13. CRIMINAL LAW

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Introduction

13.1 This review is in three parts. The first two Parts review, respectively, cases that involved offences under the Penal Code[1] ("the Code") and then, cases under the Misuse of Drugs Act[2] ("MDA"). The third Part surveys cases that involved offences under other statutes that impose criminal liability.

Penal Code

Offences

Mens rea *for murder under s 300(*a*)*

13.2 In *Iskandar bin Rahmat v Public Prosecutor*[3] ("*Iskandar bin Rahmat*"), the accused was convicted by the High Court on two counts of murder under s 300(*a*) of the Code. Section 300(*a*) – causing of death by doing an act "with the intention of causing death" – is the archetypical example of murder, and therefore attracts the mandatory death sentence. The victims were a father and his son.

13.3 On appeal, the accused challenged the convictions on several grounds. Amongst others, he argued that murder under s 300(*a*) of the Code was not made out because his actions did not show an intention of causing death. Rather, he contended that his actions showed only an intention to cause injuries (the accused did not deny causing the injuries

* Any views expressed in this chapter are the authors' own views, and do not represent the views of either the State Courts or the Attorney-General's Chambers.

1 Cap 224, 2008 Rev Ed.

2 Cap 185, 2008 Rev Ed.

3 [2017] 1 SLR 505.

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on the victims with a knife); such injuries were sufficient in the ordinary course of nature to cause death. This would have merited convictions for murder under s 300(*c*) of the Code instead, which does not attract the mandatory death sentence (as there is an option to impose a sentence of life imprisonment instead). According to the accused, his plan at the outset was only to rob the older man, whom he had tricked to remove valuables from the older man's safe deposit box,[4] and not to kill either the older man or his son (who had arrived at the older man's house soon after the accused had inflicted the injuries on the older man). The accused claimed he had inflicted the injuries to the victims because they had each attempted to first assault him.

13.4 The Court of Appeal held that it was "not strictly necessary" for the Prosecution to prove beyond a reasonable doubt that the accused had planned to kill either or both victims from the beginning – because it is "well-established that the intention to cause death under s 300(*a*) … need not be pre-planned or premeditated, and can be formed on the spur of the moment, just before the actual killing takes place".[5] If it could be shown that the accused had planned to kill both victims all along,[6] then the intention to cause their deaths at the time of the killing would be established *a fortiori*. The converse was, however, not true. As such, "[even] if the [accused] had no premeditated plan to kill [the victims], he would still be equally guilty of murder under s 300(*a*) … if it [could] be shown beyond a reasonable doubt that [he] had the intention to cause [their] deaths … at the *time of the killing*" [emphasis in original].[7]

13.5 Rejecting the accused's version that the older man had attacked him with a knife after apparently learning he had been tricked by the

4 The accused had been facing serious financial difficulties and was at risk of losing his job (because of his financial difficulties).

5 *Iskandar bin Rahmat v Public Prosecutor* [2017] 1 SLR 505 at [34].

6 The Prosecution had submitted that the accused had planned all along to kill the older man to escape with the valuables the accused had tricked the older man into removing from his safe deposit box, and ensure that he would not be identified. To this end, the accused had brought the knife along with him. In the alternative, the Prosecution had submitted that the accused developed the intention to kill the older man after the older man had discovered that the accused had tricked him into removing his valuables from his safe deposit box. In either case, the Prosecution argued that the knife wounds inflicted by the accused on the older man clearly spoke of the accused's intention to kill him.

In relation to the older man's son (who had arrived at the older man's house soon after the accused had inflicted the injuries on the older man), the Prosecution had submitted that the accused had no choice but to kill him in order to silence him. The accused's intention to kill the son was formed there and then, or just before the son arrived at the house – and this was evidenced by the injuries the accused inflicted on the son.

7 *Iskandar bin Rahmat v Public Prosecutor* [2017] 1 SLR 505 at [34].

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accused,[8] the appellate court then looked to the only evidence left before the court – *viz*, the accused's admission that he intended to, and did, cause the injuries suffered by the older man. In its view, "the overwhelming number and severity of the wounds inflicted by the [accused] to vulnerable parts of the [older man's] body[9] demonstrated, in and of itself, an *intention* to cause death [emphasis in original].[10] Indeed, the court noted that this was reinforced by other aspects of the accused's evidence:[11]

> The [accused] admitted that he knew he was stabbing [the older man] at the neck. He could not remember how many times he stabbed [the older man] but only stopped when [the older man's] body had become soft. On the [accused's] own evidence, [the older man] was unarmed for the most part and the [accused] suffered few injuries. Even if there was a struggle and the [accused] had instinctively stabbed [the older man], he could have stopped after the first (or even second) stab. Yet, he proceeded to stab and cut [the older man] 22 more times at vulnerable parts of [the older man's] body. Given our finding that [the older man] did not attack him, there was no reason for the [accused] to have been so vicious in his assault on [the older man] other than to kill [the older man]. His explanation that he only wanted [the older man] to loosen his grip on him and that he had stabbed [the older man's] neck because that was the only area he could stab is simply unbelievable. The fact that the [accused] had used his left hand to muzzle [the older man's] mouth when [the older man] started crying out after being stabbed is also incongruous with any intention to merely disable [the older man's] grip on him. In the circumstances, we find that the [accused] *intended* to cause the death of [the older man] at the time of the killing. [emphasis in original]

13.6 In a similar vein, the appellate court held that the accused must have intended to cause the son's death given:[12]

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8 *Iskandar bin Rahmat v Public Prosecutor* [2017] 1 SLR 505 at [35]–[45].

9 As to the injuries the accused inflicted on the older man, these were set out by the appellate court in the following terms by the court at [18]:

> [The older man] suffered a total of 23 stab and incised knife wounds (excluding four defensive knife wounds he had on both hands) to vulnerable areas such as the head, neck and chest. Five wounds were to the neck … and included a stab to the back of the neck that went 6cm deep and cut the cervical spinal cord. They also included a 'deep, gaping incised wound' (measuring 8x5cm) to the front of [his] neck, which [the pathologist] described as a 'cut-throat injury across the front of the neck' that cut through a major artery. This was identified to be the substantive cause of death. Seven wounds were to [his] chest … and included two stabs wounds that were, respectively, 11cm and 13cm deep. The 13cm deep wound was the deepest of all 12 stab wounds and was considered a contributory cause of death. Nine wounds were incised wounds to [his] face and scalp.

10 *Iskandar bin Rahmat v Public Prosecutor* [2017] 1 SLR 505 at [45].

11 *Iskandar bin Rahmat v Public Prosecutor* [2017] 1 SLR 505 at [45].

12 *Iskandar bin Rahmat v Public Prosecutor* [2017] 1 SLR 505 at [60].

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(a) the congregation of injuries[13] to vulnerable parts of his body (face, neck, and scalp), which showed that the accused's attacks were targeted; and

(b) the sheer number of times he had stabbed and cut the son.

Mens rea *for voluntarily causing hurt to deter public servant from duty under s 332*

13.7 *Public Prosecutor v Yeo Ek Boon Jeffrey*[14] involved an accused who pleaded guilty to slapping the cheek of a police officer who was performing his duty ("the victim"). This was an offence under s 332 of the Code, which reads as follows:

> **Voluntarily causing hurt to deter public servant from his duty**
>
> **332.** Whoever voluntarily causes hurt to any person being a public servant in the discharge of his duty as such public servant, or with intent to prevent or deter that person or any other public servant from discharging his duty as such public servant, or in consequence of anything done or attempted to be done by that person in the lawful discharge of his duty as such public servant, shall be punished with imprisonment for a term which may extend to 7 years, or with fine, or with caning, or with any combination of such punishments.

13.8 The accused was sentenced by a District Court to a week's imprisonment. The Prosecution appealed against this sentence.[15] Mitigating for the accused before the High Court, the accused's counsel stated that the accused's actions were not intended to deter the victim from discharging his duty as a police officer. It was submitted that the accused was so intoxicated that he did not even realise that the victim was a police officer at the material time. In examining if the accused had thus qualified his plea, the High Court noted that the offence under s 332 of the Code comprises "three separate limbs which [relate to] the

13 As to the injuries the accused inflicted on the older man's son, these were set out by the appellate court in the following terms by the court at [19]:

> [The son] suffered a total of 17 stab and incised wounds (excluding three defensive knife wounds on his hands) to the neck, face and scalp. Four wounds were stabs to the neck and included one to the back of [his] neck which stopped short of the cervical spinal cord, and another that was 7–8cm deep. The latter wound was considered the substantive cause of death. Three wounds were stabs to the side of [his] face, one of which was 8–9cm deep. Ten wounds were incised wounds to [his] face and scalp. Considerable force was used to inflict one of the incised wounds to [his] scalp – this caused an open fracture such that fragments of the fractured bone were found adhering to the underlying part of the brain which had also been very superficially incised …

14 [2018] 3 SLR 1080.

15 On appeal, the sentence was enhanced to ten weeks' imprisonment.

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different stages at which hurt is caused – during, before and after the discharge of duty as a public servant".[16]

13.9 The presence of these three limbs is clear when the text in s 332 of the Code is broken up as follows:

> Whoever voluntarily caused hurt to any person being a public servant:
>
> > [(a)] in the discharge of his duty as such public servant[;]
> >
> > [(b)] with intent to prevent or deter that person or any other public servant from discharging his duty as such public servant[; or]
> >
> > [(c)] in consequence of anything done or attempted to be done by that person in the lawful discharge of his duty as such public servant[,]
>
> shall be punished with imprisonment for a term which may extend to 7 years, or with fine, or with caning, or with any combination of such punishments.

13.10 It is clear that the *actus reus* of the offence is the causing of hurt.[17] As to the *mens rea* of the offence, the High Court referred to two conjunctive limbs (the second of which is not immediately apparent from the section):[18]

> (a) that the hurt was caused "voluntarily"; and
>
> (b) with the knowledge that the victim is a public servant going about his duties.

13.11 The High Court noted:[19]

> Although knowledge that the victim is a public servant going about his duties is not stated explicitly in s 332 of the Code, it cannot be right that someone who hit another person without even knowing that that person was a public servant going about his duties would be guilty of an offence under s 332.

That said, the court held that "the knowledge required is objective and not subjective knowledge". As such:[20]

> [If] an ordinary person would have such knowledge in the circumstances of the case, it is not open to the accused person to claim that he did not know. Hence, an intoxicated accused person would not be permitted to say that he was so drunk he was not aware of the

16 *Public Prosecutor v Yeo Ek Boon Jeffrey* [2018] 3 SLR 1080 at [34].
17 *Public Prosecutor v Yeo Ek Boon Jeffrey* [2018] 3 SLR 1080 at [34].
18 *Public Prosecutor v Yeo Ek Boon Jeffrey* [2018] 3 SLR 1080 at [34].
19 *Public Prosecutor v Yeo Ek Boon Jeffrey* [2018] 3 SLR 1080 at [35].
20 *Public Prosecutor v Yeo Ek Boon Jeffrey* [2018] 3 SLR 1080 at [35].

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> status of the victim and was merely lashing out at any person who was in his proximity or who went near him. Being in a state of intoxication would afford no defence to a charge under s 332 unless he could bring himself within the defence of intoxication in ss 85 or 86 of the [Code].

13.12 Noting the accused's counsel's confirmation that he was not qualifying the accused's plea of guilt, the High Court held:[21]

> [The accused] must therefore be considered to have the objective knowledge that [the victim] was a police officer, particularly when [the victim] and his partner must have been in police uniform in the course of their duties that night. [While] the [accused] was drunk and hot-tempered, he was able to tell them not to touch him. The [accused] also pointed his finger at the police officers and uttered vulgarities at them. When [the victim] told him to mind his language, the [accused] could point at him and utter an offensive word before slapping [the victim's] left cheek. The [accused] might have been able to control himself better were he not drunk but … self-induced drunkenness could not be used as an excuse.

13.13 The additional requirement that an accused must know that the victim is a public servant going about his duties is to be welcomed. There must, after all, be some distinction in *mens rea*[22] between an offence under s 332 of the Code (which attracts a maximum term of imprisonment of seven years) and that of voluntarily causing hurt *simpliciter* under s 321 of the Code (which attracts a maximum term of imprisonment of two years). Two points, however, bear mention.

13.14 First, the reference by the court to "objective knowledge" as opposed to "subjective knowledge" should not be seen as creating a new type of *mens rea* that is different from our traditional understanding of "knowledge". As with "intention", it is a subjective–objective approach that is adopted towards "knowledge". Proof is still required that the accused *himself* knew that the victim is a public servant going about his duties, but the objective facts relating to the accused's behaviour remain an important element of drawing inferences about the accused's knowledge. The following extracts from *Criminal Law in Malaysia and Singapore*[23] by Stanley Yeo, Neil Morgan and Chan Wing Cheong – albeit in the context of discussing the *mens rea* for culpable homicide and murder – are useful to understanding this:[24]

21 *Public Prosecutor v Yeo Ek Boon Jeffrey* [2018] 3 SLR 1080 at [36].

22 This is given that the *actus reus* is identical for an offence under ss 321 and 332 of the Penal Code (Cap 224, 2008 Rev Ed).

23 Stanley Yeo, Neil Morgan & Chan Wing Cheong, *Criminal Law in Malaysia and Singapore* (LexisNexis, Revised 2nd Ed, 2015).

