13. CRIMINAL LAW

Prem Raj **PRABAKARAN***
BEng (Mechanical) (Hons) (National University of Singapore), LLB (Hons) (National University of Singapore), BCL (Oxon); District Judge, State Courts.

Mansoor **AMIR***
LLB (University College London), LLM (New York University); Deputy Public Prosecutor and State Counsel, Crime Division, Attorney-General's Chambers.

TAN Ee Kuan*
MA (Cantab), LLM (Harvard); Advocate and Solicitor (Singapore); Deputy Public Prosecutor and State Counsel, Advocacy Group, Attorney-General's Chambers.

Introduction

13.1 This review is in three parts. These will examine, respectively, cases that involved offences under the Penal Code[1] ("the Code"), the Misuse of Drugs Act[2] ("the MDA"), and the Medical Registration Act[3] ("the MRA").

Penal Code

Elements of attempted murder under s 307

13.2 In *Public Prosecutor v BPK*,[4] the offender was charged with attempted murder under s 307 of the Code. He had attacked the victim with a knife, inflicting multiple stab and slash wounds to various parts of her body.[5] The victim, fortunately, survived the attack. The offender's defence was that at the material time, he did not have the intention to kill the victim and, in fact, did not even have the capacity to form intent.[6]

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* 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 Cap 174, 2014 Rev Ed.

4 [2018] SGHC 34.

5 *Public Prosecutor v BPK* [2018] SGHC 34 at [1].

6 *Public Prosecutor v BPK* [2018] SGHC 34 at [2] and [99]–[100].

13.3 This was the first local decision that discussed the elements of the offence of attempted murder under s 307 of the Code.[7] The High Court made observations on the *mens rea* and *actus reus* requirements of the offence.

13.4 In relation to the *mens rea* element, the court held that this was encapsulated by the phrase "such intention or knowledge … that … he would be guilty of murder" in s 307, which tied the *mens rea* of the offence under s 307 to the *mens rea* of the offence of murder under s 300 of the Code.[8] Therefore, for both ss 307 and 300, there were "four alternative limbs of *mens rea*":[9]

> (a) intention to cause death;
>
> (b) intention to cause such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused;
>
> (c) intention to cause bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death; and
>
> (d) knowledge that the offender's act is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death.

13.5 The court made two further comments on the *mens rea* element. First, while there might be Indian cases suggesting that an intention to kill was required for the offence to be made out, the court doubted that such a reading of s 307 could be accommodated by the language of the provision.[10] Second, the four-limbed approach to *mens rea* under s 307 might result in inconsistency with the *mens rea* requirement under the general attempt provision in s 511 of the Code, which was an intention to commit the substantive offence with which s 511 was read. However, this was not an insurmountable difficulty because, as the High Court had noted in *Public Prosecutor v Ketmuang Banphanuk*,[11] "[f]or offences where the legislature provides for specific definitions of attempt [such as s 307 of the Code], the general definition [under s 511 of the Code] will not apply".[12]

7 *Public Prosecutor v BPK* [2018] SGHC 34 at [125].
8 *Public Prosecutor v BPK* [2018] SGHC 34 at [126].
9 *Public Prosecutor v BPK* [2018] SGHC 34 at [126].
10 *Public Prosecutor v BPK* [2018] SGHC 34 at [128].
11 [1995] SGHC 46.
12 *Public Prosecutor v BPK* [2018] SGHC 34 at [129].

13.6 In relation to the *actus reus* element, the court held that this was captured by the phrase "does any act … under such circumstances that if he by that act caused death he would be guilty of murder".[13] The court observed that there might be some difficulty in delineating the extent to which an offender must have embarked on the crime for the *actus reus* element to be satisfied, and noted that there were five possible approaches:[14]

> (a) **Proximity test**. The offender must have done some overt act which is directed towards the actual commission of the crime and which is immediately and not remotely connected with the crime.
>
> (b) **Last act test**. The offender must have done all the acts which he believed to be necessary to commit the substantive offence.
>
> (c) **Apparent intention test**. The offender must have conducted himself in a manner which indicates in itself a clear and unequivocal intention to commit the offence.
>
> (d) **Substantial step test**. The offender must have progressed a substantial way towards the completion of the offence.
>
> (e) **Embarked on the crime proper test**. The offender must have "embarked on the crime proper".

13.7 The court stated that it was not necessary to reach a conclusive view on the appropriate *actus reus* test because, on all of the five approaches, the test was satisfied in the case at hand.[15] Nevertheless, the court opined that the illustrations to s 307 suggested that the "last act" test applied.[16]

13.8 On the facts, in relation to *mens rea*, the court found that the offender had the capacity to form intent at the material time.[17] The court also found that the offender had intended to kill the victim based on the evidence of the victim, a witness whom the offender had spoken to soon after the incident, and a police officer; the offender's statements to the police; the number and nature of the injuries; and the presence of a motive: the offender had been angry with the victim for her perceived infidelity.[18] The court also observed that an intention to commit suicide

13 *Public Prosecutor v BPK* [2018] SGHC 34 at [130].
14 *Public Prosecutor v BPK* [2018] SGHC 34 at [131].
15 *Public Prosecutor v BPK* [2018] SGHC 34 at [135].
16 *Public Prosecutor v BPK* [2018] SGHC 34 at [134].
17 *Public Prosecutor v BPK* [2018] SGHC 34 at [152]–[266].
18 *Public Prosecutor v BPK* [2018] SGHC 34 at [268]–[296].

was not inconsistent with a concurrent intention to kill the victim,[19] which could have been formed by the offender immediately prior to his attack on the victim.[20]

13.9 Alternatively, even if the offender had not intended to kill the victim, he had intended to cause such bodily injury as he knew to be likely to cause her death, and knew that his actions were so imminently dangerous that they must in all probability cause her death.[21] Thus, the *mens rea* element under s 307 of the Code was satisfied.

13.10 In relation to the *actus reus* element, the court found that the offender had struck repeatedly, relentlessly and forcefully at several parts of the victim's body, including vulnerable regions such as her head and neck, even after she had fallen to the ground. He had used such significant force that the tip of the knife blade bent when he missed a strike and the knife hit the floor. He had not stopped striking at the victim until her father arrived at the scene and pushed him.[22] In this light, the *actus reus* requirement was satisfied on all of the five possible approaches to that element.[23]

13.11 Finally, the court considered whether the partial defence of provocation – which had not been raised by the offender, but which the Prosecution had made submissions on – applied. The court held that the partial defence of provocation was a defence to a charge under s 307 of the Code: if the defence was established, the charge would be reduced to a charge for attempted culpable homicide under s 308 of the Code.[24] However, the court found that the subjective element of the defence – that the offender was deprived of self-control at the material time – was not made out.[25] It was therefore unnecessary to consider whether the objective element of the defence (that the provocation was sufficiently grave and sudden) was fulfilled.[26]

Mens rea *for voluntarily causing grievous hurt under s 322*

13.12 The offender in *Muhammad Khalis bin Ramlee v Public Prosecutor*[27] ("*Muhammad Khalis*") had been part of two separate group fights that took place spontaneously and in quick succession. His

19 *Public Prosecutor v BPK* [2018] SGHC 34 at [299].
20 *Public Prosecutor v BPK* [2018] SGHC 34 at [300].
21 *Public Prosecutor v BPK* [2018] SGHC 34 at [301].
22 *Public Prosecutor v BPK* [2018] SGHC 34 at [302].
23 *Public Prosecutor v BPK* [2018] SGHC 34 at [303].
24 *Public Prosecutor v BPK* [2018] SGHC 34 at [305].
25 *Public Prosecutor v BPK* [2018] SGHC 34 at [320].
26 *Public Prosecutor v BPK* [2018] SGHC 34 at [321].
27 [2018] 5 SLR 449.

involvement in these two group fights led to him being charged with two counts of rioting, an offence under s 146 of the Code.

13.13 The offender had later returned to the scene of the first group fight. A dispute was then taking place between the offender's friend and the deceased's friend near a taxi stand. The deceased, who had only observed the two group fights (that is, he was not involved), attempted to intervene and mediate in this dispute. The offender, intending to stop the deceased from intervening:[28]

> … ran towards the deceased and delivered a lunging punch from behind to the lower jaw of the deceased, causing him to fall and land heavily with his head and shoulders hitting the kerb.

An eye-witness testified that "the deceased was knocked unconscious by the blow and fell directly to the concrete ground without taking any evasive action to break his fall".[29] The deceased was sent to the hospital unconscious, and found to have severe head injuries. He died from these injuries a few days later. For this, the offender was charged and convicted (after trial) of one count of voluntarily causing grievous hurt – an offence under s 322 of the Code, which reads as follows:

> **322.** Whoever voluntarily causes hurt, *if the hurt which he intends to cause or knows himself to be likely to cause is grievous hurt,* ***and*** *if the hurt which he causes is grievous hurt*, is said 'voluntarily to cause grievous hurt'.
>
> *Explanation.*— A person is not said voluntarily to cause grievous hurt except when he *both causes grievous hurt* ***and*** *intends or knows himself to be likely to cause grievous hurt*. But he is said *voluntarily to cause grievous hurt if, intending or knowing himself to be likely to cause grievous hurt of one kind, he actually causes grievous hurt of another kind*.
>
> [emphasis added in italics and bold italics]

13.14 On appeal, the High Court affirmed the lower court's findings that the offender's punch was "a very forceful one".[30] The:[31]

> … eyes of the deceased [had] rolled back upon being punched and … he fell without taking any steps to break his fall. … [T]he punch was sufficient to and did in fact knock the deceased unconscious.

28 *Muhammad Khalis bin Ramlee v Public Prosecutor* [2018] 5 SLR 449 at [13].
29 *Muhammad Khalis bin Ramlee v Public Prosecutor* [2018] 5 SLR 449 at [13].
30 *Muhammad Khalis bin Ramlee v Public Prosecutor* [2018] 5 SLR 449 at [26].
31 *Muhammad Khalis bin Ramlee v Public Prosecutor* [2018] 5 SLR 449 at [25].

The High Court noted that the evidence was:[32]

> … clear … that regardless of whether the punch came from the deceased's left or back, the deceased did not see or anticipate the [offender's] punch, and was wholly unable to and in fact did not defend himself or take any steps to limit his injuries.

13.15 The offender had, on appeal, contended that he "never intended the deceased to lose consciousness, or to fall and fracture his skull".[33] This was, in effect, a challenge to the *mens rea* of the offence.[34] To satisfy this element, the High Court observed that:[35]

> … it must be shown that the accused intended or knew that his actions were likely to cause some form of grievous hurt. So long as this is so, it does not matter if by his actions, the accused in fact caused grievous hurt of some other kind (for instance, death) and not the precise kind of grievous hurt he intended or knew that he was likely to cause (for instance, a skull fracture).

13.16 To this end, the court endorsed its earlier decision in *Koh Jing Kwang v Public Prosecutor*[36] ("*Koh Jing Kwang*"). There, the offender's friend had got into a fight with the victim outside a club. The offender was near the club's entrance when this occurred, and had run towards the victim and punched him. The victim fell backwards, landed on the road, and suffered a skull fracture. The court in *Koh Jing Kwang* set out four "permutations" of *mens rea* by which the Prosecution could establish a conviction under s 322:[37]

> (a) The offender, when delivering the punch, *intended* for the victim to fall, knock his head, and sustain fractures.
>
> (b) The offender, when delivering the punch, *knew that it was likely* that the victim would fall, knock his head, and sustain fractures.
>
> (c) The offender, when delivering the punch, *intended to cause* some form of grievous hurt. Inadvertently, this led to a fall and the subsequent fracture.

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32 *Muhammad Khalis bin Ramlee v Public Prosecutor* [2018] 5 SLR 449 at [28]. See also *Muhammad Khalis* at [15]:

> In essence, [the lower court] accepted [the eye-witness's] evidence that the [offender] had lunged at the deceased from about 2m behind the deceased and punched him on the lower jaw; that the force of the punch knocked the deceased unconscious, such that he was unable to break his fall, and as a result, when he fell, his head hit the kerb.

33 *Muhammad Khalis bin Ramlee v Public Prosecutor* [2018] 5 SLR 449 at [29].

34 *Muhammad Khalis bin Ramlee v Public Prosecutor* [2018] 5 SLR 449 at [29].

35 *Muhammad Khalis bin Ramlee v Public Prosecutor* [2018] 5 SLR 449 at [30].

36 [2015] 1 SLR 7.

37 *Koh Jing Kwang v Public Prosecutor* [2015] 1 SLR 7 at [46].

(d) The offender, when delivering the punch, *knew that it was likely* to cause grievous hurt of another type.

13.17 The court in *Koh Jing Kwang* held that a court must *at least* find that the offender *actually knew* that his actions were likely to cause some type of grievous hurt[38] (intention being the alternative state of mind). The court in *Muhammad Khalis* agreed with *Koh Jing Kwang* that this requirement for actual knowledge (which also includes wilful blindness)[39] "contemplates a mental element that goes beyond rashness or negligence, both of which are insufficient to constitute the offence of voluntarily causing grievous hurt".[40]

13.18 The court in *Muhammad Khalis* observed that this inquiry into the offender's actual knowledge required "a consideration of the objective circumstances and with reference to what a reasonable person in the position of the accused would have known".[41] The court continued:[42]

> Practically speaking, therefore, if it is shown that a reasonable person in the accused's position, having regard to all the facts and circumstances before him, would have known that grievous hurt was likely to result from his acts, then in order for the accused to deny actual knowledge, he would have to prove or explain how and why he *did not in fact* have such knowledge as the reasonable person would have had. [emphasis in original]

13.19 The court observed that the instant case was one where the sheer force of the offender's blow was alone sufficient to fell the deceased:[43]

> A reasonable person who delivered such a forceful blow would clearly have known that it was likely that the deceased would either sustain some fracture or other form of grievous hurt, whether directly from the blow or as a result of falling due to the blow.

In addition, the offender: [44]

> … could not satisfactorily prove or explain why he nevertheless held the view that no grievous hurt was likely to result. Significantly, there [was] nothing in his conduct immediately after the incident or in the evidence that he furnished that suggested he was at all surprised by the

38 *Koh Jing Kwang v Public Prosecutor* [2015] 1 SLR 7 at [45]; *Muhammad Khalis bin Ramlee v Public Prosecutor* [2018] 5 SLR 449 at [40].
39 *Muhammad Khalis bin Ramlee v Public Prosecutor* [2018] 5 SLR 449 at [40].
40 *Muhammad Khalis bin Ramlee v Public Prosecutor* [2018] 5 SLR 449 at [33]–[35].
41 *Muhammad Khalis bin Ramlee v Public Prosecutor* [2018] 5 SLR 449 at [44].
42 *Muhammad Khalis bin Ramlee v Public Prosecutor* [2018] 5 SLR 449 at [44].
43 *Muhammad Khalis bin Ramlee v Public Prosecutor* [2018] 5 SLR 449 at [46].
44 *Muhammad Khalis bin Ramlee v Public Prosecutor* [2018] 5 SLR 449 at [46].

> effect that his blow had on the deceased, who …, was knocked unconscious and fell without making any effort to break his fall.

The court was therefore satisfied, "as a matter of inference from the facts", that the offender:[45]

> … did know at the time of delivering such a forceful punch that some form of grievous hurt was likely to result. It [was] immaterial in this regard that [the offender] may not have specifically intended the deceased to die.

Abduction simpliciter *under s 362*

13.20 The offender in *Public Prosecutor v Ong Soon Heng*[46] claimed trial to two charges under the Code: one count of abduction *simpliciter*, under s 362 ("the abduction charge"); and one count of rape, under s 375(1)(*a*) ("the rape charge"). The offender and the victim were acquainted, and had met up with each other (and others) at a nightclub – where the victim consumed a number of alcoholic drinks.

13.21 Closed-circuit television footage showed the victim unconscious and lying supine on a bench in the nightclub. The offender and others had attempted to help her to her feet, but failed. The offender then lifted the victim and carried her over his shoulder from the nightclub premises to the car park where his car was. He then drove off with the victim in the backseat of his car to his residence. It was not disputed that sexual intercourse did in fact occur between the offender and the victim at his residence. The key issue was whether the victim had consented, given her state of intoxication. In this regard, s 90(*b*) of the Code reads as follows:

> *A consent is not such a consent as is intended by any section of this Code —*
>
> …
>
> (*b*) *if the consent is given by a person who, from* unsoundness of mind, mental incapacity, *intoxication*, or the influence of any drug or other substance, *is unable to understand the nature and consequence of that to which he gives his consent* …
>
> [emphasis added]

13.22 The case for the Prosecution was that the victim was unconscious at the time of the two offences due to severe alcohol

45 *Muhammad Khalis bin Ramlee v Public Prosecutor* [2018] 5 SLR 449 at [46].
46 [2018] SGHC 58.

intoxication. She therefore lacked the capacity to consent, and did not in fact consent, to:

> (a) being transported by the offender in his car from the nightclub to his residence (which formed the subject of the abduction charge); and
>
> (b) subsequent sexual intercourse with the accused in his residence (which formed the subject of the rape charge).

13.23 The High Court found that the victim:[47]

> … was too intoxicated at the material time [of the two alleged offences] to understand the nature and consequence of giving consent, and she could not therefore have consented to the movement by force, or to the subsequent sexual intercourse with the [offender].

This was in light of the victim's "mental and physical state immediately before, during and after the material time of the two alleged offences".[48] Valid consent under s 90(*b*) of the Code was hence not given in respect of either offence.[49]

13.24 The observations of the court in relation to the abduction charge bear special mention. The offence of abduction *simpliciter* is set out in s 362 of the Code, which reads as follows:

> *Whoever by force compels*, or by any deceitful means induces *any person to go from any place, is said to abduct that person*. [emphasis added]

13.25 The punishment for abduction *simpliciter* is then set out in s 363A of the Code. Section 363A was introduced into the Code in 2007, and reads as follows:

> Whoever abducts any person 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.

13.26 Before 2007, abduction *simpliciter* was not punishable as an offence. Rather:[50]

> … abduction was punishable only as an auxiliary act, *ie*, when it was done with the specific intentions mentioned under ss 364 to 369 of [the Code], such as abduction in order to murder, to wrongfully confine, or to force into marriage.

47 *Public Prosecutor v Ong Soon Heng* [2018] SGHC 58 at [97].
48 *Public Prosecutor v Ong Soon Heng* [2018] SGHC 58 at [97].
49 *Public Prosecutor v Ong Soon Heng* [2018] SGHC 58 at [97].
50 *Public Prosecutor v Ong Soon Heng* [2018] SGHC 58 at [106].

13.27 On the abduction charge:

(a) The Prosecution submitted that the intoxicated and unconscious state of the victim meant that the offender could not have consented to the offender moving her in his car from the nightclub to his residence. The accused "must therefore had [*sic*] by force compelled her to be so moved within the meaning of s 362 of [the Code]".[51]

(b) The Defence submitted that "even if there had been no consent, the charge was not made out because s 362 of [the Code] required resistance to be put up by the [victim], and that was not satisfied".[52] According to the Defence, the use of the term "compel" in s 362 of the Code:[53]

> … indicated that the person being compelled must have been forced or constrained to do something despite resisting to do so. Thus, if the [victim] was unconscious at the material time when the [offender] carried her out of [the nightclub] and drove her to [his residence], the offence of abduction would not be made out.

13.28 The court therefore examined:[54]

> … whether the elements of the offence of abduction under s 362 of [the Code] could be made out if the alleged victim was unconscious and therefore could not and did not put up any resistance.

It concluded that the unconscious victim "had in fact been compelled by the use of force to go from [the nightclub] to the [residence] through her being transported there by the [offender] in his car".[55] It reasoned as follows:

(a) The:[56]

> … requirement of resistance or consciousness had no basis in the statutory language of s 362 [of the Code]. A plain and ordinary reading of the word 'compel' did not exclude an unconscious victim from the scope of the provision and from being the subject of an abduction ordinarily so understood.

(b) If s 362 of the Code:[57]

51 *Public Prosecutor v Ong Soon Heng* [2018] SGHC 58 at [20] and [104].
52 *Public Prosecutor v Ong Soon Heng* [2018] SGHC 58 at [25].
53 *Public Prosecutor v Ong Soon Heng* [2018] SGHC 58 at [25].
54 *Public Prosecutor v Ong Soon Heng* [2018] SGHC 58 at [104] and [107].
55 *Public Prosecutor v Ong Soon Heng* [2018] SGHC 58 at [112].
56 *Public Prosecutor v Ong Soon Heng* [2018] SGHC 58 at [108].
57 *Public Prosecutor v Ong Soon Heng* [2018] SGHC 58 at [108].

> … was limited to conscious victims, an absurd outcome might result where movements forced and compelled upon an unconscious or sleeping person would be exempted from criminal liability however egregious the offence might have been and even though the victim would have been more helpless and in need of protection.

This reading would leave "precisely the most vulnerable persons outside the scope of s 362".[58]

13.29 The court acknowledged that its interpretation would:[59]

> … create a broad scope of criminal liability, insofar as the movement of a sleeping spouse, the assisting of a person in a wheelchair, or a Good Samaritan's moving of an unconscious victim out of harm's way would *prima facie* constitute an offence.

However, it reasoned that any injustice that may be caused by its interpretation would be limited by the "general defences in the [Code], as well as the discretion of the Public Prosecutor".[60]

Criminal breach of trust as an agent under s 409

13.30 Section 409 of the Code reads:

> Whoever, being in any manner entrusted with property, or with any dominion over property, in his capacity of a public servant, or *in the way of his business as* a banker, a merchant, a factor, a broker, an attorney or *an agent*, commits criminal breach of trust in respect of that property, shall be punished with imprisonment for life, or with imprisonment for a term which may extend to 20 years, and shall also be liable to fine. [emphasis added]

13.31 In *Public Prosecutor v Lam Leng Hung*[61] ("*Lam Leng Hung*"), a five-judge *coram* of the Court of Appeal held that the phrase "in the way of his business as … an agent" ("the disputed phrase") referred "only to a person who is a professional agent, *ie*, one who professes to offer his agency services to the community at large and from which he makes his living". A director of a corporation, or governing board member or key officer of a charity, or officer of a society, who was entrusted with property, or with any dominion over property, by the said corporation, charity, or society, was *not* entrusted in the way of his business as an agent for the purposes of s 409 of the Code.[62]

58 *Public Prosecutor v Ong Soon Heng* [2018] SGHC 58 at [108].
59 *Public Prosecutor v Ong Soon Heng* [2018] SGHC 58 at [110].
60 *Public Prosecutor v Ong Soon Heng* [2018] SGHC 58 at [110].
61 [2018] 1 SLR 659.
62 *Public Prosecutor v Lam Leng Hung* [2018] 1 SLR 659 at [288].

13.32 For more than four decades prior to this decision, the position in Singapore since the 1976 High Court decision of *Tay Choo Wah v Public Prosecutor*[63] ("*Tay Choo Wah*") was that directors who misappropriated property that had been entrusted to them by their respective companies or organisations were liable for the offence under s 409 of the Code.[64] The Court of Appeal in *Lam Leng Hung*, however, held that *Tay Choo Wah* "was wrongly decided, and should no longer be followed".

13.33 This section of the review begins by setting out the background to *Lam Leng Hung* before explaining the decision of the Court of Appeal.

