weight was in line with how the pricing of cannabis products was dependent on gross weight in Singapore. Thus, the prevailing market practice supported the proposition that the gross weight was a reliable independent indicia of the harm done to society.

142 *Saravanan Chandaram v Public Prosecutor* [2020] 2 SLR 95 at [154].
143 [2015] 1 SLR 26.
144 *Saravanan Chandaram v Public Prosecutor* [2020] 2 SLR 95 at [155].
145 *Saravanan Chandaram v Public Prosecutor* [2020] 2 SLR 95 at [162]–[172].

(c) Based on the current state of science, the quantification of THC and CBN was neither precise nor accurate. This left the court to rely on the gross weight of cannabis mixture as the proxy indicator for sentencing.

14.89 On the permissibility of the Dual Charging Practice, the court first laid out the factual context. In the course of the HSA's testing and certification process, vegetable fragments were generated as the HSA analyst broke up the block of plant material into three parts: individual plant branches that could be certified as cannabis, fragments of plant parts and observable extraneous matter. This meant that some of the vegetable fragments came into existence as a result of the HSA's testing procedure ("Created Fragmented Vegetable Matter"). Thus, the contents of the block after analysis by the HSA would be different from the contents of the same block at the time of trafficking, importation or exportation.[146] The Dual Charging Practice was to prefer a charge for cannabis in respect of the first part of the material, and a charge for cannabis mixture in relation to the fragmented vegetable matter (the second part of the material). The extraneous matter in the third part would be discarded and disregarded.[147]

14.90 The court held that it was incumbent on the Prosecution to prove that the accused person knew the nature of the drugs in question and to establish accurately the relevant drug involved at the time of the offence.[148] In order to make out the Importation of Cannabis Mixture Charge, the Prosecution had to prove knowledge on Saravanan's part that the Created Fragmented Vegetable Matter was cannabis mixture. However, as it did not exist in that form at the time of the offence, and there was no basis for saying the change in form was intended by Saravanan, it could not be held that at the time of the offence, Saravanan knew the nature of the Created Fragmented Vegetable Matter or knew that it was cannabis mixture.[149] The court considered that the issue was significantly compounded by the problem of the indeterminacy of the quantity of the Created Fragmented Vegetable Matter.[150] For these reasons, the court held that the Importation of Cannabis Mixture Charge could not be established, and the Dual Charging Practice was legally impermissible.

14.91 In conclusion, the court noted two alternative charging options. The first was to charge an accused person solely in respect of the pure cannabis portion of a block of cannabis-related plant material. The

146 *Saravanan Chandaram v Public Prosecutor* [2020] 2 SLR 95 at [51] and [174].
147 *Saravanan Chandaram v Public Prosecutor* [2020] 2 SLR 95 at [175].
148 *Saravanan Chandaram v Public Prosecutor* [2020] 2 SLR 95 at [191].
149 *Saravanan Chandaram v Public Prosecutor* [2020] 2 SLR 95 at [186].
150 *Saravanan Chandaram v Public Prosecutor* [2020] 2 SLR 95 at [187].

second was to prefer one charge in respect of the entire block (less any extraneous material that could be easily separated), treating the entire block as cannabis mixture.[151]

V. Offences under miscellaneous statutes

A. Offences under Section 3(1)(a) of Administration of Justice (Protection) Act and orders under subsections 12(3) and 9(3)(d)

14.92 In *Wham Kwok Han Jolovan v Attorney-General*,[152] the Court of Appeal analysed the elements of scandalising contempt under s 3(1)(*a*) of the Administration of Justice (Protection) Act[153] ("AJPA"), as well as the circumstances under which the court should make (a) an apology order under s 12(3) of the AJPA; and (b) a cease-publication injunction under s 9(*d*) of the AJPA.