24 Stanley Yeo, Neil Morgan & Chan Wing Cheong, *Criminal Law in Malaysia and Singapore* (LexisNexis, Revised 2nd Ed, 2015) at paras 9.27–9.29.

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Proving intention and knowledge

…

… the courts have entrenched a subjective approach [towards proving intention and knowledge]. Culpable homicide requires proof that the accused *himself or herself* intended to kill or injure or knew that death was likely a result; and if there are factors that make the accused different from the 'ordinary person' in any material way, these differences should be taken into account …

Although factors that are specific to the accused must be taken into account, the objective facts relating to the accused's behaviour are an important element of the process of drawing inferences about the fault element:

> Because it is impossible for any court, judge or jury, to actually enter the mind of an accused person and search for his or her intent [and knowledge] at the critical time, it is inescapable that the forensic process by which intent [and knowledge] is judged … will address the objective facts from which an inference of intention [or knowledge] may be derived. This is why it is often said that a person's acts may provide the most convincing evidence of intention [and knowledge]. In *Richard III*, Shakespeare suggested that it is by acts that the observer straightaway shall know the heart. So it is by acts that a court straightaway may know the solution to the riddle of intention [and knowledge] required by the criminal law. If it were otherwise intention [and knowledge], absent acknowledgement or reliable confession, could scarcely ever be proved.

In cases of culpable homicide, therefore, the trier of fact must determine [*mens rea*] by inference from all relevant and admissible evidence, and taking account of relevant personal characteristics of the accused. This evidence may include the accused's evidence in court, what [he] said at the time, what [he] told police and what other witnesses say. It will also include the nature of the acts themselves; for example, the type of weapon that was used (if any), the nature, location and number of injuries inflicted on the victim, and the way the injuries were inflicted.

[emphasis in original; references omitted]

13.15 This was precisely the approach of the court,[25] where it drew the inference that the accused knew the victim was a police officer by reviewing the objective facts relating to the accused's behaviour.[26]

25 See para 13.12 above.

26 See the similar subjective–objective approach adopted by the Court of Appeal towards knowledge in *Obeng Comfort v Public Prosecutor* [2017] 1 SLR 633 – set out at paras 13.51(d)–13.51(e) below.

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13.16 Second, some issues with the current drafting of s 332 of the Code bear highlighting. Apart from proving that the accused knew that the victim was a public servant going about his duties, the Prosecution must also show that hurt was caused "voluntarily" by the accused. The definition of "voluntarily" appears in s 39 of the Code. Reading ss 39 and 332 together, a person is said to cause hurt "voluntarily" when:

> (a) he causes hurt by means whereby he *intended* to cause hurt;
>
> (b) he causes hurt by means which, at the time of employing those means,
>
> (i) he *knew*, or
>
> (ii) had *reason to believe*,
>
> to be likely to cause hurt.

13.17 The term "voluntarily" therefore covers three different types of *mens rea*: "intention to cause hurt", "knowledge of the likelihood of causing hurt", and "reason to believe that he is likely to cause hurt".[27] As such, whenever an offence uses the term "voluntarily", the Prosecution need only prove *one* of these three forms of *mens rea* for the accused to be convicted. This, in itself, raises three issues. One, it is unclear if the same penalty should be attached to an accused who merely had "reason to believe" he is likely to cause hurt compared to one who intended to cause hurt or knew of the likelihood of causing hurt.[28] There should, arguably, be a distinction in sentencing.

13.18 Two, the definition of "voluntarily" under s 39 and the need for its use in the context of s 332 of the Code, sits oddly and appears superfluous in so far as the offences of voluntarily causing hurt (under s 321 of the Code) and voluntarily causing grievous hurt (under s 322 of the Code) are concerned – because these latter two offences expressly specify the *mens rea* within their respective sections as constituting an intention or knowledge of the likelihood of causing hurt or grievous hurt only, and make no reference to "reason to believe"[29] (although the term "voluntarily" appears in these two provisions). It appears somewhat odd that a more serious offence under s 332 (that attracts a maximum term of imprisonment of seven years) can be satisfied with a less stringent *mens rea* requirement (*viz*, "reason to believe") that forms

27 Stanley Yeo, Neil Morgan & Chan Wing Cheong, *Criminal Law in Malaysia and Singapore* (LexisNexis, Revised 2nd Ed, 2015) at para 4.25.

28 Stanley Yeo, Neil Morgan & Chan Wing Cheong, *Criminal Law in Malaysia and Singapore* (LexisNexis, Revised 2nd Ed, 2015) at para 4.26.

29 Stanley Yeo, Neil Morgan & Chan Wing Cheong, *Criminal Law in Malaysia and Singapore* (LexisNexis, Revised 2nd Ed, 2015) at para 4.27.

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no part of the less serious offence under s 321 of the Code (that attracts a maximum imprisonment term of two years). That said, the distinction may well stem from a greater need to deter any form of violent behaviour against public servants discharging their duties.

Dishonest misappropriation of property under s 403

13.19 The offence of dishonest misappropriation of property is set out in s 403 of the Code, which reads as follows:

> **Dishonest misappropriation of property**
>
> **403.** Whoever dishonestly misappropriates or converts to his own use movable property, shall be punished with imprisonment for a term which may extend to 2 years, or with fine, or with both.

13.20 It was last considered by the High Court in some detail in *Wong Seng Kwan v Public Prosecutor*[30] ("*Wong Seng Kwan*"), which involved an accused who had been convicted of dishonest misappropriation of cash taken from a wallet he had found on the floor of the Marina Bay Sands Casino ("the casino"). In affirming the conviction, the High Court had set out the three elements that must be proved to make out the offence:[31]

> (a) The movable property must belong to some person other than the accused.
>
> (b) There must be an act of misappropriation or conversion to the accused's own use.
>
> (c) The accused must possess a dishonest intention.

13.21 In *Shaikh Farid v Public Prosecutor*[32] ("*Shaikh Farid*"), the High Court had to consider whether the offence is only made out if the accused's dishonest intention was formed *after* (and not before or at the time) the relevant movable property had come into his possession "innocently … in a neutral manner, or without wrong" ("the innocent possession argument") – an interpretation supported by commentary in two leading Indian texts on the Indian Penal Code and apparently by *Wong Seng Kwan*.[33]

13.22 The three accused persons in *Shaikh Farid* were all members of the casino. As members, they were eligible to take part in a particular promotion that entitled them to redeem a fixed number of free play credits ("FPCs") at electronic redemption kiosks by swiping their

30 [2012] 3 SLR 12.
31 *Wong Seng Kwan v Public Prosecutor* [2012] 3 SLR 12 at [19].
32 [2017] 5 SLR 1081.
33 *Shaikh Farid v Public Prosecutor* [2017] 5 SLR 1081 at [19]–[20].

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individual membership cards. The FPCs (which could not be exchanged for cash) could then be used as credits at electronic gaming machines in the casino. After gambling at these machines, a paper slip of winnings would be generated. This slip could then be exchanged for cash at "Ticket In, Ticket Out" machines ("TITO machines") in the casino.

13.23 A system glitch at the redemption kiosks allowed one accused to redeem an apparently unlimited number of FPCs with her membership card. On discovering this glitch, the three accused persons swiped this card 10,293 times over a seven-day period to obtain 1,029,300 FPCs. They used the FPCs to gamble at the electronic roulette machines, and then encashed their winnings at the TITO machines. Some $875,133.56 in winnings were encashed ("the moneys"). The moneys – which clearly come within the definition of "movable property" (unlike the FPCs)[34] – formed the subject of the charge under s 403, read with s 109, of the Code (*viz*, a charge for engaging in a conspiracy to dishonestly misappropriate the moneys from the casino).

13.24 Appealing against their convictions by the District Court, the accused persons contended that the offence was not made out because the moneys had not come into their possession "innocently … in a neutral manner, or without wrong" (*viz*, the innocent possession argument).[35] This was because they had repeatedly swiped the membership card knowing there was a system glitch to obtain the FPCs which they used to gamble, and from which they obtained the moneys.

13.25 The High Court rejected the innocent possession argument. It noted that a closer scrutiny of *Wong Seng Kwan* showed that innocent possession, while "not incorrect with respect to the *archetypal* s 403 scenario" [emphasis in original], was not a requisite element for *all* offences under s 403.[36] In addition, the innocent possession argument was not supported by a plain reading of the text of s 403 of the Code, which imposed no such qualification.[37]

13.26 The court noted that illustrations (*a*)–(*c*) to s 403 of the Code provided some support for the innocent possession argument.[38] These illustrations read as follows:

34 *Shaikh Farid v Public Prosecutor* [2017] 5 SLR 1081 at [31].
35 See para 13.21 above.
36 *Shaikh Farid v Public Prosecutor* [2017] 5 SLR 1081 at [22].
37 *Shaikh Farid v Public Prosecutor* [2017] 5 SLR 1081 at [23]–[24].
38 *Shaikh Farid v Public Prosecutor* [2017] 5 SLR 1081 at [25].

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Illustrations

(*a*) A takes property belonging to Z out of Z's possession *in good faith believing, at the time when he takes it, that the property belongs to himself*. A is not guilty of theft; but if A, after discovering his mistake, dishonestly appropriates the property to his own use, he is guilty of an offence under this section.

(*b*) A, being on friendly terms with Z, goes into Z's house in Z's absence and takes away a book without Z's express consent. Here, if *A was under the impression that he had Z's implied consent to take the book for the purpose of reading it*, A has not committed theft. But if, afterwards, A sells the book for his own benefit, he is guilty of an offence under this section.

(*c*) A and B being joint owners of a horse, A takes the horse out of B's possession, intending to use it. Here, as *A has a right to use the horse*, he does not dishonestly misappropriate it. But if A sells the horse and appropriates the whole proceeds to his own use, he is guilty of an offence under this section.

[emphasis added]

13.27 That said, the court reiterated that illustrations "should not be read so as to unduly circumscribe the plain meaning of [a] statutory provision".[39] The court observed that "s 403 is intended to apply where the accused person does not commit theft or some other criminal offence in order to obtain possession of the property; in other words he does not obtain possession of the property wrongfully by removing it from the possession of another".[40] This was indeed the case here, given that:[41]

> [The] payments [of cash] were correctly made out based on [the accused persons'] presentation of [their slips of winnings] for encashment at the TITO machines, and the [accused persons] were permitted (albeit because the [Casino] had belaboured under a mistake of fact) to encash their winnings. In that sense, [the accused persons] did not obtain possession of the cash wrongfully. The winnings amassed were 'legitimate' (but not untainted) in the sense that the [accused persons] at least had the right to *possess* the cash, not having taken it from the possession of some other person. It is thus common ground that they had not committed theft of the cash. But it would clearly not be tenable to say that they had any ownership rights to the cash, as they knew at all times that the true owner of the cash was always the [casino]. [emphasis in original]

39 *Shaikh Farid v Public Prosecutor* [2017] 5 SLR 1081 at [25].
40 *Shaikh Farid v Public Prosecutor* [2017] 5 SLR 1081 at [30].
41 *Shaikh Farid v Public Prosecutor* [2017] 5 SLR 1081 at [29].

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Defences

13.28 The accused in *Iskandar bin Rahmat*[42] also relied on three partial exceptions to murder under s 300 of the Code in respect of both victims:

(a) Exception 2 – exceeding the right of private defence of person;

(b) Exception 4 – sudden fight; and

(c) Exception 7 – diminished responsibility.

13.29 If one or more of these partial exceptions applied, the murder charges would have to be reduced to ones for culpable homicide not amounting to murder – which attract either imprisonment for a term which may extend to 20 years or imprisonment for life.[43]

Exception 2 to s 300: Exceeding the right of private defence of person

13.30 In considering if Exception 2 applied, the Court of Appeal referred its earlier decisions in *Soosay v Public Prosecutor*[44] as well as *Tan Chor Jin v Public Prosecutor*[45] and reiterated that the accused must prove the following elements on a balance of probabilities:[46]

Proving Exception 2 (in respect of person)		
S/No	**Element**	**Remarks**
1	The right of private defence has arisen.	Two preconditions must first be satisfied for the right of private defence to arise in respect of the accused's own person: (a) The person purporting to exercise the right of private defence ("the defender") must have been the subject of an offence affecting the human body.

42 See para 13.2 above.
43 See s 304(*a*) of the Penal Code (Cap 224, 2008 Rev Ed).
44 [1993] 2 SLR(R) 670 at [29].
45 [2008] 4 SLR(R) 306.
46 *Iskandar bin Rahmat v Public Prosecutor* [2017] 1 SLR 505 at [50]–[51].

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		(b) The defender must have attempted to seek help from the relevant public authorities if there was a reasonable opportunity for him to do so.
2	The right of private defence was exercised in good faith.	
3	The victim's death was caused without premeditation.	
4	The victim's death was without any intention of doing more harm than was necessary for the purpose of such defence.	