Background

13.34 *Lam Leng Hung* was a criminal reference that arose from the prosecution of six leaders of City Harvest Church ("CHC"), that is, the offenders, for the misuse of CHC funds. The offenders were charged with, *inter alia*, the offence of conspiring to commit criminal breach of trust ("CBT") as an agent under s 409 read with s 109 of the Code. The agents identified in these charges were the relevant offenders who were entrusted with the funds in their capacity as members of the CHC management board.[65]

13.35 At first instance, the Presiding Judge of the State Courts ("the Judge") convicted the offenders of the charges against them at trial, including the charges under s 409 of the Code.[66] The Judge rejected the offenders' defence that the relevant offenders were not acting in the way of their business as agents within the meaning of s 409 of the Code. The offenders had argued, relying on *Mahumarakalage Edward Andrew Cooray v The Queen*[67] ("*Cooray*"), a decision of the Privy Council on appeal from the Court of Criminal Appeal of Ceylon, that it did not follow from the fact that they were directors of CHC that the entrustment to them of dominion over CHC's property was therefore in the way of their business as agents. In reaching his decision, the Judge relied on the High Court judgment of *Tay Choo Wah*,[68] which had distinguished *Cooray*. In the Judge's view, *Tay Choo Wah* was binding on him and stood for the proposition that "if one is an agent, *eg*, a director, and one is entrusted with property in one's capacity as agent, that would

63 [1974–1976] SLR(R) 725.
64 *Public Prosecutor v Lam Leng Hung* [2018] 1 SLR 659 at [26].
65 *Public Prosecutor v Lam Leng Hung* [2018] 1 SLR 659 at [20].
66 *Public Prosecutor v Lam Leng Hung* [2015] SGDC 326.
67 [1953] AC 407.
68 See para 13.32 above.

be entrustment in the way of one's business as agent". Alternatively, he found that *Tay Choo Wah* could be read as adopting the reasoning of the Indian Supreme Court in *R K Dalmia v Delhi Administration*[69] ("*Dalmia*") that s 409 of the Code would operate "if the person be an agent of another and that other person entrusts him with property or with any dominion over that property in the course of his duties as an agent". On either reading of *Tay Choo Wah*, s 409 of the Code applied to the offenders since the relevant offenders identified as agents in the charges were "unarguably agents *qua* directors of the CHC board, and … were entrusted with CHC's money in the course of their duties as members of the board". They were therefore "entrusted with the money in the way of their business as agents and thus fall under s 409 [of the Code]".[70]

13.36 The offenders then appealed. Their appeal was heard by a specially convened *coram* of three judges of the High Court. The majority of the High Court ("the majority") found, *inter alia*, that *Tay Choo Wah* was wrongly decided and ruled that the disputed phrase had to necessarily refer to a professional agent, that is, one who professed to offer his agency services to the community at large and from which he made his living. It did not encompass directors of corporations, or governing board members or key officers of charities, or officers of societies. The majority therefore held that the charges against the six offenders under s 409 of the Code were not made out as the relevant offenders were not professional agents, and reduced those charges to charges under s 406 of the Code, which establishes the offence of CBT *simpliciter*. Consequently, the sentences imposed on the offenders were significantly reduced by the High Court.[71]

13.37 The Prosecution, seeking to restore the offenders' original convictions under s 409 of the Code as well as orders enhancing their sentences accordingly, then filed the criminal reference to refer two questions of law of public interest to the Court of Appeal[72] regarding the meaning and scope of the disputed phrase. These questions were as follows:[73]

> (a) **Question 1**. For the purposes of s 409 of the Code, does the expression "in the way of his business as … an agent" refer only to a person who is a professional agent, that is, one who

69 AIR 1962 SC 1821.

70 *Public Prosecutor v Lam Leng Hung* [2015] SGDC 326 at [119]–[123]. See also *Public Prosecutor v Lam Leng Hung* [2018] 1 SLR 659 at [22].

71 *Public Prosecutor v Lam Leng Hung* [2017] 4 SLR 474 at [88]–[122]. See also *Public Prosecutor v Lam Leng Hung* [2018] 1 SLR 659 at [26]–[29].

72 Under Criminal Procedure Code (Cap 68, 2012 Rev Ed) s 397(2).

73 *Public Prosecutor v Lam Leng Hung* [2018] 1 SLR 659 at [32].

professes to offer his agency services to the community at large and from which he makes his living?

(b) **Question 2**. Is a director of a corporation, or governing board member or key officer of a charity, or officer of a society, who is entrusted with property, or with any dominion over property, by the said corporation, charity, or society, so entrusted in the way of his business as an agent for the purposes of s 409 of the Code?

Decision of the Court of Appeal

13.38 The main issue of law before the Court of Appeal was the proper interpretation of the disputed phrase.[74] The Prosecution contended that it referred to acting in the course of one's regular duties or functions as a legal agent while the offenders contended that it referred to acting in the profession, trade or occupation of a professional agent.[75] The Court of Appeal noted that the issue was "ultimately a matter of statutory interpretation" and undertook a two-step analysis to answer the questions referred.[76]

Step 1 of the Court of Appeal's analysis

13.39 In the first step of its analysis, the Court of Appeal examined the text of s 409 of the Code, having regard not only to the disputed phrase but also to s 409 of the Code as a whole and other sections of CBT within the Code.[77]

13.40 The court began by noting the following two points about the structure of s 409 of the Code and the disputed phrase:[78]

(a) First, there were two limbs to s 409 of the Code, pertaining to two different groups of potential offenders and the manner in which property or the dominion over property had been entrusted to them. The first limb concerned a person who has been entrusted "in his capacity of a public servant" while the second limb applied to a person who had been entrusted "in the way of his business as a banker, a merchant, a factor, a broker, an attorney or an agent". The disputed phrase was contained within this second limb.

74 *Public Prosecutor v Lam Leng Hung* [2018] 1 SLR 659 at [33].
75 *Public Prosecutor v Lam Leng Hung* [2018] 1 SLR 659 at [164].
76 *Public Prosecutor v Lam Leng Hung* [2018] 1 SLR 659 at [48].
77 *Public Prosecutor v Lam Leng Hung* [2018] 1 SLR 659 at [48].
78 *Public Prosecutor v Lam Leng Hung* [2018] 1 SLR 659 at [78].

(b) Second, there were two parts to the disputed phrase. The first part was the phrasal verb "in the way of his business as", and the second was the noun "an agent".

13.41 The court first considered the phrasal verb "in the way of his business". In this regard, it held that its ordinary meaning was that the individuals who fell within its scope were performing commercial activities in the conduct of their trades or professions.[79] The court reasoned as follows:

(a) First, the "plainest and most intuitive reason" for the drafters' decision not to use "in the way of his business" in relation to public servants (in relation to whom the phrase "in his capacity of" was used) in s 409 of the Code was that the word "business" was used as a reference to commercial activity. At minimum, the drafters did not intend "in his capacity of" to have the same meaning as "in the way of his business". The decision of the Indian Supreme Court in *Dalmia*[80] that "in the way of his business" meant entrustment "in the ordinary course of his duty or habitual occupation or profession or trade" was "unsustainable" because the characteristic of regularity was just as crucial to the parallel expression "in his capacity of", and it therefore could not be the distinguishing factor between the meanings of "in his capacity of" (which applied to public servants) and "in the way of his business as" (which did not).[81]

(b) Second, it was notable that "in the way of his business" was an expression that did not appear anywhere else in the Code. This could be contrasted to the use of "in his capacity of" or its close equivalents in other parts of the Penal Code. This provided a "powerful indication" that it had a definition that was not shared by other phrases in the Code, including "in his capacity of".[82]

(c) Third, the phrase "a banker, a merchant, a factor, a broker, an attorney" in s 409 of the Code referred to particular trades or professions that were performed or undertaken as livelihoods. The expression "in the way of his business", which was the "*chapeau*" to this list of persons, had to be understood contextually in the light of the nature of the persons described within the list. The result was that the expression "in the way of his business as a banker, a merchant, a factor, a broker, an attorney or an agent" would not encompass persons who were

79 *Public Prosecutor v Lam Leng Hung* [2018] 1 SLR 659 at [100].
80 See para 13.35 above.
81 *Public Prosecutor v Lam Leng Hung* [2018] 1 SLR 659 at [83], [84] and [91].
82 *Public Prosecutor v Lam Leng Hung* [2018] 1 SLR 659 at [94] and [96].

> either (i) not engaged in these occupations or trades altogether; or (ii) engaged in these occupations or trades but who were entrusted with the property or dominion over it in circumstances that were unrelated to their being in those occupations or trades.[83]

13.42 The court then turned its attention to the noun "agent". Here, the court observed that each of the items in "a banker, a merchant, a factor, a broker, an attorney" were particular trades or professions, involving the conduct of particular types of commercial activities, by which persons occupying those trades or professions make their living. When this was applied to "an agent", the conclusion had to be that "an agent" referred to a professional agent, that is, a person who offers, as his trade, profession or business, agency services to interested clients in return for remuneration. It covered persons such as freight forwarders (or forwarding agents), ship's agents, insurance agents, housing or property agents, mortgage brokers, and auctioneers, among others.[84]

13.43 The court also noted that the general structure of the CBT provisions in the Code supported the view that the ordinary meaning of the second limb of s 409 of the Code only encompassed persons who were acting in the course of a certain trade, profession or occupation, and also indicated that the word "agent" could not be read as referring to any agent under the general law. The various specific classes of persons who fell within aggravated CBT provisions in the Code were all references to specific trades or professions rather than general legal categories.[85]

13.44 Through this "telescopic exercise of statutory interpretation", transitioning from a granular focus on s 409 of the Code to the broader statutory landscape, the court concluded that the ordinary meaning of the disputed phrase was that which the majority had identified, that is, that when a person is acting "in the way of his business as … an agent", he is engaged in commercial activity in the conduct of his profession or trade, which is the offering of his agency services to the community at large, through which he makes his living.[86]

Step 2 of the Court of Appeal's analysis

13.45 The Court of Appeal then embarked on the second step of its analysis, which was to ascertain the legislative purpose of s 409 of the

83 *Public Prosecutor v Lam Leng Hung* [2018] 1 SLR 659 at [97] and [98].
84 *Public Prosecutor v Lam Leng Hung* [2018] 1 SLR 659 at [126].
85 *Public Prosecutor v Lam Leng Hung* [2018] 1 SLR 659 at [159]–[161].
86 *Public Prosecutor v Lam Leng Hung* [2018] 1 SLR 659 at [165].

Code. The court discerned this from the language of the provision as well as certain extraneous material on the legislative history and background to the provision.[87]

13.46 In respect of the former, the court found that the legislative purpose of the second limb of s 409 of the Code as derived from the language of the provision was to punish more severely the commission of CBT by persons who were engaged in certain trusted trades or professions, in circumstances where they were entrusted with property or dominion over it in the course of their commercial activity. One of the trusted trades or professions identified in s 409 of the Code was the business of agency, that is, professional agents.[88]

13.47 In respect of the latter, the court noted that s 409 of the Code was first enacted as a provision within the Indian Penal Code[89] in 1860, which was thereafter brought into force in Singapore by the Legislative Council of the Straits Settlements in 1872 as Ordinance 4 of 1871. The current version of the provision in Singapore, that is, s 409 of the 2008 Revised Edition of the Penal Code, carried, for all intents and purposes, the same language, save for the prescribed punishment. In other words, the language of s 409 of the Code had remained materially unchanged since 1860, that is, for more than 150 years.[90]

13.48 The court then reviewed the historical material and noted the following:[91]

> (a) The history of the early embezzlement provisions in the UK indicated that these provisions were legislated in a piecemeal fashion to capture particular professions and trades in response to specific cases which brought about widespread public concern. There was no indication from the legislative debates or the historical material that the UK Parliament intended to inculpate persons based on broad legal categories.
>
> (b) Second, there was a sharp historical disconnect between the UK Punishment of Frauds Act 1857,[92] which first criminalised CBT by directors in the UK, and the Indian Penal Code. The Indian Penal Code was based on the state of English law prior to the enactment of the Punishment of Frauds Act 1857. Accordingly, it could not have been intended by the

87 *Public Prosecutor v Lam Leng Hung* [2018] 1 SLR 659 at [167].
88 *Public Prosecutor v Lam Leng Hung* [2018] 1 SLR 659 at [168].
89 Act 45 of 1860.
90 *Public Prosecutor v Lam Leng Hung* [2018] 1 SLR 659 at [172]–[174].
91 *Public Prosecutor v Lam Leng Hung* [2018] 1 SLR 659 at [228]–[231].
92 c 54 (UK).