14.93 The first appellant ("Wham") had published a public post on his Facebook profile containing the statement: "Malaysia's judges are more independent than Singapore's for cases with political implications. Will be interesting to see what happens to this challenge." The post included a link to an online article titled "Malaysiakini mounts constitutional challenge against Anti-Fake News Act". Subsequently, the second appellant ("Tan") published a public post on his Facebook profile containing the statement: "By charging *Jolovan* for scandalising the judiciary, the AGC only confirms what he said was true" [emphasis in original]. Tan's post also contained a link to Wham's Facebook profile.

14.94 The Attorney-General ("AG") commenced proceedings against Wham and Tan for scandalising contempt under s 3(1)(*a*) of the AJPA. The High Court convicted them and sentenced them each to a fine of $5,000 (in default, one week's imprisonment), and ordered them to pay costs. The High Court rejected the AG's application for either (a) an order that Wham and Tan each publish an apology under s 12(3) of the AJPA; or (b) an injunction requiring Wham and Tan to cease further publication of their posts pursuant to the court's inherent power read with s 9(*d*) of the AJPA.

151 *Saravanan Chandaram v Public Prosecutor* [2020] 2 SLR 95 at [192]–[195].
152 [2020] 1 SLR 804.
153 Act 19 of 2016.

14.95 Wham and Tan appealed against the High Court's decision on conviction, sentence and costs, while the AG appealed against the High Court's refusal to grant the apology order or injunction.

14.96 The Court of Appeal first addressed Wham's and Tan's convictions. Their posts satisfied the first element of contempt, namely, imputing improper motives to or impugning the integrity, propriety or impartiality of any court (s 3(1)(*a*)(i) of the AJPA). Wham's post objectively meant that Singapore judges would decide cases with political implications on the basis of something other than their merits, and were, therefore, not independent. An assertion that a judiciary would decide matters otherwise, than in accordance with the merits, was among the most serious attacks that one could make against courts and the administration of justice, and went to the very heart and essence of the judicial mission and oath. The same analysis applied to Tan's post, which affirmed the allegation made in Wham's post.[154]

14.97 The court then analysed the second element of contempt, namely, that the posts posed a risk that public confidence in the administration of justice would be undermined (s 3(1)(*a*)(ii) of the AJPA). The court held that:

> (a) Parliament's intention in modifying the common law test for contempt, such that s 3(1)(*a*)(ii) only required a "risk" (rather than a "real risk") of undermining public confidence in the administration of justice, was to introduce a test that could be applied more expediently and pragmatically. Parliament intended to pre-empt hair-splitting or fine distinctions as to the level or risk that had to be established. This was part of a considered policy choice to come out strongly in favour of upholding the integrity and standing of the Judiciary.[155]
>
> (b) The proliferation of labels such as "remote", "fanciful", "illusory" and "imaginary" were not helpful. Instead, the application of the "risk" test should be guided by the question: "Is the risk one that the reasonable person coming across the contemptuous statement would think needs guarding against so as to avoid undermining public confidence in the administration of justice?" In answering this question, both the content and the context of the alleged contemptuous statement might be relevant.[156]

154 *Wham Kwok Han Jolovan v Attorney-General* [2020] 1 SLR 804 at [32]–[34].
155 *Wham Kwok Han Jolovan v Attorney-General* [2020] 1 SLR 804 at [36] and [37].
156 *Wham Kwok Han Jolovan v Attorney-General* [2020] 1 SLR 804 at [38].

(c) On the facts, Wham's post satisfied this test. The post objectively and plainly entailed a direct attack on the independence and integrity of the Judiciary, and was accessible to the world at large (as well as accessible directly to Wham's 7,000-odd followers on Facebook). Wham held himself out as a commentator of sorts on social affairs and someone who was knowledgeable on such matters, and clearly intended his post to be taken seriously. The fact that the post was published on Facebook did not make it so fanciful or self-evidently unreliable that no risk of undermining public confidence in the administration of justice arose.[157]