13.31 With respect to the older man, the court found that that the accused was not entitled to Exception 2 because the right of private defence had not even arisen (*viz*, the first element). This was because neither of the two preconditions had been proved:

> (a) The accused had failed to show he had been the subject of an offence affecting the human body, because he had failed to prove that the older man had attacked him with a knife.[47]
>
> (b) Even if it were accepted that the older man had attempted to attack the accused with a knife, the accused did not attempt to seek help from the relevant public authorities despite there being a reasonable opportunity for him to do so.[48]

13.32 With respect to the son, the court found that the accused was also not entitled to Exception 2 because:[49]

> (a) The accused was clearly the aggressor (who was also armed with a deadly weapon).
>
> (b) The manner in which the accused viciously attacked the son with the knife showed that he had intended to do more harm than was necessary for the purpose of any alleged self-defence (*viz*, element 4).[50]

47 *Iskandar bin Rahmat v Public Prosecutor* [2017] 1 SLR 505 at [52].
48 *Iskandar bin Rahmat v Public Prosecutor* [2017] 1 SLR 505 at [53]–[54].
49 *Iskandar bin Rahmat v Public Prosecutor* [2017] 1 SLR 505 at [62]–[63].
50 See para 13.16 above.

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Exception 4 to s 300: Sudden fight

13.33 In considering if Exception 4 applied, the court referred to its earlier decision in *Tan Chun Seng v Public Prosecutor*[51] and reiterated that the accused must prove the following elements on a balance of probabilities:[52]

> (a) sudden fight in the heat of passion upon a sudden quarrel;
>
> (b) absence of premeditation; and
>
> (c) no undue advantage or cruel or unusual acts.

13.34 Given that the accused had failed to show that the older man had attacked him with a knife, there was therefore no sudden fight between the accused and the older man (*viz*, the first element was not satisfied). The court therefore held that the accused was not entitled to Exception 4.[53]

13.35 With respect to the son, the court found that the third element was not satisfied. The accused had taken undue advantage of and acted in a cruel manner towards the son, bearing in mind that:[54]

> (a) the accused was armed with a knife before any alleged sudden fight began;
>
> (b) the accused was heavier than the son; and
>
> (c) even if the son had charged at the accused (as the accused alleged), there was no reason for the accused to have resorted to stabbing and cutting the son in vulnerable areas with the knife so many times.

Exception 7 to s 300: Diminished responsibility

13.36 In holding that Exception 7 did not apply (after rejecting the evidence of the accused's psychiatrist),[55] the court referred to the three distinct elements the accused must prove on a balance of probabilities:[56]

> (a) the accused was suffering from an abnormality of mind ("the first limb").

51 [2003] 2 SLR(R) 506 at [16].
52 *Iskandar bin Rahmat v Public Prosecutor* [2017] 1 SLR 505 at [57].
53 *Iskandar bin Rahmat v Public Prosecutor* [2017] 1 SLR 505 at [57].
54 *Iskandar bin Rahmat v Public Prosecutor* [2017] 1 SLR 505 at [64]–[65].
55 *Iskandar bin Rahmat v Public Prosecutor* [2017] 1 SLR 505 at [95]–[108].
56 *Iskandar bin Rahmat v Public Prosecutor* [2017] 1 SLR 505 at [79].

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(b) such abnormality of mind ("the second limb"):

(i) arose from a condition of arrested or retarded development;

(ii) arose from any inherent causes; or

(iii) was induced by disease or injury,

(c) the abnormality of mind substantially impaired his mental responsibility for his acts and omissions in causing the death ("the third limb").

13.37 The court reiterated that whilst the second limb (otherwise known as the aetiology or root cause of the abnormality) is a matter largely to be determined based on expert evidence, the first and third limbs are matters which cannot be the subject of any medical opinion and must be left to the determination of the trial judge as the finder of fact.[57]

13.38 Referring to Yeo, Morgan and Chan,[58] the court noted that the "casual descriptors" in the second limb "have been the source of uncertainty and complexity in practice", being notoriously difficult to define and apply. Not only were they capable of being interpreted in multiple ways, they appeared to have no agreed upon meaning or definition among psychiatrists and/or other professionals.[59]

13.39 The accused had suggested that the prescribed causes in the second limb should be read broadly to include "any recognised medical condition contained in the international classificatory systems of mental conditions"[60] (such as the World Health Organisation's International Statistical Classification of Diseases and Related Health Problems or the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders). Disagreeing,[61] the court held that the express wording of Exception 7 and the second limb is clear that the onus is still on an accused person to identify which of the prescribed causes is applicable in his case.[62] As such, "[expert] witnesses are thus well-advised to, on top of diagnosing whether an accused person was

57 *Iskandar bin Rahmat v Public Prosecutor* [2017] 1 SLR 505 at [80].
58 See para 13.14 above.
59 *Iskandar bin Rahmat v Public Prosecutor* [2017] 1 SLR 505 at [83].
60 *Iskandar bin Rahmat v Public Prosecutor* [2017] 1 SLR 505 at [89].
61 The court disagreed with the accused's view after reviewing the historical origins and the parliamentary debates in respect of the second limb when s 2 of the English Homicide Act 1957 (c 11) was introduced, the section from which Exception 7 in our Penal Code was derived: see *Iskandar bin Rahmat v Public Prosecutor* [2017] 1 SLR 505 at [83]–[88].
62 *Iskandar bin Rahmat v Public Prosecutor* [2017] 1 SLR 505 at [89].

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suffering from a recognised mental condition, identify which prescribed cause, if any, in their opinion gave rise to the accused's abnormality of mind".[63] The court noted, however, that the wordings of the prescribed causes appear wide enough to include most recognised medical conditions.

13.40 The court also observed that the second limb has since been removed from the equivalent defence in England and New South Wales. In England, the law has been amended to require the abnormality of mind to arise from a "recognised medical condition".[64] In New South Wales, the second limb was removed from the law altogether.[65] That said, the court noted that whether our Exception 7 should be amended is a matter reserved solely for Parliament to decide.[66]

Misuse of Drugs Act

Mens rea *for abetting in conspiracy to traffic drugs*

13.41 The accused in *Liew Zheng Yang v Public Prosecutor*[67] was convicted by a District Court on two charges of abetting in a conspiracy to traffic in controlled drugs (cannabis and cannabis mixture). These charges related to offences under ss 5(2) and 12 of the MDA, read with s 107(*b*) of the Code. Under s 12 of the MDA, "[any] person who abets the commission of … any offence under [the MDA] … shall be liable on conviction to the punishment provided for that offence".

13.42 The accused had wanted to smoke marijuana and contacted his friend ("Xia") to buy a brick of marijuana. Xia checked with his supplier, and informed the accused that his supplier did not have any available. Xia then agreed to get the marijuana for the accused from other suppliers (and travelled to Johor Bahru to do so), and to deliver it to the accused in return for $400. Xia was arrested with the drugs when he returned to Singapore. The accused was arrested in an ambush operation, when he met Xia to collect the drugs.

13.43 The accused appealed against his convictions. The unchallenged evidence was that the drugs were intended solely for the accused's own

63 *Iskandar bin Rahmat v Public Prosecutor* [2017] 1 SLR 505 at [89].
64 *Iskandar bin Rahmat v Public Prosecutor* [2017] 1 SLR 505 at [90]–[91].
65 *Iskandar bin Rahmat v Public Prosecutor* [2017] 1 SLR 505 at [92]–[93].
66 *Iskandar bin Rahmat v Public Prosecutor* [2017] 1 SLR 505 at [93].
67 [2017] 5 SLR 611.

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consumption.[68] On the effect of the accused's convictions by the lower court, the High Court observed that:

> (a) Taken to its logical conclusion, the lower court's decision "means that every time a buyer orders drugs from a seller for delivery to the buyer, that buyer, without more, would be guilty of abetting in a conspiracy to traffic controlled drugs".[69]
>
> (b) Such a decision "has serious repercussions as the law has always made a principled distinction between the culpability of drug consumers and drug traffickers".[70]
>
> (c) "[If] the decision is correct, a buyer who orders drugs from a seller for his own consumption is liable to be convicted for abetting in a conspiracy with the seller to traffic which, significantly, caries the same sentence as the offence of trafficking.[71] By the same token, if the quantity of controlled drugs is above the capital punishment threshold, the buyer would be liable for capital punishment even if the drugs are for his own consumption. This would effectively undermine and obfuscate the recognised distinction between consumption and trafficking".[72]

13.44 The High Court characterised the issue as "whether a buyer who orders drugs from a seller for delivery to the buyer can be guilty of abetting the seller in a conspiracy to traffic the drugs [to himself] even if the drugs were intended solely for the buyer's own consumption".[73] Answering this in the negative, the court noted that the fundamental issue is whether an accused could, as a matter of law, traffic the drugs to himself.[74] The court then examined the *mens rea* required in the instant case, and held that the accused lacked the requisite *mens rea* (although the *actus reus* in a buyer–seller scenario – the seller being the trafficker and the buyer being the abettor – is satisfied).[75] The key points are set out:

> (a) A person who buys drugs for his own consumption does not have the necessary *mens rea* to commit the offence of abetting in a conspiracy to traffic.

68 *Liew Zheng Yang v Public Prosecutor* [2017] 5 SLR 611 at [19]–[23].
69 *Liew Zheng Yang v Public Prosecutor* [2017] 5 SLR 611 at [1] and [18].
70 *Liew Zheng Yang v Public Prosecutor* [2017] 5 SLR 611 at [2] and [18].
71 See para 13.41 above.
72 *Liew Zheng Yang v Public Prosecutor* [2017] 5 SLR 611 at [2].
73 *Liew Zheng Yang v Public Prosecutor* [2017] 5 SLR 611 at [3] and [5].
74 *Liew Zheng Yang v Public Prosecutor* [2017] 5 SLR 611 at [17].
75 *Liew Zheng Yang v Public Prosecutor* [2017] 5 SLR 611 at [39]–[47].

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(b) For the offence of abetting in a conspiracy to traffic to be made out, the buyer and the seller must have the common intention to traffic the drugs to a third party (*viz*, excluding the buyer and the seller) ("the *mens rea* requirement").

(c) The *mens rea* requirement is implicitly recognised by the fact that it has always been a defence for persons accused of drug trafficking to prove that the drugs were intended for their own consumption as opposed to distribution to third parties ("the defence of consumption") – as such, the offence of trafficking will not be made out in relation to the quantity of drugs meant for an accused's own consumption.

(d) The *mens rea* requirement preserves the distinction, intended by Parliament and evident from the severe penalties directed at drug traffickers, between the drug trafficker and the drug consumer.

13.45 Here, the accused "did not have the *mens rea* to traffic the [drugs] simply because his intention in the transaction was to procure the [drugs] for his own consumption and therefore not to traffic to someone else".[76] The High Court therefore acquitted the accused of the two conspiracy charges (relating to cannabis and cannabis mixture), and convicted him on two lesser charges of attempted possession of controlled drugs under ss 8(*a*) and 12 of the MDA (relating to cannabis and cannabis mixture).[77]

Presumptions of possession and knowledge in s 18 of Misuse of Drugs Act

13.46 Sections 18(1) and 18(2) of the MDA set out, respectively, the often-used presumptions of possession and knowledge in relation to controlled drugs. In its entirety, s 18 of the MDA reads as follows:

> **Presumption of possession and knowledge of controlled drugs**
>
> **18.**—(1) Any person who is proved to have had in his possession or custody or under his control —
>
> (*a*) anything containing a controlled drug;
>
> (*b*) the keys of anything containing a controlled drug;
>
> (*c*) the keys of any place or premises or any part thereof in which a controlled drug is found; or

76 *Liew Zheng Yang v Public Prosecutor* [2017] 5 SLR 611 at [53].
77 *Liew Zheng Yang v Public Prosecutor* [2017] 5 SLR 611 at [59]–[61].

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> (*d*) a document of title relating to a controlled drug or any other document intended for the delivery of a controlled drug,
>
> shall, until the contrary is proved, be presumed to have had that drug in his possession.
>
> (2) Any person who is proved or presumed to have had a controlled drug in his possession shall, until the contrary is proved, be presumed to have known the nature of that drug.
>
> (3) The presumptions provided for in this section shall not be rebutted by proof that the accused never had physical possession of the controlled drug.
>
> (4) Where one of 2 or more persons with the knowledge and consent of the rest has any controlled drug in his possession, it shall be deemed to be in the possession of each and all of them.

13.47 These two presumptions were introduced to overcome the practical difficulty faced by the Prosecution of proving possession and knowledge on the accused's part.[78]

13.48 The year under review saw a number of important decisions on the application of these presumptions, beginning with *Obeng Comfort v Public Prosecutor*[79] ("*Obeng Comfort*").

13.49 In *Obeng Comfort*, the accused was convicted by the High Court on a charge under s 7 of the MDA for importing methamphetamine into Singapore from Ghana. The High Court held that the accused had failed to rebut the presumptions of possession and knowledge that applied against her. The issues of whether the accused had knowledge of the presence, and the nature, of the drugs arose because the methamphetamine was concealed in several items: two digital video disc players; two pairs of sandals; two tin cans with food labels; and a power adapter ("the Items").[80] The Items were all in a haversack the accused was carrying. In her defence, the accused:

> (a) denied knowing of the presence of the methamphetamine that was concealed in the Items (and she was hence unaware of the nature of the drugs); and
>
> (b) stated that she was acting on the instructions of a person in Ghana (one Kwaku Mohamed), who had passed her the Items outside the airport in Ghana and directed her to pass them to someone in Singapore.

78 *Obeng Comfort v Public Prosecutor* [2017] 1 SLR 633 at [33].
79 [2017] 1 SLR 633.
80 *Obeng Comfort v Public Prosecutor* [2017] 1 SLR 633 at [2].

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13.50 On appeal, the Court of Appeal made several observations on the manner in which the twin presumptions under s 18 of the MDA operate. On the presumption of possession under s 18(1), the court observed as follows:

> (a) Section 18(1) lists certain circumstances under which a person is presumed to have had a controlled drug in his possession.[81]
>
> (b) For the purposes of s 18(1), the court is concerned with two aspects:[82]
>
> > (i) whether the thing in issue (*viz*, the container,[83] the key,[84] or the document of title)[85] exists; and
> >
> > (ii) whether the accused in fact has possession, control, or custody of the thing in issue.
>
> Once the Prosecution proves these two aspects in the affirmative, a presumption of fact is raised – meaning that the accused, by virtue of his possession, control, or custody of the thing in issue, is presumed to possess the drug contained in, or related to, the thing in issue.
>
> (c) Section 18(1) deals with secondary possession of the drug in that the accused possesses, controls, or has custody of something which has the drug or which relates to the title in, or delivery of, the drug. It is clear from s 18(3) that the accused does not need to be in physical possession of the drug (or "primary possession").[86]
>
> (d) In deciding if the presumption of possession under s 18(1) should be invoked, the court is not concerned with the qualities of the drug (contrary to the observation of the High Court in *Public Prosecutor v Mohsen Bin Na'im*).[87] Knowledge that the item was a controlled drug is not necessary to satisfy the requirement of possession.[88]
>
> (e) To rebut the presumption of possession under s 18(1), an accused must prove, on a balance of probabilities, that he did not have the drug in his possession. The accused can do this by establishing that he did not know that the thing in issue

81 *Obeng Comfort v Public Prosecutor* [2017] 1 SLR 633 at [34].
82 *Obeng Comfort v Public Prosecutor* [2017] 1 SLR 633 at [34].
83 See s 18(1)(*a*) of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed).
84 See s 18(1)(*b*)–18(1)(*c*) of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed).
85 See s 18(1)(*d*) of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed).
86 *Obeng Comfort v Public Prosecutor* [2017] 1 SLR 633 at [34].
87 [2016] SGHC 150 at [115(a)(i)].
88 *Obeng Comfort v Public Prosecutor* [2017] 1 SLR 633 at [34].

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contained that which was shown to be the drug in question – for instance, by persuading the court that the drug was slipped into his bag, or was placed in his vehicle or house without his knowledge.[89]

(f) The inquiry under s 18(1) does not extend to the accused's knowledge of the nature of the drug. This is dealt with under the presumption of knowledge in s 18(2).[90]

(g) Where the presumption in s 18(1) is invoked by the Prosecution and is then rebutted successfully by the accused, the Prosecution would have failed to prove that the accused was in possession of the drug. There would be no need to then consider whether the accused had knowledge of the nature of the drug (and hence invoke the presumption of knowledge under s 18(2)).[91]

13.51 On the presumption of knowledge under s 18(2), the court observed as follows:

(a) Where an accused is:

(i) proved to have had the controlled drug in his possession; or

(ii) presumed under s 18(1) to have had the controlled drug in his possession, and the contrary is not proved,

the presumption under s 18(2) that he has knowledge of the nature of the drug would be invoked.[92] The "nature of [the] drug" refers to the specific controlled drug found in his possession (for instance, methamphetamine or diamorphine).[93]

(b) To rebut the presumption of knowledge in s 18(2), an accused must prove, on a balance of probabilities, that he did not have knowledge of the nature of the controlled drug (in effect, that he did not have the *mens rea* of the offence).[94] When an accused seeks to rebut this presumption, he should be able to say what he thought or believed he was carrying, particularly when the goods have to be carried across international borders as they could be prohibited goods or goods which are subject to

89 *Obeng Comfort v Public Prosecutor* [2017] 1 SLR 633 at [35].
90 *Obeng Comfort v Public Prosecutor* [2017] 1 SLR 633 at [35].
91 *Obeng Comfort v Public Prosecutor* [2017] 1 SLR 633 at [35].
92 *Obeng Comfort v Public Prosecutor* [2017] 1 SLR 633 at [36].
93 *Obeng Comfort v Public Prosecutor* [2017] 1 SLR 633 at [35].
94 *Obeng Comfort v Public Prosecutor* [2017] 1 SLR 633 at [36]–[37].

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tax.[95] An accused will not be able to rebut the presumption of knowledge by merely claiming that he:[96]

> (i) did not know what he was carrying save that he did not know or think it was drugs.
>
> (ii) he did not know the proper name of the drug he was asked to carry (as the law does not require him to know the scientific or chemical name of the drug or the effects that the drug could bring about).

(c) In *Dinesh Pillai a/l K Raja Retnam v Public Prosecutor*,[97] the court had observed that an accused could rebut this presumption of knowledge by showing that "he did not know or could not reasonably be expected to have known the nature of the controlled drug".[98] But, this statement should not be taken to suggest that mere negligence or constructive knowledge on the accused's part suffices to convict him.[99]

(d) The court will assess the accused's evidence as to his subjective knowledge of the nature of the controlled drug by comparing it with what an ordinary, reasonable person would have known or done if placed in the same situation that the accused was in. If such an ordinary, reasonable person would surely have known or taken steps to establish the drug in question, the accused would have to adduce evidence to persuade the court that nevertheless he, for reasons special to himself or to his situation, did not have such knowledge or did not take such steps. The court must then assess the credibility of the accused's account on a balance of probabilities.[100]

(e) Where an accused has stated what he thought he was carrying ("the purported item"),[101] the court will assess the veracity of his assertion against the objective facts and examine his actions relating to the purported item. This assessment is a highly fact-specific inquiry. For example, the court will generally consider the nature, the value, and the quantity of the purported item and any reward for transporting such an item. If it is an ordinary item that is easily available in the country of receipt, the court would want to know why it was necessary for the accused to transport it from another country. If it is a

95 *Obeng Comfort v Public Prosecutor* [2017] 1 SLR 633 at [39].
96 *Obeng Comfort v Public Prosecutor* [2017] 1 SLR 633 at [39].
97 [2012] 2 SLR 903.
98 *Dinesh Pillai a/l K Raja Retnam v Public Prosecutor* [2012] 2 SLR 903 at [18].
99 *Obeng Comfort v Public Prosecutor* [2017] 1 SLR 633 at [37].
100 *Obeng Comfort v Public Prosecutor* [2017] 1 SLR 633 at [37].
101 See para 13.51(b) above.

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> perishable or fragile item, the court would consider what steps were taken to preserve it or to prevent damage to it. If it is a precious item, the court would consider whether steps were taken to keep it safe from loss through theft or otherwise. If it is a dangerous item, the court would consider how the item was packed and handled. Ultimately, the court is concerned with the credibility and veracity of the accused's claim that he did not know the nature of the drugs. This depends not only on the credibility of the accused as a witness, but also on how believable his account relating to the purported item is.[102]

13.52 The court noted that when the presumptions under ss 18(1) and 18(2) apply and operate against an accused, the accused can be convicted on the relevant charge if:[103]

> (a) the accused elects to remain silent and does not make his defence; or
>
> (b) the accused elects to make his defence, but calls no evidence or inadequate evidence to rebut the presumptions.

13.53 Applying these legal principles, the court agreed with the lower court that the accused had failed to rebut both presumptions.[104] The accused's conviction was, accordingly, upheld.

13.54 In *Pham Duyen Quyen v Public Prosecutor*,[105] the Court of Appeal clarified that the word "possession" in s 18(1) of the MDA is not restricted to physical possession only – but extends to legal possession as well.[106] The accused had been convicted by the High Court on a charge under s 7 of the MDA for importing methamphetamine into Singapore. She was flying from India to Laos, and was in Singapore on transit. She had checked in her luggage (in which the methamphetamine was concealed) at the airport in India and was accordingly issued a luggage tag with her name printed on it (which she kept in her passport). When she arrived in Singapore, she did not reclaim her luggage from the belt at the arrival hall because she mistakenly assumed that it would be automatically transferred to her connecting flight to Laos.

13.55 The accused argued, amongst other things, that she was not in physical custody, possession, or control of the luggage from the time she

102 *Obeng Comfort v Public Prosecutor* [2017] 1 SLR 633 at [40].
103 *Obeng Comfort v Public Prosecutor* [2017] 1 SLR 633 at [38].
104 *Obeng Comfort v Public Prosecutor* [2017] 1 SLR 633 at [45]–[51].
105 [2017] 2 SLR 571.
106 *Pham Duyen Quyen v Public Prosecutor* [2017] 2 SLR 571 at [32].

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checked it in at the airport in India. As such, the presumption of possession under s 18(1) could not apply.

13.56 Both the High Court and the Court of Appeal held that the presumption of possession under s 18(1) applied because the accused had a luggage tag which entitled her to regain possession of the luggage from the airline. The High Court held that this fell within the "control" limb in s 18(1), because the word "possession" referred only to physical possession. The Court of Appeal disagreed, however, and clarified that the word "possession" in s 18(1) covered physical *and* legal possession:[107]

> [The] word 'possession' in s 18(1) of the MDA includes both concepts of physical and legal possession. We do not think that it is restricted to physical possession alone. In the case before us, when the accused checked in the Luggage at the departure airport and was issued a luggage tag as evidence of ownership, she ceased to be in physical possession of the Luggage. However, she was still in legal possession of the Luggage by virtue of her ability to reclaim it using the luggage tag in her possession. She remained in legal possession of the Luggage even though she had not reclaimed it yet or did not reclaim it from the luggage belt at the airport because she thought it would be transferred directly onto her next flight. In these circumstances, the presumption of possession under s 18(1) of the MDA would still apply. Naturally, it was open to the [accused] to attempt to rebut the presumption of possession on a balance of probabilities, for instance, by adducing evidence to show that someone could have placed the drugs in her Luggage without her knowledge while it was not within her physical possession.
>
> …
>
> Although it was open to the [accused] to rebut the presumption of possession by adducing evidence to show that someone could have slipped the drugs into the Luggage while it was out of her physical possession, she failed to adduce any credible evidence to this effect. The evidence showed clearly that the drugs were already in the Luggage at the time of check-in.

13.57 In *Public Prosecutor v Tan Lye Heng*[108] ("*Tan Lye Heng*"), the High Court examined the scope of the presumption of possession under s 18(1)(*c*) of the MDA. This states:

> **18.**—Any person who is proved to have had in his possession or custody or under his control —
>
> …

107 *Pham Duyen Quyen v Public Prosecutor* [2017] 2 SLR 571 at [32] and [39].
108 [2017] 5 SLR 564.

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> (*c*) the keys of any place or premises or any part thereof in which a controlled drug is found …
>
> …
>
> shall, until the contrary is proved, be presumed to have had that drug in his possession.[109]

13.58 The accused had been charged with possessing diamorphine for the purpose of trafficking, under s 5(1)(*a*), read with s 5(2), of the MDA. The drugs in question had been seized from various locations in a flat ("the Kim Tian Flat") owned by the accused's friend ("Sim"). A set of keys to the Kim Tian Flat was found in the accused's place of residence ("the Yung Sheng Flat") when he was arrested at the lift lobby of the Yung Sheng Flat. These keys had been given to the accused by Sim, who also had keys to the Kim Tian Flat. The accused did not own or rent the Kim Tian Flat, but he was an occasional visitor.[110] Sim had also permitted the accused to stay at the Kim Tian Flat from time to time, although it was unclear if the accused stayed overnight. No evidence was led by the Prosecution to show that any of the accused's belongings (such as clothes or documents) were present at the Kim Tian Flat. It was, however, clear that the accused visited the Kim Tian Flat several times every week.

13.59 The High Court first observed that the presumption under s 18(1)(*c*) operates without regard to an accused's status in relation to the premises or his actual connection to the premises:[111]

> [Once] it is proved that an accused possesses the keys to the premises containing the drugs, a presumption of possession of the drugs arises regardless of his status *vis-à-vis* the premises. Pursuant to s 18(1)(*c*), possession of a thing (namely keys) granting physical control of the premises containing the drugs is treated as a presumptive indicator of physical possession of the drugs. The presumption applies without regard to whether the accused was an owner, tenant, non-occupier or mere visitor to the premises. This may appear draconian as it is conceivable that in some circumstances, an innocent party may hold a key but factually have such a loose connection to the premises that drugs not belonging to him could easily have been placed there without his knowledge or control. However, this is only a matter of relevance if actual physical control must be proved and not presumed; since the very purpose of s 18(1)(*c*) is to presume upon the physical control represented by a set of keys, s 18(1)(*c*) does not permit any room to layer on an additional inquiry as to whether the holder of the

109 The entire s 18(1) of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) is reproduced in para 13.46 above.

110 The accused admitted to consuming drugs together with Sim in the Kim Tian Flat now and then: *Public Prosecutor v Tan Lye Heng* [2017] 5 SLR 564 at [8] and [104].

111 *Public Prosecutor v Tan Lye Heng* [2017] 5 SLR 564 at [112].

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> keys actually exercised physical control over the premises and if so, the degree of such control. Any evidence to the contrary, including evidence that the accused did not reside at or leave his belongings at the premises, will go towards rebutting the presumption of possession in so far as the *actus reus* of physical control is concerned. In addition, it should be recalled that in *Obeng Comfort*, the Court of Appeal noted that the most obvious way to rebut the presumption is to dispute the mental element of possession, *ie*, by establishing that the accused did not know that the place contained the drug in question, for instance, by proving that the drug was placed there without his knowledge.

13.60 The High Court then examined how the presumption under s 18(1)(*c*) "operates in a situation where several occupants have possession of the keys to the room or premises" – a material issue, because both the accused and Sim had keys to the Kim Tian Flat.[112] Given the decision of the Court of Appeal in *Poon Soh Har v Public Prosecutor*[113] ("*Poon Soh Har*"), the High Court noted that the presumption under s 18(1)(*c*) can only apply if an accused possesses *all* the relevant keys. As the second appellant in *Poon Soh Har* was only one of four authorised occupants of an apartment (where diamorphine had been found) – who each had access to the letter box (where more diamorphine had been found) and the apartment using the other keys that were not in the second appellant's possession – the second appellant did not possess *all* the relevant keys. The Court of Appeal in *Poon Soh Har* therefore held that the presumption under s 18(1)(*c*) could not be invoked against the second appellant.[114]

13.61 Bound by the Court of Appeal in *Poon Soh Har*, the High Court in *Tan Lye Heng* thus held that the presumption under s 18(1)(*c*) could not be invoked because the accused did not possess *all* the keys to the Kim Tian Flat (given that Sim also possessed the keys to the Kim Tian Flat).[115] That said, the court expressed some unease – but left it open – as to whether "the approach … in *Poon Soh Har* is at odds with the more recent proposition that the accused's status *vis-à-vis* the premises is irrelevant to the applicability of the presumption" under s 18(1)(*c*).[116]

Resentencing based on "abnormality of mind"

13.62 *Nagaenthran a/l K Dharmalingam v Public Prosecutor*[117] involved an accused who filed a criminal motion to be resentenced to

112 *Public Prosecutor v Tan Lye Heng* [2017] 5 SLR 564 at [113].
113 [1977–1978] SLR(R) 97.
114 *Public Prosecutor v Tan Lye Heng* [2017] 5 SLR 564 at [113]–[116].
115 *Public Prosecutor v Tan Lye Heng* [2017] 5 SLR 564 at [121].
116 *Public Prosecutor v Tan Lye Heng* [2017] 5 SLR 564 at [117]–[118].
117 [2017] SGHC 222.

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life imprisonment under s 33B(1)(*b*), read with s 33B(3) of the MDA. The accused had previously been sentenced to death for importing diamorphine into Singapore, under s 7 of the MDA. To be resentenced under s 33B(3), one requirement an accused must establish under s 33B(3)(*b*) is that:

> [He] was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts and omissions in relation to the offence under section 5(1) or 7 [of the MDA].

13.63 To be resentenced to life imprisonment, the High Court held[118] that an accused must establish the same three limbs that appear in the partial exception of diminished responsibility in Exception 7 of the Code[119] – on a balance of probabilities and "with the same level of methodical rigour".[120] This was because s 33B(3)(*b*) "is, in essence, a near-identical reproduction of Exception 7".[121]

13.64 It stands to reason that the observations of the Court of Appeal in *Iskandar bin Rahmat* on the application of Exception 7 of the Code[122] will apply equally to the application of s 33B(3)(*b*) of the MDA.

Other statutes

Betting Act

13.65 *Peh Hai Yam v Public Prosecutor*[123] involved an accused who had been convicted before a district judge on nine charges under s 5(3)(*a*) of the Betting Act[124] read with s 109 of the Code – for conspiring with various accomplices to provide Baccarat "insurance" bets ("side bets" or "secondary betting" on the game itself)[125] to patrons of the casino at Resorts World Sentosa.[126] The rules of Baccarat and "Baccarat with Insurance", as summarised by the district judge, are reproduced below:[127]

118 *Nagaenthran a/l K Dharmalingam v Public Prosecutor* [2017] SGHC 222 at [34]–[36].
119 These have been set out at para 13.36 above.
120 *Nagaenthran a/l K Dharmalingam v Public Prosecutor* [2017] SGHC 222 at [36].
121 *Nagaenthran a/l K Dharmalingam v Public Prosecutor* [2017] SGHC 222 at [36].
122 See paras 13.36–13.40 above.
123 [2017] 4 SLR 454.
124 Cap 21, 2011 Rev Ed.
125 *Peh Hai Yam v Public Prosecutor* [2017] 4 SLR 454 at [28].
126 The patrons were offered the same odds as the casino.
127 *Peh Hai Yam v Public Prosecutor* [2017] 4 SLR 454 at [1].

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> Baccarat was one of the games offered at RWS Casino. Players who join the Baccarat tables play against the House (*ie*, the casino operator) by placing their bets on the designated betting areas on the table. According to the RWS, Baccarat with Insurance game rules ('the Rules') (exhibits P11 and P12), in certain situations after the first four cards have been dealt, players who have bet on either 'Player' or 'Banker' may, additionally, place an insurance bet by betting on 'Player Insurance' or 'Banker Insurance', provided that the payout from the insurance bet does not exceed the value of the original bet placed on 'Player' or 'Banker'.

13.66 Section 5(3)(*a*) of the Betting Act criminalises the act of being a "bookmaker" in any place, and reads as follows:

> **Betting in a common betting-house**
>
> **5.**—(1) …
>
> …
>
> (3) Any person who —
>
> (a) acts as a bookmaker in any place;
>
> …
>
> shall be guilty of an offence and shall be liable on conviction to a fine of not less than $20,000 and not more than $200,000 and shall also be punished with imprisonment for a term not exceeding 5 years.

13.67 The word "bookmaker" is, in turn, defined in s 2(1) of the Betting Act in the following terms:

> ['Bookmaker'] means any person who, whether on his own account or as penciller, runner, employee or agent for any other person, receives or negotiates *bets* or wagers whether on a cash or on a credit basis and whether for money or money's worth, or who in any manner holds himself out or permits himself to be held out in any manner as a person who receives or negotiates those *bets* or wagers; but does not include a club, its officers or employees or any other person or organisation operating or conducting a totalisator or pari-mutuel or any other system or method of cash or credit betting authorised under section 22 … [emphasis added]

13.68 Before the High Court, the accused contended that the district judge had erred in convicting him because:[128]

> (a) "Bets" in the definition of "bookmaker"[129] were limited to bets placed with a bookmaker on horse-races or other

128 *Peh Hai Yam v Public Prosecutor* [2017] 4 SLR 454 at [13] and [19].
129 See para 13.67 above.

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sporting events, and did not extend to bets on games of chance (such as Baccarat) played in casinos and gaming houses.

(b) The Betting Act was enacted by Parliament to regulate only unlicensed betting on horse-races and sporting events, and not to criminalise all forms of gambling in Singapore.

13.69 The High Court characterised the issue as "whether a Baccarat 'insurance' bet, which is a bet on an event or contingency related to the outcome in a Baccarat game, is a 'bet' within the meaning of the definition of 'bookmaker'" in the Betting Act.[130] Answering this issue in the affirmative (and therefore affirming the accused's convictions), the High Court observed as follows:

(a) The term "bet" should not be read restrictively to refer only to bets on horse-races or sporting events but should, except where expressly provided, include bets on any contingency or event, including the outcome of a Baccarat game.[131]

(b) In their natural and ordinary meaning, "bets or wagers" can be placed on any future and uncertain event, regardless of the type of event. This must, as a matter of logic and common sense, include a bet or wager on the result of a card game such as Baccarat.[132] This meaning is consistent with the view of our courts interpreting the terms "bets" or "wager" under the Betting Act and its predecessor statutes.

(c) Section 2(1) of the Act does not expressly limit the definition of "bookmaker" to individuals who receive or negotiate any particular types of bets and wagers. The absence of the words "horse-race" and "sporting event" in the definition of "bookmaker" in s 2(1) of the Betting Act[133] indicates that Parliament did not intend to limit the applicability of *all* the provisions of the Betting Act to horse-races and sporting events. Had Parliament intended such a limitation, it would have expressly legislated for it, as it had done in certain definitions and provisions within the Betting Act.[134]

(d) The term "betting or wagering" is expressly qualified by references to "horse-races" or "sporting events" in provisions

130 *Peh Hai Yam v Public Prosecutor* [2017] 4 SLR 454 at [13].
131 *Peh Hai Yam v Public Prosecutor* [2017] 4 SLR 454 at [21].
132 *Peh Hai Yam v Public Prosecutor* [2017] 4 SLR 454 at [22]–[23] and [28].
133 This is to be contrasted with other provisions and definitions within the Betting Act, which make express reference to horse-races and sporting events – such as the definitions of "betting information centre" and "common betting house" in s 2(1) of the Betting Act, as well as ss 6 and 8(2) of the Betting Act.
134 *Peh Hai Yam v Public Prosecutor* [2017] 4 SLR 454 at [35].

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such as s 8(2) of the Betting Act, which mentions "bets or wagers relating to a horse-race or any other kind of race". This shows that the term, when used without further qualification, refers to a wide range of activities extending beyond just bets on "horse-races" or "sporting events".[135]

(e) The definition of "betting" under s 4(1) of the Remote Gambling Act 2014[136] ("RGA") – which is limited to bets received in the context of horse-races, sporting events, and other events specified by the Minister – is not found in the Betting Act and does not support the accused's suggested interpretation. Had Parliament intended for the definition of "betting" in the RGA to apply to the Betting Act as well, it would have amended the Betting Act to reflect this. Parliament would not have provided instead for a new s 2A in the Betting Act, which expressly provides that the provisions of the Betting Act do not apply to or in relation to any remote gambling within the meaning of the RGA.[137]

(f) The legislative history of the Betting Act *vis-à-vis* the definition of "bookmaker" and the offence under s 5(3)(*a*) does not evince any intention on the part of Parliament to restrict its application narrowly to bets on horse-races and sporting events.[138] Although a penal provision should be construed strictly in favour of the accused where it could reasonably be read in two or more different ways, this should only be done as a last resort where all other interpretative tools have failed to resolve the ambiguity in the provision. Based on the legislative history of the Betting Act and its predecessor statutes, Parliament intended for the Betting Act to have a wide ambit to combat *all forms of betting and bookmaking* in Singapore, not limited to bets on horse-races and sporting events.[139]

Common Gaming Houses Act

13.70 Section 5(*a*) of the Common Gaming Houses Act[140] ("CGHA") reads as follows:

135 *Peh Hai Yam v Public Prosecutor* [2017] 4 SLR 454 at [36].
136 No 34 of 2014.
137 *Peh Hai Yam v Public Prosecutor* [2017] 4 SLR 454 at [38]–[39].
138 *Peh Hai Yam v Public Prosecutor* [2017] 4 SLR 454 at [40].
139 *Peh Hai Yam v Public Prosecutor* [2017] 4 SLR 454 at [41]–[61].
140 Cap 49, 1985 Rev Ed.

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> **Assisting in carrying on a public lottery, etc.**
>
> **5.** Any person who —
>
> (*a*) assists in the carrying on of a public lottery;
>
> …
>
> shall be guilty of an offence and shall be liable on conviction to a fine of not less than $20,000 and not more than $200,000 and shall also be punished with imprisonment for a term not exceeding 5 years.

13.71 The accused in *Bijabahadur Rai s/o Shree Kantrai v Public Prosecutor*[141] was charged under s 5(*a*) of the CGHA, for "[assisting] in the carrying on of a public lottery". The accused had received a text message from a friend ("the punter"), who he had known for some 15 years, with instructions to place an illegal TOTO bet for the punter. He had then forwarded the punter's text message to a bookmaker (*viz*, the person administering the lottery); in other words, the accused was not the person administering the lottery.

13.72 The district judge agreed with the Prosecution that:[142]

> (a) The mere fact that the accused had placed an illegal bet for the punter with the bookmaker amounted to assisting in the carrying on of a public lottery.
>
> (b) The following were irrelevant to the issue of whether the accused assisted in the carrying on of a public lottery:
>
> (i) the small value of the bet; and
>
> (ii) the fact that the accused's action amounted to only a single instance of assistance.

13.73 The accused appealed against his conviction (and sentence). He contended that his action of "simply receiving a bet from a punter and then forwarding the bet to the [bookmaker]" cannot amount to assistance in the carrying on of a public lottery. According to the accused, some further degree of participation was an essential ingredient of the offence under s 5(*a*) of the CGHA.[143]

13.74 The central issue before the High Court was the meaning of the word "assists" in s 5(*a*) of the CGHA. Before this, there had been no decision from an appellate court as to the meaning of this term.[144]

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141 [2017] 5 SLR 469.
142 *Bijabahadur Rai s/o Shree Kantrai v Public Prosecutor* [2017] 5 SLR 469 at [11].
143 *Bijabahadur Rai s/o Shree Kantrai v Public Prosecutor* [2017] 5 SLR 469 at [19].
144 *Bijabahadur Rai s/o Shree Kantrai v Public Prosecutor* [2017] 5 SLR 469 at [21].

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13.75 The High Court allowed the accused's appeal, concluding that s 5(*a*) of the CGHA did not extend to the accused, "who was merely helping his friend [a punter] place a bet with the [bookmaker], without there being any evidence whatsoever of an arrangement of some kind, whether for commission or otherwise, between the [bookmaker] and the [accused], to collect bets on the [bookmaker's] behalf".[145]

13.76 The court held that two elements must be proved beyond a reasonable doubt to make out an offence under s 5(*a*) of the CGHA.[146] The first element that must be proved is that the accused's conduct must have been for the purpose of assisting the bookmaker in "the carrying on of a public lottery" (that is, the administration or running of a public lottery, not the mere participation in it), though that may not be the only purpose behind the accused's conduct. This thus rules out conduct which assists only the punter, who is a mere participant in the lottery. Even if such conduct (which assists only the punter) may ultimately bring the bookmaker more business, that would not be a case of the accused assisting the bookmaker, but the bookmaker simply benefiting from the accused's act of assisting the punter.[147]

13.77 The court noted that it was clear from the debates in Parliament that the offence under s 5(*a*) of the CGHA is meant to catch those who organise, promote, or otherwise assist in the operation of the public lottery as runners, collectors, or otherwise. It did not appear from these debates that Parliament also intended the offence to cover an accused who only assisted a punter and not the bookmaker.[148]

13.78 According to the court, the accused's purpose of assisting the bookmaker[149] may be inferred from a variety of circumstantial evidence – the most common of which would be evidence of an arrangement between the bookmaker and the accused, whether for commission or otherwise, to collect bets or to perform some act connected with the carrying on of a public lottery on the bookmaker's behalf.[150] This arrangement:[151]

145 *Bijabahadur Rai s/o Shree Kantrai v Public Prosecutor* [2017] 5 SLR 469 at [13] and [56].
146 *Bijabahadur Rai s/o Shree Kantrai v Public Prosecutor* [2017] 5 SLR 469 at [55].
147 *Bijabahadur Rai s/o Shree Kantrai v Public Prosecutor* [2017] 5 SLR 469 at [27]–[28].
148 *Bijabahadur Rai s/o Shree Kantrai v Public Prosecutor* [2017] 5 SLR 469 at [31]–[34].
149 See para 13.76 above.
150 *Bijabahadur Rai s/o Shree Kantrai v Public Prosecutor* [2017] 5 SLR 469 at [35]–[36].
151 *Bijabahadur Rai s/o Shree Kantrai v Public Prosecutor* [2017] 5 SLR 469 at [36].

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> [May] in turn be inferred from the circumstances of the case such as the collection of bets from all and sundry on behalf of the bookie, text messages between the bookie and the assistor, or evidence of any commissions or other benefits received by the assistor from the bookie in connection with the assistance rendered.

13.79 The second element that must be proved is that the accused performed an overt act of assistance in the carrying on of a public lottery.[152] An overt act is simply an open act committed by the accused in connection with the operation of the public lottery which he is alleged to have assisted. These acts must be related to the carrying on of the public lottery. Acts that only tangentially relate to the public lottery, such as the buying of meals for the staff of the public lottery and the selling of goods at market value to the bookmaker that are used to run the public lottery, are excluded. Some non-exhaustive examples of overt acts include promoting the lotteries, recording bets, collecting bets, paying out the dividends, chasing the punters for payment and financing or sponsoring the operations of the public lottery. On this note, the court noted that in order to provide sufficient notice for the accused to meet his charge, the Prosecution must particularise this overt act of assistance in the carrying on of a public lottery, and the overt act must be proved to have been committed by the accused beyond a reasonable doubt.[153]

13.80 After setting out these two elements, the court then concluded that s 5(*a*) of the CGHA does not cover an accused who merely helps a punter to place bets with a bookmaker (even though it constituted an overt act) in the absence of any evidence to demonstrate that the accused's purpose was to assist the bookmaker.[154]

13.81 On the evidence before it, the court found that the accused could not be said to have acted with the purpose of assisting the bookmaker in the carrying on of a public lottery by collecting bets on his behalf. The first element[155] was hence not proved. The accused's conviction and sentence *vis-à-vis* the charge under s 5(*a*) of the CGHA was accordingly set aside.[156]

13.82 That said, the accused had helped the punter to procure an illegal bet. This constituted an offence of abetting in the placement of a

152 *Bijabahadur Rai s/o Shree Kantrai v Public Prosecutor* [2017] 5 SLR 469 at [37]–[54].
153 *Bijabahadur Rai s/o Shree Kantrai v Public Prosecutor* [2017] 5 SLR 469 at [50].
154 *Bijabahadur Rai s/o Shree Kantrai v Public Prosecutor* [2017] 5 SLR 469 at [56].
155 See para 13.76 above.
156 *Bijabahadur Rai s/o Shree Kantrai v Public Prosecutor* [2017] 5 SLR 469 at [57] and [68].

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bet with a public lottery – an offence under s 9(1) of the CGHA,[157] read with ss 107 and 109 of the Code. The charge was therefore amended accordingly.

Vandalism Act

13.83 An "act of vandalism" is defined in s 2 of the Vandalism Act[158] in relation to "private property" and "public property". The definitions of these three terms read as follows:

> *'[Act] of vandalism' means —*
>
> (*a*) without the written authority of an authorised officer or representative of the Government or of the government of any Commonwealth or foreign country or of any statutory body or authority or of any armed force lawfully present in Singapore in the case of public property, or without the written consent of the owner or occupier in the case of private property —
>
> (i) writing, drawing, painting, marking or inscribing on any public property or private property any word, slogan, caricature, drawing, mark, symbol or other thing;
>
> (ii) affixing, posting up or *displaying on any public property* or private property any poster, *placard*, advertisement, bill, notice, paper or other document; or
>
> (iii) *hanging*, suspending, hoisting, affixing or displaying on or *from any public property* or private property any flag, bunting, standard, *banner* or the like with any word, slogan, caricature, drawing, mark, symbol or other thing; or
>
> (*b*) stealing, destroying or damaging any public property;
>
> *'private property'* means movable or immovable property other than public property;

157 Section 9(1) of the Common Gaming Houses Act (Cap 49, 1985 Rev Ed) reads as follows:

> **Buying a ticket**
>
> **9.**—(1) Any person who, either personally or by an agent, pays or deposits any money or money's worth to or with any person concerned in the business of a common gaming house as a stake or for or in respect of any event or contingency connected with a public lottery or buys a lottery ticket shall be guilty of an offence and shall be liable on conviction to a fine not exceeding $5,000 or to imprisonment for a term not exceeding 6 months or to both.

158 Cap 341, 1985 Rev Ed.

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> '*public property*' means movable or immovable property belonging to the Government or to the government of any Commonwealth or foreign country or to any statutory body or authority or to any armed force lawfully present in Singapore.
>
> [emphasis added]

13.84 Section 3 of the Vandalism Act then criminalises any "act of vandalism", and sets out the penalty for such acts:

> **Penalty for acts of vandalism**
>
> **3.** Notwithstanding the provisions of any other written law, any person who commits any act of vandalism or attempts to do any such act or causes any such act to be done shall be guilty of an offence and shall be liable on conviction to a fine not exceeding $2,000 or to imprisonment for a term not exceeding 3 years, and shall also, subject to sections 325(1) and 330(1) of the Criminal Procedure Code 2010, be punished with caning with not less than 3 strokes and not more than 8 strokes:
>
> Provided that the punishment of caning shall not be imposed on a first conviction under this Act in the case of any act falling within —
>
> (*a*) paragraph (*a*)(i) of the definition of 'act of vandalism' in section 2, if the writing, drawing, mark or inscription is done with pencil, crayon, chalk or other delible substance or thing and not with paint, tar or other indelible substance or thing; or
>
> (*b*) paragraph (*a*)(ii) or (iii) of that definition.

13.85 The accused in *Ng Chye Huay v Public Prosecutor*[159] was convicted by the District Court on six charges under the Vandalism Act. The "act of vandalism" described in the charges related to her having displayed placards or hung banners on public property with messages in English and Chinese about Falun Gong and the persecution of its practitioners.[160] The accused has personally removed her placards and banners, without assistance from any public authority.

13.86 The accused appealed against her convictions. On appeal, she contended, amongst other things, that she had not committed any "act of vandalism" because:[161]

> (a) her placards and banners did not cause any destruction or damage to public property;

159 [2017] 5 SLR 961.
160 *Ng Chye Huay v Public Prosecutor* [2017] 5 SLR 961 at [4]–[5].
161 *Ng Chye Huay v Public Prosecutor* [2017] 5 SLR 961 at [6] and [11].

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(b) she has no intent to cause some degree of permanent alteration of the property, which would have required the intervention of third parties to effect restoration of the property or removal of the items; and

(c) she had no intent to cause social disruption.

13.87 The High Court dismissed her appeal, and held as follows:

(a) Section 2 of the Vandalism Act inclusively lists a range of prohibited acts that the Vandalism Act contemplates as falling within the definition of an "act of vandalism". The accused could not, therefore, substitute the plain meaning of the word "vandalism", derived from its etymological origins (which connote defacement, destruction, or damage to property), in place of this clear statutory definition. The definition of an "act of vandalism" in s 2 of the Vandalism Act may be extensive, but the statutory language is clear and unambiguous. It is therefore not necessary to look elsewhere for a meaning that constrains the express words found in the Vandalism Act.[162]

(b) The purpose of the Vandalism Act is to formulate a scheme of punishment to deter acts of vandalism on public and private property. There are no words of limitation or qualification in the Vandalism Act that state that an "act of vandalism" must necessarily result in some alteration, damage, or destruction to the property to be characterised as an offence.[163]

(c) A review of the debates in Parliament confirm that Parliament intended to criminalise a range of conduct that can amount to "defacing public property", even where the conduct does not result in (lasting) alteration, damage, or destruction of the property. Such conduct included (i) drawing or marking with a delible substance (such as chalk) rather than with an indelible substance (such as paint), and (ii) "affixing or displaying posters or hanging or suspending banners".[164] Parliament had adopted a calibrated approach to punishment for different acts of vandalism: if any damage had been occasioned by the accused's acts, those acts could have attracted charges involving "destroying or damaging [of] public property" under s 2(*b*) of the Vandalism Act, which would have resulted in more severe penalties.[165]

162 *Ng Chye Huay v Public Prosecutor* [2017] 5 SLR 961 at [14]–[15].
163 *Ng Chye Huay v Public Prosecutor* [2017] 5 SLR 961 at [16]–[18].
164 *Ng Chye Huay v Public Prosecutor* [2017] 5 SLR 961 at [18].
165 *Ng Chye Huay v Public Prosecutor* [2017] 5 SLR 961 at [19].

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(d) The fact that the accused had removed the banners and placards on her own afforded her no defence to liability, given that her conduct still fell within "acts of vandalism". There may have been no permanent alteration or damage to the properties in question, but there was certainly "defacement" of the property for as long as the banners and placards were being displayed.[166]

(e) The fact that minimal or no work is required to restore the property to its original condition might be relevant in mitigation and sentencing (since it reflects a lower degree of harm and culpability), but does not go to the question of liability.[167]

(f) There is no limiting or qualifying language in the Vandalism Act and no basis for the courts to impute requirements for an intent to cause some degree of permanent alteration that would require third-party efforts for restoration of the property or removal of the items as additional prerequisites for the offence. The debates in Parliament did not also indicate that such requirements were contemplated by Parliament.[168]

(g) Nothing in the debates in Parliament suggests that s 3 of the Vandalism Act was intended to create a strict liability offence. The mischief that the Vandalism Act targets is the occurrence of certain types of anti-social behaviour, which might cause, and in most cases is likely to cause, social disruption. However, there is no indication that the intent to cause social disruption is a necessary ingredient of the offence.[169]

(h) The *mens rea* required for the offence is the intent to commit one of the acts of vandalism as defined in s 2 of the Vandalism Act. Here, the *mens rea* was satisfied because the accused admitted that she had intentionally hung the banners and displayed the placards for all to see and take notice.[170]

166 *Ng Chye Huay v Public Prosecutor* [2017] 5 SLR 961 at [19].
167 *Ng Chye Huay v Public Prosecutor* [2017] 5 SLR 961 at [14]–[19].
168 *Ng Chye Huay v Public Prosecutor* [2017] 5 SLR 961 at [20]–[21].
169 *Ng Chye Huay v Public Prosecutor* [2017] 5 SLR 961 at [26]–[27].
170 *Ng Chye Huay v Public Prosecutor* [2017] 5 SLR 961 at [27].

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Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act[171] *("CDSA")*

13.88 *Abdul Ghani bin Tahir v Public Prosecutor*[172] saw the first prosecution under the CDSA of a resident non-executive director of a company whose neglect led to bank accounts being used in connection with money-laundering offences. The accused, a resident non-executive director of World Eastern International Pte Ltd ("WEL"), a Singapore-incorporated company, was convicted after trial by the District Court of six charges for WEL's transfer of stolen moneys being attributable to his neglect as an officer of WEL under s 47(1)(*b*) (punishable under s 47(6)(*a*) read with s 59(1)(*b*) of the CDSA) and one charge of failing to exercise reasonable diligence as a director of WEL under s 157(1) of the Companies Act.[173]

13.89 There were three main issues on appeal.[174] The first issue was whether a conviction of a body corporate is a prerequisite to a conviction under s 59(1) of the CDSA.[175] The High Court answered in the negative. It held that the word "proved" in s 59(1) of the CDSA only required the availability of sufficient evidence to satisfy the court that an offence had been committed by the body corporate, with there being no relevant defences to exculpate the body corporate. This was for two reasons:

> (a) If Parliament had intended for the body corporate to be convicted first before its officers could be convicted, the provision would have read instead: where a body corporate has been *convicted* of an offence under the CDSA.
>
> (b) Treating the absence of a conviction of a body corporate as a bar to convicting its officers could also lead to absurd results. For example, if a body corporate has become defunct by the time investigations are completed, this would mean that its officers would enjoy impunity, especially in a case where they have chosen to shut down the body corporate just so as to avoid prosecution. That could not be right.

13.90 In the present case, WEL committed an offence under s 47(1)(*b*) of the CDSA because it was an unchallenged finding of fact that the moneys transferred out of WEL's account were stolen properties at least

171 Cap 65A, 2000 Rev Ed.
172 [2017] 4 SLR 1153.
173 Cap 50, 2006 Rev Ed.
174 *Abdul Ghani bin Tahir v Public Prosecutor* [2017] 4 SLR 1153 at [41].
175 *Abdul Ghani bin Tahir v Public Prosecutor* [2017] 4 SLR 1153 at [41(a)].

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in part. This therefore triggered the operation of s 59(1) of the CDSA in relation to the accused as an officer of WEL.[176]

13.91 The second issue on appeal was whether the money-laundering offences committed by WEL were *attributable* to the accused's *neglect* as an officer of WEL. In addressing this issue, the High Court touched on the proper interpretation of "neglect" and "attributable to" in s 59(1)(*b*) of the CDSA:

> (a) On the question of neglect, the High Court held that the key inquiry was pegged to the commission of the offence in question by the body corporate. To prove neglect, it had to be shown that the officer knew or ought to have known of the existence of facts requiring him to take steps which fell within the scope of the functions of his role to prevent the commission of the offence by the company, and that he failed to take such steps. In assessing the state of his knowledge and the scope of action which he neglected to perform, the more remote his office from the facts surrounding the offence, the more difficult it was to infer that the officer was negligent, and hence stronger evidence would be required of the Prosecution.[177]
>
> In the present case, the surrounding circumstances placed the accused on inquiry that illicit activities were being carried out through WEL, such that the accused ought to have stepped up his supervision over WEL's activities. In fact, the accused admitted that the investigations carried out into a related company aroused his suspicion that WEL might also be used to engage in illicit activities. However, despite the state of his knowledge of these facts and circumstances that called for him to make inquiries, the Accused neglected to take any active steps of investigative and/or preventive action, which was his duty to do as the only resident director of WEL.[178]
>
> (b) On the question of attributability, the High Court held that any degree of attribution would be sufficient to satisfy the "attributable to" requirement. What mattered was whether the officer could and should have taken steps to prevent the offence; not whether any steps if taken by the officer would more likely than not or most definitely have prevented the commission of the offence. It did not have to be conclusively shown that if the officer had taken active steps such as alerting the relevant authorities and the bank, or making a police report, the offences

176 *Abdul Ghani bin Tahir v Public Prosecutor* [2017] 4 SLR 1153 at [42]–[50].
177 *Abdul Ghani bin Tahir v Public Prosecutor* [2017] 4 SLR 1153 at [57]–[63].
178 *Abdul Ghani bin Tahir v Public Prosecutor* [2017] 4 SLR 1153 at [64]–[73].

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> would not have materialised. All that the Prosecution has to show is that if the officer had not been negligent, the offence *may* have been prevented. Such an interpretation would in line with Parliament's intent of holding officers criminally liable for the actions of corporate bodies that they manage or control.[179]
>
> In the present case, if the accused had made a police report in February 2012, it was entirely possible that WEL's account could have been frozen before the money-laundering transactions took place between April and May 2012.[180]

13.92 The third issue on appeal was whether the standard of reasonable diligence under s 157(1) of the Companies Act had been breached. Here, the High Court cited *Lim Weng Kee v Public Prosecutor*,[181] in which Yong Pung How CJ held that the standard of care expected of a director is of the same degree of care and diligence as a reasonable director found in his position. However, the standard is "not fixed but a continuum" depending on various factors such as the individual's role in the company, the experience or skills that the director held himself out to possess in support of his appointment to the office, and the size and business of the company. In the present case, the skills and experience held out by the accused as a chartered accountant and a veteran local resident director could not be ignored in determining the standard of reasonable diligence expected of a director under s 157(1) of the Companies Act. A local resident director could not simply be a "dummy director" who approved, ignored, or was nonchalant as to whether the company was engaging in any illegal activities. Here, given the completely cavalier attitude adopted by the accused in relation to WEL's affairs, it was clear beyond a reasonable doubt that the accused failed to exercise any diligence, let alone reasonable diligence, as required of him as a director of WEL.

*Regulation 12(*b*) of United Nations (Sanctions – Democratic People's Republic of Korea) Regulations 2010*[182] *("DPRK Regulations")*

13.93 *Chinpo Shipping Co (Pte) Ltd v Public Prosecutor*[183] ("*Chinpo*") involved the first prosecution under the DPRK Regulations.

13.94 The accused carried on the business of ship agencies and ship chandlers. It remitted US$72,016.76 to a shipping agent operating at the

179 *Abdul Ghani bin Tahir v Public Prosecutor* [2017] 4 SLR 1153 at [74]–[76].
180 *Abdul Ghani bin Tahir v Public Prosecutor* [2017] 4 SLR 1153 at [77]–[78].
181 [2002] 2 SLR(R) 848.
182 S 570/2010.
183 [2017] 4 SLR 983.

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Panama Canal, from its Bank of China ("BOC") account ("Transfer"). The moneys were used to pay the transit expenses for the passage of a vessel ("Ship") through the Panama Canal *en route* to the Democratic People's Republic of Korea ("DPRK"). The Ship was administered by a DPRK ship operator for whom the accused and its associated companies provided ship agency services. The Ship was found with surface-to-air missile systems, military aircraft, and ammunition and miscellaneous arms-related materiel including rifles and night-vision binoculars ("the Materiel"). The Materiel was hidden under 10,500mt of sugar.

13.95 The accused was convicted in the State Courts on, *inter alia*,[184] one charge under reg 12(*b*) of the DPRK Regulations in relation to the Transfer. The accused's appeal against this conviction was allowed.

13.96 Regulation 12(*b*) reads as follows:

> **Prohibition against provision of financial services and other resources**
>
> **12**. (1) A person in Singapore or a citizen of Singapore outside Singapore must not, directly or indirectly —
>
> …
>
> (*b*) transfer financial assets or resources, or other assets or resources,
>
> that may [reasonably be used to] contribute to [the nuclear-related, ballistic missile related, or other weapons of mass destruction related programs or activities of the Democratic People's Republic of Korea].

13.97 The High Court held that reg 12(*b*) created an offence of strict liability. By its natural and ordinary meaning, reg 12(*b*) did not require knowledge on the part of the accused that the relevant transfer could reasonably be used to contribute to the nuclear-related, ballistic missile related, or other weapons of mass destruction related programs or activities ("NRPA") of the DPRK.

13.98 The words, "that may reasonably be used to contribute", qualified the nature of the financial assets/resources transferred and did not require a mental state on the part of the accused in relation to the contribution of those financial assets/resources to the NRPA of the DPRK. The word, "reasonably" connoted an objective standard by which the liability of the accused was to be assessed. Such a standard was incompatible with a requirement for a subjective mental element of

184 The accused was convicted of another charge under s 6(1) of the Money-Changing and Remittance Businesses Act (Cap 187, 2008 Rev Ed). The appeal against conviction for this charge was dismissed. This is discussed at para 13.102 below.

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"knowledge". Nevertheless, an accused could avail itself of the general defence of a mistake of fact by a person who had acted in good faith having exercised due care and attention to avoid the mistake.[185]

13.99 The physical elements of reg 12(*b*) were (a) the fact of a transfer of assets/resources, and (b) the fact that the transfer could reasonably be used to contribute to the NRPA of the DPRK.

13.100 The "contribution" (or effect) of the relevant transfer was to be assessed as a factual matter and retrospectively, with all relevant information taken into account to determine whether (or not) the relevant transfer did (or did not) in fact contribute to the NRPA of the DPRK. The adverb, "reasonably", imposed an objective standard by which the effect of the transfer fell to be assessed. The focus was not on whether the accused subjectively appreciated the effect of his act of making the transfer, but whether the assets/resources transferred appeared reasonably able to be used to contribute to the NRPA of the DPRK. This called for a prospective inquiry that the court had to undertake objectively – from the perspective of a reasonable person with the knowledge and in the circumstances of the accused – to assess whether such a person would have appreciated that the transfer could have had the effect of contributing to the NRPA of the DPRK.[186]

13.101 On the facts, the High Court held that the Transfer could not fairly be described as a transfer that "may reasonably be used to contribute to the nuclear-related … programs or activities of the [DPRK]". Regulation 12(*b*) extended only to transfers that could be used to acquire assets that had a direct contribution to the nuclear proliferation efforts of the DPRK. The Transfer went not to the acquisition of the Materiel but to the payment of the passage of the Ship through the Panama Canal. Although the Materiel had been on board the Ship, this was not known to the Appellant when it made the Transfer. Hence, the Transfer was at least somewhat removed from a transfer of funds in direct support of the NRPA of the DPRK, which was the mischief that Reg 12(*b*) targeted. Further, the Materiel comprised only conventional weaponry, and a payment for the passage of a vessel fell outside the scope of the assets/resources that could "contribute" to the NRPA of the DPRK.[187]

185 *Chinpo Shipping Co (Pte) Ltd v Public Prosecutor* [2017] 4 SLR 983 at [53]–[55].
186 *Chinpo Shipping Co (Pte) Ltd v Public Prosecutor* [2017] 4 SLR 983 at [61].
187 *Chinpo Shipping Co (Pte) Ltd v Public Prosecutor* [2017] 4 SLR 983 at [58], [60]–[64], [70], [73], [75] and [77].

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Money-Changing and Remittance Businesses Act ("MCRBA")

13.102 In *Chinpo*, the High Court also had the opportunity to consider s 6 of the MCRBA.[188]

13.103 In addition to the acts described at para 13.94 above, the accused had also made 605 outward remittances on behalf of various DPRK entities from its BOC account. It charged a fee of at least US$50 per remittance on most occasions. The total value of the 605 remittances was US$40,138,840.87.[189] This was the largest known amount illegally remitted from Singapore. The accused was charged with one count of an offence under s 6(2) read with s 6(1) of the MCRBA. The said provisions read as follows:

> **No person to carry on remittance business without licence**
>
> **6.**—(1) No person shall carry on or advertise that he carries on remittance business unless he is in possession of a valid remittance licence.
>
> (2) Any person who contravenes subsection (1) shall be guilty of an offence and shall be liable on conviction to a fine not exceeding $100,000 or to imprisonment for a term not exceeding 2 years or to both and, in the case of a continuing offence, to a fine not exceeding $10,000 for every day during which the offence continues after conviction.

13.104 The accused was convicted of the charge.

13.105 On appeal, it was undisputed that Chinpo did not have a remittance licence for the purpose of s 6 of the MCRBA at the time when it undertook the 605 remittances.[190] The questions before the High Court on appeal were as follows:[191]

> (a) First, whether the 605 remittances constituted "remittances" within the ambit of the MCRBA; and
>
> (b) Second, whether Chinpo, in executing the 605 remittances conducted a "business" that attracted the licensing requirements under s 6 of the MCRBA.

13.106 In answering the first question, the High Court considered the definition of the term "remittance". It noted that s 2(1) of the MCRBA defined only the term, "remittance business", but not the term "remittance":

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188 Cap 187, 2008 Rev Ed.
189 *Chinpo Shipping Co (Pte) Ltd v Public Prosecutor* [2017] 4 SLR 983 at [11].
190 *Chinpo Shipping Co (Pte) Ltd v Public Prosecutor* [2017] 4 SLR 983 at [89].
191 *Chinpo Shipping Co (Pte) Ltd v Public Prosecutor* [2017] 4 SLR 983 at [89].

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> ['Remittance] business' means the business of accepting moneys for the purpose of transmitting them to persons resident in another country or a territory outside Singapore …

13.107 Based on this definition of "remittance business", the High Court noted that a "remittance" appeared to be the act of "accepting moneys for the purpose of *transmitting* them to persons resident in another country or a territory outside Singapore" [emphasis added]. However, the MCRBA was silent on what a transmission of moneys entails.[192]

13.108 The accused argued that the terms "remittance" and "transmission" encompassed only the person who performs the actual transmission of money, while the Prosecution and the young *amicus curiae* suggested that the terms should encompass a person under whose instructions the transmission of money is effected as well.[193]

13.109 The High Court then considered the legislative history of the MCRBA and found that in light of its anti-money laundering and counter-terrorism financing objects, the legislative focus of the MCRBA was on the *result* of a transaction: the delivery of funds on behalf of a payor to an intended payee.[194] The licensing framework of remittance businesses under the MCRBA applied to an (upstream) entity that accepted moneys from a payor and then instructed a financial institution to transmit the moneys to the intended payee.[195] The High Court noted that the 605 remittances involved the accused accepting the moneys of various DPRK entities and then engaging BOC to deliver a total of US$40,138,840.87 to their intended payees. Accordingly, the High Court held that 605 remittances constituted "remittances" for the purpose of the MCRBA.[196]

13.110 In answering the second question, the High Court noted that the MCRBA did not define the circumstances in which the acceptance of moneys for the purpose of transmitting them to persons outside Singapore would constitute the carrying on of a "business" of remittances that attracts the licensing requirements under s 6 of the MCRBA. Nevertheless, it observed that pursuant to s 2(2)(*b*) of the MCRBA, a person is deemed to be carrying on remittance business if he "offers to transmit money on behalf of any person to another person resident in another country".

192 *Chinpo Shipping Co (Pte) Ltd v Public Prosecutor* [2017] 4 SLR 983 at [90].
193 *Chinpo Shipping Co (Pte) Ltd v Public Prosecutor* [2017] 4 SLR 983 at [91].
194 *Chinpo Shipping Co (Pte) Ltd v Public Prosecutor* [2017] 4 SLR 983 at [95].
195 *Chinpo Shipping Co (Pte) Ltd v Public Prosecutor* [2017] 4 SLR 983 at [96].
196 *Chinpo Shipping Co (Pte) Ltd v Public Prosecutor* [2017] 4 SLR 983 at [97].

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13.111 The High Court held that s 2(2)(*b*) of the MCRBA raised a rebuttable presumption of the carrying on of a remittance business by a person ("the Remitter") who offers to transmit money on behalf of any person to another person outside Singapore. This followed from the natural and ordinary meaning of s 2(2)(*b*) of the MCRBA.[197] The presumption would be rebutted if the Remitter proved that he did not carry on the business of accepting moneys for the purpose of transmitting them to persons outside Singapore.[198]

13.112 The High Court then set out the general approach to be adopted to determine whether a person who has accepted moneys for transmission to persons outside Singapore has fallen afoul of s 6 of the MCRBA to be as follows:[199]

> (a) The Prosecution must prove that the Remitter was not in possession of a valid remittance business licence at the time when he made the remittances in question.
>
> (b) The Prosecution must prove further that the Remitter in making the remittances in question carried on the business of accepting moneys for the purpose of transmitting them to persons outside Singapore. However, if the Prosecution can establish that the Remitter offered to transmit money on behalf of any person to another person resident in another country, it may rely on the presumption contained in s 2(2)(*b*) of the MCRBA to discharge this burden.
>
> (c) The burden then shifts to the lender to prove on a balance of probabilities that he did not carry on the business of accepting moneys for the purpose of transmitting them to persons outside Singapore. This can be achieved, *inter alia*, by proving that the remittances were undertaken only as an incident of a main business, but not if the making of the remittances is so unrelated to the main business as to constitute a secondary business.

13.113 On the facts, the High Court found that the accused had through its conduct, offered to transmit money on behalf of the DPRK entities to their intended payees outside Singapore. The presumption under s 2(2)(*b*) of the MCRBA therefore arose to place on the accused the burden of proving the purpose of the transactions. The evidential burden thus shifted to the accused to prove that it did not carry on the 605 remittances as a business.[200]

197 *Chinpo Shipping Co (Pte) Ltd v Public Prosecutor* [2017] 4 SLR 983 at [100].
198 *Chinpo Shipping Co (Pte) Ltd v Public Prosecutor* [2017] 4 SLR 983 at [105].
199 *Chinpo Shipping Co (Pte) Ltd v Public Prosecutor* [2017] 4 SLR 983 at [105].
200 *Chinpo Shipping Co (Pte) Ltd v Public Prosecutor* [2017] 4 SLR 983 at [108].

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13.114 The High Court found that the accused was unable to rebut this presumption as it had not undertaken the 605 remittances purely incidentally to its avowed primary business of ship agency and ship chandelling.[201] In fact, the evidence suggested that the accused was blindly receiving moneys from the DPRK entities, and then paying the moneys to their intended payees, in respect of matters unconnected with its ship agency and ship-chandelling services. Although the accused engaged BOC to facilitate the 605 remittances, it had done so in its own name, thereby concealing the identity of the DPRK entities, which were the true payors. The High Court noted that this was the very mischief that the MCRBA sought to avoid, and which Parliament sought to address through the licensing regime for remittance businesses under s 6 of the MCRBA.[202]

13.115 For completeness, it is worth noting that the High Court rejected the accused's submission that it must have undertaken the 605 remittances for the purpose of gain in order to have carried on a remittance business under the MCRBA. The High Court observed that nothing in the MCRBA required the acceptance of moneys for the purpose of transmission to persons outside Singapore to have been carried out for gain. Moreover, a Remitter was presumed under s 2(2)(*b*) of the MCRBA to have been carrying on a remittance business upon proof of an offer by it to transmit moneys, without more.[203] In any event, the High Court found that even if the undertaking of remittances for the purpose of gain was an essential element of a remittance business under s 2(1) of the MCRBA, there was no need for the transactions *per se* to yield a monetary profit. Here, the ship agency and ship-chandelling businesses of the accused had dwindled due to falling demand for such services from the DPRK entities. It was undisputed that the accused in making the 605 remittances had been motivated by a desire to maintain goodwill with the DPRK entities. Further, the accused had in fact enjoyed monetary gains from its making of the 605 remittances.[204]

13.116 The accused's conviction was accordingly upheld.[205]

201 *Chinpo Shipping Co (Pte) Ltd v Public Prosecutor* [2017] 4 SLR 983 at [111].
202 *Chinpo Shipping Co (Pte) Ltd v Public Prosecutor* [2017] 4 SLR 983 at [112].
203 *Chinpo Shipping Co (Pte) Ltd v Public Prosecutor* [2017] 4 SLR 983 at [113].
204 *Chinpo Shipping Co (Pte) Ltd v Public Prosecutor* [2017] 4 SLR 983 at [114].
205 *Chinpo Shipping Co (Pte) Ltd v Public Prosecutor* [2017] 4 SLR 983 at [115].

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Multi-Level Marketing and Pyramid Selling (Prohibition) Act[206] *("MLMPSA")*

13.117 In *Chua Hock Soon James v Public Prosecutor*,[207] the first accused was the managing director of the second accused, Harriet International Network Pte Ltd ("HIN") and the third accused, Harriet Education Group Pte Ltd ("HEG") (all three parties, collectively referred to as "the accused persons"). The impugned scheme in question, the Global Edupreneur Program ("GEP"), was administered and run by HEG. HIN's bank account was used to conduct all the money transactions relating to the GEP.

13.118 Participants were required to pay a significant upfront fee in order to join the GEP and to be licensed by HEG to use HEG's name to market HEG's educational programmes as well as the GEP. GEP participants received commissions when they enrolled new participants in HEG's educational programmes as well as the GEP ("direct commissions"). Amongst others, there were two key special groups of participants in the GEP: global managers and country managers. In addition to receiving direct commissions, a global manager was entitled to a 15% overriding commission on the direct commissions earned by the GEP participants whom the said manager recruited into the GEP. For country managers, they were entitled (in addition to direct commissions) to a 30% overriding commission on the direct commissions earned by the GEP participants under them.

13.119 The district judge convicted the accused persons for offences under the MLMPSA because, *inter alia*, she found that the GEP was a pyramid selling scheme and that it was not an excluded scheme under para 2 of the Multi-Level Marketing and Pyramid Selling (Excluded Schemes and Arrangements) Order[208] ("the Exclusion Order").

13.120 In dismissing the accused persons appeal against their respective convictions, the High Court considered the following five noteworthy issues.[209]

13.121 The first issue was whether the GEP was a pyramid selling scheme under s 2(1) of the MLMPSA. The High Court held that Parliament intended for the prohibition on pyramid selling schemes to have a wide scope and to only carve out those schemes which did not rely on the chain-letter principle for expansion. The GEP was a pyramid

206 Cap 190, 2000 Rev Ed.
207 [2017] 5 SLR 997.
208 Cap 190, O 1, 2002 Rev Ed.
209 *Chua Hock Soon James v Public Prosecutor* [2017] 5 SLR 997 at [37].

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selling scheme because it met the three conjunctive requirements stipulated in s 2(1) of the MLMPSA, which were as follows:[210]

> (a) A person ("A") recruits another person ("B") into the scheme, wherein B acquires a commodity or a right or a licence to acquire the commodity for sale, lease, licence or other distribution ("the first requirement").
>
> (b) B receives any benefit, directly or indirectly, as a result of the recruitment, acquisition, action or performance of one or more additional participants (namely, C, D and onwards) in the scheme ("the second requirement").[211]
>
> (c) Any benefit is or may be received by any other person (other than B and the GEP participants recruited by B) who promotes, or participates in, the scheme, *eg*, A ("the third requirement").

13.122 In particular, the High Court held that the third requirement was met because the country managers and/or global mangers were entitled to receive overriding commissions from HEG when a GEP participant recruited by or under them recruited another GEP participant. This was an important feature of the GEP scheme. Even if it was difficult for such benefits to be paid out, the fact that it was possible for such benefits to be received satisfied the third requirement.[212]

13.123 The second issue concerned the party that bore the burden of proving that the GEP is an excluded scheme. In this regard, the High Court applied the "construction of statute" approach to determine on whom Parliament would have placed the burden of proof. On a consideration of the objective and structure of the legislative framework in Singapore, the Exclusion Order was in substance more akin to an exception to the offence of promoting a pyramid selling scheme rather than an element of the offence, placing the burden on the accused persons to satisfy the court that the GEP constituted an excluded scheme. Additionally, the practical considerations on proof pointed to the same outcome – the criteria which the accused persons had to satisfy in order to come within any of the excluded schemes under the Exclusion Order pertained to facts which were peculiarly within the accused persons' own knowledge.[213]

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210 *Chua Hock Soon James v Public Prosecutor* [2017] 5 SLR 997 at [40].

211 The High Court only considered limb (i) of s 2(1)(b) because the Prosecution is not relying on s 2(1)(*b*)(ii) of the Multi-Level Marketing and Pyramid Selling (Prohibition) Act (Cap 190, 2000 Rev Ed).

212 *Chua Hock Soon James v Public Prosecutor* [2017] 5 SLR 997 at [46], [49], [56], [59]–[60] and [62].

213 *Chua Hock Soon James v Public Prosecutor* [2017] 5 SLR 997 at [83]–[84] and [92].

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13.124 The third issue was whether the GEP was an excluded scheme. The High Court held that for a scheme to qualify as an excluded scheme under para 2(1)(*b*) of the Exclusion Order, the scheme had to be:

> (a) a franchise scheme wherein the franchisee is given the right to sub-franchise the franchise; and
>
> (b) the scheme had to satisfy paras 2(1)(*c*)(ii), 2(1)(*c*)(iii), 2(1)(*c*)(iv) and 2(1)(*c*)(vi) of the Exclusion Order.

13.125 On the facts, the High Court held that the GEP was not an excluded scheme under para 2(1)(*b*) of the Exclusion Order because it failed to satisfy paras 2(1)(*c*)(iii) and 2(1)(*c*)(iv) of the Exclusion Order. An analysis of the legislative intention and framework revealed that the proper interpretation to adopt of para 2(1)(*c*)(iii) of the Exclusion Order was that no benefit should be received by someone other than the immediate recruiter as a direct or immediate result of the introduction or recruitment of an additional participant into the scheme. In the present case, the GEP flouted this condition because the GEP entitled benefits to be received by a participant as a direct result of another's recruitment of additional GEP participants. The GEP also flouted para 2(1)(*c*)(iv) of the Exclusion Order because HEG (through) the first accused had represented to potential GEP participants that benefits could be received in a manner other than as specified in para 2(1)(*c*)(ii) of the Exclusion Order.[214]

13.126 The fourth issue was whether s 3(1) of the MLMPSA imported a *mens rea* requirement. The High Court held that there was no *mens rea* requirement for the offence under s 3(1) of the Act with respect to the physical element of the existence of a pyramid selling scheme. The weight of the public interest protected by the MLMPSA outweighed the need for a mental element in relation to this physical element. If it were otherwise, the MLMPSA's effectiveness in eradicating pyramid selling schemes would be hampered. Even if the offence imported a *mens rea*, the Prosecution would only be required to prove that the accused persons knew that the GEP bore features which satisfied the three definitional criteria of a pyramid selling scheme under s 2(1) of the MLMPSA. There was no additional need to prove that the accused persons knew that, at law, the GEP constituted a pyramid selling scheme.[215]

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214 *Chua Hock Soon James v Public Prosecutor* [2017] 5 SLR 997 at [95], [102], [105], [113], [117]–[118], [129], and [139].

215 *Chua Hock Soon James v Public Prosecutor* [2017] 5 SLR 997 at [161], [167], [169] and [178].

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13.127 The fifth issue was whether the s 6(2) of the MLMPSA defence was available to the first accused. The said section reads:

> (2) It shall be a defence for the individual referred to in subsection (1) if he proves that the offence was committed without his consent or connivance and that he exercised such diligence to prevent the commission of the offence as he ought to have exercised having regard to the nature of his functions and to all other circumstances.

13.128 The High Court held that under s 6(2) of the MLMPSA, the "consent" limb would be met where the person consenting was aware of the facts constituting the offence and agreed to it. On the facts, the High Court found that HEG's offence of promoting a pyramid selling scheme could not be said to have been carried out without the first accused's consent. In fact, the first accused was the mastermind of the GEP and his contention that he could not have consented to HEG's offence without an intention or knowledge to promote an illegal scheme was a misguided attempt to plead ignorance of the law as a defence. In any event, the first accused had failed to exercise the requisite diligence to prevent the commission of the offence having regard to the nature of his functions as a managing director of HEG and to all other circumstances. This was an objective inquiry.[216]

216 *Chua Hock Soon James v Public Prosecutor* [2017] 5 SLR 997 at [204]–[205], [207], [209] and [210].

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