

Moad Fadzir bin Mustaffa v Public Prosecutor and other appeals [2019] SGCA 73

Case Number : Criminal Appeals Nos 12, 14 and 18 of 2019

Decision Date : 25 November 2019

Tribunal/Court : Court of Appeal

Coram : Sundaresh Menon CJ; Judith Prakash JA; Tay Yong Kwang JA

Counsel Name(s) : Peter Keith Fernando and John Tan (Leo Fernando LLC) and Shobna d/o V Chandran, Nicolette Lee and Abhinav Ratan Mohan (Dentons Rodyk & Davidson LLP) for the appellant in CCA 12/2019; Lim Jian Yi, Sarah Siaw and Wu Yu Jie (Attorney-General's Chambers) for the respondent in CCA 12/2019 and CCA 18/2019 and the appellant in CCA 14/2019; Eugene Singarajah Thuraisingam and Chooi Jing Yen (Eugene Thuraisingam LLP) for the respondent in CCA 14/2019 and the appellant in CCA 18/2019.

Parties : Moad Fadzir bin Mustaffa — Public Prosecutor — Zuraimy bin Musa

Criminal Law – Statutory offences – Misuse of Drugs Act

[LawNet Editorial Note: This was an appeal from the decision of the High Court in [2019] SGHC 33.]

25 November 2019

Judgment reserved.

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

The charges

1 Moad Fadzir bin Mustaffa (“Moad Fadzir”) and Zuraimy bin Musa (“Zuraimy”) were tried jointly in the High Court on the following related charges:^[note: 1]

Moad Fadzir bin Mustaffa

You, Moad Fadzir bin Mustaffa, are charged that you, on 12th April 2016, at or about 12.15 a.m., at the vicinity of Blk 623 Woodlands Drive 52, Singapore, together with one Zuraimy bin Musa, NRIC No. XXXXXXXXXX, in furtherance of the common intention of both of you, did traffic in a controlled drug specified in Class ‘A’ of the First Schedule to the Misuse of Drugs Act (Cap 185, 2008, Rev Ed), to wit, by having in

your possession for the purpose of trafficking, four packets of granular substances that were analysed and found to contain not less than 36.93 grams of diamorphine, without any authorization under the said Act or Regulations made thereunder and you have thereby committed an offence under section 5(1)(a) read with section 5(2) of the Misuse of Drugs Act read with section 34 of the Penal Code (Cap 224, 2008 Rev Ed) which offence is punishable under section 33(1) of the Misuse of Drugs Act.

Zuraimy bin Musa

You, Zuraimy bin Musa, are charged that you, on 12th April 2016, at or about 12.15 a.m., at the vicinity of Blk 623 Woodlands Drive 52, Singapore, together with one Moad Fadzir bin Mustaffa, NRIC No. XXXXXXXXX, in furtherance of the common intention of both of you, did traffic in a controlled drug specified in Class 'A' of the First Schedule to the Misuse of Drugs Act (Cap 185, 2008, Rev Ed), to wit, by having in your possession for the purpose of trafficking, four packets of granular substances that were analysed and found to contain not less than 36.93 grams of diamorphine, without any authorization under the said Act or Regulations made thereunder and you have thereby committed an offence under section 5(1)(a) read with section 5(2) of the Misuse of Drugs Act read with section 34 of the Penal Code (Cap 224, 2008 Rev Ed) which offence is punishable under section 33(1) of the Misuse of Drugs Act.

At the time of the incident stated in the charges, Moad Fadzir was almost 37 years old and Zuraimy was 47 years old.

2 Both Moad Fadzir and Zuraimy claimed trial with each alleging that the four packets containing diamorphine belonged to the other. The High Court Judge ("the Judge") found Moad Fadzir guilty on his charge and convicted him: *Public Prosecutor v Moad Fadzir bin Mustaffa and another* [2019] SGHC 33 ("Judgment") at [9]. The Judge found that Moad Fadzir did not satisfy any of the requirements of s 33B(2) of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) ("MDA"). Accordingly, the Judge imposed the mandatory death sentence on Moad Fadzir.

3 As for Zuraimy, the Judge was not satisfied that the Prosecution had proved the charge against him beyond reasonable doubt. The Judge amended the charge against Zuraimy to one for the offence of abetting Moad Fadzir's possession of diamorphine, as follows (Judgment at [18]):

You, ZURAIMY BIN MUSA, are charged that you, between the evening of 11th April 2016, to at or about 12.15am on the 12th April 2016, did abet by intentionally aiding one Moad Fadzir bin Mustaffa, NRIC No. SXXXXX12F, to possess a Class 'A' controlled drug listed in the First Schedule to the Misuse of Drugs Act (Cap 185, 2008, Rev Ed), namely, four packets of granular substances that were analysed and found to contain not less than 36.93 grams of diamorphine, without any authorisation under the said Act or the Regulations made thereunder, *to wit*, by directing, arranging and accompanying Moad Fadzir bin Mustaffa to Blk 157 Toa Payoh Lorong 1 to collect the four packets of granular substances, and you have thereby committed an offence under section 8(a) read with section 12 and punishable under section 33(1) of the Misuse of Drugs Act.

4 The Judge found Zuraimy guilty on the above amended charge and convicted him accordingly (Judgment at [19]). After hearing submissions on sentence from the Prosecution and from counsel for Zuraimy, the Judge sentenced Zuraimy to the maximum term of ten years' imprisonment with effect from 12 April 2016, the date of his arrest.

The factual background in the Agreed Statement of Facts

5 Much of the factual background was not in dispute. The following facts are stated in a 19-page Agreed Statement of Facts which counsel for Moad Fadzir, counsel for Zuraimy and the Prosecution agreed upon.

6 On the night of 11 April 2016, Moad Fadzir received a phone call from someone known to him as "Abang" while he was in a night class at Singapore Polytechnic. After the night class at about 10pm, Moad Fadzir went to meet Zuraimy at Block 1 Holland Close. He then drove a car to Block 157 Toa Payoh with Zuraimy in the front passenger seat. After the car was parked at the loading/unloading bay there, an unknown Indian man walked to the driver's side and threw a white plastic bag through the front window and it landed on Moad Fadzir's lap. Moad Fadzir passed the white plastic bag to Zuraimy who tied it. The white plastic bag was subsequently placed in Moad Fadzir's black helmet sling bag ("black bag") in the car.

7 Moad Fadzir then drove Zuraimy back to Block 1 Holland Close. At about 11.41pm, Zuraimy alighted along Commonwealth Avenue West and walked towards Block 1 Holland Close. Moad Fadzir then drove the car, with the black bag inside, to his residence at Block 623 Woodlands Drive 52.

8 Unknown to both accused persons, Central Narcotics Bureau ("CNB") officers were in the vicinity of Block 156A Toa Payoh Lorong 1 looking out for them. The CNB officers saw Moad Fadzir's car arriving and then leaving the location shortly thereafter. They followed Moad Fadzir's car as it proceeded to Holland Close. When Zuraimy alighted and walked towards Block 1 Holland Close, a team of CNB officers tailed him there. Another team of CNB officers continued to monitor and follow Moad Fadzir's car to Block 623 Woodlands Drive 52. There, he stopped and remained in the car for about seven minutes. When he alighted from the car at around 12.15am on 12 April 2016, the CNB officers moved in and arrested him. Zuraimy was arrested by CNB officers separately later in the morning of 12 April 2016 when he came down from his residence.

9 When Moad Fadzir was arrested, he was carrying the black bag from the car. Inside the white plastic bag was a red plastic bag containing four bundles wrapped in black tape. These "four black bundles" were the four packets of granular substances mentioned in the respective charges. During his arrest, some items fell from his body to the ground. Among these were a packet of granular substance, a Sampoerna cigarette box, a packet of crystalline substance, a stained straw and a packet containing two yellow tablets and some tablet fragments. After his arrest, he was brought up to his residence. Inside the flat, the CNB officers found one packet of granular substance from the drawer of the table in his bedroom and a digital weighing scale on his bed. A search conducted on the car that he was driving found nothing incriminating.

10 Investigations continued with Senior Station Inspector ("SSI") Tony Ng from the CNB recording a contemporaneous statement ("P84") from Moad Fadzir inside a CNB vehicle from about 1.35am to 2.35am. At about 3am, SSI Tony Ng recorded a further contemporaneous statement ("P85") from Moad Fadzir inside the CNB vehicle.

11 At about 4.28am, the CNB officers and Moad Fadzir arrived at the CNB Headquarters. Moad Fadzir was asked to provide urine samples. The exhibits that were seized were processed by the investigating officer, Woman Assistant Superintendent ("W/ASP") Michelle Sim. At about 8.20am, Moad Fadzir was placed in the lock-up.

12 At around 10.50am, Moad Fadzir was brought out of the lock-up for a medical examination. After that was done, at about 11.37am, W/ASP Michelle Sim recorded a cautioned statement from him pursuant to s 23 of the Criminal Procedure Code ("CPC") (Cap 68, 2012 Rev Ed). The recording was completed at about 12.15pm. W/ASP Michelle Sim recorded further statements from him on 17, 18 and 19 April 2016.

13 On 13 April 2016, Moad Fadzir was admitted to the Complex Medical Centre ("CMC") for drug withdrawal assessment. He was discharged from the CMC on 15 April 2016.

