IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2018] SGCA 87

Criminal Appeal No 38 of 2017

Between

MOHAMED AFFANDI BIN ROSLI

… *Appellant*

And

PUBLIC PROSECUTOR

… *Respondent*

Criminal Appeal No 39 of 2017

Between

MOHAMAD FADZLI BIN AHMAD

… *Appellant*

And

PUBLIC PROSECUTOR

… *Respondent*

In the matter of Criminal Case No 53 of 2015

Between

PUBLIC PROSECUTOR

And

(1) MOHAMAD FADZLI BIN AHMAD
(2) MOHAMED AFFANDI BIN ROSLI

JUDGMENT

[Criminal Law] — [Statutory offences] — [Misuse of Drugs Act]

[Criminal Procedure and Sentencing] — [Appeal] — [Acquittal]

[Evidence] — [Proof of evidence] — [Break in chain of evidence]

Mohamed Affandi bin Rosli
v
Public Prosecutor and another appeal

[2018] SGCA 87

Court of Appeal — Criminal Appeals No 38 and 39 of 2017
Sundaresh Menon CJ, Tay Yong Kwang JA and Chao Hick Tin SJ
10 July 2018

5 December 2018 Judgment reserved.

Sundaresh Menon CJ (delivering the judgment of the majority consisting of Chao Hick Tin SJ and himself):

Introduction

1 The present appeals pertain to the conviction of two accused persons on a pair of drug charges. The appellants are Mohamed Affandi bin Rosli ("Affandi") and Mohamad Fadzli bin Ahmad ("Fadzli"). Affandi faces one charge of possession, for the purpose of trafficking, of not less than 132.82g of diamorphine, an offence under s 5(1)(*a*) read with s 5(2) of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) ("the MDA"). Fadzli faces one charge of abetting by instigating Affandi to be in possession, for the purpose of trafficking, of not less than 132.82g of diamorphine, an offence under s 5(1)(*a*) read with s 5(2) and s 12 of the MDA. Both charges carry the mandatory death penalty. While both accused faced other non-capital charges in the proceedings below, the

Prosecution sought and obtained orders of discharge not amounting to acquittal in respect of these after the High Court judge ("the Judge") convicted Affandi and Fadzli on five out of seven charges brought against them (with one charge against Affandi reduced): *Public Prosecutor v Mohamad Fadzli bin Ahmad and another* [2017] SGHC 233 ("the Judgment") at [121]–[123] (see also [10]–[12] below).

Background

The arrests

2 At the material time, Affandi was a fire safety supervisor working at Marina Bay Sands ("MBS"). He resided at Block 124, Pasir Ris Street 11, and was the registered owner of a vehicle bearing the registration number SJW 9386 M ("Affandi's car"). Fadzli was a part-time mover who resided with his sister at Block 498L, Tampines Street 45 ("Fadzli's flat") and had charge of a vehicle bearing the registration number SGW 4282 Y ("Fadzli's car").

3 On 12 July 2013, at about 7.45am, Affandi, who was under surveillance, was seen getting on a motorcycle with another person, who was later identified as one Mansor bin Mohamad Yusoff ("Mansor"), at the carpark of his block. They rode off and later at about 8.10am entered the basement carpark of MBS. Officers from the Central Narcotics Bureau ("CNB") had noted that Affandi's car was parked at basement 4M of the same carpark and positioned themselves in the vicinity.

4 At about 3.18pm on the same day, Fadzli left his flat and drove off in his car. At about 3.50pm, Fadzli's car was seen entering the MBS carpark. It proceeded to basement 4M. Fadzli parked his car near Affandi's car. He then

alighted and met with Affandi behind Affandi's car. Shortly thereafter, Fadzli returned to his car and drove out of the MBS carpark.

5 At about 4pm, CNB officers intercepted Fadzli's car and Fadzli was placed under arrest. CNB officers then escorted Fadzli and his car to an open space in the vicinity. At about 4.22pm, a search was conducted. The items recovered and seized as case exhibits include:

(a) one plastic packet (marked as "D1A") containing:

(i) one packet of white crystalline substance (marked as "D1A1"); and

(ii) one plastic packet (marked as "D1A2") containing two packets of crystalline substance (collectively marked as "D1A2A");

(b) one packet of white crystalline substance (marked as "C1"); and

(c) several plastic bags of groceries.

6 The search of Fadzli's car ended at about 4.45pm. From about 4.50pm to 5pm, a statement (P106A) was recorded from Fadzli by Staff Sergeant Muhammad Fardlie bin Ramlie ("SSgt Fardlie") in a CNB operational vehicle. At about 5.15pm, Fadzli was escorted to his flat. At about 5.55pm, a search was conducted of the unit. Fadzli surrendered one packet (marked as "E1A") containing 30 slabs of Erimin-5 tablets (300 tablets, collectively marked as "E1A1") and one packet (marked as "E1B") containing 26 slabs of Erimin-5 tablets (being a total of 260 tablets, collectively marked as "E1B1"). From about 6.50pm to 6.55pm, a further contemporaneous statement (P106B) was recorded from Fadzli in a CNB operational vehicle. At about 7.22pm, Fadzli was escorted

to the Woodlands Checkpoint where K-9 and backscatter searches were conducted on his car. Nothing incriminating was found. At about 10.35pm, Fadzli was escorted to the Central Police Division lock-up, and placed in the custody of the officers in charge of the lock-up.

7 Meanwhile, shortly after Fadzli's arrest, at about 4.10pm, CNB officers arrested Affandi at his workplace at the MBS Fire Command Centre. Nothing incriminating was found either at his work station or in his two lockers at work. At about 5.18pm, Affandi was escorted to his car that was parked at the MBS carpark. A search was conducted on the said car and the items recovered and seized as case exhibits include:

(a) **from under the last row of passenger seats, eight bundles wrapped in black tape (marked as "B1" to "B8")**; and

(b) from the middle row of passenger seats: one plastic packet (marked as "A1A") containing three packets of white crystalline substance (marked collectively as "A1A1") and one packet of white crystalline substance (marked as "A1B").

8 At about 6.03pm, Senior Station Inspector David Ng ("SSI David Ng") recorded a contemporaneous statement (P105) from Affandi in a CNB operational vehicle ("the CNB vehicle"). After the statement was recorded, Affandi was escorted to the Woodlands Checkpoint where K-9 and backscatter searches were conducted on his car. Nothing incriminating was found. Thereafter, Affandi was escorted to his flat, but again, nothing incriminating was found. Affandi was then held in the custody of the CNB.

The seized substances

9 All seized substances were sent for analysis by the Health Sciences Authority ("HSA"), which found and certified that:

> **(a) the eight exhibits (marked as "B1A", "B2A1", "B3A" to "B8A") from the eight packets wrapped in black tape and said to have been recovered from the last row of seats in Affandi's car (see [7(a)] above) contained 132.82g of diamorphine;**
>
> (b) the plastic packets recovered from the middle row of Affandi's car (see [7(b)] above) contained not less than 8.14g of methamphetamine.
>
> (c) the four plastic packets of crystalline substance taken from Fadzli's car (see [5] above) contained 38.84g of methamphetamine.
>
> (d) the two packets of tablets taken from Fadzli's flat (see [6] above) contained 560 tablets of nimetazepam.

The charges

10 Fadzli was charged with:

> (a) abetting by instigating Affandi to be in possession, for the purpose of trafficking, of 132.82g of diamorphine, which is an offence under s 5(1)(*a*) read with s 5(2) and s 12 of the MDA ("Charge A");
>
> (b) trafficking by having in his possession, for the purpose of trafficking, 38.84g of methamphetamine, which is an offence under s 5(1)(*a*) read with s 5(2) of the MDA ("Charge B");

(c) having in his possession 560 tablets containing nimetazepam, which is an offence under s 8(*a*) of the MDA ("Charge C"); and

(d) abetting by instigating Affandi to be in possession, for the purpose of trafficking, of 8.14g of methamphetamine, which is an offence under s 5(1)(*a*) read with s 5(2) and s 12 of the MDA ("Charge D").

11 Affandi was charged with:

(a) having in his possession, for the purpose of trafficking, 132.82g of diamorphine, which is an offence under s 5(1)(*a*) read with s 5(2) of the MDA ("Charge E");

(b) having in his possession, for the purpose of trafficking, 8.14g of methamphetamine, which is an offence under s 5(1)(*a*) read with s 5(2) of the MDA ("Charge F"); and

(c) trafficking in 38.84g of methamphetamine, by delivering the same to Fadzli which is an offence under s 5(1)(*a*) of the MDA ("Charge G").

12 The Judge convicted Fadzli of Charges A, B and C and Affandi of Charge E. As for Charge F, the Judge convicted Affandi on the reduced charge of possession of 8.14g of methamphetamine, which is an offence under s 8 of the MDA ("Reduced Charge F"). The Judge acquitted Fadzli of Charge G and Affandi of Charge D. Thereafter, the Prosecution sought and obtained a discharge not amounting to an acquittal in respect of the non-capital charges (Charges B and C, and Reduced Charge F). These orders were made pursuant

to s 232(1)(*b*) of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) ("the CPC").

13 The two remaining charges, Charges A and E (against Fadzli and Affandi respectively), read as follows:

> **[Charge A]**
>
> on or about 12 July 2013, in Singapore, did abet one Mohamed Affandi Bin Rosli (NRIC No. [xxx]) to traffic in a Class A controlled drug listed in the First Schedule to the Misuse of Drugs Act (Cap 185, 2008 Rev. Ed.) ("the Act"), to wit, by instigating the said Mohamed Affandi Bin Rosli to be in possession for the purpose of trafficking, eight (8) bundles of granular / powdery substance, which were analysed and found to contain not less than 132.82 grams of Diamorphine, without authorisation under the Act or the Regulations made thereunder, and [he has] thereby committed an offence under section 5(1)(a) read with section 5(2) and section 12, and punishable under section 33(1) of the Act, and further, upon [his] conviction, [he] may alternatively be liable to be punished under section 33B of the Act.
>
> [**Charge E]**
>
> on 12 July 2013, at or about 5.30 p.m., inside a vehicle bearing registration number SJW 9386M, at lot 134 of the basement 4M carpark at Marina Bay Sands, Singapore, did traffic in a Class A controlled drug listed in the First Schedule to the Misuse of Drugs Act, (Cap 185, 2008 Rev. Ed.) ("the Act"), to wit, by having in [his] possession for the purpose of trafficking, eight (8) bundles of granular / powdery substance, which were analysed and found to contain not less than 132.82 grams of Diamorphine, without authorisation under the Act or the Regulations made thereunder, and [he has] thereby committed an offence under section 5(l)(a) read with section 5(2) and punishable under section 33(1) of the Act, and further, upon [his] conviction under section 5(1)(a) read with section 5(2) of the Act, [he] may alternatively be liable to be punished under section 33B of the Act.

14 We have emphasised in bold the seized substances that the two charges relate to at [7(a)] and [9(a)] above. We will refer to them as "the seized diamorphine", or where we refer to the diamorphine in the form of the packets

or bundles, as "the eight bundles", or where we refer to them as exhibits, as B1A, B2A1, and B3A to B8A and collectively as "the exhibits".

The statements

15 In the course of the investigations, one contemporaneous statement (in two parts) (P106A and P106B), four cautioned statements (P111–P114, of which P111 pertains to Charge A), and four investigation statements (P119–P122) were recorded from Fadzli. One contemporaneous statement (P105), four cautioned statements (P115–P118, of which only P115 pertains to Charge E) and eight investigation statements (P123–P130) were recorded from Affandi. The statements were admitted in evidence without objection.

Affandi's statements

16 The Prosecution relies substantially on two statements given by Affandi and we will turn to these before addressing the other statements. The first is the contemporaneous statement in P105, and the second is the cautioned statement recorded in respect of Charge E, P115. We set both out in full.

(1) P105

17 P105 was recorded as a series of questions and answers in English. In this statement, Affandi admitted collecting and safekeeping the seized diamorphine on the instructions of one "Abut", who he identified to be Fadzli:

> Q1. *The 8 black bundles that you surrendered to the officer found inside your vehicle SJW 9386 M belong to whom?*
>
> A1. *My friend 'Abut'.*
>
> Q2. *What is inside the 8 black bundles*?
>
> A2. *I only know they called it 'Panas'.*
>
> Q3. What is 'Panas'?

A3. I only know is 'Panas'.

Q4. Why the 8 black bundles is inside your car?

A4. To be store inside my car.

Q5. When did you collect the 8 black bundles?

A5. Last night.

Q6. From whom?

A6. A male Indian. I don't know him. I called the male Indian handphone number back after a few miss called and he told me to meet him at Kranji after the 10 mile junction big carpark. Then he passed all the drug to me.

Q7. *Who ask you to go and collect the drug from the male Indian*?

A7. *'Abut'*.

Q8. What is 'Abut' handphone no?

A8. Is inside my phone. (Recorder note: I took out 'Affandi' h/p and he shown it to me 'Abut [xxx])

Q9. Did you meet up with 'Abut' earlier?

A9. Yes.

Q10. Did you pass 'Abut' anything?

A10. Yes.

Q11. What did you pass to 'Abut'?

A11. 'Ice'.

Q12. Did 'Abut' passed any money to you?

A12. Yes. $1,500/- because I want to borrow from him.

Q13. How many packet did you pass it to 'Abut'?

A13. A lot but I don't know how many. 'Abut' suppose to take all the Ice but he left some behind. As for 'Panas' 'Abut' did not ask me to take out.

Q14. How long have you been doing these for 'Abut'?

A14. First time.

Recorder note: I shown a photo of Mohamad Fadzli Ahmad, NRIC [xxx] and 'Affandi' confirmed it to be 'Abut'.

[emphasis added]

18 To understand the context in which P105 was recorded, it is relevant to refer to an earlier conversation that had taken place between Affandi and Staff Sergeant Sanusir bin Othman ("SSgt Sanusir") (who was in the party of officers who arrested Affandi at his workplace) about half an hour before P105 was taken. While Affandi's work lockers were being searched, Affandi told SSgt Sanusir "dalam kereta ade something", which SSgt Sanusir understood to mean that there was something in the car. Then he went on to say in English "If I tell from A to Z, what will happen to me as I wanted to know the real picture". It appears that Affandi was offering to come clean and reveal all that had happened but before doing so, he wanted to have some sense of what would then transpire. SSgt Sanusir responded that if Affandi came clean, he would seek further instructions from his superiors. Subsequently, before the car was searched, SSgt Sanusir had the following exchange with him:

Q:	Berapa banyak dalam kereta? (How many inside the car?)
A:	Lapan (Eight)
Q:	Lapan apa? (Eight what?)
A:	Lapan packet, besar, panas (Eight packet, big, "panas" (a street name for heroin))
Q:	Mana awak taruk?" (Where you put?)
A:	Under the seat. Ada sejuk kat dalam jacket. Tak tau berape banyak" (Under the seat. There's Ice in the jacket. Don't know how many).
Q:	Jacket siapa? (Whose jacket?)

A: Saya.

(Mine)

[The words in parenthesis are the English translations of the original statement in Malay.]

(2) P115

19 In his cautioned statement, Affandi elaborated on what he had said in P105:

> *The black thing is only to be stored in my car. As and when Abut wants it, he will come and take it. I will pass to him.*
>
> I did it because I need cash to pay for all my debts, because I got divorced because of my debts.
>
> *All the black bundles belong to Abut. I was just told to keep them. I did not purchase the black bundles.*
>
> I started doing this for Abut for about one month. Sometimes, I collect once a week, sometimes twice a week. Normally, I only collect one or two "panas", but I don't know what is "panas". This is the first time there is so many that is passed to me. *Abut will ask me to collect from someone, store it, and then pass to him.* Abut pays me about $400 to $500 for one collection.
>
> From my point of view, Abut also doesn't know I was passed a big amount of 8 bundles because usually it is one or two.
>
> [emphasis added]

20 Up to this point, Affandi was consistent in his evidence that the seized diamorphine belonged to "Abut" (by which he meant Fadzli), and that he was only in possession of the black bundles until Fadzli was ready to collect them.

(3) Affandi's eight investigative statements

21 In the investigative statements recorded after P115, Affandi described a different version of events:

(a) On the night of 11 July 2013, he was contacted by one "Mamak", someone he had met in Johor Bahru two months earlier.

(b) Mamak told Affandi that his car had broken down and asked if Affandi could assist him by receiving a package. He obliged, and as directed by Mamak, went to the Mandai heavy vehicle carpark between 3.50am and 4am on 12 July 2013. There, he received a grey plastic bag containing the black bundles from an unidentified Indian male.

(c) While Affandi had initially claimed to have gone to the heavy vehicle carpark from home, he changed his evidence subsequently and claimed that he had first gone to Malaysia to buy petrol and to wash his car between 12am and approximately "2plus to 3am" on the morning of 12 July 2013, and had then proceeded directly to the heavy vehicle carpark at Mandai. The investigating officer, Inspector Ng Pei Xin ("the IO"), testified that this change of position occurred after Affandi was confronted with records from the Immigration & Checkpoints Authority ("ICA") which indicated that he was in Malaysia at that time and had only re-entered Singapore through Woodlands at 3.30am. Affandi also stated that after returning to Singapore, he "drove down Woodlands Road and made a U-turn at Ten Mile Junction" before turning into the heavy vehicle carpark next to Ten Mile Junction. That area was monitored by Closed Circuit Television ("CCTV"). When the CCTV footage was subsequently retrieved by the investigators, Affandi's car was not captured there whether at the time the alleged U-turn had taken place or otherwise. Affandi offered no explanation for this.

(d) After collecting the bundles, he became afraid and decided to drive to MBS instead of going home. When he arrived, he hid all the

bundles under the third row passenger seat of his car. He claimed that he had intended to hand over the eight bundles to the police if Mamak failed to contact him before he ended work on 12 July 2013. Affandi claimed that he was frightened because he did not know what was inside the bundles. He also claimed that this was the first time that he had seen such bundles.

(e) Affandi explained that he had implicated Fadzli instead of Mamak because he was scared and confused, "[t]he CNB officer was pressurizing" him, and he felt very "gan jiong" by which he meant that he had been nervous or harried.

(f) Afffandi also explained that although he had mentioned "panas" to the officers in his previous statements or conversations, he was in fact "guessing and [he] really did not know what was in the eight bundles". He suspected "panas" to be illegal but he had no idea what type of illegal substance it was.

(g) On 11 July 2013, he had bought groceries. He had earlier spoken to Fadzli about some donations of food items that he, Affandi, wished to make for the season of Ramadan. On 12 July 2013, he met Fadzli to hand him the groceries that he had purchased.

Fadzli's statements

22 In his cautioned statement, Fadzli denied knowledge of the drugs or of what Affandi did. Instead, he claimed that he had met Affandi on 12 July 2013 in order to receive Affandi's groceries at Marina Bay Sands. These groceries were meant to be donated to the Darul Ma'wa orphanage at Still Road.

23 There are two other aspects of Fadzli's statements that ought to be highlighted. First, in the contemporaneous statement taken shortly after Fadzli's arrest (P106A), he was shown a "digital photo" of Affandi and was asked whether he knew who the person in the picture was. Fadzli claimed not to know the person. The material portion of P106A reads as follows:

> Q7. Pointing to the accused a digital photo of one male Malay.
>
> "Awak kenal dia siapa?"
>
> (Do you know who he is?)
>
> A7. "Tak kenal."
>
> (I do not know.)
>
> (Recorder's note: Photo is one [Affandi] I/C [xxx])
>
> Q8. Accused was shown another digital photo of a male Malay.
>
> "Awak kenal ni siapa?"
>
> (Do you know who this is?)
>
> A8. "Tak kenal."
>
> (I do not know.)
>
> (Recorder's note: Photo shown is one [Mansor], S [xxx])
>
> Q9. "Awak ada jumpa mereka berdua tak?"
>
> (Did you meet the both of them?)
>
> A9. "Tak."
>
> (No.)
>
> [The words in parenthesis are the English translations of the original statement in Malay.]

24 However, five days later, when a subsequent statement (P120) was being recorded, Fadzli was shown two other photographs of Affandi, and Fadzli identified the person in these photographs to be Affandi. Fadzli also elaborated on the circumstances surrounding the recording of P106A:

> 7. About half an hour after my arrest, at the open carpark, an officer recorded my statement in a notebook and showed me two photographs on whatsapp. The officer asked me if I recognized the guy in the first photo. I took a look at the first photo and told the officer that I do not recognize the guy. I assumed that the second photo showed the same guy as the first photo and I said I also do not recognize the guy in the second photo. The persons in the two photographs were wearing the same dark blue shirt and the same black pants.
>
> 8. (Recorder's note: I show the accused the photographs of [Affandi] and asked him if he knows this person.) I know this person as "Fandi". (Recorder's note: Accused wrote down the name of the person and signed on the paper with the photographs.) …

25 The IO followed up on this point in the next statement (P121), which was taken on the following day:

> Q1: (Recorder's note: I showed accused the photo of [Affandi] which was shown to him during the recording of his oral statement [P106A].) Who is this person?
>
> A1: Fandi
>
> Q2: Is the person shown in these three photographs very different? (Recorder's note: I show accused the photograph shown to him during the recording of his oral statement and the two photographs I showed him during the recording of his statement on 17 July 2013.)
>
> A2: All the photographs show the same person.
>
> Q3: Why is it that you cannot recognize this person when you were shown his photograph during the recording of your oral statement?
>
> A3: I did not see this photograph first.

26 The second point of note is that Fadzli, in his statement taken on 16 July 2013 (P119), inserted, by way of a handwritten amendment to the original printed version of the statement, the following line:

> I was not known as Abut to anyone.

27 We will return to these two points below at [79] and it would suffice to note, at this juncture, that the Prosecution relied on these two points as lies corroborative of Fadzli's guilt.

The Judge's decision

Affandi

28 The Judge found Affandi guilty of Charge E, *ie*, possessing diamorphine for the purpose of trafficking. A central feature of Affandi's defence was that serious questions had been raised as to the chain of custody of the drugs such that there was a real possibility that the expert reports were not given in respect of the very same drugs that had been seized from Affandi's possession. The Judge rejected this. He found that there was no break in the chain of custody. The Judge found it insufficient for the defence to suggest that there was a real possibility of a break in the chain of custody without giving any indication as to when and how the chain of custody might have been broken (Judgment at [32]). Instead, the Judge held that the defence needed to show "that the exhibits [had] left the custody of the officers, or that unauthorised parties had access to them at some time during that period, or that the exhibits [had] been interfered with" (Judgment at [34]). He also found that there was no basis for any complaint as to how the IO had handled the exhibits (Judgment at [36]).

29 Second, the Judge also found that Affandi failed to rebut the presumption of knowledge that arose under s 18(2) of the MDA. The Judge found that Affandi's contemporaneous statement (P105) and cautioned statement (P115) were "voluntary and true statements". In the light of the conversation that Affandi had with SSgt Sanusir (detailed at [18] above), the Judge found that Affandi was in a "co-operative frame of mind" at the time these statements were recorded (Judgment at [70]).

30 The Judge disbelieved Affandi's reasons for renouncing the admissions in his contemporaneous and cautioned statements. The Judge observed that several aspects of the cautioned statement (P115) went beyond what was said in the contemporaneous statement (P105), such as how Affandi stored drugs for Fadzli for about a month (Judgment at [57]). When queried on this, Affandi explained that he was "just coming out with stories" to "save [himself]" (Judgment at [58]). But the Judge noted that if Affandi wished to save himself, Affandi could have told the IO that his contemporaneous statement was untrue, and put across to her what he later claimed was the truth (Judgment at [59]).

31 The Judge also pointed out several unsatisfactory aspects of Affandi's defence which undermined his credibility and his attempt to rebut the presumption:

(a) While Affandi had initially claimed not to have Mamak's number, he later admitted that he did have Mamak's number stored in his mobile phone (Judgment at [60]);

(b) Affandi also changed his account about his trip to the Mandai heavy vehicle carpark. Originally, he had claimed to have come from home. Then he claimed to have gone to the vehicle park from Johor Bahru instead. ICA records showed his car entering Singapore on 12 July 2013 at 3.30am. But even this version of events was, at least in part, inconsistent with the CCTV footage (Judgment at [61]–[63] and see further [21(c)] above). The Judge concluded that Affandi had gone to Johor Bahru in the early hours of 12 July 2013 and had returned to Singapore at 3.30am; however, he found that Affandi did not drive to the heavy vehicle carpark but had gone to the MBS carpark directly, had then hid the eight bundles, and gone home (Judgment at [71]).

(c) Affandi also gave different accounts of what he did with the bundles after he received them. In his statement on 15 July 2013, Affandi claimed to have looked into the plastic bag he had received from Mamak *on the way home* and then taken one bundle and looked at it. However, during the trial, he testified that he only checked the plastic bag and realised that there were eight bundles inside *after he reached MBS*. When cross-examined on this, Affandi's answers "equivocated wildly" (Judgment at [65]–[67]).

32 The Judge held that for Affandi to rebut the presumption of knowledge, he had to prove that he did not know that the bundles contained diamorphine. However, Affandi could only say that he thought the bundles contained "panas" which he suspected to be illegal but he did not enquire further or examine them. Given the confusion, equivocation and falsehoods in his evidence, the Judge concluded that the presumption had not been rebutted (Judgment at [73], [75]–[76]), and convicted Affandi of Charge E.

Fadzli

33 The Judge found Fadzli to be guilty of Charge A, *ie*, abetting by instigating Affandi to possess diamorphine for the purpose of trafficking. The Judge found that P105 and P115 were admissions that could be used against Fadzli pursuant to s 258(5) of the CPC. He accorded them substantial weight and he thought that in these statements, Affandi was telling the truth as to how he came into possession of the eight bundles and who they belonged to (Judgment at [99]). He saw no reason for Affandi to falsely incriminate his friend Fadzli when he could have said that he had collected and held the bundles for Mamak if that were true (Judgment at [96]).

34 Aside from the statements, the Judge considered three other facts (Judgment at [98]):

(a) First, Fadzli and Affandi had made two calls each to the other in the morning of 12 July 2013 when the eight bundles were delivered to Affandi.

(b) Second, Fadzli failed to identify Affandi from his photograph when P106A, his contemporaneous statement, was recorded (see [23] above).

(c) Third, Fadzli lied when he said he was not known as "Abut" in P119, a statement he gave on 16 July 2013 (see [26] above).

Based on the facts at (b) and (c) above, the Judge found that Fadzli was seeking to distance himself from Affandi. He had no reason to do that if he had nothing to hide. The Judge thought in the circumstances that this indicated that he was involved in the activities with Affandi for which they were arrested. The Judge took the view that these lies acted against Fadzli. While they were not evidence of guilt, they damaged his credibility and his defence (Judgment at [108]), and he therefore found Fadzli guilty of Charge A.

The parties' cases

35 Affandi's case on appeal is entirely premised on attacking the integrity of the chain of custody of the exhibits, and no attempt was made to rebut the presumptions of knowledge or possession that arose under ss 18 and 21 of the MDA. Counsel for Affandi, Mr Michael Chia, identified two flaws in the Prosecution's case:

(a) First, there were differing accounts as to who in the arresting party had possession of the exhibits from the time they were seized until they were handed over to the IO.

(b) Second, after the IO took possession of the exhibits, she did not lock them in her safe, but left them on the floor of her office instead.

Mr Chia submitted that in evaluating Affandi's defence, the threshold should not be set at an unreasonably high level, which would be the case if it were incumbent on *the defence* to provide a full explanation as to by whom, when and how exhibits had been tampered with. The burden was on the Prosecution to prove and establish the chain of custody and the defence simply would not be in a position to establish the chain, these being matters entirely within the knowledge of the CNB. In the final analysis, the question was whether the Prosecution had proved beyond reasonable doubt that the items in respect of which the expert evidence was led were the very same items seized in the case at hand.

36 Counsel for Fadzli, Mr Ramesh Tiwary, focused his submissions on two aspects. First, he argued that the version of events set out in P105 and P115 could not be relied upon because the statements contained numerous assertions that were "either untrue or suspicious". Second, in relation to the alleged lies that the Prosecution and the Judge referred to, Mr Tiwary argued that (a) it was unsafe to conclude that Fadzli was lying about not recognising Affandi because the photograph shown to Affandi had not been produced to the Judge and the Judge therefore had no frame of reference against which he could reasonably conclude whether Fadzli had been lying; and (b) Fadzli could have made a genuine mistake about his statement on 16 July 2013 that he was not known as

"Abut" to anyone. In addition, Mr Tiwary associated himself with Mr Chia's arguments on the integrity of the chain of custody of the exhibits.

37 The Prosecution's arguments closely tracked the reasons of the Judgment. In essence, the Prosecution's case was premised on the version of events set out in P105 and P115. In respect of Fadzli, the Prosecution also relied on Fadzli's alleged lies. We will elaborate on the Appellants' and Prosecution's arguments in greater detail below.

Our decision

38 Two issues arose for our consideration. First, was there a reasonable doubt as to the integrity of the chain of custody of the exhibits? If there was such a doubt, then both the convictions of Fadzli and Affandi ought to be set aside. Second, if the chain of custody was established, was the version of the events set out in P105 and P115 true?

Whether there was a reasonable doubt as to the integrity of the chain of custody

39 We begin with the applicable principles when considering whether a reasonable doubt has been raised as to the integrity of the chain of custody. It is well-established that the Prosecution bears the burden of proving beyond a reasonable doubt that the drug exhibits analysed by the HSA are the very ones that were initially seized by the CNB officers from the accused. Much of the discussion in this area has been framed in terms of whether such a doubt has been raised as to a possible break in the chain of custody. *But this obscures the fact that it is first incumbent on the Prosecution to establish the chain*. This requires the Prosecution to account for the movement of the exhibits from the point of seizure to the point of analysis. In the context of the Prosecution

establishing the chain of custody, the defence may also seek to suggest that there is a break in the chain of custody. This refers not necessarily to challenging the Prosecution's overall account but to showing that at one or more stages, there is a reasonable doubt as to whether the chain of custody may have been broken. Where this is shown to be the case and a reasonable doubt is raised as to the identity of the drug exhibits, then the Prosecution has not discharged its burden: *Nguyen Tuong Van v Public Prosecutor* [2005] 1 SLR(R) 103 ("*Nguyen Tuong Van*") at [36], citing *Abdul Rashid bin Mohamed and another v Public Prosecutor* [1993] 3 SLR(R) 656 ("*Abdul Rashid*") at [17]. To put it another way, the Prosecution must show an *unbroken chain*. There cannot be a single moment that is not accounted for if this might give rise to a reasonable doubt as to the identity of the exhibits: *Public Prosecutor v Chen Mingjian* [2009] 4 SLR(R) 946 ("*Chen Mingjian*") at [4].

40 The importance of ensuring a *complete* chain is paramount. It is not an understatement to say that it could be a matter of life and death, as Chao J (as he then was) noted in his dissenting judgment in *Lim Swee Seng v Public Prosecutor* [1995] 1 SLR(R) 32 ("*Lim Swee Seng*") at [70]. His comment related to a discrepancy in weight, but it applies all the more strongly when there is doubt as to whether the exhibits relied upon to secure a conviction were the same exhibits seized from the accused in question.

41 That is not to say that speculative arguments about the *possibility* of contamination will be entertained: *Chen Mingjian* ([39] *supra*) at [4]. Neither must the chain of custody be laboriously proved by calling witnesses to testify to each step in every case. As this Court held in *Lai Kam Loy v Public Prosecutor* [1993] 3 SLR(R) 143 ("*Lai Kam Loy*") at [38]:

> … it cannot be that in every drug case it lies on the Prosecution to laboriously call every single witness to establish the chain of

> possession of the seized drugs. The need to do so only arises where a doubt as to the identity of an exhibit has arisen. This may arise for instance where it has been established that there was a shortfall in numbers or a failure to mark the exhibits.

42 This was reaffirmed in a number of subsequent cases such as *Satli bin Masot v Public Prosecutor* [1999] 1 SLR(R) 931 ("*Satli bin Masot*") at [15], and *Public Prosecutor v Yen May Woen* [2003] SGHC 60 at [59] (which was upheld on appeal). The fact is that the keeping of proper records will obviate the need to adduce evidence or to prove this in most cases and it is incumbent on the CNB officers to keep such records. *But none of this excludes the need for the court to carefully consider the matter where a proper challenge is mounted*.

43 In our judgment, a reasonable doubt *was* raised in respect of the integrity of the chain of custody of the exhibits having regard to the evidence that was led in this case. Specifically, the difficulty is that the Prosecution failed to establish beyond a reasonable doubt the actual chain of custody in the first place. In particular, we were presented with differing accounts of who held the exhibits before they were handed to the IO and this gave rise to a reasonable doubt as to the identity of the exhibits that were relied upon to secure the convictions of the appellants. For this reason, which we will shortly develop, we are satisfied that the Prosecution has not discharged its burden. However, for the avoidance of doubt, we also make it clear that we reject the second argument that was mounted by Mr Chia and which was premised on the way in which the IO stored or handled the exhibits. We now elaborate on both points.

Carriage of the exhibits before handover to IO

44 During the course of the trial, two inconsistent narratives emerged as to how the drugs were handled by officers in the arresting party.

45 The first was recounted by SSI David Ng. According to him, after the eight bundles were seized, they were placed in a black trash bag along with other seized items. The black trash bag was then placed on the front passenger seat of the CNB vehicle. It remained there as the arresting party moved first from MBS to Affandi's flat and then to Woodlands Checkpoint. It remained inside the vehicle when searches were conducted at the Woodlands Checkpoint. However, SSI David Ng maintained that he took the black trash bag with him when he participated in the search of Affandi's flat. He said that he then passed the trash bag containing the exhibits to Senior Staff Sergeant Jenny Woo ("SSSgt Jenny Woo") at about 10.47pm, shortly after he and his team returned to CNB headquarters. He was *certain* that no one else had touched the trash bag, which contained the exhibits. SSI David Ng's account that he handed over the exhibits to SSSgt Jenny Woo at 10.47pm is corroborated by an entry (recorded by Senior Staff Sergeant Alwin Wong ("SSSgt Alwin Wong")) in the field diary covering Affandi's arrest, which stated that "[a]t 2247 hours, Beckham hand over exhibits to Princess" ("Beckham" and "Princess" being the call signs of SSI David Ng and SSSgt Jenny Woo respectively).

46 As against this, at trial, SSSgt Alwin Wong recounted a different narrative that was inconsistent in material respects with that of SSI David Ng. SSSgt Alwin Wong's evidence was that *he* held on to the exhibits from the time the recording of P105 was complete (at about 6.50pm) right until 10.56pm when he handed over the exhibits *to SSI David Ng* before going for his break. By then, the arresting party had returned to the CNB Supervision A Office and a live ID (which is the ascertainment of the accused's real identity using his or her fingerprints) had been conducted in respect of Affandi at the Criminal Records Office. He also said that he recalled handing over the exhibits at 10.56pm because he wrote this down on his hand, and because he distinctly recalled

handing over the exhibits to SSI David Ng before he went on his break. SSSgt Alwin Wong added that while the team was in the CNB vehicle, the exhibits were locked in the boot because he did not "want the accused to… grab the exhibits". When the party searched Affandi's unit and when the backscatter and canine search was being conducted on Affandi's car, SSSgt Alwin Wong said that he took the exhibits with him and held on to them. Finally, SSSgt Alwin Wong also recalled that the trash bag containing the exhibits was blue.

47 Subsequently, when shown the entry he made in the field diary covering Affandi's arrest, SSSgt Alwin Wong stuck with the narrative outlined above, claiming that the exhibits were handed over from SSI David Ng to SSSgt Jenny Woo as reflected in field diary but that there could have been a "time lapse". With respect, this does not seem to us to follow. SSSgt Alwin Wong was very clear in his evidence that the exhibits had been handed over to SSI David Ng at 10.56pm, even stating, as we have noted, that he had written this down on his hand. But it was also SSSgt Alwin Wong who had recorded in the station diary that SSI David Ng had handed over the exhibits to SSSgt Jenny Woo at 10.47pm. The latter was nine minutes *earlier* than the time at which SSSgt Alwin Wong testified that he had handed the exhibits over to SSI David Ng. This would have been impossible and cannot be explained away as a time lapse.

48 More importantly, however, there were two plausible but irreconcilable versions of the chain of custody of the exhibits between the time of their seizure and about 11pm on the same day, when the exhibits were apparently handled over to the IO and the court was left none the wiser as to which was correct. As the Judge noted, there were "inconsistencies in [the witnesses'] evidence on the time when the exhibits changed hands and the colour of the bags in which the

exhibits were held" (Judgment at [31]). However, beyond these general points, the following inconsistencies in particular stood out:

(a) The exhibits could have either been on the front passenger seat of the CNB vehicle *or* locked in the boot at the time the vehicle was on the move between MBS, Affandi's flat and the Woodlands Checkpoint.

(b) When the arresting party were searching Affandi's flat, the exhibits were either held by SSI David Ng *or* SSSgt Alwin Wong.

(c) When backscatter and K-9 searches were being conducted on Affandi's car, the exhibits were either inside the CNB vehicle *or* held by SSSgt Alwin Wong.

(d) At 10.47pm, the exhibits were either handed over to SSSgt Jenny Woo by SSI David Ng, *or* they were still held by SSSgt Alwin Wong as Affandi was participating in the live ID.

These four dichotomies could not be reconciled. In each case, each version was supported by the robust evidence of a senior law enforcement officer. But both could not possibly be true. Nor was any plausible explanation put forward by the Prosecution as to how these inconsistencies were to be reconciled.

49 The evidence of the other officers in the arresting party also did not help in any way to resolve the inconsistencies:

(a) Staff Sergeant Jordi Chew could not remember who had custody of the exhibits.

(b) Staff Sergeant Sunny Tay ("SSgt Sunny Tay") testified that after the eight bundles were seized, he put them in either a blue or black trash bag and then handed them over to SSI David Ng. While this statement is consistent with SSI David Ng's evidence, he contradicted SSI David Ng's account in another respect when he mentioned that it was SSI David Ng who brought the exhibits to the CNB HQ Exhibit Management Room *subsequently at about 1.57am the following day,* only to change tack when he was informed of the contradiction with the other evidence and say that he only saw SSI David Ng holding a trash bag at that time, but was not certain whether the bag contained the exhibits in question.

(c) SSSgt Jenny Woo did not record the receipt of the exhibits from SSI David Ng in her pocketbook. Neither did she include mention of this in any of her statements. She claimed to have overlooked this because she was "very involved in Fadzli". She does not recall the colour of the bag that the exhibits were kept in, but she was sure that she received the exhibits from SSI David Ng, and that they were handed over to her at about "10.00-plus at night". But given that she had made no records in relation to the exhibits, her evidence appeared to be based solely on SSSgt Alwin Wong's record in one of the two field diaries.

50 On this basis, the Prosecution suggested that both SSI David Ng and SSSgt Alwin Wong "held joint custody of the exhibits until they returned to the CNB Headquarters". We reject this without hesitation because it contradicts *both* narratives. Indeed, with respect, this seemed an impossible contention given that the two versions were in direct conflict in material respects. It also bears mention that when SSSgt Alwin Wong was asked to explain the discrepancy between the two narratives, he suggested that since they were in the same vehicle and SSI David Ng did not "give… a clear instruction that he is

holding on to the… custody of the drugs… [s]o, [SSSgt Alwin Wong] assumed the role of holding on to the exhibits". But, with respect, this avoided the real issue, which is that his account was not capable of being reconciled with the account of SSI David Ng in the respects set out at [48] above. On SSI David Ng's account, he personally held the bag of exhibits at the relevant times, and there was simply no question of him giving any other instructions; and on this account, it would have been impossible for SSSgt Alwin Wong to also have been holding on to the same bag of exhibits, and all the more so when according to the two accounts, the exhibits were simultaneously in two different locations.

51 As we have already noted, we were faced with two complete and mutually exclusive chains of custody of exhibits, neither of which was disproved and this was the insurmountable hurdle that the Prosecution was ultimately not able to overcome. The fact is that *either* of the two narratives could be true, and as a result, the upshot of this is that *neither of the narratives we have described at [45]–[46] above can be said to have been established beyond a reasonable doubt. Each raises a reasonable doubt as to the other in relation to the manner in which what was seized from the accused was then passed to the CNB headquarters and subsequently, the HSA*. Because the burden was on the Prosecution to establish *the* chain of custody of the exhibits, and given that there are two irreconcilable narratives on the evidence, the Prosecution has simply failed to establish that chain. In that sense, it is not so much that the chain has been broken, as it is that it has not been properly strung in the first place.

52 We respectfully disagree with the Judge's conclusion that the defence had to show "that the exhibits have left the custody of the officers, or that unauthorised parties had access to them at some time during that period, or that the exhibits have been interfered with" (Judgment at [34]). *Instead, the onus is*

first and foremost on the Prosecution to prove ***the*** *chain of custody beyond reasonable doubt.* Until it has done this, there is simply no clarity as to the Prosecution's case, which the accused is required to meet and it is a fundamental requirement of fairness in our system of criminal justice that the accused is clear as to what that case is: see *Mui Jia Jun v Public Prosecutor* [2018] SGCA 59 ("*Mui*") at [1] and [77]. Neither does the argument that the officers should be considered as a collective and that they were "operating in a team effort" help the Prosecution overcome the lack of certainty over which of the two narratives is to be preferred (*cf* Judgment at [33]). In the final analysis, the fact that two officers testified to holding the exhibits in a manner that could not be reconciled leaves open the possibility that (a) one of them was not being truthful; or (b) both of them were being truthful. We have no reason or basis to think that either of them would have been untruthful. But, if they were both being truthful, this leaves us with the possibility that there was another bag of exhibits that was somehow in the vehicle at the material time. This is not as implausible as it might come across at first glance, especially when the evidence of SSgt Sunny Tay, which we have set out at [49(b)] above, is also taken into consideration. It is not for the defence or the court to fill gaps in the case led by the Prosecution: see *Mui* at [72]–[78]. The burden, as we have noted, is on the Prosecution to prove the chain of custody and for the reasons we have outlined at [39]–[41] above, this is a matter of fundamental importance. It cannot discharge that burden by leading evidence in support of a range of options, which are inconsistent with one another, and then inviting the court to choose that which it wishes. Not only is this completely inconsistent with the way facts are to be found, but it is also fundamentally unfair to the accused who, as we have noted above, is left to face a shifting case with moving parts.

53 Finally, although this is not probative in and of itself, it does add to the difficulties we have identified that neither Affandi's nor Fadzli's DNA was found on the eight bundles. On the other hand, DNA traces of two other people were found on exhibits B5 and B6. The first is Mr Lim Wen Xiang Wilson ("Mr Wilson Lim"), who was part of the DNA Profiling Lab Staff at HSA. It was likely that any (unintentional) contact with the exhibits occurred in the course of his work since he handled the exhibits, but this occurrence was nevertheless unusual as HSA officers typically take many precautionary measures to minimise contamination, so much so that the incidence rate, according to HSA analyst Ms Wong Hang Yee, is "very, very low" and "[c]lose to zero". Perhaps more significantly, there was a second set of DNA traces found on the exhibits. This belonged to a profile tagged as "A057576", later identified to be Ms Jasmin Tan Hui Min ("Ms Jasmin Tan"), a Home Team Specialist from the Forensic Response Team *who was not involved in the investigations*. She explained that her DNA might have been found on the exhibit because she was the person who restocked the tamper-proof bags used in the exhibit management room, but this was mere speculation. In the final analysis, this again left open the possibility that the exhibits were mixed up with those pertaining to a different case.

The IO's handling of the exhibits

54 We turn to Mr Chia's second argument on the chain of custody of the exhibits. The nub of the point that was taken is that the exhibits were left in tamper-proof bags on the floor of the IO's office, unsealed and unsigned, for approximately 34 hours between 6am on 13 July 2013 and 3.15pm on 14 July 2013. Mr Chia submits that this gave rise to a possibility that the exhibits were tampered with.

55 We reject this argument because it is speculative and is founded purely on the *theoretical* possibility of the exhibits being tampered. This much is clear from Mr Chia's line of questioning at trial:

> Q: Right. You agree with me it's possible---it's possible between the time---this time and the time it's sealed and signed by you that the exhibit could change bags? That means the original contents could be removed and another exhibit put in - possibility?
>
> A: Your Honour, that is a possibility but it was not done ah.
>
> …
>
> Q You don't know if it's done. I'm---you're---we're talking about possibility. It's something that's possible because it's not sealed and signed yet.
>
> A Mm-hm.
>
> Q Right? So conceptually, I can take it - if I've got access to your room somehow, I could actually remove the package inside the bag to replace it with something else. Agree?
>
> A Conceptually, yes.

56 As we have observed at [41] above, speculative arguments that seek to raise a theoretical *possibility* of a break in the chain of custody would not suffice. What must be raised is a reasonable doubt that there was such a break and on the facts, we are satisfied that the defence has failed to establish this in relation to this aspect of its case. The IO's office was locked and even though the keys to her office were centrally available, there was a clear protocol to be followed. Her personal authorisation was required before anybody else could enter the office. During the period in question, no one had requested such access, and there is nothing to suggest that the protocol had been compromised. In short, this was nothing but a fanciful notion which might have been theoretically possible but was wholly unsupported and baseless.

57 In sum, we find that the Prosecution has failed to establish the chain of custody of the exhibits, given the inconsistent accounts given by different members of the arresting party. We therefore set aside Affandi's conviction. Given that Fadzli's liability is accessorial, we also set aside Fadzli's conviction. Both appeals are therefore allowed.

Whether the version of the events set out in P105 and P115 was true

58 Given the conclusions we have reached, it is not necessary for us to consider this issue. Nevertheless, we will briefly explain why, in our judgment, even if the chain of custody was found to have been established beyond a reasonable doubt and Affandi had been convicted on Charge E, Charge A would not have been made out.

59 The version of events that the Prosecution urged us to accept is that set out in P105 and P115: in particular, it is said that Affandi was collecting the bundles of drugs on behalf of Fadzli because he was cash-strapped and needed money to pay off his debts, and for each trip that Affandi ran on behalf of Fadzli, he stood to earn between $400 and $500 (see [19] above). The Prosecution submitted on this basis that Fadzli was the mastermind behind and instigator of Affandi's involvement with the seized diamorphine.

60 We are unable to accept the Prosecution's version of events as they have not satisfied their burden of proving their case beyond a reasonable doubt. As we recently emphasised in *Mui* at [76], the principle that the Prosecution must prove the guilt of the accused beyond reasonable doubt is a cornerstone of our criminal law. While the Prosecution does not have to dispel all conceivable doubts, the Prosecution would, at least, have to dispel all doubts that are relatable to and supported by the evidence presented: *Jagatheesan s/o*

Krishnasamy v Public Prosecutor [2006] 4 SLR(R) 45 ("*Jagatheesan*") at [61]. It should also be emphasised that none of the presumptions under the MDA are applicable in the present case because the eight bundles of diamorphine were found in *Affandi's* possession. Moreover, the charge against Fadzli (Charge A) was that of abetment by instigation and the MDA does not provide for presumptions in respect of the elements to be proved: namely (a) the "active suggestion, support, stimulation or encouragement" of the primary offence (the *actus reus*), and (b) the intention for the primary offender to carry out the conduct abetted (the *mens rea*) (see *Ali bin Mohamad Bahashwan v Public Prosecutor* [2018] 1 SLR 610 at [34] and *Chan Heng Kong and another v Public Prosecutor* [2012] SGCA 18 at [34]).

61 Whether the elements of the offence under Charge A were made out turned on whether we accepted the Prosecution's version of events – which is that Fadzli instigated Affandi's involvement with the seized diamorphine. After considering the parties' submissions and all the facts of the case, we find that there are a number of doubts as to the Prosecution's version of events that have not been dispelled. It follows that in our judgment, the Prosecution has not proved its case against Fadzli beyond a reasonable doubt, and neither the *actus reus* nor *mens rea* of the offence under Charge A has been made out. In the rest of this section, we will first address the factors that militate against the acceptance of the Prosecution's version of events. Secondly, we will elaborate on the inconsistencies and difficulties inherent in the account of events that Affandi presented in P105 and P115 – the two statements that the Prosecution premised its case on. Thirdly, we will address the alleged lies that the Judge relied on to establish guilt on Fadzli's part, before finally turning to the calls made to Fadzli early in the morning on 12 July 2013.

Factors that suggest that Fadzli was not the mastermind and instigator

62 There are three key factors that cause us to doubt the submission that Fadzli was the mastermind behind Affandi's involvement in the trafficking of the seized diamorphine. First, the amount of seized diamorphine was sizeable. Its weight was several times that at which capital punishment would be imposed and it had a considerable street value. Yet Fadzli left the eight bundles with Affandi even after they met in the afternoon of 12 July 2013. In fact, what was even more confounding was that on the evidence that was led, Fadzli did not even check the bundles of diamorphine: when CNB officers found these bundles in Affandi's car, they were still wrapped in black tape (see [7(a)] above). The short duration of this meeting (less than ten minutes) supported the conclusion that Fadzli did not even look at or examine the bundles on the surface, although it should be noted that none of the CNB officers stationed at the MBS carpark occupied a vantage point that allowed them to see precisely what transpired during their meeting.

63 Second, Affandi had direct access to Mamak, who was identified by the Prosecution as Fadzli's drug supplier. Affandi's phone records revealed that Affandi and Mamak had communicated with each other from as early as 18 April 2013. On 12 July 2013, the day on which the eight bundles were transferred, there were records of six communications between Affandi and Mamak between 4.14am and 4.36am comprising two outgoing calls from Affandi, two text messages from Affandi and two text messages from Mamak. The Judge was cognisant of this, as noted in [68] of the Judgment. In addition, it was *put to Affandi* that an earlier call at 3.35am to Mamak was made to *notify Mamak* that he had received the items that he was supposed to collect. This direct connection between Mamak and Affandi raises a question as to just what Fadzli's involvement was. If Mamak was content to contact Affandi directly,

what meaningful role did Fadzli play as the middleman? He would have been superfluous in this arrangement and nothing was advanced to explain this.

64 Third, the Prosecution's entire case against Fadzli rested on two of Affandi's statements. One of these was his contemporaneous statement (P105) and the other was his cautioned statement (P115). However, Affandi subsequently retracted these allegations against Fadzli in the investigative statements that he later made. In these, as noted at [21] above, he said that what he had said in P105 and P115 (which implicated Fadzli) was untrue. Instead, he stated that he had been acting on the directions of Mamak. There are three important points to be made in this context:

(a) First, while it is true that a court may choose to rely even on the withdrawn statement(s) of a co-accused person to convict an accused person, the fact that the statement has been retracted gives rise to the need to subject such statements to "painstaking if not relentless scrutiny", and to assess the evidence carefully in order to consider whether it is nonetheless reliable based on the circumstances of the case: *Jagatheesan* at [85]–[86].

(b) Second, this was especially relevant here, where the Judge did harbour concerns over Affandi's credibility (see [31]–[32] above).

(c) Third, the foregoing two points should have weighed even more heavily given that even the Prosecution accepted that Mamak was not some imaginary figure but was in fact Affandi's supplier of the drugs. This becomes especially troubling given what we have set out at [63] above.

Reasons for rejecting the version of events in P105 and P115

65 Following from this, we turn to the version of events set out in P105 and P115, which formed the foundation of the Prosecution's case against Fadzli and explain why we reject this account of the relevant events. In our judgment, a closer scrutiny of the two statements reveals that they are riddled with untruths and inconsistencies.

66 We begin with P105, which is Affandi's contemporaneous statement. As Mr Tiwary observed, this statement essentially stood for six propositions:

(a) Affandi collected and stored the diamorphine on Fadzli's instructions;

(b) He collected the diamorphine the night before from "Kranji after the 10-mile junction big carpark";

(c) He collected "panas" but he does not know what that actually is;

(d) He had met Fadzli earlier;

(e) He borrowed money from Fadzli during the earlier meeting;

(f) The earlier meeting was the first time he delivered ice to Fadzli.

67 Of these six assertions, (a) was the conclusion that the Prosecution wanted to reach, and (d) was neutral. *Every other assertion was untrue, doubtful or inconsistent with P115.* As regards (b), it was not clear whether he did in fact go to the heavy vehicle carpark near Ten Mile Junction to collect the diamorphine bundles. As mentioned above at [21(c)] and [31(b)], Affandi changed his original account of going to the carpark from his home after he was confronted with the ICA records which revealed that his car only returned to

Singapore from Malaysia at about 3.30am on 12 July 2013. Further, there remain doubts as to whether he took the route he described because his car was not captured in CCTV footage of the area during the material period. Indeed, as we have noted at [31(b)] above, the Judge actually found that he never went to the carpark in question.

68 As regards (c), Affandi claimed that he used the word "panas" despite not knowing what it meant because he overheard SSgt Sanusir using it. However, this is simply untenable. As the Judge found at [70] of the Judgment, Affandi knew that the "panas" was something illegal and this explains why he felt scared when he took over possession of the bundles, and why he decided to hide the bundles under the last row of passenger seats.

69 Both statements (e) and (f) are inconsistent with P115. In P105, Affandi mentioned receiving a loan of $1,500, but he claimed to receive remuneration of $400 to $500 per collection in P115. In P105, Affandi mentioned that the present case was the first time he had received and delivered drugs on behalf of Fadzli, but in P115, he claimed to have been doing it for a month, at a frequency of once or twice a week. None of these inconsistencies were resolved.

70 Turning to P115, Affandi claimed that the number of packages that he received on 12 July 2013 was abnormally large because he would usually only receive one or two bundles. Mr Tiwary submits that if the number of packages had indeed been so large, Affandi should have contacted Fadzli to check with him, but he had not done this. Further, if this indeed was an unusually large consignment, then it made it even more implausible that Fadzli did not seem to have even cursorily checked on the bundles when they met in the MBS carpark.

71 In the proceedings below, the Judge accorded great weight to P105 and P115 as they were the earliest statements recorded, and they were thought to be untainted by pressure or suggestion. The Judge found that Affandi was in a "co-operative frame of mind" when he gave both statements (Judgment at [70]). In addition, the Judge saw no reason why Affandi would "falsely incriminate his friend Fadzli when he could have said that he had collected and held the bundles for Mamak, if that were true" (Judgment at [96]).

72 In a statement recorded on 16 July 2013, Affandi explained that he had mentioned "Abut" in P105 and P115 because SSI David Ng had "pressuriz[ed]" him, and made him feel "scared and confused":

> Q9 You tell me that the eight bundles belong to Mamak. Then why did you say earlier that they belonged to Abut?
>
> A9 I was scared and confused. The CNB officer was pressurizing me. I didn't really know what I was thinking at that point of time. I was very "gan jiong".

73 As to this, the Prosecution submitted that there was no reason for Affandi, who supposedly felt scared and pressurised by a CNB officer, to fabricate a fake story that would *nevertheless incriminate himself*. Further, it seemed highly unlikely that Affandi was truly affected by SSI David Ng as he provided details in P115 that went over and beyond what he mentioned in P105, when there was no suggestion that the IO, who recorded P115, had imposed any such pressure on him. Affandi in fact testified that he had "no complaints" against her. When cross-examined on this, Affandi claimed that he "was just coming out with stories", and "deliberately fabricating lies" to "save himself"; he could not, however, explain how telling more lies would achieve that end.

74 In our judgment, Affandi's actions were not as inexplicable as the Judge and the Prosecution found them to be. Affandi was caught by the CNB officers

with a large amount of drugs. Right before the contemporaneous statement was taken, SSI David Ng told Affandi that it was likely that he would face a capital charge:

> Mr Chia: Okay. But in that---in that conversation, you will have told him, "Look, for those bundles that you've got, it will be death penalty"? You did say that?
>
> SSI David Ng: No. I put it in this way. I said, "The drugs that we see---we found, okay, you could---the sentences that you are facing could be a death penalty. It's a capital charge. The drugs that we found, the 8 bundle." Yes.
>
> …
>
> SSI David Ng: A person---Your Honour, a person who are facing a capital charge, we have to inform that "you are facing this capital charge. So I'm going to record a contemporaneous statement."

75 It is not surprising that the prospect of having to face a capital charge would have caused Affandi to feel scared and confused, as Affandi testified in court. In fact, SSgt Sanusir testified in court that Affandi was visibly nervous and afraid from the point of arrest till after the search of the car.

76 Affandi's actions might be explained on the basis that he might have hoped that by providing "assistance", such as by identifying someone *with greater involvement in the drug activities he had been caught red-handed in,* he would be minimising his role and this might somehow benefit him. It would be recalled that he had asked SSgt Sanusir just prior to P105: "if I tell you A to Z, what will happen to me as I wanted to know the real picture" (see [18] above). The evidence he gave at trial is also indicative of this:

> Q: Why did you say this to follow what you said in your contemporaneous statement?
>
> A: Because at that time the words that David told me that I will be facing the death sentence keep on playing in my

> mind. So if I were to be co-operative and write according to what the contemporaneous statement states, maybe I'll be released.
>
> …
>
> A: As I have mentioned just now---in my mind whatever David has said to me with regards to death sentence, it was running all along in my mind. As such, I answered this way just to save myself.

77 We therefore do not share the same reservations as the Judge did in rejecting the admissions in P105 and P115 (*cf* Judgment at [59] and [96]).

The alleged lies that were corroborative of Fadzli's guilt

78 We turn to the alleged lies that the Judge thought were factors that supported a finding of guilt on the part of Fadzli.

(1) Failure to recognise Affandi when shown Affandi's photograph

79 The first relates to Fadzli's inability to recognise Affandi when he was shown a photograph of Affandi while his contemporaneous statement (P106A) was being taken by SSgt Fardlie (see [6] and [23] above). In a subsequent statement, he claimed that this was because he saw the first photo and was unable to recognise the person in it. He then thought that the second photo displayed a picture of the same person (see [24] above).

80 At trial, Fadzli claimed in examination-in-chief that it was an unidentified Chinese officer, and not SSgt Fardlie, who had showed him two photos on a hand phone while P106A was being recorded. He also claimed that he was shown the photos at an open space *outside* the CNB vehicle (and not while inside the vehicle (*cf* [6] above)). He claimed that he was unable to recognise Affandi because at the time he was shown the two photos, his body

was restrained such that he could not hold the mobile phone (which displayed the photos), and there was glare from the sun that made it difficult for him to see the photos clearly.

81 When Fadzli was cross-examined, he further clarified that he was actually able to have a good look at the first photo (which he claimed to be one that was not of Affandi), but he was not able to get a good look at the second photo because of the angle of the phone that was used to display the photos, and also the glare from the sun. Fadzli therefore assumed that the second photo was the same as the first photo because the individuals shown in the photos were wearing shirts of the same colour.

82 Fadzli's evidence on what he saw in the first photograph was not clear. First, he claimed that the first photograph was that of Mansor:

> And with regards to my answer to Q3 [of P121], the reason why I said I did not see this photograph was because the first photograph was the photo of Mansor and I only see the photo of Mansor during the oral statement when I was --- when it was taken from me.

Fadzli then claimed to not know who Mansor was (even at the date of the hearing):

> At that point of time [when P106A was recorded], Your Honour, I did not know who was Mansor. Until this day, I do not know who is Mansor. I have only seen his photograph once when it was shown to me when my contemporaneous statement was taken from me.

Fadzli then clarified that he was only assuming that the photograph was that of Mansor:

> Q: Sorry, so up to now, you do not know what Mansor looks like?

> A: I've seen the photograph once but I've since forgotten how he look like.
>
> Q: Just to clarify, you're now assuming the first photograph that was shown to you was Mansor's photograph, is that what you are saying?
>
> A: Yes.
>
> Q: You do not know for a fact that it is---that is Mansor?
>
> A: Yes.

83 The Judge did not accept Fadzli's explanation for his failure to identify Affandi. First, he found that there was no reason for SSgt Fardlie not to show the photographs to Fadzli, given that he had the photographs on his phone, and he did not have to rely on or report to anyone about the usage of the photographs. Second, he found that the contemporaneous statements clearly showed that the photographs were shown to Fadzli when he was questioned by SSgt Fardlie (Judgment at [106]). The Judge then went on to find that Fadzli's failure to recognise Affandi from the photograph that was shown to him during the recording of his contemporaneous statement, while not evidence of his guilt, damaged his credibility and defence. It suggested that Fadzli was intentionally trying to distance himself from Affandi because he had been involved in some activities with Affandi for which they were being arrested (Judgment at [108]). On appeal, the Prosecution submitted that this lie was *corroborative* of Fadzli's guilt, placing reliance on the principle in *Regina v Lucas (Ruth)* [1981] 1 QB 720, which was cited with approval recently by this Court in *Public Prosecutor v Ilechukwu Uchechukwu Chukwudi* [2015] SGCA 33 ("*Ilechukwu*").

84 With respect, we do not agree with the Judge. First, and we consider this to be the overriding point, the failure to recognise Affandi from the photos shown to him cannot be relied on because *the Judge had not even satisfactorily established for himself a proper frame of reference within which he could assess*

Fadzli's evidence. We agree with Mr Tiwary that there were difficulties on at least three levels:

(a) First, there was no direct evidence as to exactly which photo was shown by the officer who took Fadzli's contemporaneous statement (P105).

(b) Second, none of the photos before the Judge were in digital form and specifically as a digital representation on a mobile phone, when this was the form in which Fadzli was shown the relevant photo. Neither was there any evidence as to the device used to show Fadzli the photo of Affandi. This was so, despite the fact that Fadzli had consistently mentioned the glare which prevented him from having a good look of the photographs he was shown. Without having been shown the relevant photographs in a similar way that Fadzli had been shown them, still less would the Judge have had a proper frame of reference to assess his evidence.

(c) The third point relates to the recording of P121 (see [25] above). Fadzli was able to recognise Affandi when the IO showed him a particular print version of a photo which she claimed to be the same photograph as the one shown to Affandi when P105 was recorded. But even if this was true (and it should be noted that Fadzli denies being shown this photograph: see his third answer in P121 at [25] above as well as his evidence at [82] above), it was a print copy magnified to A4 size. Whatever image it was and in whatever medium it was, it was not a print copy of A4 size that Fadzli was shown at the time that P105 was recorded. What the IO referred to was a much enlarged copy of what *might* have been shown to Affandi.

85 In addition to this, Fadzli's evidence at trial was consistently that he would have recognised Affandi in the photos he was shown if he could actually have seen the photo clearly. In fact, when Fadzli was interviewed by the IO on 17 and 18 July 2013 for the recording of P120 and P121, which was shortly after his contemporaneous statement was recorded, he was forthcoming and quick to say that he recognised and knew who Affandi was (see [24]–[25] above). This being the case, it does not in fact seem that Fadzli had any real desire to distance himself from Affandi.

86 The Prosecution also raised the following arguments:

(a) First, Fadzli could not have thought that the two photographs shown to him for the recording P106A were the same when the ninth question in P106A was whether he met the "both of them", implying that the two photographs he was shown were of two different people.

(b) Second, Fadzli would have seen the recorder's notes which referred to Affandi when he signed the contemporaneous statement.

(c) Third, if Fadzli was somehow prevented from having a good look of the photographs, he could have asked SSgt Fardlie to allow him to have a better look at them, instead of answering that he did not know the people in the photographs.

(d) Fourth, Fadzli gave conflicting accounts about whether he was able to recognise Mansor or not (see [82] above).

87 Some of these were addressed by Fadzli at trial. As regards the first, Fadzli explained that:

> Because when I was answering question 9, in my mind was my answer to Officer Fardlie that I do not know the person in the photograph. So, it was in relation to that. If I do not know the person, I wouldn't have met him before.

As regards the second, Fadzli explained that:

> Okay, when they show me this pocketbook and requested me to sign on it, I was ---- my hand was already being restrained. And from the limited movement, they just show me where to sign. As such, I just sign whatever they showed me to.

These explanations do not seem plainly implausible and it does not appear they were pursued under cross examination; but the more important point is that none of the Prosecution's arguments could overcome the difficulties we have noted at [84] above. In the final analysis, the Judge could not have been clear as to just what Fadzli was being shown. Accordingly, he could not then have concluded that Fadzli was lying and then placed reliance on this "lie" to support the conviction of Fadzli.

(2) The statement that he was not known as "Abut"

88 We turn to Fadzli's inclusion of the following words to the print version of P119, his statement dated 16 July 2013:

> I was not known as Abut to anyone.

89 At trial, Fadzli testified that he had made a mistake and that he meant to say that "[he] was not known as Abut to anyone except to [his] family members and to those friends who has [*sic*] come to [his] house before".

90 The Judge thought that this inclusion showed that Fadzli had something to hide because he was involved in activities with Affandi for which they were arrested (Judgment at [108]). The Prosecution also submitted that a clear

inference to be drawn was that Fadzli was trying to dissociate himself from Affandi and the drugs found on the day of the arrest.

91 In our judgment, these conclusions were not the only ones that could inexorably be drawn from the circumstances. As Mr Tiwary noted, Fadzli had not denied knowing and meeting Affandi in his cautioned statement given just three days *earlier*:

> I really have no idea that [Affandi] did had the possession of the drug. I really have no idea that he is doing illegal things. I would like to engage a lawyer with regards to this. I really have no idea what he is doing all the while. My DNA will not be on any of the drugs because I have no idea about these things at all. If I know he is doing illegal things, I will not make friends with him. The purpose of me meeting him yesterday was just to take the groceries from him at Marina Bay Sands. I really have no idea of what he is doing. That is all.

This displaces any weight being placed on this addition as an indication of Fadzli's desire to distance himself from Affandi. We therefore find that this insertion was neutral in that it could possibly have been a genuine mistake, as Fadzli testified at trial.

Calls between Fadzli and Affandi on the morning of 12 July 2013

92 We turn to the final point: the calls between Fadzli and Affandi on the morning of 12 July 2013. Specifically, these calls were made between Affandi and Fadzli at 3.38am, 5.37am, 6.21am and 6.23am (Judgment at [68]).

93 At trial, and in the Prosecution's submissions before us, the focus was on Affandi's call to Fadzli at 3.38am. Both Affandi and Fadzli testified that there was an arrangement between them that the person who wakes up first would call and wake the other person up for a pre-dawn meal since it was the month of Ramadan.

94 The Judge did not address the explanation proffered by the accused. He found that on the morning of 12 July 2013, there was "a high level of communication" between Affandi and Fadzli as well as between Affandi and Mamak after Affandi returned from Johor Bahru, and that this "showed that something was going on between them which required them to stay up in the early hours of the morning and communicate with one another" (Judgment at [68]–[69]).

95 On appeal, the Prosecution submitted that the accused's explanation for the 3.38am call was not plausible because on Affandi's account, he would have just collected the bundles under suspicious circumstances in a deserted heavy vehicle carpark and he claimed to be so afraid that he decided not to drive directly home. It would therefore seem unlikely that Affandi would have the presence of mind to call Fadzli for a pre-dawn meal. Further, Affandi also said that he set a phone alarm to call Fadzli, and this could not be reconciled with their account that the arrangement was for the person who woke up first to call the other.

96 Mr Tiwary submitted that there was no objective evidence of what was said during the calls, and that it was unsafe to conclude that the calls "had something to do with the eight bundles of heroin in Affandi's car".

97 We agree with Mr Tiwary's submissions. There was insufficient evidence to conclude one way or the other whether Affandi's call to Fadzli at 3.38am was connected to delivery of the eight bundles of diamorphine. It should be noted that Fadzli was not the only person that Affandi was in touch with in the early morning of 12 July 2013. As the Judge noted, there was also a heightened level of communication between Affandi and Mamak after 3.30am (Judgment at [69]).

98 In fact, even prior to the 3.38am call, there was a call from Affandi to Mamak at 3.35am. Affandi's evidence was that he received calls from Mamak asking him to meet a friend on his behalf at the carpark after Ten Mile Junction and that he acceded to this request when Mamak called at "3.00-plus am". (In relation to this piece of evidence, there was a discrepancy with the phone records which showed that the call at 3.35am (which was the only call between Affandi and Mamak from 3am to 4am of 12 July 2013) was an ***outgoing call from Affandi***; nonetheless, we do not find this to be of such materiality that we ought to disregard the substance of Affandi's evidence entirely). Between 4.14am and 4.36am, there were also two outgoing calls from Affandi to Mamak, two messages sent by Affandi and two messages received from Mamak. Affandi's evidence was that he was trying to ask Mamak what was in the bundles he received, but Mamak rebuffed him, telling him that he was busy, and Affandi therefore never got to verify the contents of the bundle with Mamak.

99 This takes us back to our observations at [63] above – that Affandi was in close contact with Mamak, who was identified to be Fadzli's drug supplier. In fact, there was a flurry of communications between Affandi and Mamak on the morning of 12 July 2013, the date on which Affandi took possession of the bundles alleged to contain diamorphine. In our judgment, it was equally plausible that Mamak and Affandi were in touch for the delivery of the bundles, and that Fadzli was not involved. We therefore do not find that the calls between Fadzli and Affandi on the morning of 12 July 2013, even if they might have been suspicious, would have sufficed to support the Prosecution's account of the events.

Conclusion

100 We therefore allow the appeals against the convictions on Charges A and E. Our primary finding is that the Prosecution has failed to establish the chain of custody of the relevant exhibits.

101 We will hear the parties on any further orders that may be sought in connection with the orders that were made pursuant to s 232(1)(*b*) of the CPC in respect of the other charges on which the Judge convicted the appellants but in respect of which a discharge not amounting to acquittal was sought and ordered prior to sentencing. These are Charges B and C, and Reduced Charge F.

Sundaresh Menon
Chief Justice

Chao Hick Tin
Senior Judge

Tay Yong Kwang JA (dissenting):

Introduction

102 I have had the advantage of reading in draft the judgment of Menon CJ with which Chao SJ concurs. I shall refer to that judgment as "the majority Judgment". For easy reference, I adopt the same abbreviations and references used in the majority Judgment unless otherwise stated.

103 The appellants were arrested separately in the afternoon of Friday, 12 July 2013, in two concurrent operations conducted by the CNB. The second appellant, Fadzli, was arrested at about 4pm that day with 38.84g of methamphetamine found in his car. A total of 560 tablets of nimetazepam were recovered from his flat subsequently. The first appellant, Affandi, was arrested at about 4.10pm. Eight bundles containing 132.82g of diamorphine were found under the third row of seats in his seven-seater vehicle and 8.14g of methamphetamine were recovered from the middle row of seats in the vehicle.

104 At the trial in the High Court, Affandi faced three charges while Fadzli faced four charges. Out of these seven charges, two were capital charges. The first was against Affandi for possessing the 132.82g of diamorphine for the purpose of trafficking, which is an offence under s 5(1)(*a*) read with s 5(2) of the MDA (*ie*, Charge E). The second was against Fadzli for abetting Affandi by instigating him to be in possession of the 132.82g of diamorphine for the purpose of trafficking, which is an offence under s 5(1)(*a*) read with s 5(2) and s 12 of the MDA (*ie*, Charge A).

105 The Judge convicted both appellants on their respective capital charges. Fadzli was convicted on Charge A and Affandi was convicted on Charge E. The Judge acquitted the appellants of one non-capital charge each (*ie*, Charges D

and G) as he found that they were not proved beyond reasonable doubt. Although the Judge had convicted the appellants on the remaining non-capital charges (*ie*, Charges B and C and Reduced Charge F), the Prosecution invoked s 232(1)(*b*) of the CPC and stated that it would take no further action on these charges. Accordingly, the Judge granted the appellants a discharge not amounting to an acquittal in respect of these three charges. In respect of the capital charges in Charges A and E, the Judge sentenced both appellants to death as they did not satisfy any of the conditions set out in s 33B of the MDA. Affandi and Fadzli appealed against their convictions on these capital charges.

106 The majority Judgment of this Court allows both Affandi's and Fadzli's appeals and acquits them of Charges E and A respectively. The primary finding there is that the Prosecution has failed to establish the chain of custody of the relevant drug exhibits. With respect, I hold a contrary view and would dismiss both appeals for the reasons that follow.

The parties' cases at the trial

The Prosecution's case

107 The Prosecution's case at trial was premised principally on two statements given by Affandi in the early stages of the investigations (*ie*, P105 and P115). The narrative that emerged from these two statements was that Affandi had, on Fadzli's instructions, collected the eight bundles of diamorphine the night before from an Indian man at a heavy vehicle carpark at Kranji and was safe keeping them in his vehicle until he received further instructions to pass them to Fadzli. Affandi drove his vehicle to his workplace at MBS. Although he knew that the bundles contained "panas", he did not know what "panas" was. Fadzli, on the other hand, was the mastermind who had instigated Affandi to take possession of the bundles of diamorphine, having

instructed Affandi to collect the bundles and to safe keep them in return for payment.

108 Based on this narrative, as regards Charge E, Affandi was: (a) presumed under s 21 of the MDA to be in possession of the seized diamorphine since he admitted that he was the owner of the vehicle in which the diamorphine was found and he was unable to rebut this presumption; (b) in possession of the seized diamorphine for the purpose of trafficking as defined under s 2 of the MDA since he was safe keeping it for the purpose of passing it on to Fadzli; and (c) presumed under s 18(2) of the MDA to have knowledge of the nature of the seized diamorphine since he was presumed to be in possession of the drug and was unable to rebut this presumption.

109 In respect of Charge A, Fadzli was directly implicated by Affandi's statements in P105 and P115 as the person who had instructed Affandi to collect the seized diamorphine and to safe keep it, given that these statements were confessions by Affandi that were admissible against Fadzli pursuant to s 258(5) of the CPC. The Prosecution submitted that ample weight should be placed on these statements because they were corroborated by various lies told by Fadzli, which damaged the credibility of his alternative account of the events.

Affandi's case

110 Affandi's defence at the trial was defined by two main developments. First, he retracted the version of events contained in his statements in P105 and P115 and instead recounted the alternative version that he provided in his subsequent statements in P123–P130. In this alternative narrative, Affandi claimed that he was acting under the instructions of one "Mamak" and not Fadzli for the collection of the bundles. He had intended to hold onto the bundles

until he had a chance to find out from Mamak what they were and, if they contained illegal items, he would hand them over to the police. Unfortunately, he was arrested before he had the opportunity to do so. Affandi also claimed that he did not know that the bundles contained "panas". He claimed that his sole purpose of meeting Fadzli in the afternoon of 12 July 2013 at MBS was to pass groceries to Fadzli for donation purposes.

111 Second, Affandi alleged that there was a break in the chain of custody of the exhibits after their seizure from his vehicle. In particular, Affandi asserted that there was a real possibility of a break in the chain of custody because of: (a) the differing accounts provided by the relevant CNB officers regarding the precise movement of the exhibits before they were handed over to the IO; and (b) the possibility of contamination of the exhibits when they were handled by the IO before they were handed over to the HSA.

Fadzli's case

112 As for Fadzli, his defence at trial was a denial of the charge. He denied any knowledge of the seized diamorphine found in Affandi's possession and denied abetting Affandi by instigating him to be in possession of the seized diamorphine. He claimed that his sole purpose of meeting Affandi in the afternoon of 12 July 2013 at MBS was to collect groceries from Affandi for donation to the Darul Ma'wa orphanage at Still Road. This coincided with the alternative narrative presented by Affandi.

The appeals

113 Before us, counsel for Affandi, Mr Chia, argued for an acquittal on Charge E by seeking to impugn the Judge's finding that there was no break in the chain of custody of the exhibits (Judgment at [32]–[36] and [74]). However,

Mr Chia made no submissions on the Judge's finding that Affandi was in possession of the eight bundles for the purpose of trafficking and that he had failed to rebut the presumption that he knew that the bundles contained diamorphine (Judgment at [75]–[76]).

114 Counsel for Fadzli, Mr Tiwary, on the other hand, argued that Fadzli had been wrongly convicted on Charge A. This was because first, P105 and P115, which were the only two statements given by Affandi that implicated Fadzli in relation to that charge, were unreliable, and second, the Judge erred in inferring from the evidence that "there was something going on between [Fadzli] and Affandi in connection to their arrests which [Fadzli] was trying to conceal" (Judgment at [98]) and which therefore corroborated P105 and P115.

Issues to be determined

115 From the submissions made on appeal, the two issues that arise for determination are:

(a) first, whether there was a break in the chain of custody of the drug exhibits; and

(b) second, whether Fadzli abetted Affandi by instigating him to be in possession of the seized diamorphine for the purpose of trafficking.

116 If the first issue is answered in the affirmative, then both appeals must be allowed. The conviction of Affandi on Charge E would be rendered unsafe, while the conviction of Fadzli on Charge A must also fall given that Charge A is accessorial to Charge E. On the other hand, if the first issue is answered in the negative, Affandi's appeal must be dismissed because this is Affandi's only ground of contention on appeal and he does not contest the Judge's finding that

the elements of Charge E have been made out. In such a situation, it remains necessary to go on to consider the second issue in so far as Fadzli's appeal is concerned.

My decision

117 In my judgment, there was no break in the chain of custody of the drug exhibits and Fadzli was found correctly to have abetted Affandi by instigating him to be in possession of the seized diamorphine for the purpose of trafficking. I would therefore dismiss both appeals.

Whether there was a break in the chain of custody of the exhibits

118 The law is that the Prosecution bears the burden of proving beyond reasonable doubt that the drug exhibits seized by the CNB officers were the substances eventually analysed by the HSA. Where there is a break in the chain of custody such that a reasonable doubt arises as to the identity of the drug exhibits, the Prosecution would not have discharged this burden: *Nguyen Tuong Van* at [36], citing *Abdul Rashid* at [17]. Accordingly, the inquiry whenever a break in the chain of evidence is alleged will always revolve around the identity of the drugs involved: *Satli bin Masot* at [12], citing *Lim Swee Seng* at [26]. Speculative arguments regarding the mere possibility of contamination will not be sufficient to raise a reasonable doubt as to the identity of the exhibits: *Chen Mingjian* at [4].

119 Mr Chia submitted that there was a break in the chain of custody of the drug exhibits. He argued that: (a) there was conflicting testimony regarding the custody of the drug exhibits before they were handed over to the IO; and (b) the exhibits were not stored securely by the IO after they were handed over to her, therefore raising the possibility of tampering of the exhibits.

120 I reject Mr Chia's submissions. In my view, such arguments on mere possibilities fall within the realm of speculation and do not rise to the level of creating a reasonable doubt as to the identity of the drugs exhibits seized from Affandi's car.

121 First, in respect of the conflicting testimonies provided by the relevant CNB officers regarding the carriage of the exhibits before they were handed over to the IO, I note that two inconsistent narratives emerged from the Prosecution's evidence. In essence, there are two accounts of how the exhibits were handled from the time that they were seized from Affandi's car at 5.32pm on 12 July 2013 to when they were handed over to SSSgt Jenny Woo later that day:

(a) In the first account, SSI David Ng claimed that he placed the eight bundles into a black trash bag, placed the trash bag on the front passenger seat of the CNB vehicle while travelling from MBS to Affandi's flat, took the trash bag with him while searching Affandi's flat, placed the trash bag on the front passenger seat of the CNB vehicle again while travelling to Woodlands Checkpoint, left the trash bag in the vehicle while conducting searches at the Checkpoint and finally passed the trash bag to SSSgt Jenny Woo at the CNB headquarters at about 10.47pm. This account was corroborated by a contemporaneous entry made by SSSgt Alwin Wong in the field diary covering Affandi's arrest stating that SSI David Ng handed over the exhibits to SSSgt Jenny Woo at 10.47pm.

(b) In the second account, SSSgt Alwin Wong claimed that he held on to the exhibits, which were kept in a blue trash bag, from the end of the recording of P105 at 6.50pm, locked the trash bag in the boot of the

> CNB vehicle while travelling from MBS to Affandi's flat,took the trash bag with him while searching Affandi's flat, locked the trash bag in the boot of the CNB vehicle again while travelling to Woodlands Checkpoint, took the trash bag with him while conducting searches at the Checkpoint, and finally passed the trash bag to SSI David Ng at the CNB headquarters at 10.56pm. According to SSSgt Alwin Wong, he was certain that he passed the trash bag to SSI David Ng at 10.56pm because he had written down this piece of information on his hand. However, he did not transfer this information to his pocketbook. SSI David Ng subsequently passed the trash bag to SSSgt Jenny Woo.

122 In my judgment, while these inconsistencies in the evidence suggested that the care with which the team of CNB officers took in recording the movement of the exhibits was not entirely satisfactory, they did not suggest that there was a break in the chain of custody of the exhibits. On the evidence, the first account provided by SSI David Ng would appear to be the more accurate version of events because it was corroborated by contemporaneous objective evidence in the form of the field diary entry. However, going by either version of the events, it is evident that there was a single unbroken chain of custody of the exhibits from the seizure of the exhibits to the handing over of the exhibits to SSSgt Jenny Woo. The exhibits were always in a trash bag and in the custody of the team of CNB officers. There was no evidence that they were mixed up with some other exhibits along the way. There was also no evidence that some other unrelated drug exhibits were in the CNB vehicle or were held by the CNB officers such that there was a real possibility of a mix-up or contamination. Whoever was holding the exhibits that day was part of the team of CNB officers involved in the operation at the MBS and there was no indication of any sort that any of the officers was involved in some other unrelated operation such that

drug exhibits from that unrelated operation could have been confused with or added to the seized drug exhibits in this case.

123 The difference of about ten minutes in the timing of the handover at the CNB headquarters was not so substantial as to raise a doubt that perhaps, there were two occasions of handing over instead of one. Further, whether the trash bag was black or blue, the indisputable fact was that there was only one trash bag and not two trash bags of the drug exhibits at the handing over and there was no doubt that the trash bag handed over came from the operation at the MBS. From the moment the exhibits were seized, they were not unaccounted for and they remained in the custody and control of at least one member of the team of CNB officers. Nothing in the evidence gave rise to a reasonable doubt as to the identity of the exhibits. Based on all the above, I find no basis for any suggestion that there was a break in the chain of custody of the exhibits.

124 Second, Mr Chia argued that the IO did not store the exhibits properly after getting custody of them, therefore raising the possibility of tampering of the exhibits. Mr Chia submitted that the exhibits could have been tampered with or contaminated because the IO kept them in tamper-proof bags on her office floor, unsealed and unsigned for almost 34 hours from 6am on 13 July 2013 to 3.15pm on 14 July 2013, instead of locking them in a safe or a steel cabinet. It was technically possible for other CNB officers to gain access to her office as they could easily draw the keys to her office from a central location. However, it would be against the established office protocol for other CNB officers to do that.

125 I also reject this second contention because it is premised again on a mere theoretical possibility of contamination of the exhibits. This would entail someone entering the IO's office without authorisation and then, for some

reason, interfering with the exhibits placed on the floor. Such speculative possibilities are incapable of raising any reasonable doubt as to the identity of the exhibits.

126 Neither Affandi's nor Fadzli's DNA was found on the eight bundles of seized diamorphine. This Court has accepted that this fact alone does not disprove possession (see majority Judgment at [53] above). The bundles were in the trash bag and, as stated at [122] above, there could be no doubt that the trash bag came from the operation at MBS. Where Affandi is concerned, the evidence shows that the bundles were in his vehicle and in his possession. Further, analysis conducted by the DNA Profiling Laboratory of the HSA showed that Affandi's DNA was found on the exterior of the plastic packet, A1A, and on the exterior and the interior of the plastic packet, D1A. Where Fadzli is concerned, as the evidence shows that he did not come into contact with the bundles hidden in Affandi's vehicle, it was not surprising that Fadzli's DNA was not found on the bundles or the related exhibits.

127 However, there were DNA traces of two other persons on two of the said bundles. The DNA found on the adhesive side of the tapes on exhibit B5 matched the DNA of Mr Wilson Lim (a staff member from the DNA Profiling Lab in the HSA) and that of an unknown male person. As he had handled the drug exhibits in the laboratory, it was likely that the deposit of his DNA was made unintentionally in the course of his analysis. There was no indication that he had mixed up unrelated drugs from elsewhere with the eight bundles in question.

128 In respect of exhibit B6, the DNA found on the adhesive side of the tapes matched that of Ms Jasmin Tan and that of an unknown person. Ms Jasmin Tan was a member of the Forensic Response Team in the CNB. However, she was

not involved in the investigations in this case. When asked why her DNA was found on exhibit B6, she could only say that it was "most likely because I replenish the stock, for example, pre-cut, er, box, tamper-proof bag in the exhibit management room" and brown paper. She explained that the drug exhibits were laid on a brown paper and that was the possible reason why her DNA was found on the said bundle. She did not touch any of the drug exhibits in this case. However, her duties included the packing of drug exhibits in boxes for the investigating officers to send to the HSA.

129 I accept that Ms Jasmin Tan's explanation about the possible cause of her DNA being present on exhibit B6 was speculative but she was merely trying to answer the questions directed at her on this issue. What is important is that there was no indication that she had brought unrelated drug exhibits into contact with the bundles of the seized diamorphine. In my opinion, the mere fact that someone has come into contact with one or some of the drug exhibits cannot mean that the chain of custody is thereby broken or cast into doubt. What it means, as shown by the cross-examination of Ms Jasmin Tan, is that she could become a possible suspect in the drug transaction.

130 In any event, exhibit B5 contained not less than 16.50g of diamorphine and exhibit B6 contained not less than 16.48g of diamorphine. Together, they accounted for not less than 32.98g out of the 132.82g of diamorphine mentioned in Charge A and Charge E. Therefore, even if these two bundles were considered suspect, the other six bundles would still contain almost 100g of diamorphine and this remaining amount is way above the 15g threshold for a capital offence.

Whether Fadzli abetted Affandi by instigating him in the trafficking of the seized diamorphine

131 I now consider whether the Judge was correct in his finding that Fadzli abetted Affandi by instigating him in the trafficking of the seized diamorphine. Fadzli's defence in respect of Charge A, both at the trial and on appeal, is that he did not know anything about the eight bundles and that his sole purpose of meeting Affandi in the afternoon of 12 July 2013 at MBS was to collect groceries from Affandi for donation to the Darul Ma'wa orphanage at Still Road.

132 The Judge convicted Fadzli on Charge A on two bases. First, the Judge found that P105 and P115 were confessions made by Affandi that could be used against Fadzli and the Judge gave full weight to them. Second, the Judge found that Fadzli lied in two material aspects when he was giving his statements and that such lies showed that he was trying to distance himself from Affandi and could be used to support Fadzli's conviction on Charge A.

Fadzli's version of events is not credible

133 In my judgment, Fadzli's claim that he met Affandi on 12 July 2013 for the sole purpose of collecting groceries purchased by Affandi for donation to the Darul Ma'wa orphanage at Still Road was not credible.

134 First, there was no urgent need for Fadzli to insist on meeting Affandi on 12 July 2013 to collect the groceries for donation during the month of Ramadan when Hari Raya Puasa in that year fell on 8 August 2013, which was about 26 days away. Fadzli said he considered Ramadan to be a good month to make donations. However, both appellants agreed that there was no urgency in making the donations as it was acceptable to make donations even after the

fasting month. Moreover, the groceries that Affandi had purchased were not perishables. They comprised bottled cooking oil and processed food items like instant noodles, Milo and Nescafé sachets. There was therefore no pressing need to donate the goods on that day. Affandi agreed at the trial that he did not inform Fadzli on the night of 11 July 2013 that he had purchased groceries already for donation because Fadzli was meant to call him concerning the date of donation. Accordingly, it was difficult to accept that Fadzli would be willing to go to such lengths just to collect the groceries from Affandi on 12 July 2013 in order to make the donation that very day.

135 Second, there was no good reason for Fadzli to travel all the way to Affandi's workplace at MBS in town just to collect the goods for donation. Both men lived in the east (Affandi in Pasir Ris and Fadzli in Tampines respectively). Similarly, Darul Ma'wa orphanage, the intended beneficiary of the groceries, was located in the east (at Still Road, which is near Bedok). Fadzli also conceded at the trial that MBS was clearly out of the way if he travelled from his home in Tampines to the orphanage at Still Road. Moreover, since Affandi had his own car, he could deliver the groceries quite easily to the Darul Ma'wa orphanage himself without having to trouble Fadzli to drive all the way to his workplace at MBS to collect them.

136 I therefore reject Fadzli's claim that he met Affandi on 12 July 2013 solely for the purpose of collecting groceries for donation. I agree with the Prosecution's submission and with the Judge's finding that the collection of the groceries was merely a convenient pretext for their urgent meeting on that day. At the highest, the collection of the groceries would be only one of the purposes for the meeting or something incidental to it.

137 However, I accept that the mere absence of an innocent reason for the meeting on 12 July 2013 would not lead necessarily to the conclusion that there was an arrangement for Affandi to collect and safe keep bundles of diamorphine for Fadzli. Therefore, I now consider the Prosecution's evidence, in particular, Affandi's statements in P105 and in P115, as well as the lies told by Fadzli during the recording of his investigation statements in P106 and P119.

P105 and P115 constitute reliable evidence of Fadzli's guilt

138 The Judge found that P105 and P115, which were the only two statements provided by Affandi that supported Fadzli's conviction, were "voluntary and true statements, untainted by pressure or suggestion" because "Affandi was at the time of arrest and not long before [the] making of the statements in a co-operative frame of mind, telling the officers searching his locker that there was something in his vehicle, and offering to tell them 'A to Z'" (at [70]). The Judge accorded full weight to P105 and P155 as confessions against Fadzli as he found Affandi's reasons for retracting those confessions "unworthy of belief" (at [97]).

139 In my view, the Judge was correct to give full weight to P105 and P115 as confessions incriminating Fadzli in respect of Charge A.

(1) Retracted confessions can be used against a co-accused

140 Mr Tiwary first submits that P105 and P115 are unreliable as confessions because Affandi provided a different account of events in his subsequent investigation statements. However, a confession that has been retracted can still be used against a co-accused. The degree to which the confession may be relied on is ultimately a matter of the weight to be given to the confession in the light of the retraction: *Jagatheesan* at [84]; *Syed Abdul*

Mutalip bin Syed Sidek and another v Public Prosecutor [2002] 1 SLR(R) 1166 at [26]; *Ong Chee Hoe and another v Public Prosecutor* [1999] 3 SLR(R) 273 at [44]; *Panya Martmontree and others v Public Prosecutor* [1995] 2 SLR(R) 806 at [50].

141 In *Jagatheesan,* V K Rajah J (as he then was) elaborated (at [87], cited in *Muhammad bin Kadar and another v Public Prosecutor* [2011] 3 SLR 1205 at [74]–[75]) that:

> … the fact that a witness admits to a statement and later withdraws it constitutes, both, in principle and in effect, a discrepancy or inconsistency in his evidence. Accordingly, the weight to be assigned to such statements and the assessment of the witness's credibility falls to be determined by the general *corpus* of case law relating to inconsistencies, discrepancies and falsehoods in a witness's statement. In other words, ***whether the fact that a witness has retracted his statement should be allowed to cast [doubt] about the credibility of that witness and the veracity of his statement depends on whether a reasonable and reliable explanation can be furnished for the retraction***; see, in this regard, the Court of Appeal decision in *Syed Abdul Mutalip bin Syed Sidek v PP* [2002] 1 SLR(R) 1166 at [22] where it was held, in the context of an accused retracting his confession, that "While the court should consider any explanation that the accused person gives for his change of position, the explanation can be rejected if it is found to be untrue." I would respectfully add that if the explanation for the retraction is unsatisfactory then this may cast doubt on the entire evidence of that witness. [emphasis added in bold italics]

Hence, whether P105 and P115 remain reliable as confessions against Fadzli despite Affandi's retraction would ultimately depend on whether Affandi could give a reasonable and reliable explanation for the retraction of these two statements in his subsequent statements.

142 To reiterate, Affandi claimed in P105 and P115 that he was collecting the bundles of drugs and safe keeping them on Fadzli's behalf. However, he claimed subsequently that he had collected the bundles on behalf of Mamak.

When Affandi was asked why he claimed previously that "Abut" (*ie*, Fadzli) was the one who had instructed him to collect the bundles but subsequently claimed that Mamak was the one who instructed him to do so, he first explained in his statement recorded on 15 July 2013, P123, (at para 19) that:

> I had said earlier that the eight black bundles belonged to Abut and that he asked me to collect them and that he would get them from me when he wanted to. All that is not true. I do not know what I was thinking at that time. I was confused and so I said that it is Abut. All the eight bundles actually belonged to Mamak. The eight bundles also do not belong to me.

143 In his further statement recorded on 16 July 2013, P125, Affandi answered (at para 38) as follows:

> …
>
> Q9. You tell me that the eight bundles belong to Mamak. Then why did you say earlier that they belonged to Abut?
>
> A9. I was scared and confused. The CNB officer was pressurizing me. I didn't really know what I was thinking at the point of time. I was very 'gan jiong'.
>
> Q10. What do you mean by 'the CNB officer was pressurizing me"?
>
> A10. He kept on asking me 'whose one is it?', 'who does it belong to?'. I was scared I never go through all these before.
>
> …
>
> Q13. If he did not threaten you, why did you say the bundles belong to Abut and that you passed him ice?
>
> A13. I don't know**.** I felt scared and confused and did not know what to say.
>
> …

144 At the trial, Affandi also explained that he fabricated whatever he stated in P105 and P115:

> Q "Abut pays me about 4 to $500 for one collection." Yes. So why did you say this?

A It's not true.

Q Yes. So why did you say it? Why did you make this up?

A As I have mentioned just now --- in my mind whatever [SSI] David [Ng] has said to me with regards to death sentence, it was running all along my mind. As such, I answered this way just to save myself.

Q Now you said you gave this statement because you wanted to remain co-operative to save yourself, right?

A Yes.

Q Now if that is the case, there's no need for you to provide further details in your contemporaneous statement, isn't it?

A Yes, but on that day I was just coming out with stories.

Q So you were deliberately fabricating lies to add to this statement.

A Yes. I have to save myself.

Q No. So why did you think that you needed to fabricate more lies to save yourself?

A I don't know.

145 In my judgment, Affandi's reasons given for retracting his confessions should be rejected. First, contrary to Affandi's assertions that he had implicated Fadzli falsely because he was "scared" and "confused", the statements showed that Affandi was lucid and had a clear mind when providing those statements. P115 even added more details to the answers in P105. Second, Affandi conceded at the trial that he had "no complaints" about the IO who was involved in the recording of P115. It therefore appears that Affandi gave that statement under no stress or pressure, unlike what he was seeking to portray. Third, I agree with the Judge that there was simply no reason for Affandi to implicate a close friend even if he wanted to provide "assistance" by identifying someone falsely as having greater involvement in the drug activities that he was involved in. For example, Affandi could have named Mamak at the start of the questioning but he did not do so. Instead, he implicated his close friend, Fadzli. Fourth, it is

illogical that Affandi would invent facts that do not result in his own culpability being reduced but that still expose himself to the death penalty that he claims to be so fearful of. Fifth, if Affandi was aiming to obtain a certificate of substantive assistance, it would be illogical for him to furnish the CNB with fabricated information which was of no value to the CNB and which would be exposed easily upon investigation.

(2) Inconsistencies in the confessions are immaterial

146 Mr Tiwary submits that to prove Charge A against Fadzli, the evidence must establish beyond reasonable doubt that it was Fadzli who instructed Affandi to collect the drugs and that his possession of the drugs after collection was on Fadzli's instructions. He submits that the only evidence that supports this hypothesis is P105 and P115 but both statements are unreliable as confessions against Fadzli as they are inconsistent with each other and this means that Affandi is someone who is prone to tell lies.

147 In *Jagatheesan*, Rajah J made the following observations (at [82]):

> It is trite law that minor discrepancies in a witness's testimony should not be held against the witness in assessing his credibility. This is because human fallibility in observation, retention and recollection is both common and understandable: *Chean Siong Guat v PP* [1969] 2 MLJ 63 ("*Chean Siong Guat*") at 63–64; *Ng Kwee Leong v PP* [1998] 3 SLR(R) 281 at [17]. Inconsistencies in a witness's statement may also be the result of different interpretations of the same event: *Chean Siong Guat*. In fact, a witness may even lie but need not be completely distrusted if he lies not out of guilt but because of a misguided desire to bolster his case, or in other cases, to prevent shameful information from being revealed: *PP v Yeo Choon Poh* [1993] 3 SLR(R) 302 … In such circumstances, the court is not obliged, as a matter of course, to dismiss the credibility of the witness and reject his entire testimony out of hand. Confronted with such a witness, the court should, naturally, be more circumspect than ever when scrutinising the rest of his testimony with care. But a court is perfectly entitled, notwithstanding minor inconsistencies, to hold that a

> particular witness is in fact a witness of truth and to accept the other aspects of his testimony which are untainted by discrepancies.

148 Here, the two inconsistencies between P105 and P115 are that:

(a) P105 states that Fadzli passed Affandi $1,500 because Affandi was to borrow money from Fadzli. However, P115 states that Fadzli paid him $400 to $500 as payment for each collection of "panas"; and

(b) P105 states that this was the first time Affandi collected the drugs for Fadzli, whereas P115 states that Affandi has been doing this for Fadzli for a month, with one collection each week or sometimes twice a week.

149 In my judgment, these inconsistencies do not affect the core of P105 and P115 which comprises the following common facts: (a) Fadzli was the one who instructed Affandi to collect the bundles of "panas"; (b) Affandi would collect and safe keep the bundles for Fadzli; (c) Affandi needed money; and (d) money was passed by Fadzli to Affandi for doing these tasks. These facts are sufficient to implicate Fadzli in respect of Charge A in spite of the inconsistencies as to the details.

(3) The confessions are not contradicted materially by objective evidence

150 Finally, Mr Tiwary submits that P105 and P115 are unreliable because they are contradicted by independent objective evidence. I also reject this submission. In my view, the objective evidence referred to by Mr Tiwary as purportedly contradicting P105 and P115 is either immaterial in the discrepancies or does not contradict the two statements and in fact corroborates them.

151 First, Mr Tiwary points out that Affandi's telephone records show that Affandi was in contact with Mamak since 18 April 2013, which is some four (it should be three) months before the arrests. This suggests that it was more likely that Mamak was the instigator of Affandi's trafficking of diamorphine rather than Fadzli. Therefore, the account of events in P105 and P115 (which implicate Fadzli and not Mamak) is likely to be false. The telephone records for the early hours of 12 July 2013 also show that there were six instances of communication between Affandi and Mamak between 4.14am and 4.36am – these comprised two outgoing calls from Affandi, two text messages from Affandi and two text messages from Mamak. These suggest similarly that there was a direct relationship between Mamak and Affandi, therefore casting doubt on the Prosecution's case that it was Fadzli who instigated Affandi to possess the seized diamorphine for the purpose of trafficking.

152 In my judgment, however, these telephone records are insufficient to cast doubt on the Prosecution's case that Fadzli instigated this particular transaction for the trafficking of diamorphine as they do not show that Fadzli was not involved at all. Although these records show that Affandi had direct contact with Mamak previously, thus making it less likely that Fadzli had to play the middleman, in the absence of information as to the contents of the calls, they were not capable of showing that Fadzli did not instigate Affandi to possess the seized diamorphine for the purpose of trafficking. This is especially so when we look at two messages between Fadzli and Affandi.

153 The first is a message that Fadzli sent on 10 July 2013 at about 9.32pm to Affandi stating "Da kol mamak", which translates to "Already kol Mamak". The Prosecution submits that this was likely to have been Fadzli's update to Affandi that he had already called Mamak, whom Affandi claimed was the drug supplier in Johor Bahru who had asked him to collect the seized diamorphine

("the first Mamak"). Both Affandi and Fadzli sought to explain this message by claiming that this message was sent to a "Mamak" who was their mutual friend and not the aforementioned drug supplier ("the second Mamak").

154 In my opinion, the message sent on 10 July 2013 was indeed a message sent from Fadzli to Affandi about him having contacted the first Mamak, who is the same person that Affandi claimed asked him to collect the seized diamorphine. The second Mamak was most likely a fictitious character invented by the appellants. This is evident for three reasons.

(a) First, Fadzli described the second Mamak in P121 as being "1.7m tall, fair, Malay, about 20 years old, with long hair". However, Affandi described the second Mamak in P127 as an "Indian Muslim around 20 years old, not so fat, dark with short hair". Both appellants conceded at trial that these two descriptions of the second Mamak were different.

(b) Second, both appellants also gave inconsistent evidence about the number of times that they had met up with the second Mamak. Fadzli claimed that the both of them had met the second Mamak "on more than a couple of times", whereas Affandi claimed to have met the second Mamak either once or twice.

(c) Third, Fadzli claimed that he did not have the contact number of the second Mamak and had never contacted him before. Not only does this contradict Fadzli's evidence that both he and Affandi have met the second Mamak on more than a couple of occasions, it also contradicts Affandi's evidence that Fadzli had given him the contact number of the second Mamak previously but he did not save that contact number.

It was therefore clear that the second Mamak did not exist and most likely Fadzli did send a message to Affandi on 10 July 2013 to inform him that he had already contacted the first Mamak.

155 The second is a draft message that Affandi composed and which was to be sent to Fadzli on 12 July 2013. However, he did not manage to send it. It reads, "Abut aku tumpeng kwn aku g keje. S n don nk bwk kuar brape byk", which translates to "Abut, I get a ride from my friend to go to work. S n don want to bring out how many?". The Prosecution submits that the significance of this message is that Affandi intended to ask Fadzli how much of the drugs he wanted to collect from Affandi that day. I agree.

156 Secondly, Mr Tiwary submits that Affandi's acknowledgement in P115 that the eight bundles collected were more than usual is contradicted by the fact that Affandi failed to contact Fadzli immediately to inform him about the unusually large number of packets when that would have been the reaction expected of Affandi in those circumstances. Hence, the fact that Affandi failed to call Fadzli to inform him about this showed that Fadzli was never involved in Affandi's collection of the seized diamorphine.

157 I reject this submission. The telephone records show that there were calls between Affandi and Fadzli in the early hours of 12 July 2013: Affandi called Fadzli at 3.38am, received a call from Fadzli at 5.37am, called Fadzli again at 6.21am and received a call from Fadzli at 6.23am. Mr Tiwary argues that the Judge should not have relied on these calls to infer that both appellants were communicating to coordinate Affandi's collection of the seized diamorphine. At the trial, both appellants claimed that these calls were made pursuant to an arrangement to give each other morning "wake-up calls" for their pre-dawn meal during the Ramadan fasting month. I agree with the Prosecution that this

claim was not credible. The first call was made at 3.38am, which was well before daybreak (which was at 7.05am on 12 July 2013) and therefore significantly earlier than the time to start fasting on 12 July 2013. Further, it was made shortly after Affandi returned from Johor Bahru at about 3.30am and, according to him, went to collect the drugs at the Kranji heavy vehicle carpark. Affandi explained at the trial that he had set an alarm on his phone to remind him to call Fadzli to wake him up. However, Fadzli testified that their arrangement was a flexible one and whoever woke up should call to wake the other person up. If the 3.38am call was a wake-up call to Fadzli, what were the other three calls about? They could not all be wake-up calls. In my opinion, while the contents of the calls could not be verified, they do show that there was constant communication between Affandi and Fadzli after Affandi had collected the drugs. Therefore, it could not be said that Affandi failed to call Fadzli to inform him about the unusually large number of packets.

158 Thirdly, Mr Tiwary submits that Affandi's claim in P105 that he collected the bundles from an Indian man at the Kranji heavy vehicle carpark is contradicted by the fact that Affandi's car was not captured on the CCTV footage at the U-turn area along Woodlands Road at the Ten Mile Junction. Even in Affandi's alternative narrative provided in his subsequent investigation statements (*ie*, P123–P130), Affandi continued to insist that he did collect the bundles from an Indian man at the Kranji heavy vehicle carpark after driving into Singapore from Johor Bahru via the Woodlands Checkpoint at about 3.30am on 12 July 2013. When asked by the CNB officers why his car was not captured on the CCTV at the Ten Mile Junction Woodlands Road U-turn between 3.30am to 5am, Affandi had no answer. The Judge was therefore justified in rejecting Affandi's claim that he picked up the bundles from the Indian man at the Kranji heavy vehicle carpark and finding instead that Affandi

had gone to Johor Bahru in the early hours of 12 July 2013 (Affandi left for Johor Bahru by the Woodlands Checkpoint seven minutes before midnight on 11 July 2013), returned to Singapore at 3.30am and drove straight to the MBS carpark without stopping by the Kranji heavy vehicle carpark (see Judgment at [71]). In the circumstances, I find that although the fact that Affandi's car was not captured on the CCTV at the Ten Mile Junction Woodlands Road U-turn at the material time contradicts Affandi's account of the route he took as presented in P105, this inconsistency does not affect materially the rest of P105, especially when P115 is also considered.

159 Finally, the Prosecution submits that there is strong forensic evidence that corroborates P105 in particular. In P105, Affandi stated that Fadzli had received a lot of "Ice" from him and that Fadzli was supposed to take "all the Ice but he left some behind". As mentioned earlier (at [126] above), analysis conducted by the DNA Profiling Laboratory of the HSA showed that Affandi's DNA was found on both the interior and exterior surfaces of the plastic packet, D1A, which was found in Fadzli's car after his arrest. This shows that Affandi did come into contact with the packet in Fadzli's car containing 38.84g of methamphetamine, which is the subject of Charge B. Further, analysis conducted by the Forensic Chemistry and Physics Laboratory ("FCPL") of the HSA also showed that one of the plastic packets, D1A2, which was found in Fadzli's car, was directly connected in the manufacturing process to another plastic packet, A1A1, which was found in Affandi's car. An FCPL expert testified at the trial that the likelihood of another machine producing the same manufacturing marks is so remote that it can be regarded as a practical impossibility. This therefore shows that the packets found in Fadzli's car, which contain 38.84g of methamphetamine and are the subject of Charge B, originate

from the same source as the packets found in Affandi's car, which contain 8.14g of methamphetamine and are the subject of Reduced Charge F.

160 The Judge also took note of the evidence on DNA profiling and on the FCPL analysis (Judgment at [9] and [10]). However, quite surprisingly, he decided that both these strands of evidence did not really assist the Prosecution or the appellants and accordingly decided he would not refer to them any further (Judgment at [11]). No explanation was provided for this conclusion. The Judge subsequently acquitted Affandi on Charge G on the basis that although Affandi admitted in his contemporaneous statement that he had passed "a lot" of ice to Fadzli, it was not explained what he meant by that and there was no evidence of the amount of methamphetamine involved. The Judge also held that the Prosecution had not proved beyond a reasonable doubt that Affandi had passed Fadzli the four packets containing 38.84g of methamphetamine (Judgment at [80]–[81]). The Judge also acquitted Fadzli on Charge D because it was not clear where the methamphetamine came from. Although Affandi's contemporaneous statement indicated that Fadzli had left some methamphetamine with him, it did not state that the 8.14g of methamphetamine was from Fadzli. Further, Affandi's statement that he had bought methamphetamine from a Chinese man in Geylang was not seriously challenged by the Prosecution, leaving a reasonable doubt whether the methamphetamine recovered from Affandi originated from Fadzli. The Judge was also of the view that even if the methamphetamine had originated from Fadzli, there was no evidence that Fadzli had instigated Affandi to be in possession of it for the purpose of trafficking (Judgment at [119]–[120]). As the Prosecution has not appealed against these findings, I shall not discuss the correctness of the Judge's decision to acquit Affandi and Fadzli on Charge G and Charge D respectively. However, the forensic evidence relating to the DNA profiling and the FCPL

analysis corroborates strongly Affandi's statement in P105 that he had passed a lot of the "Ice" to Fadzli on 12 July 2013 but Fadzli left some behind. Further, since "Ice" was passed between the two appellants that day, their meeting was not for the sole purpose of collecting the groceries as alleged.

Fadzli told lies that amount to corroboration of evidence of his guilt

161 The Judge found that two lies by Fadzli damaged his credibility and his defence that he had nothing to do with the seized diamorphine and that he did not instruct Affandi to collect and to store the eight bundles (Judgment at [108]). The first was Fadzli's failure to identify Affandi from the photo shown to him when P106 was being recorded. The second was Fadzli's lie in P119 that "I was not known as Abut to anyone".

162 On appeal, the Prosecution submits that not only do these two lies by Fadzli damage his credibility and his defence but the lies also corroborate the other evidence that point to his guilt. It argues that these lies amount to lies in the *Lucas* sense. Lord Lane CJ in the English Court of Appeal decision in *Lucas* said (at 724F) that a lie can amount to corroboration of evidence of guilt if, first, the lie told out of court is deliberate, second, the lie relates to a material issue, third, the motive for the lie must be a realisation of guilt and a fear of the truth and, fourth, the statement must be shown clearly to be a lie by independent evidence (see *Ilechukwu* at [60], *Kamrul Hasan Abdul Quddus v Public Prosecutor* [2011] SGCA 52 at [18] and *Public Prosecutor v Yeo Choon Poh* [1993] 3 SLR(R) 302 at [33]).

163 In my opinion, Fadzli's lies in these two material aspects are capable of corroborating the evidence that support the finding that Fadzli was guilty of the offence as charged.

(1) Fadzli's failure to recognise Affandi when shown Affandi's photo while P106 was recorded

164 Shortly after Fadzli was arrested on 12 July 2013, SSgt Fardlie recorded a contemporaneous statement from him, *ie*, P106, while inside the CNB's operations vehicle. During the recording of P106, Fadzli claimed that he did not recognise the man in the photo when shown a photo of Affandi on SSgt Fardlie's mobile phone. The material portion of P106 reads as follows:

> …
>
> Q7. Pointing to the accused a digital photo of one male Malay.
>
> "Awak kenal dia siapa?"
>
> (Do you know who he is?)
>
> A7. "Tak kenal."
>
> (I do not know.)
>
> (Recorder's note: Photo is one Mohamed Affandi Bin Rosli I/C [xxx])
>
> Q8. Accused was shown another digital photo of a male Malay.
>
> "Awak kenal ni siapa?"
>
> (Do you know who this is?)
>
> A8. "Tak kenal."
>
> (I do not know.)
>
> (Recorder's note: Photo shown is one Mansor Bin Mohamed Yusoff, S [xxx])
>
> Q9. "Awak ada jumpa mereka berdua tak?"
>
> (Did you meet the both of them?)
>
> A9. "Tak."
>
> (No.)
>
> [The words in parenthesis are the English translations of the original statement handwritten in Malay.]

165 On 17 July 2013, Fadzli elaborated that:

> 7. About half an hour after my arrest, at the open carpark, an officer recorded my statement in a notebook and showed me two photographs on whatsapp. The officer asked me if I recognized the guy in the first photo. I took a look at the first photo and told the officer that I do not recognize the guy. I assumed that the second photo showed the same guy as the first photo and I said I also do not recognize the guy in the second photo. The persons in the two photographs were wearing the same dark blue shirt and the same black pants.
>
> 8. (Recorder's note: I show the accused the photographs of Mohamed Affandi Bin Rosli and asked him if he knows this person.) I know this person as "Fandi". (Recorder's note: Accused wrote down the name of the person and signed on the paper with the photographs.)

166 At the trial, Fadzli first claimed that it was an unidentified Chinese officer and not SSgt Fardlie who showed him two photos on a mobile phone while P106 was being recorded. He also claimed that he was shown the photos at an open space outside the CNB operations vehicle (and not while inside the said vehicle). Next, when asked why he failed to recognize Affandi in the photo, Fadzli claimed in examination-in-chief that when he was shown the two photos, his body was restrained such that he could not hold the mobile phone and there was glare from the sun that made it difficult for him to see the photos clearly because this was done outside the CNB vehicle. During cross-examination, he clarified that he was actually able to have a good look at the first photo (which he claimed was not Affandi) but he was not able to get a good look at the second photo because of the angle of the phone that was used to display the photos and also because of the glare from the sun. Fadzli therefore assumed that the second photo was the same as the first photo because the individuals shown in the photos were wearing shirts of the same colour.

167 In my view, Fadzli clearly told a *Lucas* lie when he said he did not recognise Affandi in the photo while P106 was being recorded. The lie was in relation to a material issue of whether Fadzli knew Affandi.

168 Fadzli told the lie deliberately and was motivated by a desire to dissociate himself from Affandi because his explanation for his failure to recognise Affandi was unbelievable.

(a) First, Fadzli's claim that he was shown the photos by an unidentified Chinese officer (and not SSgt Fardlie) while outside (and not inside) the CNB operations vehicle was contradicted by SSgt Fardlie, whose evidence was that P106 was recorded while inside a vehicle and that he showed the two photos to Fadzli while recording P106 himself, without the help of any other CNB officer. P106 stated clearly that "inside CNB ops vehicle parked at F1 open space carpark along Republic Boulevard, I, Sgt Muhd Fardlie commenced recording the statement of [Fadzli]". There was no indication of any other CNB officer being present or assisting in the recording. In my opinion, Fadzli was untruthful about P106 having been recorded outside the vehicle so as to buttress his explanation about the glare from the sun, causing him not to be able to look at the second photo clearly.

(b) Second, assuming that it was true that Fadzli could not see the second photo (or even both photos) clearly, there was no reason why he could not say "I cannot see the face" instead of answering "I do not know" when asked by SSgt Fardlie, "Do you know who this is?".

(c) Third, Fadzli's explanation that he assumed that both photos showed the same person was plainly incredible because he was asked whether he met the "both of them" and he said "No".

169 When the IO was recording Fadzli's statement on 17 July 2013, she referred to the print version of Affandi's photo and asked Fadzli whether he knew the person in the photo. Fadzli replied that he knew the person in the photo as "Fandi". On this point, Mr Tiwary submits that it was unsafe for the Judge to conclude that Fadzli was lying previously because the digital photo that was shown to Fadzli on SSgt Fardlie's mobile phone was never produced in court and therefore the court could not be sure that Fadzli was shown Affandi's photo or even if it was, it was one that looked like Affandi. Even so, in my view, Fadzli's lies highlighted earlier still undermined his credibility.

(2) Fadzli's unsolicited declaration in P119 that he was not known as "Abut"

170 The IO recorded an investigation statement, P119, from Fadzli on 16 July 2013. The statement was recorded in English as that was Fadzli's preferred language. After the statement was typewritten and printed out for Fadzli to confirm and sign, he inserted at the end of the first paragraph, in his own handwriting, the following sentence:

> I was not known as Abut to anyone.

171 At the trial, Fadzli, who was testifying in Malay, admitted in examination-in-chief that this handwritten sentence was incorrect as he was known as "Abut" to his family members and to Affandi (whom Fadzli knew for 10 years). Fadzli said he also had an alias "Afad", as indicated in his statement, P119. In cross-examination, Fadzli said that "Abut" was a nickname given by his family. He also explained that the handwritten sentence was a mistake and should have read (as translated by the interpreter) "I was not known as Abut to anyone except to my family members and to those friends who has come to my house before". The Judge rejected Fadzli's explanation and found that when he stated that he was not known as Abut, he was seeking to distance himself from

Affandi. The Judge also opined that if Fadzli had nothing to hide, he would not have tried to distance himself from Affandi and the lie showed that he was involved with some activities with Affandi for which they were arrested (Judgment at [108]).

172 In my judgment, there was absolutely no reason for Fadzli to volunteer the statement that "I was not known as Abut to anyone". He did not think there was any need to explain his alias "Afad" during the recording of P119. The handwritten sentence was written by him neatly in English and the sentence was unequivocal. He was educated up to NTC3 and was obviously conversant in English, his chosen language for the recording of P119. He did not appear to have been rushed during the recording because he made four other additions of details in P119 after he added the sentence in the first paragraph of P119. In any case, he made no assertion that he was rushed by the IO and therefore made the mistake. He certainly could not say that he was not thinking about his family members when he added the unequivocal sentence in the first paragraph of P119 because one line down in the second paragraph, he mentioned his family members and later added "younger sister" in his handwriting. Further, the unequivocal sentence is about his own family-given nickname and no one will make such a glaring mistake unless the falsehood was entirely intentional. I therefore agree with the Judge's observation that the clear inference to be drawn from this deliberate and unsolicited insertion in P119 is that Fadzli was trying to distance himself from Affandi and the drugs that were still in Affandi's custody. This was because Affandi knew him as "Abut" and would almost certainly implicate him as the owner of the drugs.

173 On appeal, Mr Tiwary submits that it was possible that Fadzli had made a genuine mistake in stating that he was not known as "Abut" to anyone when P119 was being recorded. This was because Fadzli did not deny knowing

Affandi in his earlier cautioned statement, P111, which was recorded in the morning of 13 July 2013 when he was charged with abetting Affandi in the trafficking of the seized diamorphine. In P111, Fadzli was recorded as having stated the following:

> I really have no idea that Mohamad Affandi did had the possession of the drug. I really have no idea that he is doing illegal things. I would like to engage a lawyer with regards to this. I really have no idea what he is doing all the while. My DNA will not be on any of the drugs because I have no idea about those things at all. If I know he is doing illegal things, I will not make friends with him. The purpose of me meeting him yesterday was just to take the groceries from him at Marina Bay Sands. I really have no idea of what he is doing. That is all.

174 In my opinion, just because Fadzli did not deny knowing and meeting Affandi in P111 did not mean that Fadzli was not trying deliberately and desperately to distance himself from Affandi and the drugs. The whole tenor of P111 is that Fadzli really did not know very much about Affandi. It was almost certain that Affandi would mention the name "Abut" if asked about the owner of the drugs. As mentioned earlier, he was known as "Abut" to Affandi. Having Affandi know about his family-given nickname would show, at the least, that they were close. If they were close, the possibility that they were involved in a drug transaction together, with Affandi collecting and then storing the seized diamorphine for Fadzli, becomes less remote on the facts of this case.

Conclusion

175 For these reasons, I dismiss both appeals against conviction and affirm the decision of the Judge in convicting both appellants on their respective capital charges. There was no doubt that the huge amount of diamorphine was meant for trafficking. