CULPABILITY IN THE MISUSE OF DRUGS ACT

Wilful Blindness, the Reasonable Person and a Duty to Check

This article reviews recent developments where knowledge is the required fault element of a criminal offence. In many cases, direct evidence of knowledge is unavailable and inferences must be made. Recent drug trafficking cases concerning the mental state associated with wilful blindness in particular are reviewed, and a call is made for a new offence that more accurately defines what the wilfully blind accused in such cases failed to do.

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I. Introduction

1 The difficulty of determining whether an accused possessed the mental state of knowledge as required by an offence is well known. In *Public Prosecutor v Koo Pui Fong* ("*Koo Pui Fong*"), it was noted that:[1]

> … we would never have the benefit of going into the mind of another person to ascertain his knowledge and in every case, knowledge is a fact that has to be inferred from the circumstances.

2 Various devices are available to the Legislature if it wishes to extend the scope of criminal liability to those who had a lesser mental state. The alternatives of acting "knowingly or recklessly" have been used in a range of statutes;[2] and objective belief ("has reason to believe") can also be found as an alternative fault element to knowledge.[3]

* The author would like to thank Michael Hor for his comments on an earlier version of this article. The usual caveats apply.

1 [1996] 1 SLR(R) 734 at [14].

2 See, for example, Banking Act (Cap 19, 2008 Rev Ed) ss 7(2), 18(3)(*b*), 54A(9)(*b*); Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (Cap 65A, 2000 Rev Ed) s 48F(10); Mental Capacity Act (Cap 177A, 2010 Rev Ed) s 32(8)(*a*); Moneylenders Act (Cap 188, 2010 Rev Ed) ss 9(1)(*a*)(ii)(A), 24(7), 25(4); Police Force Act (Cap 235, 2006 Rev Ed) s 103(6)(*b*); Telecommunications Act (Cap 323, 2000 Rev Ed) s 32E(3)(*b*).

3 See, for example, Penal Code (Cap 224, 2008 Rev Ed) ss 258, 269–270, 411–414 and 471.

3 Furthermore, where the Legislature has not expressly included a fault element for the offence, the Judiciary can take one of two routes. One way is to interpret the offence as one of strict or absolute liability.[4] The other approach is to interpret the offence as requiring proof of a subjective fault element, but because it is so difficult to prove actual knowledge, the device of "wilful blindness" can be used to render liable as well those who would have known something if they had not intentionally shut their eyes to avoid such knowledge.[5]

4 The concept of wilful blindness or shutting one's eyes to the obvious[6] has apparently been used by the common law since the mid-19th century[7] as a basis to impute[8] knowledge to an accused. In the local context, the concept is deployed most often in offences relating to controlled drugs under the Misuse of Drugs Act.[9] A typical case involves an accused who is charged with possession or trafficking of a controlled drug that is found in a concealed compartment of a motor vehicle or bag. The accused claims that he did not have actual knowledge of

4 See, for example, *Mohamed Ibrahim v Public Prosecutor* [1963] MLJ 289 where it was held that s 292(*a*) of the Penal Code (Cap 224, 2008 Rev Ed) (which prohibits sale of obscene books) did not require proof that the accused knew that the book was, in fact, obscene. For a critical discussion of the approach to strict liability in Singapore, see Stanley Yeo, Neil Morgan & Chan Wing Cheong, *Criminal Law in Malaysia and Singapore* (LexisNexis, 2nd Ed, 2012) ch 7. See also ss 376B and 377D of the Penal Code, where a mistake as to a prostitute's age is generally not a defence.

5 The category where an accused's claim of ignorance is not believed is put aside. In such cases, the alleged ignorance is only a sham: he pretends not to know when he actually did know. No difficulties arise in such cases since there is a finding of actual knowledge despite the accused's protestations. The case for discussion here is where the wilfully blind accused does not possess actual knowledge but is treated in law as though he did.

6 Also known as Nelsonian knowledge or "blind eye knowledge" in reference to then Vice-Admiral Horatio Nelson at the Battle of Copenhagen in 1801, who was reputed to have disobeyed his commander's order to withdraw by holding his telescope to his blind eye to look at the commander's signals.

7 J L Edwards, *Mens Rea in Statutory Offences* (St Martin's Press, 1955) at p 194.

8 There is confusion as to whether wilful blindness is: (a) an independent and separate mental state; (b) equivalent to knowledge; or (c) a basis from which knowledge can be inferred. See paras 10–16 below.

9 Cap 185, 2008 Rev Ed. There is no reason why the concept of wilful blindness cannot be used in other contexts to impute knowledge if that is the required fault element such as dishonestly making a false claim before a court of justice under s 209 of the Penal Code (Cap 224, 2008 Rev Ed) (*Bachoo Mohan Singh v Public Prosecutor* [2010] 4 SLR 137), abetment under s 109 of the Penal Code (*Awtar Singh s/o Margar Singh v Public Prosecutor* [2000] 2 SLR(R) 435) or even murder under s 300 of the Penal Code (see the Canadian case of *R v Briscoe* 2010 SCC 13). *Cf* Michael Hor, "Criminal Justice in the Chan Court" in *SAL Conference 2011: Developments in Singapore Law between 2006 and 2010 – Trends and Perspectives* (Yeo Tiong Min, Hans Tjio & Tang Hang Wu eds) (Academy Publishing, 2011) at p 147, para 39.

the contents of the compartment and therefore cannot be convicted of the offence.

5 In *Koo Pui Fong*, it was explained:[10]

> It seems to me that it is wholly in keeping with common sense and the law to say that an accused knew of certain facts if he deliberately closed his eyes to the circumstances, his wilful blindness being evidence from which knowledge may be inferred.

6 In *Chiaw Wai Onn v Public Prosecutor* ("*Chiaw Wai Onn*"), the point was put more strongly:[11]

> [I]f a man says to himself, 'Despite all that I have seen and heard, I refuse to accept what my brain tells me is obvious', it is an absurdity to say that he does not have the relevant knowledge simply because he chooses to practise Nelsonian blindness and delude himself.

7 With regard to the Misuse of Drugs Act, two matters may distract one from, and even distort, an accurate appraisal of the doctrine of wilful blindness. The first is the fear that if proof of actual knowledge of the drug is required, the efficacy of the law would be seriously undermined.[12]

8 Second, owing to the reverse burden of proof provisions, an accused is presumed to have a drug in his possession if, for example, he had control of the motor vehicle in which the drug was hidden, and is also presumed to know the nature of the drug.[13] It is up to the accused to rebut these presumptions on a balance of probabilities.[14] However, this reversal of burden of proof should not affect our analysis of *what* must be proved. It only affects which party bears the burden of proof.[15]

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10 *Public Prosecutor v Koo Pui Fong* [1996] 1 SLR(R) 734 at [14].

11 [1997] 2 SLR(R) 233 at [45].

12 See the Parliamentary speech of Chua Sian Chin, the then Minister for Home Affairs and Education, on the introduction of statutory presumptions and the death penalty for offences in the Misuse of Drugs Act 1973 (Act 5 of 1973) (*Singapore Parliamentary Debates, Official Report* (20 November 1975), vol 34 at cols 1379–1386) and the description in *Public Prosecutor v Tan Kiam Peng* [2007] 1 SLR(R) 522 at [8] of the drug trade as "a major social evil" and drug peddlers causing "alarmingly insidious problems on society that have the potential to destroy its very fabric if left unchecked".

13 Misuse of Drugs Act (Cap 185, 2008 Rev Ed) ss 18(1)–18(2).

14 *Nagaenthran a/l K Dharmalingam v Public Prosecutor* [2011] 4 SLR 1156 at [31].

15 In the High Court case of *Public Prosecutor v Tan Kiam Peng* [2007] 1 SLR(R) 522 at [18], it was noted:

> [T]he offence of trafficking in controlled drugs in Singapore has never been and is not a strict liability offence. It continues to be incumbent on the Prosecution to prove that the accused knew or intended to bring the controlled drugs into Singapore … However, the burden of proving lack of

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9 This article will, first of all, consider the concept of wilful blindness and how it fits into the "ladder" of fault elements in the criminal law. This is followed by a discussion of whether the reasonable person is relevant in deciding if an accused is wilfully blind. It concludes by suggesting that the law on controlled drugs can be clearer if the duty to inspect for concealed drugs is explicitly stated along the lines of the duty of due diligence found in the Immigration Act.[16]

II. Intention, knowledge and recklessness

10 In terms of the hierarchy of culpability, the subjective fault elements of acting intentionally, knowingly and recklessly (*ie*, rashly)[17] should be ranked in that order. If support for this statement is needed, one can refer to the offence of homicide in the Penal Code, where the punishment for causing a person's death ranges from the mandatory death penalty for causing death intentionally,[18] to ten years' imprisonment for doing an act with the knowledge that it is likely to cause death,[19] to five years' imprisonment for causing death by a rash act.[20]

11 Acting intentionally means acting purposively, with the commission of the physical elements of the offence as the accused's conscious object,[21] which explains why this state of mind deserves the highest condemnation. Acting knowingly is next in the scale since the accused has acted with awareness of the physical elements of the offence even though he may not have desired its commission;[22] whereas in acting recklessly, the accused acted while consciously disregarding the risk that the physical elements of the offence will be committed. The difference between knowledge and recklessness (or rashness) is brought out in the following passage from *Empress of India v Idu Beg*:[23]

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knowledge of the nature of the particular drug being trafficked rests on an accused as a consequence of statutory presumptions.

The same point was made several years earlier in Michael Hor, "Misuse of Drugs and Aberrations in the Criminal Law" (2001) 13 SAcLJ 54.

16 Cap 133, 2008 Rev Ed.

17 The term "recklessly" (in the subjective sense) will be used here instead for ease.

18 Penal Code (Cap 224, 2008 Rev Ed) s 302.

19 Penal Code (Cap 224, 2008 Rev Ed) s 304(*b*).

20 Penal Code (Cap 224, 2008 Rev Ed) s 304A(*a*).

21 See Stanley Yeo, Neil Morgan & Chan Wing Cheong, *Criminal Law in Malaysia and Singapore* (LexisNexis, 2nd Ed, 2012) at para 4.7.

22 In *Public Prosecutor v Mas Swan bin Adnan* [2011] SGHC 107 at [55], it was said: "Actual knowledge is the subjective mental state where one is certain of the existence of a set of facts." See also Stanley Yeo, Neil Morgan & Chan Wing Cheong, *Criminal Law in Malaysia and Singapore* (LexisNexis, 2nd Ed, 2012) at para 4.8.

23 (1881) ILR 3 All 776. This definition, as well as the similar definition in *Re Nidamarti Nagabhushanam* (1872) 7 MHC 119, has often been cited locally;

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> [C]riminal rashness is hazarding a dangerous or wanton act with the knowledge that it is so, and that it may cause injury, but without intention to cause injury, or knowledge that it will probably be caused. The criminality lies in running the risk of doing such an act with recklessness or indifference as to the consequences.

12 Some statements made by the Court of Appeal may suggest that wilful blindness is an independent fault element separate from knowledge and recklessness. See, for example, the statement made in *Tan Kiam Peng v Public Prosecutor* ("*Tan Kiam Peng*"):[24]

> [W]ilful blindness *cannot* be equated with virtual certainty for … this would be to equate wilful blindness with actual knowledge … The result would be to erase the doctrine of wilful blindness from the legal landscape altogether. [emphasis in original]

13 Is there enough conceptual space left then for wilful blindness as a separate fault element that is neither knowledge nor recklessness? The law is clear that the mental state of "knowledge" does not mean full or actual awareness of a fact only, but includes an awareness that something is virtually certain to exist or occur. In *Koo Pui Fong*,[25] it was said that "a person 'knows' a certain fact if he is aware that it exists or is almost certain that it exists or will exist or occur. Thus knowledge entails a high degree of certainty".