14 Cautioned statements were also recorded by W/ASP Michelle Sim from Moad Fadzir on 19 April 2016 in respect of various charges. He chose to speak in English. After Assistant Superintendent Lucas Seah took over Moad Fadzir's case, he recorded another statement from him on 31 August 2016.

15 Zuraimy was arrested at about 6.35am on 12 April 2016 when he came down from his flat in Block 1 Holland Close. A search conducted at the flat found nothing incriminating. At about 7.20am, a contemporaneous statement was recorded from him inside a CNB vehicle. He was then escorted to his official address at a flat in Woodlands. A search in that flat, and later of his body at the CNB, also uncovered nothing incriminating. He gave urine and blood samples during the investigations.

16 A cautioned statement was recorded from Zuraimy at 3.35pm on 12 April 2016. Further statements were recorded from him on 14, 15 and 17 April 2016 and on 31 August 2016.

17 Moad Fadzir's urine samples tested positive for monoacetylmorphine and methamphetamine and negative for a variety of other controlled substances. Zuraimy's urine samples tested negative for any controlled substance.

18 Both accused persons did not question the integrity of the processing of the drugs during investigations. Both accepted that the four black bundles seized from Moad Fadzir contained not less than 36.93g of diamorphine as stated in their charges.

19 Moad Fadzir, Zuraimy as well as the Prosecution appealed against the Judge's decision, resulting in the following three appeals before us:

(a) in Criminal Appeal No 12 of 2019 ("CCA 12"), Moad Fadzir appealed against his conviction and sentence, disputing the elements of knowledge of the nature of the drugs and possession of the drugs for the purpose of trafficking;

(b) in Criminal Appeal No 14 of 2019 ("CCA 14"), the Prosecution appealed against the acquittal of Zuraimy on the original trafficking charge; and

(c) in Criminal Appeal No 18 of 2019 ("CCA 18"), Zuraimy appealed against his sentence on the amended charge, on the ground that it is manifestly excessive.

20 We heard the arguments on these three appeals and reserved judgment.

The evidence at trial

Events surrounding the commission of the offence

21 In the evening of 11 April 2016, Moad Fadzir was in a night class at Singapore Polytechnic. He was then doing a part-time course for a Diploma in Warehouse Operations.^[note: 2] While he was in class, he received a call from an unknown person known to him only as "Abang".^[note: 3]

22 Moad Fadzir first testified during his examination-in-chief that he received a call at around 9.58pm from a private number. The caller asked him in Malay to call "Lan" and then introduced himself as "Abang".^[note: 4] Moad Fadzir testified that he did not know who Abang was and that the caller did not want to tell him who he was when asked. Moad Fadzir did not ask anything else. He knew that Lan was his friend, Zuraimy. Moad Fadzir said, during his cross-examination by Zuraimy's counsel, that this account was consistent with para 6 of the statement which was recorded from him on 17 April 2016 under s 22 of the CPC.^[note: 5]

23 Moad Fadzir identified from the phone records a call at 9.58pm as the one from Abang.^[note: 6] However, the phone records showed that that call actually came from Zuraimy's hand phone. Moad Fadzir then explained that he did not recognise the voice of the caller who had asked him to call Zuraimy.^[note: 7] Nevertheless, during cross-examination, Moad Fadzir again maintained that Abang's number was a private number.^[note: 8] The toll records, however, showed that there was only one incoming/outgoing call made to/from Moad Fadzir's hand phone between 8pm and 10pm and that was the incoming call received on Moad Fadzir's hand phone and the call came from Zuraimy's hand phone.

24 On the other hand, Zuraimy testified that he called Moad Fadzir that night because he wanted to ask him about an issue that Moad Fadzir had with one Bai Rai and for which Moad Fadzir would like Zuraimy's help.^[note: 9] Moad Fadzir replied that he was in class and would call Zuraimy later.

25 After his class, Moad Fadzir called Zuraimy at around 10.20pm.^[note: 10] Moad Fadzir testified that Zuraimy asked him to go to Zuraimy's uncle's flat at Holland Close to "chill", *ie*, just to talk.^[note: 11] Before meeting Zuraimy, Moad Fadzir withdrew \$3,000 from his bank account. However, Zuraimy's evidence was that it was Moad Fadzir who wanted to stop by.^[note: 12]

26 Moad Fadzir then drove his rented car to Block 1 Holland Close. Zuraimy met him at his car and sat in the front passenger seat.^[note: 13] Moad Fadzir testified that he could smell alcohol in Zuraimy's breath but Zuraimy was not drunk and was speaking normally.^[note: 14] On the other hand, Zuraimy testified that he was a bit tipsy after having consumed a bottle of Johnnie Walker around two to three hours earlier.^[note: 15]

27 Moad Fadzir testified that after about five to ten minutes, Zuraimy asked for a lift to Block 157 Toa Payoh to meet a friend. Moad Fadzir acceded to the request. He denied that he knew he was going to Toa Payoh to collect diamorphine with Zuraimy.^[note: 16]

28 However, Zuraimy denied that he asked to go to Toa Payoh. His account was that Moad Fadzir asked him for the contact number of one Benathan.^[note: 17] Zuraimy testified that he would meet Benathan once every fortnight for secret society updates and that Moad Fadzir knew Benathan as well as they were all in the same gang.^[note: 18] A CNB officer gave evidence that she had no idea if Benathan had been found or who he was.^[note: 19] Following Moad Fadzir's request, Zuraimy called Benathan. He testified that Benathan told him that there was no need to give his phone number to Moad Fadzir since Zuraimy was then with Moad Fadzir and that he would message Zuraimy "the location of that place later on and you relay to Fadzir".^[note: 20] Zuraimy testified that Benathan then ended the call, without him being able to ask Benathan much. Thereafter, it was Moad Fadzir who asked Zuraimy

to accompany him and he simply drove away from Holland Close with Zuraimy seated in the front passenger seat.^[note: 21] Moad Fadzir then requested Zuraimy's help to do an online search for the address of Toa Payoh Industrial Park and he subsequently talked about the Bai Rai issue that he wanted Zuraimy's help with.

29 The evidence showed that throughout the day, Zuraimy had multiple phone calls with Benathan. Zuraimy testified that they had been arranging a meeting between the two of them which was ultimately fixed for the next day at Broadway Ang Mo Kio.^[note: 22] However, in the call between Zuraimy and Benathan in Moad Fadzir's car, they did not talk about the meeting arrangement. Zuraimy testified that it was during that call that Moad Fadzir's name surfaced between them for the first time.

30 As Moad Fadzir drove to Toa Payoh with Zuraimy, Benathan sent a text message to Zuraimy stating "Blk 157a lorong 1" and later, another text message stating "Sorry,... Blk 156a lorong 1".^[note: 23] Zuraimy testified that he read Benathan's text messages aloud for Moad Fadzir and Moad Fadzir asked him to do an online search for the new address.^[note: 24] Zuraimy testified that he was suspicious about the change in address so he asked Moad Fadzir what they were supposed to do there. Moad Fadzir replied for the first time that Benathan had asked him to deliver money. Zuraimy was more curious than he was suspicious and did not ask Moad Fadzir for further details.

31 Zuraimy showed Moad Fadzir the direction to the location in Toa Payoh.^[note: 25] Moad Fadzir then drove to Block 157 Toa Payoh and parked at the loading/unloading bay.^[note: 26] Moad Fadzir testified that Zuraimy told him to park there.^[note: 27] After the car stopped, Moad Fadzir turned off the car's headlights and while the car doors remained closed, they wound down the windows.

32 Moad Fadzir testified that Zuraimy then informed someone over the phone that they had arrived.^[note: 28] Zuraimy testified instead that Benathan called to ask him to inform Moad Fadzir to pass the money to the person who would be approaching the car and asked Zuraimy to send a text message to Benathan when that was done.^[note: 29] Zuraimy denied knowing that someone was going to approach the car with diamorphine.^[note: 30]

33 Subsequently, an unknown Indian man walked to the driver's side and threw the white plastic bag into the car through the front window and it landed on Moad Fadzir's lap.^[note: 31] Save for the fact that Moad Fadzir and Zuraimy both denied knowing what was in the white plastic bag at the material time and asserted that they did not check what it contained, their accounts as to what happened next again differed.