Indian law commissioners that directors and other officers of body corporates were to fall within s 409 as "agents".

(c) The Indian Penal Code and the earlier embezzlement provisions in the UK were enacted at a time when professional agents, which included factors, brokers and the like, were a recognised and distinct class of persons who provided agency services to the public. Therefore, it was readily understood at the time that the references to "agents" in these statutes had to be construed purposively as referring to professional or mercantile agents who provided commercial services to the community at large as part of the emerging market economy of that era.

Conclusion of the Court of Appeal's analysis

13.49 The Court of Appeal acknowledged that in the modern context, where directors of companies and officers of charities and societies play key roles in the lives of companies and the economy as a whole, there did not appear to be a good policy reason to ignore their heightened culpability and the enhanced potential for harm were they to commit CBT. But the court was of the view that the task of law reform should be left to Parliament as the courts were ill-suited, and lacked the institutional legitimacy, to undertake the kind of wide-ranging policy review of the various classes of persons who, having regard to modern conditions, deserve more or less punishment for committing CBT. It observed that such a review was not only essential but also long overdue owing to the dated nature of the provision. The Court of Appeal noted that in any event, the Prosecution's proposed definition of an agent in s 409 as referring to any legal agent would only exacerbate any perceived inadequacy in the law. That proposed definition was not only *over-inclusive*, as it would inculpate not only directors but also low-level workers entrusted with small amounts of money needed to carry out their regular responsibilities, but also *under-inclusive*, given that there remained many significant categories of persons deserving of equal or greater punishment (such as trustees) who were not legal agents.[93]

13.50 For these reasons, the Court of Appeal concluded that directors of corporations, governing board members or key officers of a charity, and officers of a society did not fall within the scope of s 409 of the Code as "agents". Such persons were not in the *business* of agency, nor did they provide their services to the community at large. The court accepted that company directors did play a vital role in corporate governance, and consequently had a significant impact on commerce

93 *Public Prosecutor v Lam Leng Hung* [2018] 1 SLR 659 at [276]–[281].

and enterprise. However, since a director of a company had only one principal, that is, his company, it would be a stretch to argue that he was in the *business* of agency even if he did receive remuneration for his services. In other words, a company director, while clearly a legal agent who bore onerous fiduciary duties, was not a *professional* agent within the object of s 409 of the Code. The same difficulties arose, but to an even greater extent, in respect of governing board members or key officers of a charity, and officers of a society, since these persons were not even engaged in any commercial activity or business, let alone the business of agency.[94]

13.51 The Court of Appeal therefore answered the questions referred as follows:[95]

> (a) **Answer to Question 1**. For the purposes of s 409 of the Code, the expression "in the way of his business as … an agent" refers only to a person who is a professional agent, that is, one who professes to offer his agency services to the community at large and from which he makes his living.
>
> (b) **Answer to Question 2**. A director of a corporation, or governing board member or key officer of a charity, or officer of a society, who is entrusted with property, or with any dominion over property, by the said corporation, charity, or society, is not entrusted in the way of his business as an agent for the purposes of s 409 of the Code.

13.52 The court thus ruled that the majority had correctly found that the offenders could not be convicted under s 409 of the Code.[96] Accordingly, the sentences meted out to them by the High Court were ordered to remain.[97]

House trespass under s 442

13.53 Section 454 of the Code sets out the punishment for the offence of "house-breaking in order to commit any offence punishable with imprisonment". Where the "offence intended to be committed is theft", s 454 provides for a longer term of imprisonment.

13.54 The offence of "house-breaking" is, however, defined and circumscribed by the six means of entry or exit listed in s 445 of the Code. This section reads:

94 *Public Prosecutor v Lam Leng Hung* [2018] 1 SLR 659 at [287].
95 *Public Prosecutor v Lam Leng Hung* [2018] 1 SLR 659 at [288].
96 *Public Prosecutor v Lam Leng Hung* [2018] 1 SLR 659 at [287].
97 *Public Prosecutor v Lam Leng Hung* [2018] 1 SLR 659 at [289].

A person is said to commit "house-breaking", who commits house-trespass if he effects his entrance into the house or any part of it in any of the 6 ways hereinafter described; or if, being in the house or any part of it for the purpose of committing an offence, or having committed an offence therein, he quits the house or any part of it in any of such 6 ways:

> (*a*) if he enters or quits through a passage made by himself, or by any abettor of the house-trespass, in order to the committing of the house-trespass;
>
> (*b*) if he enters or quits through any passage not intended by any person, other than himself or an abettor of the offence, for human entrance; or through any passage to which he has obtained access by scaling or climbing over any wall or building;
>
> (*c*) if he enters or quits through any passage which he or any abettor of the house-trespass has opened, in order to the committing of the house-trespass, by any means by which that passage was not intended by the occupier of the house to be opened;
>
> (*d*) if he enters or quits by opening any lock in order to the committing of the house-trespass, or in order to the quitting of the house after a house-trespass;
>
> (*e*) if he effects his entrance or departure by using criminal force or committing an assault, or by threatening any person with assault;
>
> (*f*) if he enters or quits by any passage which he knows to have been fastened against such entrance or departure, and to have been unfastened by himself or by an abettor of the house-trespass.
>
> …
>
> *Illustrations*

(*a*) A commits house-trespass by making a hole through the wall of Z's house, and putting his hand through the aperture. This is house-breaking.

[(*b*)] A commits house-trespass by creeping into a ship at a porthole between decks, although found open. This is house-breaking.

[(*c*)] A commits house-trespass by entering Z's house through a window, although found open. This is house-breaking.

[(*d*)] A commits house-trespass by entering Z's house through the door, having opened a door which was fastened. This is house-breaking.

[(*e*)] A commits house-trespass by entering Z's house through the door, having lifted a latch by putting a wire through a hole in the door. This is house-breaking.

> [(*f*)] A finds the key of Z's house-door, which Z had lost, and commits house trespass by entering Z's house, having opened the door with that key. This is house-breaking.
>
> [(*g*)] Z is standing in his doorway. A forces a passage by knocking Z down, and commits house-trespass by entering the house. This is house-breaking.
>
> [(*h*)] Z, the door-keeper of Y, is standing in Y's doorway. A commits house trespass by entering the house, having deterred Z from opposing him by threatening to beat him. This is house-breaking.
>
> [emphasis added]

13.55 That said, a person must first commit the offence of "house-trespass" before one of these six means of entry can amount to "house-breaking". On this note, the offence of "house-trespass" is defined in s 442 of the Code in the following terms:

> *Whoever* commits criminal trespass by *entering* into, or remaining in, any building, tent or vessel used as a human dwelling, or any building used as a place for worship or as a place for the custody of property, is said to commit "house-trespass".
>
> *Explanation. — The introduction of any part of the criminal trespasser's body is entering sufficient to constitute house-trespass.*
>
> [emphasis added]

13.56 In *Nur Jihad bin Rosli v Public Prosecutor*,[98] the offender had used his hands to insert a bamboo pole through an open window louvre in the living room of a flat. Using the pole (which he found near the flat), he then hooked a sling bag (which was lying on a table in the living room) containing valuables and dishonestly removed the bag from the flat. No part of the offender's body entered the flat, as he manoeuvred the pole while standing at the corridor outside the flat. The window louvre had initially been shut, but had come open sometime before the offender inserted the pole through it. It was not disputed that the offender had committed theft of the bag by using the pole to remove the bag from the flat.[99]

13.57 The offender was convicted for an offence under s 454 of the Code. The relevant extract from the charge averred that he:[100]

> … did commit house-breaking, in that [he] effected [his] entry into the [flat] *to wit*, by using [his] hands to insert a bamboo pole into the

98 [2018] 5 SLR 1410.
99 *Nur Jihad bin Rosli v Public Prosecutor* [2018] 5 SLR 1410 at [13].
100 *Nur Jihad bin Rosli v Public Prosecutor* [2018] 5 SLR 1410 at [4].

> [flat] through an opened window, which was a passage not intended by any person, other than [himself], for human entrance, with the intention to, and in order to commit theft …

13.58 On appeal, the offender argued (amongst others) that his conviction by the lower court was wrong in law because there had been no "house-trespass" (and, consequently, "house-breaking").[101] According to the offender:[102]

> (a) The ordinary meaning of "entering" in s 442[103] is restricted to the physical entry of a person into a building.
>
> (b) The legislative purpose of s 442 is to prevent "unlawful intrusion into habitations in which men reside", which must entail physical intrusion of the offender's body, as the drafters indicated in their Explanation to s 442.
>
> (c) Since only the entry of his body into the flat could have constituted "entering" under s 442, and no part of his body entered the flat, the lower court[104] was hence wrong in its interpretation that his use of the pole was sufficient to satisfy the requirement of "entering" into the flat.

13.59 The High Court noted that the "central issue" on appeal was:[105]

> … whether the [offender's] insertion of a bamboo pole through the opened window louvre to remove the bag, without introducing any part of his body into the [flat], constitute[d] 'entering' under s 442 of the [Code].

The court answered this issue in the affirmative, after engaging in a purposive interpretation[106] of s 442 of the Code. The court held as follows:

> (a) The ordinary meaning of "entering" in s 442 of the Code is not confined to just the physical entry of a person's body into the premises. Rather, the "use of an instrument [held

101 To this end, the offender had submitted that his actions in the present case fell under the offence of theft-in-dwelling instead, under s 380 of the Code: *Nur Jihad bin Rosli v Public Prosecutor* [2018] 5 SLR 1410 at [18].

102 *Nur Jihad bin Rosli v Public Prosecutor* [2018] 5 SLR 1410 at [18].

103 See para 13.32 above.

104 The lower court had held that (*Nur Jihad bin Rosli v Public Prosecutor* [2018] 5 SLR 1410 at [14]):

> … entering in s 442 of the [Code] would include a situation where an offender inserted an instrument held in his hand(s) into a building for the purpose of removing any goods, without any part of his body entering the same.

105 *Nur Jihad bin Rosli v Public Prosecutor* [2018] 5 SLR 1410 at [25].

106 The court applied the purposive approach to statutory interpretation as set out in *Tan Cheng Bock v Attorney-General* [2017] 2 SLR 850 at [34]–[54].

by the offender] to enter into premises is sufficient to constitute entry, even without the introduction of the offender's body [into the premises]".[107]

(i) The use of the word "whoever" in s 442 of the Code:[108]

> … denotes the offender as the target of liability under s 442 and does not impose limits on what must enter the premises in order to constitute 'entering'.[109]

For instance:[110]

> … an offence under s 509 of the Code could be made out without physical intrusion when '[w]hoever, intending to insult the modesty of any woman … intrudes upon the privacy of such woman" by setting up a camera.

(ii) The Explanation to s 442 of the Code[111] should not be read as to unduly circumscribe the plain meaning of s 442 of the Code. By stipulating that "[t]he introduction of *any* part of the criminal trespasser's body is entering sufficient to constitute house-trespass" [emphasis added], all the Explanation seeks to do is "to clarify [that it is not necessary for] the offender's entire body [to] enter the premises in order to make out the offence of house-trespass".[112] Had Parliament intended that only the entry of the offender's physical body or body part(s) would constitute "entering", it was open to Parliament to have adopted restrictive language – such as "necessary" or "required"[113] – in the Explanation. Such restrictive language was, however, not used in the Explanation.[114]

(b) The legislative purpose of s 442 of the Code is to provide for an aggravated form of criminal trespass that addresses intrusion upon certain premises, regardless of degree.[115]

107 *Nur Jihad bin Rosli v Public Prosecutor* [2018] 5 SLR 1410 at [36] and [42].
108 See para 13.55 above.
109 *Nur Jihad bin Rosli v Public Prosecutor* [2018] 5 SLR 1410 at [39].
110 *Nur Jihad bin Rosli v Public Prosecutor* [2018] 5 SLR 1410 at [37(b)].
111 See para 13.55 above.
112 *Nur Jihad bin Rosli v Public Prosecutor* [2018] 5 SLR 1410 at [41].
113 *Nur Jihad bin Rosli v Public Prosecutor* [2018] 5 SLR 1410 at [38].
114 *Nur Jihad bin Rosli v Public Prosecutor* [2018] 5 SLR 1410 at [42].
115 *Nur Jihad bin Rosli v Public Prosecutor* [2018] 5 SLR 1410 at [44], [46] and [60].

(c) Extraneous materials confirmed the ordinary meaning identified.[116] The Indian Penal Code drafters' explanatory notes on the criminal trespass and house-trespass provisions indicated that "the drafters had intended to safeguard against any degree of unlawful intrusion upon premises".[117] In addition, the:[118]

> … position prevailing in English common law at the time of the enactment of the Indian Penal Code was that it was sufficient to constitute 'entry' for a person to insert an instrument into the premises for the purpose of removing property, even if no part of his body entered the premises.

13.60 The High Court also observed that the narrow interpretation advanced by the offender[119] undermined the legislative purpose of s 442 of the Code.[120] The offender's interpretation meant that:[121]

> … a person who used a long instrument to commit the offence or who used an instrument to commit the offence even though he could have reached for the items with his hand would escape with a less severe charge of theft-in-dwelling under s 380 of the [Code].

But, this was an:[122]

> … anomalous result because the instrument may in fact be more effective at removing the items and may represent a greater degree of intrusion into the premises than the entry of the person's body part. The absurdity of this result is even more apparent when one considers that whether the person used his body part or an instrument may be a matter of fortuitous circumstance. For instance, an offender may use a pole because the window was fitted with metal grilles that prevented his hand from slipping through or the items were located further inside the premises and could not have been reached by the offender stretching his hand over the window sill … By allowing the person who uses an instrument to escape with a lesser charge for the same, if not greater, degree of intrusion, the narrow definition would undermine the legislative object of s 442 to protect against any degree of unlawful intrusion.

116 See para 13.59(a) above.
117 *Nur Jihad bin Rosli v Public Prosecutor* [2018] 5 SLR 1410 at [51].
118 *Nur Jihad bin Rosli v Public Prosecutor* [2018] 5 SLR 1410 at [55].
119 See para 13.58 above.
120 See para 13.59(b) above.
121 *Nur Jihad bin Rosli v Public Prosecutor* [2018] 5 SLR 1410 at [61].
122 *Nur Jihad bin Rosli v Public Prosecutor* [2018] 5 SLR 1410 at [61].

Misuse of Drugs Act

Proving possession of drugs, and the presumptions under ss 17 and 18 of the MDA

13.61 In *Zainal bin Hamad v Public Prosecutor*,[123] two offenders were jointly tried in the High Court on one count each of trafficking in diamorphine. The first offender had delivered a bag containing the drugs to the second offender, and collected $8,000 from the latter. Sometime later, the second offender had moved the bag to a warehouse, placing it behind pallets where it could not readily be seen.[124]

13.62 The first offender's defence was that he had believed that he was transporting medicines and hence, he had rebutted the presumption of knowledge of the nature of the drug under s 18(2) of the MDA.[125] The second offender's defence was that he had not possessed the drugs and, alternatively, he had rebutted the presumption under s 18(2).[126] He claimed that he had expected the first offender to deliver uncustomed cigarettes, and had paid the $8,000 as an advance payment for the same. That said, he knew that the bag did not contain the cigarettes, and had put it behind the pallets so that it could be retrieved and return to the first offender when the latter returned.[127]

13.63 The High Court convicted the offenders on the charges against them and sentenced them to the mandatory death penalty. The offenders appealed against their convictions. The Court of Appeal dismissed both appeals. In doing so, the court made remarks on the requirements for proving possession of drugs, and the presumptions under ss 17 and 18 of the MDA.

13.64 The court dealt first with the second offender's appeal. In this regard, the court considered two issues. The first concerned the requirements for proving possession of drugs. The court endorsed the following propositions:

> (a) To prove possession, the Prosecution must prove not only that the offender was in possession of the package or container, but also that the offender knew that it contained something. In proving possession, it is not incumbent on the Prosecution to prove that the offender specifically knew he was

123 [2018] 2 SLR 1119.
124 *Zainal bin Hamad v Public Prosecutor* [2018] 2 SLR 1119 at [3(e)].
125 *Zainal bin Hamad v Public Prosecutor* [2018] 2 SLR 1119 at [3(c)] and [5].
126 *Zainal bin Hamad v Public Prosecutor* [2018] 2 SLR 1119 at [7].
127 *Zainal bin Hamad v Public Prosecutor* [2018] 2 SLR 1119 at [3(e)].

in possession of drugs, or even of something that turns out to be contraband, as long as it proves that he was in possession of something, which turns out to be the drugs in question.[128]

(b) Once the Prosecution proves that the offender had physical control over or possession of the package or container that contains the thing in question, the court is entitled to infer that the offender had knowledge of the existence of that thing. It is then incumbent on the offender to discharge the evidential burden by raising a reasonable doubt that this was not the case. This may not always readily be done given the fact of control or possession, especially where the circumstances would have aroused the suspicions of the offender, or where the offender has had an opportunity to examine the package.[129]

(c) The paradigm situation where an offender does not know the package he was given contains the thing in question is where something was planted on the offender, without the latter's knowledge.[130]

13.65 Applying these principles to the facts, the court held that the second offender had been in possession of the drugs in the bag, for the following reasons:

(a) By taking control of the bag without taking any steps to inspect it, the second offender was taken to be in possession not only of the bag but also its contents. It was then incumbent on him to adduce evidence to raise a reasonable doubt and to show that he reasonably ought not be taken to be in possession of the contents of the bag.[131]

(b) It was not the second offender's case that the drugs had been planted on him. His case was in essence a bare denial that he had possessed the drugs: he claimed that he did not know or care what was in the bag, and had paid the moneys for uncustomed cigarettes.[132] This was not sufficient to raise even a reasonable doubt, for the following reasons:[133]

(i) The second offender claimed that he was urgently trying to accumulate savings of $12,000 to get married. If this were true, it was inexplicable that he

128 *Zainal bin Hamad v Public Prosecutor* [2018] 2 SLR 1119 at [12].
129 *Zainal bin Hamad v Public Prosecutor* [2018] 2 SLR 1119 at [16].
130 *Zainal bin Hamad v Public Prosecutor* [2018] 2 SLR 1119 at [14].
131 *Zainal bin Hamad v Public Prosecutor* [2018] 2 SLR 1119 at [17].
132 *Zainal bin Hamad v Public Prosecutor* [2018] 2 SLR 1119 at [17].
133 *Zainal bin Hamad v Public Prosecutor* [2018] 2 SLR 1119 at [18].

would pay $8,000 to the first offender when the latter did not have the cigarettes.

(ii) The second offender's statements to the police and the fact that he had waited for more than 45 minutes before collecting the bag were inconsistent with his claim that he did not know or care what was in the bag.

(iii) It was inexplicable that the second offender, who claimed that he had thought that he was in a transaction to pick up uncustomed cigarettes, would have been delivered a valuable cargo of drugs instead.

13.66 The court added in passing that since it was accepted that the second offender had physical control of the bag containing the drugs, he would also have been presumed to have had the drugs in his possession under s 18(1)(*a*) of the MDA.[134]

13.67 The second issue raised by the second offender's appeal was the presumption of knowledge of the nature of the drug under s 18(2) of the MDA. In this regard, the court held that the proper analytical framework, as laid down by the Court of Appeal in *Obeng Comfort v Public Prosecutor*[135] ("*Obeng Comfort*") and supplemented in *Harven a/l Segar v Public Prosecutor*,[136] was as follows:[137]

(a) The presumption under s 18(2) applies where the offender is "proved or presumed to have had a controlled drug in his possession", that is to say, by proving the fact of possession or by relying on the presumption of possession under s 18(1) of the MDA, assuming this is not rebutted.

(b) The offender bears the burden of rebutting the presumption under s 18(2) on a balance of probabilities. As a matter of common sense and practical application, he should be able to say what he thought or believed he was carrying, and a claim that he simply did not know what he was carrying would not usually suffice.

(c) Once the offender has stated what he thought he was carrying, the court would then assess the veracity of the offender's assertion against the objective facts to determine whether the offender's account should be believed.

134 *Zainal bin Hamad v Public Prosecutor* [2018] 2 SLR 1119 at [22].
135 [2017] 1 SLR 633.
136 [2017] 1 SLR 771.
137 *Zainal bin Hamad v Public Prosecutor* [2018] 2 SLR 1119 at [23].

(d) However, because of the inherent difficulties of proving a negative, the burden on the offender should not be made so onerous that it becomes virtually impossible to discharge.

13.68 Given the difficulties with the second offender's claim that he did not know or care what was in the bag,[138] the court found that he had not rebutted the presumption under s 18(2).[139] The court also found that the second offender would have been proved to have had knowledge of the nature of the drugs. Since the court had rejected his account that he had paid the $8,000 as an advance payment for the cigarettes, it made no sense at all for him to have parted with $8,000 for anything other than the drugs. This, coupled with his admissions in his investigation statements that he had been dealing in drugs, led to the finding that he had actual knowledge of the drugs.[140]

13.69 The court also observed that the presumption of possession for the purpose of trafficking under s 17(*c*) of the MDA had not been rebutted; and, in any case, a finding of possession for the purpose of trafficking would have been made out given, among other things, the quantity of the drugs involved and the fact that the second offender had previously been in the business of selling diamorphine.[141]

13.70 The court then turned to the first offender's appeal. The court rejected the first offender's submission that he had rebutted the presumption under s 18(2) of the MDA. His account that he had delivered the bag, which he had believed contained medicines, in exchange for an interest-free loan from one Kanna, was incredible, since Kanna ostensibly ran an illegal moneylending business and did not have a deep history of close friendship with the first offender.[142] The first offender's account was also inconsistent with his investigation statements, the intricate set of arrangements he had entered into in delivering the bag, and the fact that he had passed the $8,000 to his wife to hide in her underclothes; further, the first offender's account was also incredible because nobody would pay $8,000 for the delivery of one bag of medicines.[143]

13.71 In a coda, the court articulated the following propositions:

(a) The presumptions under ss 17 (of trafficking) and 18(1) (of possession) cannot run together, because s 17 only applies

138 See para 13.65(b) above.
139 *Zainal bin Hamad v Public Prosecutor* [2018] 2 SLR 1119 at [25].
140 *Zainal bin Hamad v Public Prosecutor* [2018] 2 SLR 1119 at [26].
141 *Zainal bin Hamad v Public Prosecutor* [2018] 2 SLR 1119 at [28].
142 *Zainal bin Hamad v Public Prosecutor* [2018] 2 SLR 1119 at [34].
143 *Zainal bin Hamad v Public Prosecutor* [2018] 2 SLR 1119 at [35].

where possession is proved whereas if s 18 is invoked, its effect is to give rise to a presumption (and not proof) of possession.[144]

(b) The presumptions under ss 17 and 18(2) also cannot run together.[145] In this regard, the court preferred the view adopted in *Mohd Halmi bin Hamid v Public Prosecutor*[146] over that taken in the earlier case of *Aziz bin Abdul Kadir v Public Prosecutor*.[147] The court emphasised that the statutory scheme of the MDA made clear that s 18(2) was to operate as an ancillary provision to s 18(1), in the sense that where an offender was in physical control of an object, the Prosecution could rely on s 18 as a whole to invoke a presumption of possession and also of knowledge of what it was that the offender was in possession of. Section 18 as a whole thus dealt with the issue of knowing possession.[148] Section 17, on the other hand, was a distinct provision concerned with the question of the purpose for which the offender has possession of the item in question.[149]

(c) The presumption under s 17 of the MDA could only be invoked if both the fact of physical possession and the fact of knowledge of what was possessed had been proved. This was because once the premise of s 17 was proved, the presumption could be invoked and no other elements of the offence needed to be proved. It followed that the premise in s 17 was both the fact of physical possession and the element of knowledge (what the court referred to collectively as knowing possession).[150]

(d) It is incumbent on the Prosecution to make clear which presumption(s) it relies on when advancing its case in the trial court and on appeal. This would assist the trial and appeal courts in assessing whether the Prosecution's case is made out. More fundamentally, it would give the offender a fair chance of knowing the case that is advanced against him and what evidence he has to adduce (and to what standard of proof) in order to meet that case. It would not be sufficient for the Prosecution to simply state, for instance, that the elements of possession of the drugs, knowledge of the nature of the drugs and possession for the purpose of trafficking have either been

144 *Zainal bin Hamad v Public Prosecutor* [2018] 2 SLR 1119 at [38].
145 *Zainal bin Hamad v Public Prosecutor* [2018] 2 SLR 1119 at [45].
146 [2006] 1 SLR(R) 548.
147 [1999] 2 SLR(R) 314.
148 *Zainal bin Hamad v Public Prosecutor* [2018] 2 SLR 1119 at [46].
149 *Zainal bin Hamad v Public Prosecutor* [2018] 2 SLR 1119 at [47].
150 *Zainal bin Hamad v Public Prosecutor* [2018] 2 SLR 1119 at [49].

> proved or presumed without making clear the precise nature of the primary case that was being put against the offender.[151]

13.72 In relation to the last-mentioned proposition, the court noted that the Prosecution ran different primary cases against the second offender in the High Court and on appeal. However, the court was satisfied that the second offender had not suffered any prejudice, since all three elements of the offence in relation to the former had been proved, and the presumptions under ss 17 and 18 could also apply on either basis on which the case against the second offender was framed.[152]

Presumption of knowledge under s 18(2)

13.73 In *Public Prosecutor v Gobi a/l Avedian*,[153] the offender was charged with one count of importing diamorphine into Singapore. The sole issue before the High Court was whether the offender had rebutted the presumption of knowledge of the nature of the drug under s 18(2) of the MDA. The offender admitted that he had known that he was transporting drugs. His defence was that he had believed the drugs were "chocolate" drugs – drugs normally used in discos but mixed with chocolate – and that he would only be fined or given light punishment if he was caught with the drugs in Singapore.[154] He claimed that he had been given assurances to this effect by the drug supplier and his friend who had introduced him to the supplier.

13.74 The High Court found that the offender had rebutted the presumption under s 18(2) of the MDA, and convicted him on an amended charge of attempting to import into Singapore a Class C controlled drug.[155] The Court of Appeal allowed the Prosecution's appeal. In doing so, the court made the following observations on how the presumption under s 18(2) of the MDA may be rebutted by an offender who admits that he knew he was carrying drugs, but claims that he did not know that the drugs were the specific kind of drugs that he was caught in possession of:

> (a) The "starting point" is that, as the Court of Appeal held in *Obeng Comfort*,[156] the presumption vests an offender with knowledge of the nature of the drug which he is in possession

151 *Zainal bin Hamad v Public Prosecutor* [2018] 2 SLR 1119 at [53].
152 *Zainal bin Hamad v Public Prosecutor* [2018] 2 SLR 1119 at [55].
153 [2019] 1 SLR 113.
154 *Public Prosecutor v Gobi a/l Avedian* [2019] 1 SLR 113 at [5], [17] and [31].
155 *Public Prosecutor v Gobi a/l Avedian* [2019] 1 SLR 113 at [2].
156 See para 13.67 above.

of; and to rebut this, the offender must give an account of what he thought it was.[157]

(b) As was held in *Obeng Comfort*, an offender would not be able to rebut the presumption by claiming that he did not know the proper, scientific or chemical name of the drug, or the effects it could bring about.[158]

(c) An offender who knew he was transporting illegal drugs would not be able to rebut the presumption by merely stating that he did not know what drugs he was carrying.[159]

(d) The penalties that a particular type of drug attracted in law could not be used as a proxy for identifying the drug itself. If the professed intention of an offender was to refuse to carry drugs that attracted the death penalty, then it was incumbent on him to find out what sorts of drugs would lead to such a penalty and how he was to identify them. He must then show that he did take adequate steps to ensure that he was not carrying those sorts of drugs.[160]

(e) In determining whether an offender believed subjectively the information given by the drugs supplier about the drugs, the court will consider the knowledge of and the efforts made by the offender to find out about the drugs that he was going to traffic in. Unique circumstances justifying a very high level of trust must be shown by an offender before the court is persuaded that the offender is entitled to rely solely or mainly on the information given by the drugs supplier.[161] Similarly, if an offender wishes to rely on assurances given by others to him, there must similarly be unique circumstances justifying a very high degree of trust in the person(s).[162]

13.75 The court then applied these principles to the facts as follows:

(a) The offender's alleged belief that the drugs were not serious drugs, which would have only occasioned a fine or a light sentence if he were caught with them, was insufficient to rebut the presumption.[163]

(b) The offender did not know what type of drugs would attract a fine or a short imprisonment term, and what drugs

157 *Public Prosecutor v Gobi a/l Avedian* [2019] 1 SLR 113 at [32].
158 *Public Prosecutor v Gobi a/l Avedian* [2019] 1 SLR 113 at [33].
159 *Public Prosecutor v Gobi a/l Avedian* [2019] 1 SLR 113 at [35].
160 *Public Prosecutor v Gobi a/l Avedian* [2019] 1 SLR 113 at [36].
161 *Public Prosecutor v Gobi a/l Avedian* [2019] 1 SLR 113 at [39].
162 *Public Prosecutor v Gobi a/l Avedian* [2019] 1 SLR 113 at [44].
163 *Public Prosecutor v Gobi a/l Avedian* [2019] 1 SLR 113 at [31].

would result in more serious punishment. Further, he had not bothered to find out more about the drugs he was carrying; the inquiries that he had made would not have informed him about the nature of the drugs. Therefore, he would not have known whether the drug he was carrying, diamorphine, would attract a fine or a long imprisonment term or the death penalty.[164]

(c) The alleged assurances given to the offender by the supplier could not do very much to help him rebut the presumption, because the supplier did not give him any information that would have helped him to identify the drugs and there was in any case little reason for the offender to have trusted the supplier.[165]

(d) There were problems with the offender's evidence on the assurances given to him by his friend: the offender did not mention the assurances in his statements to the police, did not adduce any evidence concerning his friend's knowledge or experience in drugs, and did not ask his friend any questions in relation to the nature of the drugs that would have helped the offender to identify them.[166]

13.76 Finally, the court also commented on the High Court's decision to convict the offender on the amended charge. The court observed that there was a high degree of artificiality in stating that the offender "believed" that he was importing a Class C controlled drug when he did not mention a single drug name or even drug classes throughout his testimony. This was because a drug described by the offender as not dangerous or not serious could also be a Class A or B drug of a quantity which did not attract the death penalty, and it was unclear what the offender would consider to be heavy punishment or light punishment in any event.[167]

Scope of the "courier exception" under s 33B of the MDA

13.77 Following the amendments to the MDA in 2012, our courts now have the discretion under s 33B of the MDA to sentence a person convicted of committing or attempting to commit an offence under s 5(1) or 7 of the MDA to life imprisonment instead of the death penalty. Section 33B of the MDA reads as follows:

164 *Public Prosecutor v Gobi a/l Avedian* [2019] 1 SLR 113 at [34], [36] and [37].
165 *Public Prosecutor v Gobi a/l Avedian* [2019] 1 SLR 113 at [40]–[41].
166 *Public Prosecutor v Gobi a/l Avedian* [2019] 1 SLR 113 at [44]–[46].
167 *Public Prosecutor v Gobi a/l Avedian* [2019] 1 SLR 113 at [50].

Discretion of court not to impose sentence of death in certain circumstances

33B.—(1) Where a person commits or attempts to commit an offence under section 5(1) or 7, being an offence punishable with death under the sixth column of the Second Schedule, and he is convicted thereof, the court —

(*a*) may, if the person satisfies the requirements of subsection (2), instead of imposing the death penalty, sentence the person to imprisonment for life and, if the person is sentenced to life imprisonment, he shall also be sentenced to caning of not less than 15 strokes; or

(*b*) shall, if the person satisfies the requirements of subsection (3), instead of imposing the death penalty, sentence the person to imprisonment for life.

(2) The requirements referred to in subsection (1)(*a*) are as follows:

(*a*) the person convicted proves, on a balance of probabilities, that his involvement in the offence under section 5(1) or 7 was restricted —

(i) to transporting, sending or delivering a controlled drug;

(ii) to offering to transport, send or deliver a controlled drug;

(iii) to doing or offering to do any act preparatory to or for the purpose of his transporting, sending or delivering a controlled drug; or

(iv) to any combination of activities in sub-paragraphs (i), (ii) and (iii); and

(*b*) the Public Prosecutor certifies to any court that, in his determination, the person has substantively assisted the Central Narcotics Bureau in disrupting drug trafficking activities within or outside Singapore.

(3) The requirements referred to in subsection (1)(*b*) are that the person convicted proves, on a balance of probabilities, that —

(*a*) his involvement in the offence under section 5(1) or 7 was restricted —

(i) to transporting, sending or delivering a controlled drug;

(ii) to offering to transport, send or deliver a controlled drug;

(iii) to doing or offering to do any act preparatory to or for the purpose of his

transporting, sending or delivering a controlled drug; or

(iv) to any combination of activities in sub-paragraphs (i), (ii) and (iii); and

(*b*) 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.

(4) The determination of whether or not any person has substantively assisted the Central Narcotics Bureau in disrupting drug trafficking activities shall be at the sole discretion of the Public Prosecutor and no action or proceeding shall lie against the Public Prosecutor in relation to any such determination unless it is proved to the court that the determination was done in bad faith or with malice.

13.78 In *Zainudin bin Mohamed v Public Prosecutor*,[168] the Court of Appeal embarked on a full and structured examination of the scope of the "courier exception" in ss 33B(2)(*a*) and 33B(3)(*a*) of the MDA, with a particular focus on the question of whether the division and packing of drugs permits an offender to remain within the ambit of the "courier exception" as that was the act undertaken by the offender in that case.[169] The offender was convicted by the High Court of the offence of possession of not less than 22.73g of diamorphine for the purposes of trafficking under s 5(1) read with s 5(2) of the MDA and received the death sentence. He was found not to be a "courier" because at the time of his arrest, he had already embarked on the process of repacking one bundle of controlled drugs into two smaller packets of equal weight.

13.79 On appeal, the offender focussed his submissions entirely on the issue of whether he could be considered a "courier".[170] He argued that his act of dividing the drugs was necessary for his onward transmission of the correct quantity of drugs to the parties who collected the drugs from him. He also emphasised that the divided drugs were still many times above the retail size and the division was therefore not meant to facilitate distribution or sale. Further, he had acted on instructions and did not exercise decision-making powers in seeking to divide and pack the drugs.[171]

13.80 The Court of Appeal dismissed the offender's appeal.

168 [2018] 1 SLR 449.
169 *Zainudin bin Mohamed v Public Prosecutor* [2018] 1 SLR 449 at [24].
170 *Zainudin bin Mohamed v Public Prosecutor* [2018] 1 SLR 449 at [4].
171 *Zainudin bin Mohamed v Public Prosecutor* [2018] 1 SLR 449 at [23].

13.81 The court began its analysis by finding that the language of s 33B of the MDA did not in itself provide any sufficiently clear indication as to whether an offender who divides and repacks drugs and intends thereafter to deliver those divided packets of drugs to recipients has committed an act that excludes him from the definition of a courier.[172] The court therefore resorted to extraneous material in the form of the parliamentary debates on the introduction of s 33B of the MDA to ascertain the meaning of the text.[173]

13.82 Before considering the parliamentary debates, however, the court made three observations on the language of s 33B that provided important pointers as to its correct interpretation:[174]

> (a) First, *the offender himself* bears the legal burden of proving, on a balance of probabilities, that he satisfies the requirements of a courier. This has important practical implications on the offender's decision at trial as to whether he should give evidence on the nature and purpose of his involvement in the drug trafficking activities.
>
> (b) Second, the offender is required to prove that his involvement in the offence was "restricted" to the acts of a courier. The use of "restricted" provides a "preliminary but compelling indication that the court must be wary of an overly expansive interpretation of [the courier exceptions]"; and
>
> (c) Third, all acts identified in the courier exceptions are closely tied to *only* the transporting, sending, or delivering of drugs. Specifically, in relation to s 33B(2)(*a*)(iii) of the MDA, "the aim of the offender's facilitative act must be for such transporting, sending or delivering of the drugs; it cannot serve any other aim".

13.83 The court then considered the parliamentary debates on the introduction of s 33B of the MDA and observed that they showed that Parliament intended the conditions in s 33B of the MDA to be limited and "tightly defined" exceptions to the general rule that the death penalty was the appropriate punishment for those who trafficked or imported quantities of drugs exceeding the prescribed threshold. Parliament did not intend the enactment of s 33B of the MDA to reflect any relaxation of the strict policy against drug related activities. In fact, s 33B(2) of the MDA was enacted to further disrupt such activities by incentivising drug couriers to volunteer information that would assist

172 *Zainudin bin Mohamed v Public Prosecutor* [2018] 1 SLR 449 at [31].
173 *Zainudin bin Mohamed v Public Prosecutor* [2018] 1 SLR 449 at [32].
174 *Zainudin bin Mohamed v Public Prosecutor* [2018] 1 SLR 449 at [34].

enforcement agencies in targeting those who held higher positions in drug syndicates.[175]

13.84 The court then considered how s 33B(2)(*a*) of the MDA had been applied in the cases that had come before the courts thus far and the guidelines that had emerged in the jurisprudence.[176] In doing so, the court listed the types of acts that have been accepted by the courts as falling within the scope of s 33B(2)(*a*) of the MDA and those that have not.[177] This list is tabulated below:

Acts that fall within the scope of s 33B(2)(*a*) of the MDA[178]	**Acts that fall beyond the scope of s 33B(2)(*a*) of the MDA**[179]
Storing or safekeeping drugs in the course of transporting, sending or delivering those drugs	Recruitment of drug couriers and administration of remuneration
Collection of drugs for the purpose of subsequent transporting, sending or delivering of those drugs	Efforts to expand the drug consumer base
Collection of money upon sending, transporting or delivering of drugs	Sourcing for drug supply and acting as a go-between in negotiations for drug transactions
Relaying of information regarding subsequent deliveries in the course of transporting, sending or delivering drugs	

13.85 The Court of Appeal observed that the common thread that ran through the types of conduct that had been found to fall within the scope of s 33B(2)(*a*) of the MDA, leaving aside acts that consisted of transporting, sending or delivering controlled drugs and offering to do such acts, was that they were all acts that were *facilitative of* or *incidental to* the transporting, sending or delivering of the controlled drugs by the offender to the intended recipient.[180] The court unpacked and elaborated upon this statement of principle in the following terms:

> (a) acts that were facilitative of the transporting, sending or delivering of drugs were, in other words, acts that were "preparatory to" or "for the purpose of" such transporting,

175 *Zainudin bin Mohamed v Public Prosecutor* [2018] 1 SLR 449 at [48]–[51].
176 *Zainudin bin Mohamed v Public Prosecutor* [2018] 1 SLR 449 at [53].
177 *Zainudin bin Mohamed v Public Prosecutor* [2018] 1 SLR 449 at [56].
178 *Zainudin bin Mohamed v Public Prosecutor* [2018] 1 SLR 449 at [57]–[64].
179 *Zainudin bin Mohamed v Public Prosecutor* [2018] 1 SLR 449 at [65]–[68].
180 *Zainudin bin Mohamed v Public Prosecutor* [2018] 1 SLR 449 at [81].

sending or delivering. They enabled or assisted the offender to transport, send or deliver the drugs (and not to accomplish any unrelated aims which the offender might have had in mind);[181] and

(b) acts that were incidental to the sending, transporting or delivering of controlled drugs were secondary or subordinate acts that occurred or were likely to occur in the course or as a consequence of such sending, transporting or delivering. The court made three points in relation to construing such acts. First, a cautious and restrained approach had to be adopted in determining whether an act could properly be considered incidental to the primary acts of transporting, sending or delivering. Second, for the offender's act to be incidental to the transporting, sending or delivering of the controlled drug, it had to be highly proximate to the nature and purpose of those primary acts. Third, a courier is a person who simply carries out instructions given to him and had practically no room for his own exercise of discretion or decision-making. If the acts carried out by the offender indicated that he possessed some executive decision-making power in the organisation and activities of the drug syndicate, then it was highly unlikely that he could be considered a mere courier. However, the converse was not necessarily true.[182]

13.86 The Court of Appeal then turned to the crux of the appeal, which was whether and when the division and packing of drugs takes an offender out of the definition of a courier as stated in s 33B(2)(*a*) of the MDA.[183] The following is a summary of the principles articulated by the court on whether the division and packing of drugs by an offender falls within the scope of s 33B(2)(*a*)(iii) of the MDA:[184]

(a) The division of drugs refers to the breaking up of an existing quantity of drugs into any number of smaller amounts. The packing (or repacking) of drugs consists of the individual parcelling of each of the divided parts of the drugs.

(b) It was crucial to have close regard to the offender's reason or purpose in carrying out such acts of division and packing, in determining whether the offender can nevertheless be considered a courier. The analysis was inherently fact-sensitive. No *a priori* conclusion could be drawn as to whether

181 *Zainudin bin Mohamed v Public Prosecutor* [2018] 1 SLR 449 at [82]–[83].
182 *Zainudin bin Mohamed v Public Prosecutor* [2018] 1 SLR 449 at [84]–[87].
183 *Zainudin bin Mohamed v Public Prosecutor* [2018] 1 SLR 449 at [88].
184 *Zainudin bin Mohamed v Public Prosecutor* [2018] 1 SLR 449 at [112].

an offender was or was not a courier based on his acts (or intended acts) of division and packing alone.

(c) Division and packing that was carried out in order to enable the bundles of drugs to be (for example) (i) transported securely without fear of inadvertent leakage; (ii) placed into confined spaces within the transporting vehicle; (iii) concealed or disguised to prevent detection; or (iv) identified more easily during delivery are acts that could be considered to be purely facilitative of or incidental to the transporting, sending or delivering of the drugs.

(d) In contrast, if the reason or purpose of the division and packing was to enable the original quantity of drugs to be transmitted to a wider audience (that is, more than one person), then the division and packing was intended to be facilitative of the distribution of the drugs and not the mere transporting, sending or delivering of those drugs from point to point. It was irrelevant whether (i) the intended direct recipient of those drugs is an end-consumer or a person who will pass the drugs along to someone else; and (ii) the divided and packed drugs are to be distributed to two, three or more persons.

(e) It was crucial to note that the burden under s 33B(2)(*a*) of the MDA lay on the *offender* to satisfy the court on a balance of probabilities that his involvement in the offence was merely that of a courier. This meant that it was imperative for the offender to account for the reason or purpose for his division and packing of drugs. If he did not provide any or any sufficient evidence that he had a permissible reason or purpose for dividing and packing the drugs, then he would have failed to discharge that burden and would be ineligible for alternative sentencing.

13.87 Applying these principles to the facts of the case, the Court of Appeal found the offender's submission that he should be considered a "courier" because his involvement in the offence fell within the scope of ss 33B(2)(*a*)(i)–33B(2)(*a*)(iv) of the MDA was without merit and accordingly dismissed his appeal and affirmed the sentence of death that had been passed on him by the High Court.[185] The court reasoned as follows:

(a) First, by choosing to remain silent at the close of the Prosecution's case and not offering oral evidence in his defence, and in the face of clear evidence in his statements that he was to await instructions from someone else on how the drugs that he

185 *Zainudin bin Mohamed v Public Prosecutor* [2018] 1 SLR 449 at [123].

had divided and repacked were subsequently to be distributed (just as he had done so on a previous occasion), the offender failed to discharge the burden on him to satisfy the court that the reason or purpose for his intended division and packing of the diamorphine was to facilitate the transporting, sending or delivering (rather than for distribution) of those drugs.[186]

(b) Second, the offender's argument that he had not exercised his own business decision-making powers in dividing the drugs and therefore was not a courier was flawed. An offender's ability to exercise decision-making power might provide a strong reason to find that he was not merely a courier, but the fact that he did not possess such ability was not in itself sufficient to establish that he was in fact a mere courier.[187]

(c) Third, the offender's argument that his division and packing was necessary for his onward transmission of the correct quantity of drugs to the intended recipients was a mischaracterisation and understatement of the nature of his conduct. What the offender really sought to accomplish, in the absence of any satisfactory explanation by him, after receiving instructions to divide the drugs, was the division and packing of drugs for the purpose of *distribution*. Indeed, the division and repacking of diamorphine for distribution was his central role in the drug trafficking enterprise. It would not be unreasonable in characterising his residence as a sort of "distribution hub". The fact that the divided portions were above the retail size was an irrelevant consideration.[188] What is crucial is the fact that the reason or purpose for the offender's division and packing is to create the prospect for wider dissemination of the drugs. Such a prospect materialises when he breaks down the original quantity of drugs into smaller amounts for this purpose, even if those smaller amounts remain substantial and therefore subject to possible further sub-division down the line.[189]

Whether claim by offender that he intended to consume a portion of drugs is valid defence against charge of abetting another to traffic in drugs

13.88 In *Ali bin Mohamad Bahashwan v Public Prosecutor*,[190] the Court of Appeal considered the question of whether the defence of

186 *Zainudin bin Mohamed v Public Prosecutor* [2018] 1 SLR 449 at [115].
187 *Zainudin bin Mohamed v Public Prosecutor* [2018] 1 SLR 449 at [117].
188 *Zainudin bin Mohamed v Public Prosecutor* [2018] 1 SLR 449 at [118].
189 *Zainudin bin Mohamed v Public Prosecutor* [2018] 1 SLR 449 at [107].
190 [2018] 1 SLR 610.

personal consumption was in principle a valid defence to a charge of abetting another to traffic in drugs.[191] One of the offenders in this case, Ali, was charged with abetting by instigating another, Selamat, to traffic in a controlled drug under s 5(1)(*a*) read with s 12 of the MDA.[192] Ali's defence to that charge was that half of the drugs was intended for his and Selamat's personal consumption, and that that portion took the quantity of the drugs intended for trafficking below the amount warranting capital punishment.[193] The issue therefore arose as to whether Ali's claim that he had intended to consume a portion of the drugs was in principle a valid defence against his charge of abetting Selamat to traffic in those drugs.

13.89 The High Court had recently answered this question in the affirmative in *Liew Zheng Yang v Public Prosecutor*[194] ("*Liew Zheng Yang*"), holding that a buyer who ordered drugs from a seller for delivery to himself could not be liable for abetting the seller in a conspiracy to traffic in the drugs if the drugs were intended solely for the buyer's own consumption.[195] Ali argued that *Liew Zheng Yang* assisted him because he did not intend to deliver half of the drugs to a third party, and therefore did not have the requisite *mens rea* for the offence of abetting another in a conspiracy to traffic in drugs.[196]

13.90 The Court of Appeal endorsed *Liew Zheng Yang* and held that a person incurred no criminal liability under s 5 read with s 12 of the MDA for abetting another to traffic drugs to himself if the drugs were intended for his own consumption, that is, if he was a consuming-recipient. He would be so liable only if the Prosecution was able to prove beyond a reasonable doubt that he intended the offending drugs to be passed on from himself to someone else, that is, that he himself intended to traffic in the offending drugs. In other words, the Prosecution had to show that he was *not* a consuming-recipient. The corollary is that a person would escape a charge of abetting another to traffic in drugs if the court found that there was reasonable doubt arising from the possibility that he was the intended recipient of the offending drugs and that he did intend to consume them himself.[197] The court explained the operation of this rule in the following terms:[198]

191 *Ali bin Mohamad Bahashwan v Public Prosecutor* [2018] 1 SLR 610 at [2].
192 *Ali bin Mohamad Bahashwan v Public Prosecutor* [2018] 1 SLR 610 at [4(b)].
193 *Ali bin Mohamad Bahashwan v Public Prosecutor* [2018] 1 SLR 610 at [2].
194 [2017] 5 SLR 611.
195 *Ali bin Mohamad Bahashwan v Public Prosecutor* [2018] 1 SLR 610 at [2].
196 *Ali bin Mohamad Bahashwan v Public Prosecutor* [2018] 1 SLR 610 at [19].
197 *Ali bin Mohamad Bahashwan v Public Prosecutor* [2018] 1 SLR 610 at [75].
198 *Ali bin Mohamad Bahashwan v Public Prosecutor* [2018] 1 SLR 610 at [76]–[77].

> … A court faced with an accused person charged with abetting another to traffic in drugs must be satisfied that the accused is not a consuming-recipient before convicting him on the charge. If there is evidence that the accused was the intended recipient of the drugs which form the subject matter of the charge, then the Prosecution has the burden of proving beyond a reasonable doubt that he intended to traffic in the offending drugs. The accused will ordinarily not be presumed under s 17 of the MDA to have such an intention because he will not, as an alleged abettor, usually have had the drugs in his possession. And in so far as he attempts to say that those drugs were intended wholly or partly for his own consumption, that attempt will go towards raising a reasonable doubt as to whether he intended to traffic in the offending drugs. Also, it is possible for a person to be a consuming-recipient in respect of a certain portion of the offending drugs and also to have an intention to traffic in the remaining portion.
>
> If, however, there is no evidence that the accused is the intended recipient of the drugs or if he is not alleged by the Prosecution even to have been such a recipient but instead to have abetted another to traffic in drugs in some other manner or capacity (*eg*, by directing a courier to deliver drugs to a client), that would preclude the possibility of his being a consuming recipient. The same is true where the accused himself denies being the intended recipient of the offending drugs because even if that is a false denial, he would be contradicting himself by also claiming that the drugs were meant for his own consumption, and therefore such a claim would *ex hypothesi* be devoid of merit. In such situations, there would be no reasonable doubt that the accused is not a consuming recipient, and the Prosecution will correspondingly not have to prove that he intended to traffic in the offending drugs.

13.91 Against this backdrop, the Court of Appeal explained that the *ratio* in *Liew Zheng Yang* could be understood as a "narrow but principled exception to the traditional rules of abetment".[199] This exception took the form of an additional *mens rea* element that needed to be proved where an offender is alleged to be abetting another to traffic drugs to himself. That element is that the offender as abettor was required to have himself intended to traffic in the drugs. This was a narrow exception because it came into play only:[200]

> … where there [was] evidence of a specific fact, namely, the [offender's] being the intended recipient of the offending drugs, without which the drugs [could not] possibly have been for his own consumption.

This was also a principled exception because it existed to give effect to the clear policy of the statute creating the primary offence in question,

199 *Ali bin Mohamad Bahashwan v Public Prosecutor* [2018] 1 SLR 610 at [78].
200 *Ali bin Mohamad Bahashwan v Public Prosecutor* [2018] 1 SLR 610 at [78].

namely, the MDA. In this regard, the differential treatment of traffickers and mere addicts was a "well-established" policy of the MDA. As was evident from relevant ministerial statements, the distinction was premised on the MDA's provision for more severe penalties for the offence of trafficking than for the offences of possession and consumption, and for an addict's treatment and rehabilitation.[201] This distinction in the MDA's policy was capable of affecting the elements of the offences of trafficking and abetment of trafficking because there was no evidence of legislative intention to the contrary in that context, unlike in the context of the offence of importation.[202]

13.92 On the facts, however, the Court of Appeal held that Ali could derive no assistance from this rule because he was unable to establish his case that half the drugs were for his and Selamat's own consumption. Even if he was able to establish such a case, that would not assist him because there was no such thing as a joint personal consumption defence: each offender had to be treated individually and independently for the purpose of the charge which had been brought against him; therefore, the amount that Ali intended to consume could not be credited to Selamat, and *vice versa*, for the purpose establishing that the portion of the drugs intended for personal consumption took its total quantity below the amount warranting capital punishment. Moreover, the court was satisfied that the evidence led by the Prosecution established beyond a reasonable doubt that Ali was guilty of the charge on which he had been convicted and accordingly dismissed his appeal.[203]

Medical Registration Act

Practising as medical practitioner in contravention of s 13

13.93 The offender in *Neo Ah Luan v Public Prosecutor*[204] – who was not a medical practitioner – had provided freelance home-based beauty services that involved her injecting her clients' skin with a dermal filler product. It was not disputed that the offender had never held herself out to be a medical practitioner while administering the dermal filler injections. None of the offender's clients were also under the misapprehension that she was medically qualified. None of the dermal filler products were registered with the Health Sciences Authority as medical devices under the Health Products Act.[205] Indeed, the

201 *Ali bin Mohamad Bahashwan v Public Prosecutor* [2018] 1 SLR 610 at [64]–[67].
202 *Ali bin Mohamad Bahashwan v Public Prosecutor* [2018] 1 SLR 610 at [73]–[74].
203 *Ali bin Mohamad Bahashwan v Public Prosecutor* [2018] 1 SLR 610 at [3].
204 [2018] 5 SLR 1153.
205 Cap 122D, 2008 Rev Ed.

unregistered dermal fillers were classified as "high risk"[206] devices that could cause (amongst others) infections.

13.94 The offender pleaded guilty to two counts of contravening s 13 of the MRA, for practising as an unauthorised person. This contravention is an offence punishable under s 17(1)(*e*) of the MRA. The charges averred that the offender had:[207]

> … practise[d] as a medical practitioner, to wit, by administering injections of 'Cross Linked Sodium Hyaluronate' fillers using a syringe and needle to the face of [her client], while being an unauthorised person, that is to say, a person who was not registered as a medical practitioner and who did not possess a valid practi[s]ing certificate.

One of the offender's clients developed an adverse reaction; the other did not.

13.95 Sections 13 and 17 of the MRA read as follows:

> **Qualifications to practise**
>
> **13.** Subject to section 66[208] —
>
> (*a*) no person shall *practise as a medical practitioner* or *do any act as a medical practitioner* unless he is registered under this Act and has a valid practising certificate; and
>
> (*b*) a person who is not so qualified is referred to in this Act as an unauthorised person.
>
> …
>
> **Unauthorised person acting as medical practitioner**
>
> **17.**—(1) Any unauthorised person who —
>
> (*a*) practises medicine;
>
> (*b*) wilfully and falsely pretends to be a duly qualified medical practitioner;
>
> (*c*) practises medicine or any branch of medicine, under the style or title of a physician, surgeon, doctor, licentiate in medicine or surgery, bachelor of medicine, or medical practitioner, or under any name, title, addition or description implying that he holds any diploma or degree in medicine or surgery or in any branch of medicine;

206 *Neo Ah Luan v Public Prosecutor* [2018] 5 SLR 1153 at [11]–[14].

207 *Neo Ah Luan v Public Prosecutor* [2018] 5 SLR 1153 at [4].

208 This is an exemption for all ships' surgeons while in discharge of their duties relating to the treatment of cabin crew and passengers on board.

> (*d*) advertises or holds himself out as a medical practitioner; or
>
> (*e*) contravenes section 13 or 14,
>
> 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 12 months or to both and, in the case of a second or subsequent conviction, to a fine not exceeding $200,000 or to imprisonment for a term not exceeding 2 years or to both.
>
> [emphasis added]

13.96 On appeal, a question arose as to whether the charges were made out. This was because there was some uncertainty as to the meaning of the words "practise as a medical practitioner or do any act as a medical practitioner"[209] in s 13(*a*) of the MRA. These terms are not defined in the MRA. On a plain reading, the High Court noted that they were capable of carrying either of two possible meanings:[210]

> (a) practising or doing acts while holding oneself out as, or assuming the identify of, a qualified and registered medical practitioner ("the narrow meaning"); or
>
> (b) practising or doing acts which should only be done by qualified and registered medical practitioners, such as diagnosing illnesses, giving medical advice, or performing procedures on patients ("the broad meaning").

13.97 The court settled on the broad meaning, after engaging in a purposive interpretation[211] of s 13 of the MRA.

13.98 The court first noted that considering s 13(*a*) as a whole, it was clear that s 13 should be read alongside s 17(1) of the MRA.[212] The Prosecution had relied on the principle that the court should endeavour to make sense of and give significance to every word in a statute because Parliament shuns tautology and does not legislate in vain ("the tautology principle"). To this end, the Prosecution had argued that ss 17(1)(*b*), 17(1)(*c*) and 17(1)(*d*)[213] "already proscribe conduct which involves pretence, holding out, and generally creating a false impression that the

209 See para 13.95 above.
210 *Neo Ah Luan v Public Prosecutor* [2018] 5 SLR 1153 at [20] and [23].
211 This was the approach in *Tan Cheng Bock v Attorney-General* [2017] 2 SLR 850: see para 13.59 above.
212 *Neo Ah Luan v Public Prosecutor* [2018] 5 SLR 1153 at [24].
213 See para 13.95 above.

offender is a medical practitioner"[214] (in other words, the narrow meaning). As such, the Prosecution contended that:[215]

> … the words practising or doing any act as a medical practitioner in s 13(*a*) cannot mean 'holding oneself out as a medical practitioner' because if that were the case, then s 17(1)(*e*) would be a penal provision against holding out as a medical practitioner, and this, in turn, would render ss 17(1)(*b*)–(*d*) tautologous.

The Prosecution therefore submitted that the broad meaning should prevail in relation to s 13(*a*) of the MRA. The court disagreed with the Prosecution, noting that "there will be tautology within s 17(1) of the MRA regardless of how s 13(*a*) is construed".[216] The tautology principle was therefore not useful in interpreting s 13(*a*) of the MRA.

13.99 In deciding that the broad meaning was to prevail over s 13(*a*) of the MRA, the court referred to s 2A of the MRA. This section, which expressly sets out the general purpose of the MRA, read as follows:

> **Object of Act**
>
> **2A.** The object of this Act is to protect the health and safety of the public by providing for mechanisms to —
>
> (*a*) ensure that registered medical practitioners are competent and fit to practise medicine;
>
> (*b*) uphold standards of practice within the medical profession; and
>
> (*c*) maintain public confidence in the medical profession.

13.100 The court noted that the broad meaning would "better comport with the wider purposes expressed in s 2 of the MRA".[217] In addition, the parliamentary debates confirmed that the:[218]

> … legislative object behind s 17(1) was to target the mischief of unauthorised persons *doing acts which should only be done by medical practitioners* whether or not they had held themselves out as qualified medical practitioners. [emphasis in original]

13.101 Here, there were guidelines from the Singapore Medical Council stating that filler injections were minimally invasive procedures that could only be performed by doctors. The charges against the offender

214 *Neo Ah Luan v Public Prosecutor* [2018] 5 SLR 1153 at [25].
215 *Neo Ah Luan v Public Prosecutor* [2018] 5 SLR 1153 at [25].
216 *Neo Ah Luan v Public Prosecutor* [2018] 5 SLR 1153 at [26]–[28].
217 *Neo Ah Luan v Public Prosecutor* [2018] 5 SLR 1153 at [35].
218 *Neo Ah Luan v Public Prosecutor* [2018] 5 SLR 1153 at [36]–[38].

were therefore made out as she had "practised or done acts which should only be done by a medical practitioner, even though she had never held herself out as such".[219]

219 *Neo Ah Luan v Public Prosecutor* [2018] 5 SLR 1153 at [43].