14 On the other hand, acting recklessly can be satisfied by an awareness of the *possibility* of the proscribed consequences happening.[26] This is unlike the situation in some jurisdictions where the likelihood of the proscribed consequences must reach the level of *probability* or a *substantial* risk in order to satisfy the fault element of recklessness.[27]

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see, *eg*, *Public Prosecutor v Teo Poh Leng* [1991] 2 SLR(R) 541; *Ng So Kuen Connie v Public Prosecutor* [2003] 3 SLR(R) 178; *Balakrishnan S v Public Prosecutor* [2005] 4 SLR(R) 249; *Lim Hong Eng v Public Prosecutor* [2009] 3 SLR(R) 682.

24 [2008] 1 SLR(R) 1 at [129]. See also *Khor Soon Lee v Public Prosecutor* [2011] 3 SLR 201 at [20]: "recklessness does *not* amount to wilful blindness" [emphasis in original].

25 *Public Prosecutor v Koo Pui Fong* [1996] 1 SLR(R) 734 at [14]. See also *Tan Kiam Peng v Public Prosecutor* [2008] 1 SLR(R) 1 at [127] and [129].

26 *Lim Hong Eng v Public Prosecutor* [2009] 3 SLR(R) 682 at [5]: "Rashness thus implies a disregard to the *possibility* of injury or death" [emphasis added]. A distinction can therefore be drawn between causing death by a rash act under s 304A of the Penal Code (Cap 224, 2008 Rev Ed), and culpable homicide under s 299 of the Penal Code, where the act that causes death in the latter case may be done with "knowledge that he is *likely* by such act to cause death" [emphasis added]. See Stanley Yeo, Neil Morgan & Chan Wing Cheong, *Criminal Law in Malaysia and Singapore* (LexisNexis, 2nd Ed, 2012) at para 4.30.

27 See, *eg*, Model Penal Code § 2.02(2)(c) (US): "A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct."

Hence, a line can potentially be drawn between the mental states of knowledge (an awareness that something is at least virtually certain to occur) and recklessness (an awareness of the possibility that something will occur). Wilful blindness can potentially fill this space, by proof that the accused was aware of the *probability* of the proscribed consequences.

15 However, it is submitted that the differences in the fault elements are too fine to be split this way. Furthermore, positioning a substantively new mental state of wilful blindness in this way runs into charges of judicial rewriting of the offence which did not recognise this fault element in the first place. Support for not recognising wilful blindness as an alternative fault element can be found in the following excerpts from selected judgments:

In *Koo Pui Fong*:[28]

> This concept of wilful blindness does not introduce a new state of mind to that of knowing … It is simply a reformulation of actual knowledge. It seems to me that it is wholly in keeping with common sense and the law to say that an accused knew of certain facts if he deliberately closed his eyes to the circumstances, his wilful blindness being evidence from which knowledge may be inferred.

In *Chiaw Wai Onn*:[29]

> [W]here the facts obviously point to one result, and the accused must have appreciated it but shuts his eyes to the truth, then together with the other evidence adduced, this can form a very compelling part of the evidence to infer the requisite guilty knowledge.

In *Public Prosecutor v Mas Swan bin Adnan* ("*Mas Swan bin Adnan*"):[30]

> Wilful blindness may be the legal equivalent of actual knowledge, but it is not the same as actual knowledge … [Wilful blindness is] an evidential tool towards establishing actual knowledge.

In *Nagaenthran a/l K Dharmalingam v Public Prosecutor* ("*Nagaenthran a/l K Dharmalingam*"):[31]

> Wilful blindness … is merely 'lawyer-speak' for *actual knowledge* that is *inferred* from the circumstances of the case. It is an indirect way to prove actual knowledge; *ie*, actual knowledge is proved because the inference of knowledge is

28 *Public Prosecutor v Koo Pui Fong* [1996] 1 SLR(R) 734 at [14].
29 *Chiaw Wai Onn v Public Prosecutor* [1997] 2 SLR(R) 233 at [45].
30 [2011] SGHC 107 at [55].
31 [2011] 4 SLR 1156 at [30].

> *irresistible* and is the *only rational inference* available *on the facts*. [emphases in original]

16 In sum, the better view, based on the above judicial pronouncements, is that wilful blindness is neither an independent fault element nor a "legal equivalent of actual knowledge",[32] but an evidential matter to be taken into account when deciding if the necessary knowledge existed.[33]

III. Indicia of culpability

17 The more critical issue is when a finding of wilful blindness *should* be made, such that the accused is placed in the same category of moral culpability as one who actually knows. The reckless and the wilfully blind accused are similar in that they are both consciously aware that some incriminating fact is true. How can the two be distinguished?

18 In *Tan Kiam Peng*, the Court of Appeal separated the two categories in the following way:[34]

> [*S*]*uspicion is* legally sufficient to ground a finding of wilful blindness provided the relevant factual matrix warrants such a finding *and* the accused deliberately decides to turn a blind eye … However, the caveat is that a *low level* of suspicion premised on a factual matrix that would *not* lead a person to make further inquiries would be insufficient to ground a finding of wilful blindness … [T]hat level of suspicion *must then lead to a refusal to investigate further* …
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> … [W]ilful blindness, being … the equivalent of actual knowledge, is distinct from recklessness … [W]ilful blindness is a combination of suspicion *coupled with* a *deliberate* decision not to make further inquiries, whereas the recklessness that has been referred to … refers to recklessness in terms of the accused's conduct in the context of circumstances *which would not otherwise have aroused suspicion* on the part of the accused.
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> [emphases in original]

32 *Cf Tan Kiam Peng v Public Prosecutor* [2008] 1 SLR(R) 1 at [139].

33 *Cf* Toh Yung Cheong, "Knowing, not Knowing and Almost Knowing: Knowledge and the Doctrine of *Mens Rea*" (2008) 20 SAcLJ 677 at [13], where it is noted that another approach of the courts in redefining actual knowledge is to include both "actual knowledge in its purest form and wilful blindness". It is respectfully suggested that the author may be reading too much into isolated passages of the judgments and that there was no intention to redefine "knowledge" in this way.

34 *Tan Kiam Peng v Public Prosecutor* [2008] 1 SLR(R) 1 at [125] and [127].

19 These passages provoked a sharp comment from Michael Hor:[35]

> According to the Court of Appeal [in *Tan Kiam Peng*], that which sets wilful blindness apart is the 'deliberate decision' not to take steps to confirm a suspicion. This cannot be correct because all forms of recklessness involve a deliberate decision to take a risk … The error was compounded by an apparent redefinition of reckless which is unsustainable – in 'circumstances which would not otherwise have aroused suspicion' – in those circumstances, there can be no recklessness, nor even for that matter, negligence. Shorn of an illusory distinction, the Court of Appeal's conception of wilful blindness reveals itself to be no more than recklessness – taking a substantial risk that one is handling illicit drugs.

20 It is suggested that, although Michael Hor is right that wilful blindness and recklessness may indeed have in common a subjective foresight of a risk, wilful blindness is different from recklessness in terms of the *motive* of the accused in choosing not to make the necessary inquiries when he knows there is reason to inquire.[36] Glanville Williams' description of an accused's calculated steps not to find out the truth as being "to cheat the administration of justice" brings out the idea of motive-based culpable conduct very clearly.[37] It is this aspect of culpability that explains why those who do not possess actual knowledge may nevertheless be equated with those who do.

21 The requirement of a "deliberate" decision not to make further inquiries shows that it is those who choose to avoid knowledge in order to escape punishment that are brought within the concept of wilful blindness. Hence, for example, a person who did not make further inquiries because he was too tired or confused cannot be said to belong to the same category of culpability. Similarly, a person who has an honest contrary belief that explains why he did not make further inquiries to ascertain the true nature of the drug can also be said not to act "deliberately" or culpably. Some recent cases encountered in the courts concern a close relationship or prior course of dealings between the parties, such that the accused's story that he believed what he was told – namely, that the bundles contained something completely innocuous or a less serious controlled drug – was accepted by the

35 Michael Hor, "Criminal Justice in the Chan Court" in *SAL Conference 2011: Developments in Singapore Law between 2006 to 2010 – Trends and Perspectives* (Academy Publishing, 2011) at p 147, para 25.

36 *Chiaw Wai Onn v Public Prosecutor* [1997] 2 SLR(R) 233 at [45]: "[B]ecause he suspected the truth and did not want his suspicions confirmed."

37 Glanville Williams, *Criminal Law* (Stevens & Sons, 2nd Ed, 1961) at p 159. The older term of "connivance" brings out the culpability involved better, which the modern formulations like "deliberate ignorance", "contrived ignorance", "conscious avoidance" and "purposeful avoidance" also seek to do.

courts.[38] However, an accused who does not act "deliberately" can still be said to have acted recklessly, but this would not be sufficient for liability for an offence that requires an accused to act knowingly.

22 It is suggested that one further requirement to satisfy a "deliberate" decision not to make further inquiries is that there must be a readily available opportunity and effective means to resolve the suspicion, and the accused chooses not to do so. It is the failure of the accused to act on his suspicions when there is opportunity and means to do so, that is a sign of wilful blindness. However, there should not be any need for the accused to pursue acts that, in the accused's opinion, would be extraordinary means to learn the truth. These factors were alluded to, in *Public Prosecutor v Azman bin Mohamed Sanwan*[39] ("*Azman bin Mohamed Sanwan*") and *Public Prosecutor v Ng Pen Tine*[40] ("*Ng Pen Tine*").

23 In *Azman bin Mohamed Sanwan*, the court pointed out:[41]

> There was no evidence that he had actual knowledge that the bundles contained drugs, or cannabis in particular. Was there wilful blindness and equated [with] knowledge? … Did he have the opportunity to allay his suspicions? The events from the retrieval of the bundles in [the] bag to the arrest took place too quickly for him to make enquiries or to examine the bundles.

24 In *Ng Pen Tine*,[42] the second accused was found not wilfully blind that he was transporting heroin to Singapore, on the basis that he did not suspect that he was carrying drugs in his car, and in any case, he did not have an opportunity to check the car. With regard to the latter, it was noted that the second accused was not a mechanic and he did not even know of the existence of the rear signal light compartments where

38 See, *eg*, *Khor Soon Lee v Public Prosecutor* [2011] 3 SLR 201; *Public Prosecutor v Mas Swan bin Adnan* [2012] SGCA 29, [2011] SGHC 107; *Public Prosecutor v Puthita Somchit* [2011] 3 SLR 719 (the Prosecution did not appeal against the acquittal of the first accused: *Quek Hock Lye v Public Prosecutor* [2012] 2 SLR 1012). In *Public Prosecutor v Tan Kok An* [1996] 1 MLJ 89 at 101, the Malaysian High Court remarked:

> In the Malaysian context, it is courteous to carry goods on behalf of one's friend to a third party. It is certainly discourteous to open those goods to see its contents before sending it to a third party. That would be the courteous behaviour of right-thinking Malaysians.

It is submitted that arguments of "courteous behaviour" must have its limits, especially where the goods are received in suspicious circumstances or from a stranger.

39 [2010] SGHC 196.

40 [2009] SGHC 230.

41 *Public Prosecutor v Azman bin Mohamed Sanwan* [2010] SGHC 196 at [146]. On appeal, the Court of Appeal did not criticise this passage: *Azman bin Mohamed Sanwan v Public Prosecutor* [2012] 2 SLR 733.

42 *Public Prosecutor v Ng Pen Tine* [2009] SGHC 230 at [148]–[149].

the drugs were hidden, and that he believed that his every move was under surveillance by others who would kill him if he had departed from what he was told to do.

25 In summary, for wilful blindness to be shown, three requirements must be satisfied. It must be shown that the accused:

(a) suspects that something is amiss;

(b) knows that he has the opportunity and means to ascertain the true facts; and

(c) has a motive for not doing so.

IV. The reasonable person

26 Portions of some judgments may be read as suggesting that a finding of wilful blindness can be met by showing that the accused fell below the standard expected of a reasonable person. This may be because the concept of a "failure to inquire" is also a feature of negligence. In *Azman bin Mohamed Sanwan*, it was said:[43]

> A finding of wilful blindness … should be made only when it is clear that the person had intentionally and deliberately maintained his ignorance, in circumstances when a reasonable person would have suspicions and would have made enquiries or take other steps to allay his suspicions.

27 Similarly, in *Public Prosecutor v Sng Chun Heng*,[44] one of the two accused, Chan, drove from Malaysia to Singapore to deliver cheap and common foodstuff (Mamee noodle packets and Pagoda groundnuts) in exchange for relatively large amounts of cash. It was said:[45]

> Any person of average intelligence and honesty would have realised immediately that the task given to Chan was not merely one of collecting money …
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> …
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> … Clearly, Chan ought to have been highly suspicious about the nature of his work and the things that were placed in his car in Malaysia.

43 *Public Prosecutor v Azman bin Mohamed Sanwan* [2010] SGHC 196 at [147]. On appeal, the Court of Appeal did not criticise this passage: *Azman bin Mohamed Sanwan v Public Prosecutor* [2012] 2 SLR 733.

44 [2011] 3 SLR 437.

45 *Public Prosecutor v Sng Chun Heng* [2011] 3 SLR 437 at [75] and [77]. No specific comment was made by the Court of Appeal, *Chan Heng Kong v Public Prosecutor* [2012] SGCA 18, on these passages but it was noted (at [22]) that "Chan knew '*[i]n [his] heart*' that he was dealing with illegal drugs when he brought the 'Mamee Monster' snack packs from Malaysia to Singapore" [emphasis in original].

28 However, these passages should be read with care. The requirement of suspicion is subjective in nature. The relevance of the reasonable person test in the concept of wilful blindness is evidential only as explained in some judgments.

In *Mas Swan bin Adnan*:[46]

> [I]f the objective facts show that a reasonable person would have been suspicious, this would lead to the Court's examination into the reasons given by the accused for not making inquiries and then drawing the appropriate inferences in determining whether the accused was *in fact* suspicious. [emphasis in original]

In *Nagaenthran a/l K Dharmalingam*:[47]

> [Wilful blindness] is a subjective concept, in that the extent of knowledge in question is the knowledge of the *accused* and not that which might be postulated of a hypothetical person in the position of the accused (although this last-mentioned point may not be an irrelevant consideration). [emphasis in original]

29 A case that illustrates this point well is *Khor Soon Lee v Public Prosecutor*[48] ("*Khor Soon Lee*"), where the accused was found to be complacent but not wilfully blind. He had transported less-controlled drugs in the past such as erimin, ketamin, ice and ecstasy pills, but not heroin. He also sought assurances from his accomplice, Tony, that the packages would not contain heroin. The court pointed out:[49]

> [I]t is, however, *also* necessary to consider whether the Appellant ought to have nevertheless *checked* the package on this particular occasion. In particular, in not so checking, had the Appellant been *wilfully blind* to the diamorphine contained in the package (which was found in the Black Plastic Bag)? … It would, of course, have been ideal if he had … [H]is failure to check the contents of the package would, at best, constitute only *negligence or recklessness* … [This is] insufficient to amount to wilful blindness. [emphases in original]

30 In *Dinesh Pillai a/l K Raja Retnam v Public Prosecutor*[50] ("*Dinesh Pillai a/l K Raja Retnam*"), a Malaysian was paid a large sum of money (RM200 *per* trip) to deliver "food" wrapped in brown packets to Singapore. During the third such delivery, he was detained in Woodlands, and diamorphine was found inside the brown packet. He

46 *Public Prosecutor v Mas Swan bin Adnan* [2011] SGHC 107 at [54]. On appeal, the Court of Appeal did not comment on this passage: *Public Prosecutor v Mas Swan bin Adnan* [2012] 3 SLR 527.

47 *Nagaenthran a/l K Dharmalingam v Public Prosecutor* [2011] 4 SLR 1156 at [30].

48 [2011] 3 SLR 201.

49 *Khor Soon Lee v Public Prosecutor* [2011] 3 SLR 201 at [24].

50 [2012] 2 SLR 903.

claimed that he did not know that the brown packet contained drugs and that when he asked about the contents of the packet, he was told it was a secret. He admitted that he did suspect that the packet did not contain food, but had been warned not to open it. The court interestingly held that:[51]

> As s 18(2) [of the Misuse of Drugs Act ('MDA')] has been triggered in the present case, the appellant bears the burden of proving on a balance of probabilities that he did not know or *could not reasonably be expected to have known* the nature of the controlled drug that was found inside the Brown Packet. The issue we now have to examine is whether the appellant has proved the contrary of what s 18(2) presumes, *ie*, whether he has proved that he did not know or *could not reasonably be expected to have known* that the controlled drug in the Brown Packet was diamorphine.
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> … This is not a case where the appellant reasonably believed that the Brown Packet contained some controlled drug other than diamorphine (*eg*, 'ice', ecstasy, *etc*) and had good reason for such belief … In the present case, the appellant *did not bother* to take the *simple step* of peeping into the Brown Packet to see what it contained *despite suspecting that it contained something illegal* … If, for example, the appellant had testified that he had opened the Brown Packet and had seen some yellow substance which he had genuinely, but mistakenly, believed to be some food item, then that testimony might be evidence which the court could have considered to determine whether he had rebutted or disproved the s 18(2) MDA presumption.
>
> In our view, the appellant has failed to rebut the s 18(2) MDA presumption on a balance of probabilities because he *turned a blind eye* to what the Brown Packet contained despite suspecting that it contained something illegal … [I]n the present case, the appellant was *aware that he was carrying something illegal*, and he *could easily have verified* what that thing was by simply opening the Brown Packet. It was not enough for the appellant to take the position that he did not open the Brown Packet because he had been told not to do so … [I]t is for the appellant to prove on a balance of probabilities that he did not know *or could not reasonably be expected to have known* that the Brown Packet contained diamorphine. In our view, the appellant has failed to rebut the s 18(2) MDA presumption by his mere general assertions that he did not know what was in the Brown Packet as: (a) the nature of the controlled drug in that packet could easily have been determined by simply opening the packet; and (b) there was no evidence to show that it was not *reasonably expected* of him, in the circumstances, to open the packet to see what was in it. In short, the appellant has failed to prove the contrary of what s 18(2) of the MDA presumes in the present case as he neglected or refused to take

51 *Dinesh Pillai a/l K Raja Retnam v Public Prosecutor* [2012] 2 SLR 903 at [18] and [20]–[21].

> reasonable steps to find out what he was asked to deliver … in circumstances where a *reasonable person* having the suspicions that he had would have taken steps to find out (*viz*, by simply opening the Brown Packet to see what was in it).
>
> [emphases added]

31 When the same case was heard by the Court of Appeal again, this time on a constitutional issue, it was said:[52]

> The material issue was not what he actually knew or did not know was in the Brown Packet. Since the Judge had found that the Red Plastic Bag was in the applicant's physical possession, and that it was subsequently found to contain a controlled drug (*ie*, diamorphine), s 18(2) of the [Misuse of Drugs Act ('MDA')] applied to presume that he knew the nature of the controlled drug – a presumption which he had to prove, on a balance of probabilities, to the contrary. Thus, the material issue was whether on the facts of the case, the applicant had proved the contrary of the presumption on a balance of probabilities. The Judge found, on the totality of the evidence, that the applicant had not proved the contrary of the presumption … In our view, the presumption in s 18(2) of the MDA could not be rebutted if the accused made no effort to find out what he was bringing into Singapore in circumstances which would have *alerted a reasonable person* that he was being asked to do something illegal. In the circumstances of this case, the conveyance of food from Malaysia to Singapore to unknown persons for a disproportionate reward … made no common sense except that what was being conveyed was something valuable and illegal, like controlled drugs. [emphases added]

32 These passages in *Dinesh Pillai a/l K Raja Retnam* appear to be contrary to what was said in *Khor Soon Lee*[53] above. However, it is submitted that care must be taken in reading the passages in *Dinesh Pillai a/l K Raja Retnam*. The correct interpretation of the case is that the requirement of knowledge is not satisfied by proof that the accused was merely careless or negligent in not checking the brown packet to find out what was in it. The use of the reasonable person test arises in the following way:

> (a) if the objective facts show that a reasonable person would have been suspicious of the contents of the packet, the accused's reasons for not making inquiries can be examined and inferences drawn to decide if the accused was, in fact, suspicious;[54]

52 *Dinesh Pillai a/l K Raja Retnam v Public Prosecutor* [2012] SGCA 49 at [11].

53 *Khor Soon Lee v Public Prosecutor* [2011] 3 SLR 201. See also the warning by Glanville Williams, *Criminal Law* (Stevens & Sons, 2nd Ed, 1961) at p 159 to keep wilful blindness separate from the "civil doctrine of negligence in not obtaining knowledge".

54 *Public Prosecutor v Mas Swan bin Adnan* [2011] SGHC 107 at [54].

(b) suspicion coupled with a deliberate refusal to investigate further may be sufficient for a finding of wilful blindness;[55]

(c) alternatively, the Prosecution can rely on the presumption and need not establish actual knowledge;[56]

(d) in which case, it is for the Defence to prove that he did not know on a balance of probabilities;[57] and

(e) s 18(2) of the Misuse of Drugs Act cannot be rebutted if the accused merely asserts that he did not know. It is insufficient to rebut the presumption on a balance of probabilities where, objectively, any reasonable person would have at least suspected and checked, and the accused did not do so without any plausible explanation.[58]

V. The duty to check

33 When confronted with an accused who claims ignorance, such as he did not know the true nature of the drug or that the motor vehicle or suitcase had a secret compartment where the drugs were hidden, it is tempting to admonish the accused that he "ought to have checked", and that if he did, he would have discovered the drugs. However, this approach – which implies a legal duty to check – is tantamount to imposing liability on the basis of negligence or failure to reach the standard of a reasonable person in his shoes, whereas liability under the Misuse of Drugs Act is premised on proof of knowledge that one has a controlled drug in one's possession.[59]

34 The difference between wilful blindness and negligence has been pointed out in many cases. See, for example, *Nagaenthran a/l K Dharmalingam* where it was noted:[60]

55 *Tan Kiam Peng v Public Prosecutor* [2008] 1 SLR(R) 1 at [125].

56 *Nagaenthran a/l K Dharmalingam v Public Prosecutor* [2011] 4 SLR 1156 at [26].

57 *Nagaenthran a/l K Dharmalingam v Public Prosecutor* [2011] 4 SLR 1156 at [31].

58 In *Dinesh Pillai a/k K Raja Retnam v Public Prosecutor* [2012] 2 SLR 903 at [21], the Court of Appeal noted:

> The factual distinction between this case and *Khor Soon Lee* is that in the latter case, the accused did not have any suspicion that he was carrying anything other than erimin and ketamine (which the court accepted). In contrast, in the present case, the appellant was *aware that he was carrying something illegal*, and he could easily have verified what that thing was by simply opening the Brown Packet. It was not enough for the appellant to take the position that he did not open the Brown Packet because he had been told not to do so. [emphasis added]

59 See n 15 above.

60 *Nagaenthran a/l K Dharmalingam v Public Prosecutor* [2011] 4 SLR 1156 at [30].

> [Wilful blindness] is an indirect way to prove actual knowledge; *ie*, actual knowledge is proved because the inference of knowledge is *irresistible* and is the *only rational inference* available *on the facts* … Wilful blindness is not negligence or an inadvertent failure to make inquiries. [emphases in original]

35 Unfortunately, there are cases that have adopted a negligence approach towards liability. In the context of abetment of harbouring an illegal immigrant (where proof that the accused *knew* of the circumstances constituting the crime is required), it was said in *Awtar Singh s/o Margar Singh v Public Prosecutor*:[61]

> The Prosecution must show that the circumstances of the case are such that he *ought to have* made the enquiries and by not doing so, he could be said to have 'wilfully shut his eyes to the obvious' that [the principal offender] was harbouring illegal immigrants. In other words, the appellant must be shown to know or *ought to have known* that the subtenants at the premises were illegal immigrants. [emphases added]

36 The same sentiment can be seen in some cases involving the Misuse of Drugs Act. In *Cheng Heng Lee v Public Prosecutor*, it was held that:[62]

> [The second appellant] *should have suspected* that the contents of [the two paper bags] might be illicit in light of the surreptitious circumstances in which he had received the bags, and *should have inspected* the bags to ascertain their contents … His bald assertion that he did not know the two bags contained drugs was thus insufficient to rebut the presumption of knowledge operating against him. [emphases added]

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61 [2000] 2 SLR(R) 435 at [49]. Note though that in the very next paragraph, it was correctly pointed out that negligence is not a sufficient basis to impose liability for the offence:

> [I]t has to be remembered that there is a vast difference between a state of mind which consists of deliberately shutting the eyes to the obvious, the result of which a person does not care to have, and a state of mind which is merely neglecting to make inquiries which a reasonable and prudent man would make [citing *Public Prosecutor v Koo Pui Fong* [1996] 1 SLR(R) 734].

See Michael Hor, "Illegal Immigration: Principle and Pragmatism in the Criminal Law" (2002) 14 SAcLJ 18.

62 [1998] 3 SLR(R) 747 at [46]. See also, *eg*, the dissenting judgment in *Public Prosecutor v Hla Win* [1995] 2 SLR(R) 104 at [50] ("he did not take the trouble to inspect [the goods]") and [59] ("I thought it incumbent on him to check his bag for its true contents"); and *Yeo Choon Huat v Public Prosecutor* [1997] 3 SLR(R) 450 at [22]:

> In the circumstances, one would have thought it incumbent on the appellant to open up the bag to ascertain its true contents … [H]is apparently nonchalant reaction to having discovered all these alien items in his car simply defies logic and credulity.

37 In *Shan Kai Weng v Public Prosecutor*[63] ("*Shan Kai Weng*"), the accused was charged with unlawful possession of a controlled drug, which he believed was merely sleeping pill. On his petition for criminal revision and appeal against his sentence to the High Court, it was said:[64]

> The position under our law, therefore, is that possession is proven once the accused knows of the existence of the thing itself. Ignorance or mistake as to its qualities is no excuse. The appellant knew that the tablet was in his car. He believed it to be a sleeping pill, which, like the aspirin of the hypothetical in *Warner*[65] and *Tan Ah Tee*,[66] is a drug. As such, his ignorance as to the qualities of the tablet did not provide him a defence to the charge of possession.

38 It can be noted that, in *Shan Kai Weng*, the accused did not even need to suspect what he had was a *controlled drug*. He would be liable for possession of a controlled drug even if he had thought the pill was an *aspirin*.

39 In *Tan Kiam Peng*, the Court of Appeal gave the following example:[67]

> Where, for example, an accused is given a wrapped package and is told that it contains counterfeit currency when it actually contains controlled drugs … [A]bsent unusual circumstances, the accused should at least ask to *actually view* what is in the package. Even a query by the accused coupled with a false assurance would, in our view, be generally insufficient to obviate a finding of wilful blindness on the part of the accused under such circumstances … And, where, in fact, only token efforts are made to investigate one's suspicions, this would be insufficient … Much will, of course, depend on the precise facts before the court but it would appear, in principle, that merely asking and receiving answers … would be insufficient simply because the accused concerned would certainly be given false answers and assurances. [emphasis in original]

40 The example given by the Court of Appeal involves a mistake that the accused possesses something illegal (counterfeit currency) instead of something innocuous like aspirin, but the duty imposed is high. "Merely asking" about the contents of the package is not sufficient; the accused should "at least ask to actually view" the contents.[68]

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63 [2004] 1 SLR(R) 57.

64 *Shan Kai Weng v Public Prosecutor* [2004] 1 SLR(R) 57 at [24]. Ignorance of the quality of the drug was, however, accepted as a mitigating factor and the sentence of imprisonment reduced from six months to one month.

65 *R v Warner* [1969] 2 AC 256.

66 *Tan Ah Tee v Public Prosecutor* [1979–1980] SLR(R) 311.

67 *Tan Kiam Peng v Public Prosecutor* [2008] 1 SLR(R) 1 at [129].

68 In situations where the accused knows that the package contains drugs, it has been held that he should open the package and ascertain what drug it is, in order to rebut the presumption in s 18(2) of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed):

(*cont'd on the next page*)

VI. Lessons from the Immigration Act

41 In order to encourage greater vigilance, it is suggested that there should be a duty to investigate criminal activity in certain situations. A person who is suspicious that he is being asked to carry prohibited drugs should be required to take *reasonable* steps to learn the true facts. With respect to the Misuse of Drugs Act, this translates to the law imposing a duty of inspection and expressly stating what an accused should have done in the situation to learn the truth, such as thoroughly checking his suitcase or car compartments. Such an offence should be less serious than "knowing" drug possession.

42 The new offence should accurately identify the conduct that is required. Persons who fail to meet this standard are punished for failing to do something that would have led to the discovery of the drugs. They are not punished for "possession" of drugs that they would have discovered if they had made the inquiries. Hence, instead of focusing on drug "possession" (what they would have discovered if they made further inquiries), the focus is on the failure to make the inquiries in the first place.

43 An example of such a law that is already in place is the Immigration Act: ss 57(1)(*d*) and 57(1)(*e*) of the Act[69] make it an offence to harbour or employ an illegal immigrant. It was explained in Parliament that, in the past, employers of illegal immigrants were able to secure an acquittal for harbouring or employing an illegal immigrant by arguing that they were shown a copy of a work permit by the foreign worker even though it subsequently turned out that the work permit was forged.[70] The law was changed to require a person charged with harbouring or employing an illegal immigrant to show that he had exercised due diligence to ascertain that the entry permit or work pass was valid.[71]

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see, *eg*, *Public Prosecutor v Lim Boon Hiong* [2010] 4 SLR 696 at [66], [74]; *Public Prosecutor v Azman bin Mohamed Sanwan* [2010] SGHC 196 at [146]–[147].

69 Immigration Act (Cap 133, 2008 Rev Ed).

70 *Singapore Parliamentary Debates, Official Report* (10 November 1993), vol 61 at col 914 (S Jayakumar).

71 Immigration (Amendment) Act 1993 (Act 38 of 1993). A similar, but less nuanced, regime exists under s 5 of the Employment of Foreign Manpower Act (Cap 91A, 2009 Rev Ed). There is a reversal in the burden of proof in the Immigration Act and the Employment of Foreign Manpower Act, which need not be the case in the reforms suggested here.

44 In its current form, the checks required to show due diligence are stipulated explicitly. With regard to the offence of harbouring an illegal immigrant, one must:[72]

> (a) inspect the original entry permit or visit pass;
>
> (b) ascertain that the holder of the passport is the person named in the entry permit or the visit pass; and
>
> (c) verify with the employer that the immigrant's particulars tally with those in their records, or verify with the Controller of Immigration or the Controller of Work Passes that the entry permit or visit pass is valid.

45 A further refinement in the offence of harbouring an illegal immigrant is that the offence is now split into three types: where the accused does so (a) knowingly, (b) recklessly or (c) negligently. The first two categories are subject to a mandatory imprisonment term of six months, while the third category does not have any mandatory term of imprisonment.[73] An accused who conducts only two of the three due diligence checks can be found guilty of negligent harbouring. A person who conducts only one of the three due diligence checks can be found guilty of either negligent harbouring or reckless habouring.

46 A possible approach to impose liability for a failure to check the contents of a container, vehicle or other object that was subsequently found to contain controlled drugs can involve aspects from the Immigration Act, namely:

> (a) explicitly stipulating the checks that are needed such as opening the container or package;
>
> (b) graduating the culpability of the accused into reckless or negligent conduct depending on the number of checks fulfilled; and
>
> (c) reversal of the burden of proof such that it is for the accused to show that he did conduct the required checks.

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72 Immigration Act (Cap 133, 2008 Rev Ed) s 57(7D). The due diligence requirements for those who employ an illegal immigrant are substantially the same; see s 57(10) of the Immigration Act. These requirements were imposed by the Immigration (Amendment) Act 1998 (Act 34 of 1998).

73 The punishment for the first two categories is imprisonment of between six months and two years, and also liable to a fine of up to $6,000 (Immigration Act (Cap 133, 2008 Rev Ed) s 57(1)(iv)), whereas the punishment for the last category is imprisonment of up to 12 months, fine of up to $6,000 or both (s 57(1)(v)). The graduated penalty structure is not available to those who employ illegal immigrants: the negligent employer is also subject to the mandatory imprisonment of six months (ss 57(1)(ii), 57(9)–57(10)).

47 As for what reasonable checks may be required, guidance may be obtained from past cases such as opening up a wrapped package given in suspicious circumstances[74] or known to contain prohibited items,[75] or checking a suitcase for hidden compartments.[76] Efforts that go beyond what can reasonably be expected of the accused, such as dismantling of equipment, should not be needed.[77]

48 However, such a duty to check is subject to two drawbacks. First, the duty is potentially placed on all persons who suspect the presence of drugs. There is no requirement of a high level of suspicion, as in wilful blindness, to be triggered. Hence, persons who are merely reckless will also be brought into the fold; but it does not extend to those persons who are negligent, since a subjective awareness or suspicion of the presence of drugs is needed.

49 Second, liability could potentially be imposed on accused persons whose suspicions subsequently turn out to be unfounded and are not in possession of drugs at all. Since the offence is in failing to make reasonable inquiries, it does not matter if there were, in fact, drugs found or not. It is submitted that, provided that there is discretion in sentencing, both of these drawbacks can be acknowledged by providing for a lower sentence in such cases.[78]

VII. Conclusion

50 A growing body of judicial dicta has been built up in the recent cases referred to in this article, on when behaviour amounts to wilful blindness, such that a finding of requisite knowledge can be made. In such cases, knowledge is imputed to the accused even where such knowledge, in fact, does not exist. Extreme caution must be used in applying the concept of wilful blindness because it is often used in the context of drug trafficking where evidentiary presumptions and mandatory sentences exist.

51 In addition, it is suggested that a possible alternative offence, which better reflects culpability of the wilfully blind accused, is to impose reasonable duties of inspection on them. It is admitted that

74 See, *eg*, *Cheng Heng Lee v Public Prosecutor* [1998] 3 SLR(R) 747; *Public Prosecutor v Sng Chun Heng* [2011] 3 SLR 437; *Dinesh Pillai a/l K Raja Retnam v Public Prosecutor* [2012] 2 SLR 903.

75 See, *eg*, *Public Prosecutor v Lim Boon Hiong* [2010] 4 SLR 696; *Public Prosecutor v Azman bin Mohamed Sanwan* [2010] SGHC 196.

76 See, *eg*, *Pang Siew Fum v Public Prosecutor* [2011] 2 SLR 635.

77 See, *eg*, *Public Prosecutor v Ng Pen Tine* [2009] SGHC 230.

78 Prosecutorial discretion in whether to charge the accused or to give a warning/conditional warning can be used as well.

there is a "sacrifice of principle"[79] in casting a legal duty on an accused to check for the presence of prohibited drugs under certain circumstances. However, in exchange for this "sacrifice" is greater clarity of the checks that are needed in suspicious circumstances and less judicial gymnastics to overcome any perceived loopholes in the law.

79 Michael Hor, "Illegal Immigration: Principle and Pragmatism in the Criminal Law" (2002) 14 SAcLJ 18 at para 3.