(d) The same analysis largely applied to Tan's post. Tan's post could also be seen in the news feeds of his 352 Facebook followers and 2,597 Facebook friends (in addition to being accessible to the world at large).[158]

14.98 Wham's and Tan's posts satisfied the third element of contempt, namely, that they did not constitute fair criticism. There was no objective or rational basis for the posts. Though Wham claimed that his post was based on the comparability of three pairs of cases from Malaysia and Singapore, it was not evident that he had these cases in mind when preparing the post. In any event, there was nothing in the cases that could reasonably lead one to conclude that Singapore judges, unlike their Malaysian counterparts, were prone to deciding cases with political implications otherwise than in accordance with their merits.[159]

14.99 The court thus affirmed Wham's and Tan's convictions, and also dismissed their appeals against sentence and the order of costs.

14.100 Turning to the AG's appeal, the Court of Appeal first affirmed the High Court's decision not to order Wham and Tan to publish an apology under s 12(3) of the AJPA. The court held that:

(a) An apology order could primarily serve signalling, educative and corrective functions, though retribution and deterrence might also be relevant depending on the circumstances of the case and whether the sentence was seen from the viewpoint only of the contemnor or also of the wider public.[160]

(b) It was not the case that for scandalising contempt, a contemnor should, as a starting point, be ordered to apologise if he refused to do so voluntarily. Not every case required a signal

157 *Wham Kwok Han Jolovan v Attorney-General* [2020] 1 SLR 804 at [39].
158 *Wham Kwok Han Jolovan v Attorney-General* [2020] 1 SLR 804 at [40].
159 *Wham Kwok Han Jolovan v Attorney-General* [2020] 1 SLR 804 at [41]–[47].
160 *Wham Kwok Han Jolovan v Attorney-General* [2020] 1 SLR 804 at [75].

to be sent to the public in the form of an apology order. An insincere apology made under compulsion could in fact diminish the standing of the Judiciary.[161]

(c) A mandated apology should only be considered in exceptional circumstances, where the content of the contempt and the conduct of the contemnor were so egregious that the imposition of a fine and/or imprisonment would not suffice. Wham's and Tan's cases did not fall within this category.[162]

14.101 The court allowed the AG's appeal in respect of an injunction under s 9(*d*) of the AJPA. It held that:

(a) An injunction under s 9(*d*) might take the form of a directive requiring the contemnor to either *desist* from future publication, or also to *take down* a continuing publication.[163]

(b) Wham's post on Facebook was a continuing publication. Material which was published on the Internet continued to be published for the entire time that it remained available on the Internet, and Wham's post could actively resurface in the news feeds of other people.[164]

(c) In general, there was no justification for permitting the continued existence or posting of a statement that had already been found to be contemptuous. The issue in each case was whether there were good reasons to favour the status quo and leave the contemptuous statement in existence. The court should consider all relevant circumstances, including the technical feasibility of removing the statement, and whether issuing an injunction would only breathe new life into a falsehood that had died a natural death. There were no good reasons in this case for leaving Wham's post online.[165]

14.102 The court thus granted a cease-publication injunction in respect of Wham, requiring him both to desist from future publication of his post and to take down that post. No such injunction was necessary for Tan, as his post had already been removed, and the AG had not sufficiently demonstrated Tan's propensity to repeat his offending conduct.[166]

161 *Wham Kwok Han Jolovan v Attorney-General* [2020] 1 SLR 804 at [75].
162 *Wham Kwok Han Jolovan v Attorney-General* [2020] 1 SLR 804 at [76].
163 *Wham Kwok Han Jolovan v Attorney-General* [2020] 1 SLR 804 at [79].
164 *Wham Kwok Han Jolovan v Attorney-General* [2020] 1 SLR 804 at [80].
165 *Wham Kwok Han Jolovan v Attorney-General* [2020] 1 SLR 804 at [81] and [82].
166 *Wham Kwok Han Jolovan v Attorney-General* [2020] 1 SLR 804 at [82] and [83].

B. Meaning of "course of conduct" for offence of unlawful stalking under Section 7 of Protection from Harassment Act

14.103 In *Lee Shing Chan v Public Prosecutor*,[167] a three-judge bench of the High Court discussed the meaning of "course of conduct" in the context of the offence of unlawful stalking under s 7 of the Protection from Harassment Act ("POHA").[168]

14.104 The appellants ("Lee" and "Tan") were two unlicensed fruit hawkers. On the day of the incident, Lee and Tan were spotted selling fruits illegally by National Environment Agency ("NEA") officers. The officer issued Tan a summons for being an unlicensed hawker, and seized the fruits and two wooden planks forming part of a makeshift table. The NEA officers then left the scene in a van ("the NEA Van").

14.105 Lee, Tan and a third unlicensed hawker then followed the NEA Van in a lorry ("the Lorry") to various destinations over three hours. They continued following the NEA Van even after the NEA officers had unloaded the seized items at a NEA office. They also followed the NEA Van to a carpark, where they alighted from the Lorry, and Lee demanded to see the warrant card of a NEA officer. When the officer refused to produce his warrant card, Lee and Tan hurled Hokkien vulgarities at him.

14.106 Lee and Tan were each charged with (a) using abusive words towards a public servant in relation to the execution of his duty as such public servant, under s 6 of the POHA (for abusing the NEA officer with Hokkien vulgarities); and (b) unlawful stalking with the common intention to cause alarm, under s 7 of the POHA read with s 34 of the Penal Code (for following the NEA Van to various places over three hours). Lee and Tan were convicted at first instance in the State Courts. They then appealed against their convictions and sentences for the charges under s 7 of the POHA.

14.107 On appeal, the key issue in relation to Lee and Tan's convictions was whether the requirement that the accused engage in "a course of conduct" under s 7(2) of the POHA, which was defined under s 7(10) of the POHA to include conduct on one occasion if it was "protracted", was made out. The High Court held as follows:

> (a) Whether conduct on one occasion was "protracted" so as to amount to a "course of conduct", under ss 7(2) and 7(10) of the POHA, was a fact-sensitive assessment that had to be made

167 [2020] 4 SLR 1174.
168 Cap 256A, 2015 Rev Ed.

as a matter of common sense. The court had to look at all the circumstances, including the type, intensity and intrusiveness of the conduct.[169]

(b) To be protracted, the conduct did not have to be continuous or uninterrupted. Generally, if the conduct on a single occasion was engaged in for longer than would reasonably be considered sensible in the circumstances, that would be a pointer towards it fulfilling the meaning of protracted conduct under s 7(10) of the POHA. The court had to be satisfied that there was a certain degree of persistence or continuity of purpose which was unreasonable in the circumstances.[170]

(c) To avoid artificiality, too much emphasis ought not to be placed on whether the conduct was better classified as happening on one or multiple occasions. The way that s 7(10) of the POHA was worded allowed the court to avoid being drawn into such semantic debates by accepting that conduct on one or two or more occasions would suffice.[171]

14.108 On the facts, Lee and Tan's conduct was protracted. They followed the NEA Van to numerous places over a three-hour period, persisting in doing so even after the seized goods were unloaded at a NEA office.[172] All the other elements of the offence of unlawful stalking under s 7 of the POHA were satisfied. The High Court therefore dismissed Lee and Tan's appeals against conviction.[173]

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169 *Lee Shing Chan v Public Prosecutor* [2020] 4 SLR 1174 at [21].
170 *Lee Shing Chan v Public Prosecutor* [2020] 4 SLR 1174 at [21] and [22].
171 *Lee Shing Chan v Public Prosecutor* [2020] 4 SLR 1174 at [23].
172 *Lee Shing Chan v Public Prosecutor* [2020] 4 SLR 1174 at [24].
173 *Lee Shing Chan v Public Prosecutor* [2020] 4 SLR 1174 at [30].