34 According to Moad Fadzir, Zuraimy gestured to him to hand over the white plastic bag which he did. Zuraimy passed him a stack of half-folded \$50 notes which belonged entirely to Zuraimy and he (Moad Fadzir) passed the money to the Indian man.^[note: 32] The Indian man took the money and walked away in the direction behind the car.^[note: 33] Zuraimy then tightened the white plastic bag and put it in Moad Fadzir's black bag of his own accord.^[note: 34] Zuraimy told Moad Fadzir not to worry and that this was "nothing". Initially, Zuraimy said that he was merely putting the white plastic bag temporarily in the black bag and would take it out when they reached his (Zuraimy's) official address in Woodlands. However, later he said that he would meet Moad Fadzir the next day or later to collect the white plastic bag from him since they both stayed in Woodlands. Moad Fadzir did not ask Zuraimy what was in the white plastic bag because he merely assumed that Zuraimy was dealing in illegal cigarettes. At first, Zuraimy told Moad Fadzir to send him to his official address in Woodlands but later told Moad Fadzir to send him back to Block 1 Holland Close instead.^[note: 35] Zuraimy alighted at Commonwealth Avenue West (which was near Holland Close) without the white plastic bag or the black bag. Moad Fadzir then drove to his home at Block 623 Woodlands Drive 52 and parked his car on the road leading to a loading/unloading area in front of that block.^[note: 36] Moad Fadzir also testified that Zuraimy neither nodded off nor fell asleep while he was sitting in the car.^[note: 37]

35 On the other hand, according to Zuraimy, he dozed off in the car after Benathan's call because the alcohol he had consumed earlier was taking its toll on him.^[note: 38] He woke up because of the sound of plastic and caught a glimpse of a dark-skinned man walking away from the car. Moad Fadzir then said he would send Zuraimy back to Zuraimy's official address in Woodlands and Zuraimy agreed. Zuraimy also asked Moad Fadzir whether the "money" had been handed over and when Moad Fadzir confirmed it was done, Zuraimy sent Benathan the text message "clear".^[note: 39] Zuraimy disagreed the Prosecution's suggestion that "clear" meant that it was clear for the drugs to be delivered to Moad Fadzir and himself.^[note: 40] Moad Fadzir then asked Zuraimy to tie the white plastic bag because Moad Fadzir was worried that its contents would fall out.^[note: 41] Zuraimy did not see how the white plastic bag entered the car. Zuraimy also did not ask Moad Fadzir about its contents but simply helped to tie it and then returned it to him. Zuraimy asked Moad Fadzir to drop him off at Holland Close.

36 According to Zuraimy, Benathan also sent him the text message in Malay "Gagi brape kasi".^[note: 42] As both Zuraimy and Moad Fadzir were unsure about what Benathan meant by "gagi", Zuraimy called Benathan to clarify.^[note: 43] Benathan apologised and explained that the message was meant for somebody else. Zuraimy disagreed with the Prosecution's suggestion that Benathan was asking how much salary Zuraimy was going to pay the male Indian for delivering the drugs because "gagi" should in fact be "gaji" which meant salary.^[note: 44] Zuraimy also disagreed with the Prosecution's suggestion that it was only after this call that the four black bundles were delivered to him and Moad Fadzir. He claimed that the car had already left that area when he made the call to Benathan.

37 The Prosecution's stand at the trial was that although the CNB officers were in the vicinity of Block 156A Toa Payoh Lorong 1 and saw Moad Fadzir's car, they did not see the male Indian or the transaction involving the white plastic bag being thrown through the window into the car.^[note: 45] As stated in the Agreed Statement of Facts, the white plastic bag was subsequently placed in Moad Fadzir's black bag.^[note: 46]

Summary of the parties' cases in the High Court

38 At the trial, Moad Fadzir argued that his contemporaneous statements P84, in particular, and P85 were inadmissible on two grounds.^[note: 47] First, P84 was recorded under oppressive circumstances. Prior to the recording of those two statements, Moad Fadzir had consumed Ipam tablets and cough syrup. He argued that these affected his mental state such that he was unable to comprehend what was happening when P84 was recorded. Second, SSI Tony Ng had allegedly threatened to "arrest" Moad Fadzir's mother because of the diamorphine found in Moad Fadzir's bedroom.

39 Moad Fadzir did not dispute that he had physical possession of the white plastic bag. His defence was that he had no knowledge of its contents. He thought that it contained illegal cigarettes. He also submitted that he did not have any common intention with Zuraimy to possess diamorphine for the purpose of trafficking. He claimed that he allowed the white plastic bag to remain in his black bag because Zuraimy had said that he would collect the white plastic bag the next day.

40 As for Zuraimy, his defence was that he did not have possession of the diamorphine and was also not deemed to be in joint possession with Moad Fadzir of the diamorphine pursuant to s 18(4) of the MDA. Zuraimy argued that he did not consent to Moad Fadzir having the diamorphine in his possession and was not instrumental in putting Moad Fadzir in possession of the diamorphine. Zuraimy submitted that he had no knowledge of the four black bundles in the white plastic bag, let alone knowledge of the nature of the drugs contained in them. Zuraimy also submitted that he did not have any common intention with Moad Fadzir to possess diamorphine for the purpose of trafficking.

41 The Prosecution's case was that Moad Fadzir and Zuraimy had the common intention to possess diamorphine for the purpose of trafficking and they had failed to rebut the presumption of trafficking under s 17 of the MDA. Specifically, the Prosecution submitted that Moad Fadzir had possession of the white plastic bag and actual knowledge that it contained diamorphine. The Prosecution also argued that Moad Fadzir's contemporaneous statements in P84 and P85 were admissible.^[note: 48] The Prosecution submitted that there was no evidence that prior to the recording of those statements, Moad Fadzir had consumed Ipam tablets and cough syrup. The Prosecution also argued that Moad Fadzir was neither assaulted nor threatened by CNB officers at the time of his arrest.

42 As for Zuraimy, the Prosecution submitted that he was at least in joint possession of the diamorphine with Moad Fadzir, as he had been instrumental in putting Moad Fadzir into actual physical possession of the diamorphine. The Prosecution also argued that Zuraimy had actual knowledge that the white plastic bag contained diamorphine.

The decision of the High Court

43 Following the ancillary hearing on admissibility of the contemporaneous statements, the Judge allowed P84 and P85 to be admitted into evidence and found that Moad Fadzir made those statements freely and without coercion for the following reasons.^[note: 49] First, the injuries Moad Fadzir allegedly sustained in the course of his arrest all appeared to be minor.^[note: 50] There was apparently a violent struggle during the arrest. Second, even if the Court accepted that Moad Fadzir was very much indisposed and too sleepy to answer questions properly, it was not and could not be sufficient in law to reject the statements just because he was under the influence of Ipam tablets and cough syrup, all of which he had consumed himself.^[note: 51] Third, Moad Fadzir did not in fact testify at the ancillary hearing that the threat was to arrest his mother.^[note: 52] If at all, SSI Tony Ng only said that because drugs were found in the Woodlands flat, the CNB may have to take Moad Fadzir's mother in. Such a statement, the Judge said, was not quite the same as saying that they were going to arrest Moad Fadzir's mother or that she would be charged. Further, the alleged threat that his mother might be taken to the police station did not seem to have been the strongest factor causing Moad Fadzir to make the contemporaneous statements. This was because the bulk of the ancillary hearing was focused on the question of Moad Fadzir's inability to stay awake. The strongest part of the evidence of any threat concerning his mother came at the end of Moad Fadzir's examination-in-chief and it took a leading question from his counsel to elicit from him that it was the alleged threat that led him to make the contemporaneous statements.

44 Where the charge against Moad Fadzir was concerned, the Judge found that he had possession of the drugs and knowledge that the drugs were diamorphine and that he failed to rebut the presumption of trafficking under s 17 of the MDA (Judgment at [8]). The Judge did not accept Moad Fadzir's assertion that he thought the four taped packets contained contraband cigarettes. Apart from the fact that Moad Fadzir did not make this assertion in his cautioned statement and that he could not give a good account as to how he could have mistaken four packets of hard, irregularly shaped granular substances for cigarettes, his assertion was also contradicted by his admission of knowledge of the drugs in his contemporaneous statement in P84.

45 The Judge therefore convicted Moad Fadzir on the charge against him. As Moad Fadzir could not satisfy any of the requirements of s 33B(2) of the MDA, the Judge imposed the mandatory death penalty on Moad Fadzir.

46 Where Zuraimy's case was concerned, the Judge found that the criminal act element and the participation element for the common intention charge were made out because Zuraimy had abetted Moad Fadzir in obtaining actual physical possession of the diamorphine by arranging and accompanying him in the car to Toa Payoh to collect the diamorphine (see Judgment at [17]). The Judge, however, found that the common intention element, *ie*, common intention for Moad Fadzir to be in possession of diamorphine for the purpose of trafficking, was not established by the Prosecution. The Judge found that Zuraimy was neither in possession nor in joint possession of the diamorphine with Moad Fadzir (Judgment at [14]–[15]). There was no evidence of any pre-arranged plan between Moad Fadzir and Zuraimy in relation to the diamorphine and it was Moad Fadzir who paid for the diamorphine and kept it in his physical possession. Since Zuraimy was not in possession of the diamorphine, the Prosecution could not rely on the presumption of trafficking under s 17 of the MDA (Judgment at [17]). Although Zuraimy may have known the quantity and the nature of the drugs, this did not necessarily imply that he knew Moad Fadzir was purchasing the diamorphine for the purpose of trafficking. Zuraimy might possibly have thought Moad Fadzir purchased the drugs for his own consumption. Given this uncertainty, the Judge was not satisfied that Zuraimy was guilty of the charge against him. The Judge also held that where the Prosecution sought to rely on the presumption of trafficking under s 17, it could not then in conjunction rely on "the presumption of possession under s 18(4) of the MDA" against Zuraimy (Judgment at [13]). The Judge relied on *Mohd Halmi bin Hamid and another v Public Prosecutor* [2006] 1 SLR(R) 548 ("*Mohd Halmi*") at [7]–[8] for this proposition.

47 Nevertheless, the Judge was satisfied that Zuraimy was an abettor who had arranged the drug transaction as a middle man (Judgment at [11] and [18]). The Judge thus amended the charge against Zuraimy (Judgment at [18]) and convicted him of abetment by intentionally aiding Moad Fadzir to possess the diamorphine. After hearing submissions on sentence, the Judge sentenced Zuraimy to the maximum term of ten years' imprisonment with effect from the date of arrest.

48 We note at this juncture that the charge against Moad Fadzir, which the Judge held was proved beyond reasonable doubt, still contained the assertion about the common intention that Moad Fadzir had with Zuraimy. If Zuraimy was found not to have such common intention, it follows that Moad Fadzir could not have such common intention too.

The parties' arguments on appeal

49 On appeal, the parties made essentially the same submissions that they had made before the High Court.

50 In his appeal in CCA 12, Moad Fadzir did not dispute that the "Abang" who called him on 11 April 2016 was Zuraimy.^[note: 53] He argued that P84 was an involuntary statement and that the Judge erred in admitting it into evidence. He submitted that even if P84 was admitted into evidence, little or no weight should have been given to it. He argued that he did not know that the white plastic bag contained diamorphine and genuinely thought that it contained illegal cigarettes. He also submitted that he had rebutted the presumption of trafficking under s 17 of the MDA because he was only safekeeping the white plastic bag with the four packets for Zuraimy temporarily, with the intention of returning them to him.

51 In the Prosecution's appeal in CCA 14, Zuraimy defended the Judge's decision to acquit him on the original trafficking charge. He submitted that he was not in joint possession of the diamorphine. Zuraimy also argued that the presumption of trafficking under s 17 could not be relied in conjunction with deemed possession in s 18(4) of the MDA and that there was no proof of trafficking on his part. Zuraimy further argued he did not have any common intention with Moad Fadzir to possess diamorphine for the purpose of trafficking.

52 In his appeal against sentence in CCA 18, Zuraimy sought a sentence of seven years' imprisonment for the amended charge of abetment by intentionally aiding Moad Fadzir to possess diamorphine. Zuraimy contended that the Judge erred in principle in meting out the maximum sentence of ten years' imprisonment.

53 The Prosecution argued that Moad Fadzir and Zuraimy went to Toa Payoh with the shared intention of collecting diamorphine which was delivered into their joint possession. The Prosecution submitted that they both knew that the drugs collected were diamorphine and that Moad Fadzir knew this because Zuraimy had told him so. The Prosecution argued that Zuraimy later instructed Moad Fadzir to keep the diamorphine for the time being for both of them. Zuraimy thus knew and consented to Moad Fadzir having the diamorphine in his possession at the time of his arrest and Zuraimy was therefore deemed to be in joint possession of the diamorphine with Moad Fadzir pursuant to s 18(4) of the MDA. The Prosecution's case was that as both failed to rebut the presumption of trafficking under s 17 of the MDA, they also shared a common intention to possess diamorphine for the purpose of trafficking. In relation to Moad Fadzir, the Prosecution submitted that the Judge rightly admitted the contemporaneous statements in P84 and P85 in evidence. The Prosecution also contended that even if Moad Fadzir had only kept the diamorphine on Zuraimy's behalf, this did not constitute "bailment" within the scope of *Ramesh a/l Perumal v Public Prosecutor and another appeal* [2019] 1 SLR 1003 ("*Ramesh*").

54 On Zuraimy's appeal against sentence on the amended charge, the Prosecution submitted that the ten years' imprisonment was not manifestly excessive.

The issues before this Court

55 Accordingly, in respect of Moad Fadzir, the main issues before us are: (a) whether the Judge was right to admit his contemporaneous statements P84 and P85 in evidence; (b) whether Moad Fadzir knew that the white plastic bag contained diamorphine; (c) if he did, whether he managed to rebut the presumption of trafficking under s 17 of the MDA; and (d) if the Judge's decision on Zuraimy's original charge is upheld, *ie*, that there was no common intention as alleged, should the charge against Moad Fadzir be amended to delete all references to common intention.

56 As regards Zuraimy, the main issues before us are: (a) whether he was in joint possession of the diamorphine with Moad Fadzir; (b) whether there was a common intention for Moad Fadzir to be in possession of diamorphine for the purpose of trafficking; and (c) if Zuraimy was not guilty on the original trafficking charge against him, whether the maximum sentence of ten years' imprisonment for his conviction on the amended charge of abetment by intentionally aiding Moad Fadzir to possess diamorphine was manifestly excessive.

Moad Fadzir

57 Moad Fadzir was arrested while carrying his black bag which contained the white plastic bag with the four black bundles inside. It was therefore beyond dispute that he had physical possession of the white plastic bag with the said bundles on 12 April 2016 at about 12.15am.

Admissibility of the contemporaneous statements P84 and P85

58 Moad Fadzir's appeal turns largely on whether the Judge was right to admit his contemporaneous statement in P84 in evidence. This is because the only time that Moad Fadzir stated that the four black bundles contained "heroin" (*ie*, diamorphine) was in P84. There was no other direct evidence in which Moad Fadzir or Zuraimy stated

that the white plastic bag or the four black bundles contained diamorphine.

59 As mentioned, SSI Tony Ng recorded P84 from Moad Fadzir at the time of his arrest on 12 April 2016 from around 1.35am to 2.35am. We set out P84 in full, omitting only the appended signatures of Moad Fadzir and SSI Tony Ng:^[note: 54]

0135 hrs I, SSI Tony Ng recorded the following questions and answers from subject Moad Fadzir Bin Mustaffa of NRIC: XXXXXXXXX that is recorded inside CNB car at the rear seat at the vicinity of Blk 623, Woodlands Drive 52 as follows:

Q1: "What language do you wish to speak?"

Ans: "English"

Q2: "What is the level of your education?"

Ans: "O Level". "I study part time diploma."

Q3: Recorder's Note: Subject was shown a series of sealed polymer bags that contained black sling bag, red plastic bag, white plastic bag and I asked: "The items shown to you belongs to who?"

Ans: "They asked me to pick up at Toa Payoh."

Q4: "What did they asked you to pick up?"

Ans: "Never say anything."

Q5: Recorder's Note: Subject was shown a sealed polymer bag that contained a total four black tape bundles and I asked: "This sealed bag of total four black tape bundles belongs to who?"

Ans: "They asked me to go Toa Payoh to collect."

Q6: "Who is the they you refering to?"

Ans: "Abang is the Malay guy that asked me to go and collect."

Q7: "What is inside the four tape bundles?"

Ans: "They told me to be careful, is heroin."

Q8: "Do you have the contact number of abang?"

Ans: "I don't have, only wait for his call."

Q9: "Where did you collect the four tape bundles?"

Ans: "Just now about ten plus at Toa Payoh Blk 157."

Q10: "Who did you go with?"

Ans: "Lan."

Q11: "How did you go to Toa Payoh?"

Ans: "By rental car, the one I am driving when arrested."

- Q12: "Did Lan has any involvement in the collection of the four black tape bundles?"
- Ans: "He show me the way to Toa Payoh." "Ah Bang called and asked me to Holland and pick up Lan and Lan show me the way to Toa Payoh."
- Q13: "What happen at Toa Payoh?"
- Ans: "Indian guy come and pass the black bag, no the black bag is mine but he pass me the white plastic bag contained red plastic bag contained the four bundles and he put inside my black bag." "Just now at Toa Payoh."
- Q14: "Are you inside your car at Toa Payoh when the Indian guy come and pass to you?"
- Ans: "He pass to Lan and Lan pass to me."
- Q15: "I don't understand what you mean, can you say clearly, that the four black tape bundles from plastic bags is pass by who that was found on you?"
- Ans: "Indian guy pass to Lan. Lan put the plastic bags inside my black bag."
- Q16: "Why do you keep this four tape bundles?"
- Ans: "Lan asked me to keep for him first."
- Q17: Recorder's Note: Subject was shown a photo board and I asked: "Who is Lan?"
- Ans: "The photo with under 4 (four)."
- Recorder's Note: Photo marked 4 established to be: Zuraimy Bin Musa ID/NRIC: XXXXXXXXX.
- Q18: "So the four black tape bundles belongs to him?"
- Ans: "Ya la."
- Q19: "Whose items, that were found inside the room of unit #XX-XX of Blk 623, Woodlands Drive 52 belongs to?"
- Recorder's Note: Subject was shown series of sealed polymer bags containing one packet of granular substances, one digital weighing scale, and items recovered from the floor during his arrest that contained one red packet, contained 1 pkt of granular substance, one Sampoerna cigarett box, one packet of crystalline substance, one stained straw, one packet of two yellow tablets and some fragment of tablets and: "also the items found during your arrest?"
- Ans: "All mine, heroin for smoke, ice for smoke, tablets is pain killer, weighing scale to check whether the weight is correct."
- Q20: "Do you have anything else to say?"
- Ans: "Just now, I mentioned in the Notification that I am willing to co-operate by telling you the true that Lan had asked me to help him."
- 0235 hrs The above questions and answers ended, with subject go through all the recordings and subject affirm it to be true and correct by pending signature and I/C number to it. It were all explained again and subject was invited to make changes to it but subject declined. They were no threat, inducement or promises make before or during the recordings.

Recorded by:

[SSI Tony Ng]

Note: Subject was normal, before or during the recordings.

60 The "Notification" that Moad Fadzir referred to in his answer to Q20 (in P84) was the notification under s 33B of the MDA that SSI Tony Ng had read to him just before he made his contemporaneous statement in P84. For completeness, Moad Fadzir's response to the notification was:[note: 55]

Just now, a guy call me to wait for one person at Holland that I call him: "Lan" to show me the way to Toa Payoh

The guy I just call him: "Ah Bang"

That is all.

61 The other statement which was the subject of the ancillary hearing on admissibility was P85, which was the further contemporaneous statement that SSI Tony Ng recorded from Moad Fadzir 25 minutes after P84 was recorded, from around 3am to 3.05am. We also set out P85 in full, omitting only the appended signatures of Moad Fadzir and SSI Tony Ng:[note: 56]

0300 hrs Further questions and answers recorded inside CNB car by I, SSI Tony on subject Moad Fadzir Bin Mustaffa NRIC: XXXXXXXXXX as follows:

Q21: "Have you see Abang before?"

Ans: "No, never."

Q22: "When abang call you, does his number appear?"

Ans: "He call by private number."

Q23: "What Lan number?"

Ans: "Inside my hand phone"

Q24: "What is your hand phone?"

Ans: "Samsung S6"

Q25: "Where is the number?"

Recorder's Note: Subject was refer to his Samsung S6 and he furnished the name under Lan Kacang.

Ans: "This is the one, Lan Kacang 872XXXXX."

0305 hrs The above questions and answers ended, it were all go through for subject to affirm it to be true and correct.

Recorded by:

[SSI Tony Ng]

62 Moad Fadzir argued that P84 was involuntary for two reasons. The first was that he was in a doped mental state when P84 was recorded, due to a potent concoction of diamorphine, Ipam tablets and cough syrup that he had consumed earlier. He was drowsy, sleepy and disoriented. Moad Fadzir argued that the unusually long period of time which SSI Tony Ng took to record P84 was an indication of the extent of Moad Fadzir's physical and psychological state at the time of recording, when he was extremely drowsy and was repeatedly dozing off.^[note: 57] SSI Tony Ng took an hour to record 20 short questions and answers from Moad Fadzir in P84 but took just five minutes to record five questions and answers in P85. There was a break of 25 minutes between the recording of P84 and P85, which Moad Fadzir explained was a result of his being so drowsy that he needed a break.^[note: 58] He submitted that SSI Tony Ng could not give any other logical or credible explanation for the 25-minute break between the two statements which should have been recorded in one sitting. The break did not occur at a natural juncture because the questions in P85 regarding the identity of "Abang" were intrinsically linked to and flowed naturally from the questions in P84. Moad Fadzir also referred to the seemingly incoherent and inconsistent answers he had given in P84 to substantively similar questions, like from Q4 to Q7, to show that he was unable to understand properly or to appreciate the relevant questions and answers.^[note: 59]

63 At the trial, SSI Tony Ng explained that he required time to structure his questions in P84, write them and Moad Fadzir's answers, read what he had written to Moad Fadzir, explain the statement to Moad Fadzir, obtain his signature and thereafter sign the statement himself.^[note: 60] SSI Tony Ng denied that Moad Fadzir dozed off repeatedly during the recording of P84.^[note: 61] SSI Tony Ng explained that he could not really remember what happened during the 25-minute break between the recording of P84 and P85 but during that time, he did go out of the CNB vehicle to smoke a cigarette.^[note: 62] SSI Tony Ng explained that he recorded P85 from Moad Fadzir later to ask him further questions, including questions on Abang, which were related to what had already been recorded in P84.^[note: 63]

64 We accept that when SSI Tony Ng was recording P84, he was also showing Moad Fadzir seized items and some photographs and that it was understandable that a reasonable amount of time would be needed to record P84, depending on the speed of the questioner when he was asking and writing down the questions and the answers and also the readiness of the one being questioned to respond. However, both SSI Tony Ng and Moad Fadzir were speaking in English and the questions and answers were relatively succinct, save perhaps for Q19 concerning the items found in Moad Fadzir's flat and during his arrest. In these circumstances therefore, we found it odd that it took an hour to record the 20 questions and answers. Nevertheless, this alone does not dispose of the issue whether Moad Fadzir's statements in P84 should be rejected, as discussed below.

65 Neither SSI Tony Ng nor Moad Fadzir was asked about the note that SSI Tony Ng made at the end of P84, *ie*, "Note: Subject was normal, before or during the recordings". It seemed unusual that such a note was included in P84 as it did not appear to be the practice to do so in the recording of statements. This was evident from the fact that a similar note did not appear in P85 and the other statements that were recorded from Moad Fadzir and Zuraimy in the course of investigations. However, this does not mean that there was no good reason for SSI Tony Ng to include such a note. It is not uncommon during trials and ancillary hearings on admissibility that recording officers are asked about the mental state of the accused person during the recording of his statement. In the absence of explanation or cross-examination about this note, we consider only the oral testimony in the ancillary hearing about Moad Fadzir's mental state during the recording of P84.

66 Although Moad Fadzir alleged that he had consumed ten Ipam tablets and drunk more than half a bottle of cough syrup on 12 April 2016 at around 12.08am, *ie*, just before he emerged from the car and was arrested, there was no evidence to corroborate his account. While Moad Fadzir claimed that he kept in his bedroom his remaining stock of seven to eight slabs of Ipam tablets (each slab having ten tablets), there was no record of CNB finding any Ipam tablets from his bedroom or elsewhere in the flat. There was also no evidence of the CNB officers finding any bottle of cough mixture although Moad Fadzir claimed that, upon his request made while in the CNB headquarters, SSI Tony Ng checked with his superior officer over the phone and then allowed Moad Fadzir to be fed some cough mixture from a bottle. SSI Tony Ng could not recall such an incident.^[note: 64] Moad Fadzir also claimed that he took the said bottle with him to show the doctors who examined him at the CMC in April 2016.

67 We find it highly unlikely that the CNB officers would have allowed Moad Fadzir to be in possession of the said bottle of cough mixture while in custody and under investigation.

68 Even if Moad Fadzir needed a 25-minute break between P84 and P85 because he was feeling tired and/or was suffering from mild opioid drug withdrawal during the recording of those statements, he acknowledged that all the answers in those statements came from him. If he was intoxicated and “rambling” when he answered that the four black bundles contained “heroin” (*ie*, diamorphine, in answer to Q7 in P84),^[note: 65] he failed to explain why he gave such an answer since he thought that they were merely cartons of contraband cigarettes. Nowhere in P84 and P85 was there any allusion to such cigarettes. In our view, it is incredible that he did not know the bundles contained diamorphine and did not intend to say that they contained diamorphine but said so anyway in his alleged doped mental state and it turned out that the four bundles in fact did contain diamorphine. Further, it is plain that he started by stating that he was acting on Abang’s instructions and Zuraimy was only showing him the way to Toa Payoh and then shifted his evidence eventually at the end of P84 to stating that he would cooperate with the CNB by telling the truth that it was Zuraimy who had asked him to help him.

69 All this suggests that despite Moad Fadzir’s assertions about his mental state during the one hour taken to record P84, he was actually quite clear-headed throughout that period of time.

70 The second reason Moad Fadzir gave for his contention that P84 was made involuntarily was that SSI Tony Ng had allegedly threatened him that his aged mother would be brought in for questioning as she lived in the flat where diamorphine and a digital weighing scale were found. Moad Fadzir claimed that this caused him not to ask for some time to rest before he made his contemporaneous statement in P84.^[note: 66] SSI Tony Ng denied making the alleged threat.

71 In any case, even if SSI Tony Ng had told Moad Fadzir that his mother would be brought in for questioning, this could not amount to a threat that “sapped the free will” of Moad Fadzir (Explanation 1 to s 258(3) of the CPC) so as to render his contemporaneous statements P84 and P85 inadmissible. It would have been expected that as part of routine investigations, the CNB officers would want to interview anyone who might be able to explain the presence of the diamorphine in the flat. This would naturally include Moad Fadzir’s mother who lived in the said flat. It would not have been unusual if CNB officers told Moad Fadzir that if he could not explain the diamorphine in the flat, they would ask someone else, like his mother.

72 Moad Fadzir did not submit, in the High Court or before this Court, that the injuries sustained by him in the course of his arrest affected the voluntariness of the two contemporaneous statements. However, for completeness, we agree with the Judge that the injuries appeared to be minor and could not have affected the voluntariness of P84 and P85.

73 We are of the view that Moad Fadzir made his contemporaneous statements in P84 and P85 voluntarily. Therefore, the Judge was right to admit them in evidence although nothing much turns on the statements in P85.

Knowledge that the white plastic bag contained diamorphine

74 Following from the above analysis, we also think that the Judge was right to consider Moad Fadzir's contemporaneous statement in P84 in coming to his finding that Moad Fadzir knew that the white plastic bag contained diamorphine. Contrary to Moad Fadzir's submissions, there was no basis to ascribe little or no weight to Moad Fadzir's answers in P84.

75 As mentioned above, in P84, Moad Fadzir's answer in response to Q7 ("What is inside the four tape bundles?") was that the four black bundles contained "heroin" (*ie*, diamorphine). The four packets of granular substances were still wrapped in black tape then. Moad Fadzir did not explain at the trial why he chose to say "They told me to be careful, is heroin" if he had not seen or did not know what was inside the four black bundles. There was no mention whatsoever that he thought they were contraband cigarettes. The only possible conclusion from all this must be that Moad Fadzir knew for a fact that the four black bundles were drugs and that they contained diamorphine.

Possession of the diamorphine for the purpose of trafficking

76 Moad Fadzir claimed that he was only safekeeping the white plastic bag for Zuraimy temporarily because Zuraimy told him that he would collect the white plastic bag from him the next day or later. However, Zuraimy denied this assertion.

77 The Prosecution submitted that as it has proved Moad Fadzir's possession and knowledge of the nature of the drugs, the presumption of trafficking in s 17 of the MDA applied. The Prosecution argued that Moad Fadzir's assertion that he kept the drugs for the sole purpose of passing them back to Zuraimy the next day or later could not be believed. This is because Moad Fadzir was not a credible witness, having been discredited in his fabricated evidence about Abang and in his claim that he believed the four black bundles contained contraband cigarettes. The Prosecution maintained its primary case that Moad Fadzir and Zuraimy possessed the drugs jointly for the purpose of trafficking and Moad Fadzir was safekeeping the drugs "on both their behalves" and submitted that the issue of bailment therefore did not arise on the facts.

78 The Prosecution argued further that even if this Court accepts Moad Fadzir's account that he was keeping the drugs on Zuraimy's behalf and would have passed the drugs to Zuraimy the next day and would have nothing to do with the drugs thereafter, this would not constitute "bailment" within the scope of the decision of this Court in *Ramesh* and would not rebut the presumption of trafficking.^[note: 67] In *Ramesh*, this Court held at [110] and [114]:

110 ... [I]n our judgment, a person who returns drugs to the person who originally deposited those drugs with him would not ordinarily come within the definition of "trafficking". It follows that a person who holds a quantity of drugs with no intention of parting with them other than to return them to the person who originally deposited those drugs with him does not come within the definition of possession of those drugs "for the purpose of trafficking".

...

114 ... In the vast majority of cases, it can reasonably be assumed that the movement of drugs from one person to another, anywhere along the supply or distribution chain, was done to facilitate the movement of drugs towards their ultimate consumers. It is clear, however, that this assumption does not hold true in the case of a person who merely holds the drugs as "bailee" with a view to returning them to the "bailor" who entrusted him with the drugs in the first place.

79 The Prosecution submitted that Moad Fadzir's account would not fall within the bailment scenario envisaged in *Ramesh* because there were additional factors that brought Moad Fadzir's act outside the role of a simple bailee who is outside the chain of trafficking. Further, Moad Fadzir was in physical possession of the drugs from the beginning and at no point did Zuraimy acquire sole possession of the drugs so that he could be said to be "depositing" the drugs with Moad Fadzir.^[note: 68] Instead, Moad Fadzir received possession of the drugs from the male Indian and then kept the drugs until he could pass them to Zuraimy. Moad Fadzir was more than a mere bailee and was involved in moving the drugs in the direction from supplier to consumer, *ie*, trafficking.^[note: 69] He would not be returning but passing the drugs to Zuraimy. The Prosecution sought to illustrate the differences between *Ramesh* and the present case in the following way:

The transaction in *Ramesh*

Supplier to Chander to Ramesh to Chander to Consumer

The transaction in the present case

Benathan/male Indian to Moad Fadzir and Zuraimy in the car to Moad Fadzir to Zuraimy to Consumer

The Prosecution pointed out that Moad Fadzir was part of the transaction that put both him and Zuraimy in possession of the drugs whereas Ramesh was uninvolved until he received the drugs from Chander. Further, the direction of transfer in the present case was clearly towards the end-consumer whereas in *Ramesh*, the drugs were going backwards in the chain towards Chander.

80 In our view, such fine distinctions may be taking an overly restrictive view of the concept of "bailment" expounded in *Ramesh*. It appeared fortuitous that the white plastic bag with its contents landed on Moad Fadzir's lap. It could have landed easily on Zuraimy's lap as well when it was thrown into the car. In any case, Moad Fadzir passed it to Zuraimy almost immediately and Zuraimy tied it up. Zuraimy then placed the white plastic bag in Moad Fadzir's black bag in the car. The evidence showed that the black bag was then placed on Moad Fadzir's lap and Moad Fadzir in turn placed it on Zuraimy's lap and finally the black bag was left in the car. We agree with the Prosecution that the events in the car should be looked at holistically. We do not think that coming into possession of the four black bundles in the car at or almost at the same time would mean that Zuraimy could not be depositing them with Moad Fadzir. If Moad Fadzir's account were to be believed and Zuraimy was the intended recipient of the white plastic bag all along, notwithstanding the fact that it first landed on Moad Fadzir's lap, we think that Zuraimy's subsequent request to Moad Fadzir to safe-keep it for him for a day or more could arguably still constitute the sort of bailment contemplated in *Ramesh*. However, we do not need to decide this issue because, like the Judge, we do not accept the account given by Moad Fadzir as the truth.

81 The Prosecution submitted that the money handed over to the male Indian for the drugs could have come from either Moad Fadzir or Zuraimy^[note: 70] and that the Judge was wrong to presume that the said money came from Moad Fadzir. Moad Fadzir had withdrawn \$3,000 on the night of 11 April 2016 from an automated teller machine at Singapore Polytechnic before he drove to meet Zuraimy at Holland Close. Moad Fadzir claimed that he

passed \$2,500 out of the \$3,000 to his fellow student Yan that night because Yan had called him earlier that day asking to borrow money from him to repay loan sharks. The Prosecution submitted that the \$643.40 found on Moad Fadzir after his arrest was consistent with this assertion. While the phone records did show Yan calling Moad Fadzir at around 10.19pm,^[note: 71] which Moad Fadzir claimed was when Yan informed him that he had reached the vicinity of Singapore Polytechnic to meet and to receive the money, Moad Fadzir testified that his family was not able to call Yan as a witness because Yan's hand phone number (which Moad Fadzir claimed used a prepaid card) was no longer in use.

82 We find it odd that Moad Fadzir would lend \$2,500 to someone he apparently knew so little about and that the only thing he seemed to know about Yan was that Yan was a terrible credit risk because he had resorted to borrowing from a loan shark and was seeking a loan from Moad Fadzir to repay the loan shark. When Moad Fadzir was arrested, he had with him \$643.40 in cash. Further, he had another \$24,000 in his bank account.^[note: 72] In contrast, as at 11 April 2016, Zuraimy had only \$1.24 in his POSB bank account. For the monthly bank statement for April 2016, there were a few deposits and withdrawals soon thereafter of the same amounts deposited between 6 and 11 April 2016 but they were insignificant amounts of \$380, \$400 and \$50. On 14 April 2016 (after Zuraimy's arrest), there was a "salary" deposit of \$589 and on 25 April 2016, there was another "salary" deposit of \$1,059.23. The balance at the end of that month showed \$1,640.47. The Prosecution argued that there was no evidence that Zuraimy had only one bank account or that he did not keep money in cash. However, we now know that Zuraimy was in prison for many of the years between 2001 and 2015 until his release and placement on drug supervision orders less than one year before 11 April 2016. It was not likely in such a situation that he would have spare cash elsewhere. In the circumstances of this case, we think that it was more likely that the money for the drugs came from Moad Fadzir especially when his withdrawal of the \$3,000 was so close in time to the drug transaction at Toa Payoh. Nevertheless, we note that there was no evidence as to how much money was actually passed to the male Indian at Toa Payoh during the drug transaction and the only evidence was that the money was apparently in a rolled stack of half-folded \$50 notes.

83 When we consider Moad Fadzir's response to the notification under s 33B of the MDA and his contemporaneous statements in P84 and P85 (set out in full earlier), it is evident that Moad Fadzir was not speaking the truth about Abang in the early stages of the investigations as he had made it appear that Abang and Lan (Zuraimy) were different persons. He acknowledged only during the trial that they were actually the same person.

84 In P84, in his answer to Q16 about why he kept the four black bundles, he stated that "Lan asked me to keep for him first". Similarly, in his answer to Q18, he confirmed that the four black bundles belonged to Zuraimy and in his answer to Q20, he stated that "Lan had asked me to help him". These answers would implicate Zuraimy and cast him as being the more culpable between the two of them. However, Moad Fadzir had initially stated, in his response to the notification under s 33B of the MDA and in the earlier portion of P84, that Zuraimy simply showed him the way to Toa Payoh when he was asked about Zuraimy's involvement in the collection of the four black bundles.

85 Other drugs were found in Moad Fadzir's possession at his arrest and in Moad Fadzir's flat after his arrest, even if those drugs were in small quantities and for his personal consumption. A digital weighing scale was also found on his bed in his bedroom. Moad Fadzir's explanation for this was that he was a drug addict and whenever he bought drugs such as "Ice", he would use the weighing scale to weigh the drugs to ensure that the seller did not cheat him on the amount. In contrast, Zuraimy had nothing incriminating on his body and there was also nothing incriminating in his uncle's flat in Holland Close where he was residing and in the flat in Woodlands which was his official home address. The evidence therefore pointed to the fact that Moad Fadzir was the one dealing in drugs.

86 On the totality of the evidence, we agree with the Judge that “Zuraimy was the middleman in this escapade” (Judgment at [18]) and we do not believe Moad Fadzir’s claim that he was only safe-keeping the white plastic bag with its contents for Zuraimy. We agree with the Judge that it was Moad Fadzir who transacted in the diamorphine received from the male Indian, with Zuraimy acting as the middleman and the contact point between Moad Fadzir and the third party, Benathan.

87 The Prosecution relied on the presumption of trafficking under s 17(c) of the MDA which states that any person proved to have had in his possession more than two grammes of diamorphine shall be presumed to have had that drug in possession for the purpose of trafficking unless it is proved that his possession of that drug was not for that purpose. On the evidence, it is clear that Moad Fadzir failed to rebut the presumption. This is because his defence that he was acting under Zuraimy’s directions and was merely a custodian of the drugs for Zuraimy has been rejected and there is no other rebuttal evidence.

88 The Judge was therefore correct in finding Moad Fadzir guilty of having in his possession, for the purpose of trafficking, the four black bundles containing 36.93g of diamorphine. As Moad Fadzir did not satisfy the “courier and certificate” requirements in s 33B(2) of the MDA, he was not eligible for the alternative sentencing provided in s 33B(1)(a). Accordingly, the mandatory death penalty had to be imposed because the quantity of diamorphine in question was more than 15 grammes. Moad Fadzir’s appeal against conviction is therefore dismissed, subject to what we state at the end of this judgment under “Conclusion” in relation to the amendments that we think the Judge ought to have made to the charge against Moad Fadzir.

Zuraimy

89 The Judge convicted Zuraimy on a non-capital offence charge of abetment by intentionally aiding Moad Fadzir to possess the diamorphine, instead of the original capital offence charge. The Prosecution appealed against this and sought a conviction on the original charge which alleged common intention with Moad Fadzir. Zuraimy did not appeal against his conviction on the amended charge. His appeal was only against the sentence of 10 years’ imprisonment imposed for the amended charge. Counsel for Zuraimy clarified at the hearing before us that Zuraimy was no longer contending that he lacked knowledge of the nature of the drugs contained in the white plastic bag.

90 For the amended charge, the ingredients of the offence of abetment by intentionally aiding to possess diamorphine are: (a) the abettor did something which facilitated the commission of the primary offence (*actus reus*); and (b) the abettor did so intentionally and with knowledge of the circumstances constituting the primary offence (*mens rea*) (see *Public Prosecutor v Koh Peng Kiat* [2016] 1 SLR 753 at [24]). As for the *mens rea* for the primary offence of possession under s 8(a) of the MDA, what is required is not just knowledge of the existence of the thing which is later found to be a drug but also knowledge of the specific nature of the drug (*Adili Chibuike Ejike v Public Prosecutor* [2019] 2 SLR 254 at [35]).

Joint possession of the diamorphine

91 The Judge found that Zuraimy liaised with Benathan for the drug transaction through phone calls and text messages and so enabled Moad Fadzir to obtain the diamorphine from the male Indian (Judgment at [11]). Zuraimy was in contact with Benathan throughout the day on 11 April 2016 and until soon after the time the white plastic bag was thrown into the car by the male Indian. It was Zuraimy who told Moad Fadzir to go to Block 157 Toa Payoh as that was the location stated in Benathan’s text message to Zuraimy.

92 Zuraimy knew that Moad Fadzir would be receiving diamorphine at Block 157 Toa Payoh. He acknowledged that he tied the white plastic bag after it was thrown into the car. Zuraimy's account at trial where he claimed that he only knew that Benathan had asked Moad Fadzir to deliver some money at the Toa Payoh location was untrue.

93 Zuraimy testified that he had dozed off when the male Indian threw the white plastic bag into the car because of the alcohol he had consumed earlier. Zuraimy claimed at trial that he had finished a bottle of around 750ml of Johnnie Walker whisky around two to three hours before he met Moad Fadzir. As will be evident below, this was a lie designed specifically to deny knowledge of the moment the male Indian passed possession of the white plastic bag containing the diamorphine to Moad Fadzir. This was obviously a strategic lie amounting to corroboration of guilt in that he was at least intentionally aiding Moad Fadzir to possess diamorphine. This lie fulfilled the requisite four conditions: (a) it was deliberate; (b) it related to a material issue; (c) the motive for the lie was a realisation of guilt and a fear of the truth; and (d) it was clearly shown to be a lie by independent evidence (see *Public Prosecutor v Ilechukwu Uchechukwu Chukwudi* [2015] SGCA 33 at [60]).

94 Clearly, Zuraimy could not have been so intoxicated as he claimed when Moad Fadzir drove to Toa Payoh with him since he was in constant contact with Benathan through phone calls and text messages. After the transaction at Toa Payoh, Zuraimy could also walk back to his uncle's flat at Block 1 Holland Close after he alighted from the car at Commonwealth Avenue West. At around 6.35am on 12 April 2016, he could take the lift to the ground level where he was arrested by the waiting CNB officers. Further, Zuraimy had made a statement on 14 April 2016, recorded under s 22 of the CPC, stating that he had bought "a small 75ml of Johnnie Walker red label alcohol".^[note: 73] The doctor who did a forensic psychiatric evaluation for Zuraimy after examining him in April 2016 and May 2016 also testified, based on his medical notes, that Zuraimy's account to him was that he had consumed "75mls" of Johnnie Walker.^[note: 74]

95 However, while Zuraimy's deliberate lie about the state of his intoxication was material for the purposes of the trial where he claimed to be unaware of the real purpose of the trip to Toa Payoh, nothing turns on it at this stage after his conviction on the amended charge by the Judge as Zuraimy has accepted that he knew that the transaction in Toa Payoh concerned diamorphine.

96 The Prosecution submitted that Zuraimy was in joint possession of the diamorphine with Moad Fadzir pursuant to s 18(4) of the MDA. That provision states:

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

Knowledge is no longer in dispute. For the requirement of "consent" under s 18(4), "acquiescence or condonation is not enough" and "[t]here must be some dealing between the parties in relation to the drug, such as an agreement to buy it or help in concealing it" (see *Muhammad Ridzuan bin Md Ali v Public Prosecutor and other matters* [2014] 3 SLR 721 at [64]).

97 The Judge held that the Prosecution failed to prove beyond reasonable doubt that Zuraimy was in joint possession of the diamorphine with Moad Fadzir as there was no pre-arranged plan between them to sell or subsequently deal with the diamorphine and it was Moad Fadzir who paid for the diamorphine and kept it in his physical possession (Judgment at [15]). The Judge disbelieved Moad Fadzir's testimony that Zuraimy told him to safe-keep the diamorphine on Zuraimy's behalf. The Judge also found that Zuraimy's role was only that of an abettor who arranged the drug transaction, liaising between Benathan and Moad Fadzir (Judgment at [11]). The

Judge was of the view that if Moad Fadzir could have arranged directly with Benathan to purchase the diamorphine without Zuraimy's help, Moad Fadzir would have done so. On the facts therefore, the Judge was not satisfied that Zuraimy's actions in aiding Moad Fadzir to possess diamorphine amounted to "consent" under s 18(4) of the MDA.

98 We see no reason to disagree with the Judge's finding although we think that the facts of this case failed only marginally to show "consent" within the meaning of s 18(4) as it was arguable that Zuraimy helped in concealing the drugs by tying the white plastic bag and then placing it in Moad Fadzir's black bag. This finding is also consonant with our view, from analysing Moad Fadzir's response to the notification under s 33B of the MDA and in the earlier portion of P84, that Zuraimy was simply a middleman giving him directions to Toa Payoh to collect the diamorphine. Accordingly, Zuraimy was not deemed to be in joint possession of the diamorphine with Moad Fadzir.

Common intention to be in possession of diamorphine for the purpose of trafficking

99 Given that Zuraimy was not in joint possession of the diamorphine with Moad Fadzir, as "consent" in s 18(4) was not satisfied, it is clear that the presumption of trafficking under s 17 could not apply in Zuraimy's case.

100 The Judge relied on *Mohd Halmi* and held that as the Prosecution sought to rely on the presumption of trafficking under s 17, it could not then in conjunction rely on "the presumption of possession under s 18(4)" against Zuraimy (Judgment at [13]). The Prosecution submitted that the Judge was wrong in this view because s 18(4), unlike s 18(1) and (2), is not a presumption but is a deeming provision and that, in the specific context of the MDA, it was intended to be irrebuttable. As we have agreed that s 18(4) did not apply on the facts here because "consent" was not proved and there was therefore no joint possession of the drugs, we decline to rule on the questions whether the Prosecution may rely on the deeming provision in s 18(4) in conjunction with the presumption in s 17 and whether possession that is "deemed" under s 18(4) is to be treated as "proved" for the purposes of s 17.

101 The Judge found that the criminal act element and the participation element for the common intention charge were made out because Zuraimy abetted Moad Fadzir in obtaining actual physical possession of the drugs by arranging and driving him to Toa Payoh to collect the drugs. We note that there was a factual error here because Moad Fadzir was the driver of the car and Zuraimy merely accompanied him, helping him with directions along the way. However, the Judge held that the common intention element was not proved beyond reasonable doubt. This was because it was not proved beyond a reasonable doubt that Zuraimy knew Moad Fadzir was purchasing the diamorphine for the purpose of trafficking. We see no reason to disagree with this finding. Although the amended charge mentions that Zuraimy intentionally aided Moad Fadzir to possess "four packets" of granular substances, there was no evidence that Zuraimy knew before the transaction that some 911.7g (about two pounds) of diamorphine would be involved in the transaction. We therefore agree that Zuraimy was simply a middleman giving Moad Fadzir directions to Toa Payoh to collect the diamorphine. There was no joint enterprise between the two men as to any further dealing with respect to the diamorphine.

102 We therefore affirm the Judge's conclusion that Zuraimy was not guilty on the original charge of possession for the purpose of trafficking in diamorphine in furtherance of a common intention with Moad Fadzir. We agree that Zuraimy was instead guilty on the amended charge of abetment by intentionally aiding Moad Fadzir to possess the diamorphine.

Sentence for Zuraimy's conviction on the amended charge

103 The Judge sentenced Zuraimy to the maximum term of ten years' imprisonment on the amended charge. Zuraimy appealed against this sentence as being manifestly excessive and submitted that a sentence of seven years' imprisonment would be appropriate instead.

104 Zuraimy knew that he was aiding Moad Fadzir to possess diamorphine. Zuraimy had numerous drug-related antecedents^[note: 75] and committing the present offence meant that he reoffended within a year of his release (on 17 April 2015) from his last imprisonment.^[note: 76] The quantity of diamorphine involved turned out to be high, being more than twice the amount at which the death penalty would be imposed for trafficking in diamorphine. The maximum sentence of ten years' imprisonment for Zuraimy was therefore justified.

Conclusion

105 Since the Judge held that there was no common intention between Moad Fadzir and Zuraimy to possess diamorphine for the purpose of trafficking and had amended the original charge against Zuraimy, he ought to have amended Moad Fadzir's charge as well by deleting the references to common intention. On the same day, after we heard the arguments in these appeals, we directed the Supreme Court Registry to send a letter to all parties to ask them whether they agree that in the event after considering the matter, this Court decides to dismiss the appeals and so affirm Moad Fadzir's conviction for trafficking and Zuraimy's conviction on the amended charge, the original charge against Moad Fadzir should be amended by deleting the words, "together with one Zuraimy bin Musa, NRIC No. XXXXXXXXXX, in furtherance of the common intention of both of you" and "read with section 34 of the Penal Code (Cap 224, 2008 Rev Ed)". We also asked counsel for Moad Fadzir, if the parties agree with the said amendments, for the purposes of s 390(6) and (7) of the CPC, whether he confirms, that the defence case will remain the same and the evidence of Moad Fadzir will be the same as that adduced during the trial in the High Court. The Registry has received the agreement and the confirmation sought.

106 We amend the charge against Moad Fadzir to the following:

You, Moad Fadzir bin Mustaffa, are charged that you, on 12th April 2016, at or about 12.15 a.m., at the vicinity of Blk 623 Woodlands Drive 52, Singapore, did traffic in a controlled drug specified in Class 'A' of the First Schedule to the Misuse of Drugs Act (Cap 185, 2008, Rev Ed), to wit, by having in your possession for the purpose of trafficking, four packets of granular substances that were analysed and found to contain not less than 36.93 grams of diamorphine, without any authorization under the said Act or Regulations made thereunder and you have thereby committed an offence under section 5(1)(a) read with section 5(2) of the Misuse of Drugs Act which offence is punishable under section 33(1) of the Misuse of Drugs Act.

As counsel for Moad Fadzir has given the confirmation sought, s 390(6) and (7) of the CPC have been complied with. In any case, we have read the above amended charge to Moad Fadzir and he has confirmed again before us today that his defence case remains the same and his evidence will be the same as that adduced during the trial in the High Court. The original charge against Moad Fadzir was a capital offence charge. The amended charge remains a capital offence charge. The changes relate only to the deletion of the references to common intention and the statutory provisions governing such, necessitated by the findings made by the Judge. We affirm the conviction and the mandatory death sentence based on this amended charge. Moad Fadzir's appeal in CCA 12 is therefore dismissed.

107 We also affirm Zuraimy's conviction on the amended charge of abetment by intentionally aiding Moad Fadzir to possess the diamorphine and the sentence of ten years' imprisonment with effect from 12 April 2016. Accordingly, the Prosecution's appeal in CCA 14 and Zuraimy's appeal in CCA 18 are dismissed.

[note: 1]See 2Record of Proceedings ("ROP") 1–4.

[note: 2]See 1ROP 293–294.

[note: 3]See 2AROP 388 (Agreed Statement of Facts).

[note: 4]See 1ROP 297.

[note: 5]See 1ROP 338–339.

[note: 6]See 1ROP 339–340, 343–344, 357, 367; 2AROP 436, 475.

[note: 7]See 1ROP 340.

[note: 8]See 1ROP 342.

[note: 9]See 1ROP 377, 387–388.

[note: 10]See 2AROP 436, 475.

[note: 11]See 1ROP 299–300, 332–333.

[note: 12]See 1ROP 378, 388–389.

[note: 13]See 2AROP 388 (Agreed Statement of Facts).

[note: 14]See 1ROP 353, 359.

[note: 15]See 1ROP 401.

[note: 16]See 1ROP 366.

[note: 17]See 1ROP 378, 388.

[note: 18]See 1ROP 403.

[note: 19]See 1ROP 70, 80.

[note: 20]See 1ROP 350, 379, 404–405; 2AROP 436.

[note: 21]See 1ROP 379–380.

[note: 22]See 1ROP 373, 377–378; 2AROP 436.

[note: 23]See 1ROP 381–382; 2ROP 243; 2AROP 436.

[note: 24]See 1ROP 382, 405–408.

[note: 25]See 1ROP 302, 350–351.

[note: 26]See 2AROP 388 (Agreed Statement of Facts).

[note: 27]See 1ROP 302–303.

[note: 28]See 1ROP 303, 353–354.

[note: 29]See 1ROP 383, 410.

[note: 30]See 1ROP 390.

[note: 31]See 2AROP 388 (Agreed Statement of Facts).

[note: 32]See 1ROP 303–305, 322–323, 354.

[note: 33]See 1ROP 335.

[note: 34]See 1ROP 306–309, 311–312, 316, 361, 364.

[note: 35]See 1ROP 309–311.

[note: 36]See 1ROP 337; 2AROP 388 (Agreed Statement of Facts).

[note: 37]See 1ROP 302–303, 361.

[note: 38]See 1ROP 383–384.

[note: 39]See 1ROP 384; 2ROP 243; 2AROP 436.

[note: 40]See 1ROP 410.

[note: 41]See 1ROP 385, 412–413, 415.

[note: 42]See 2ROP 243; 2AROP 436.

[note: 43]See 1ROP 384–385, 410–411.

[note: 44]See 1ROP 411–412.

[note: 45]See 1ROP 408–409.

[note: 46]See 2AROP 388–389 (Agreed Statement of Facts).

[note: 47]See 1ROP 231–238 (Moad Fadzir’s submissions in the trial-within-a-trial).

[note: 48]See 1ROP 239–241 (Moad Fadzir’s submissions in the trial-within-a-trial).

[note: 49]See 1ROP 242 (findings of the Court in the trial-within-a-trial).

[note: 50]See 1ROP 242 (findings of the Court in the trial-within-a-trial).

[note: 51]See 1ROP 243 (findings of the Court in the trial-within-a-trial).

[note: 52]See 1ROP 244 (findings of the Court in the trial-within-a-trial).

[note: 53]Moad Fadzir’s Skeletal Arguments at paras 89(d), 117.

[note: 54]See 2AROP 320–324.

[note: 55]See 2AROP 639.

[note: 56]See 2AROP 325.

[note: 57]See Moad Fadzir’s Skeletal Arguments at paras 20–21.

[note: 58]See Moad Fadzir’s Skeletal Arguments at paras 23–24.

[note: 59]See Moad Fadzir’s Skeletal Arguments at paras 26, 33.

[note: 60]See 1ROP 157.

[note: 61]See 1ROP 158.

[note: 62]See 1ROP 159–163.

[note: 63]See 1ROP 158, 163.

[note: 64]See 1ROP 259–260.

[note: 65]See 1ROP 365–366.

[note: 66]See Moad Fadzir’s Skeletal Arguments at para 42.

[note: 67]See Prosecution’s Submissions at paras 103, 109.

[note: 68]See Prosecution’s Submissions at paras 111(b), 119, 120.

[note: 69]See Prosecution’s Submissions at paras 115, 118, 121.

[note: 70]See Prosecution’s Submissions at para 91.

[note: 71]See 2ROP 61 S/N 551; 2AROP 475.

[note: 72]See 1ROP 337; 2AROP 641; Prosecution’s Submissions at para 81.

[note: 73]See 2AROP 346–347.

[note: 74]See 1ROP 54, 56–58.

[note: 75]See Zuraimy’s Skeletal Submissions at para 47.

[note: 76]See Prosecution’s Submissions at para 189.

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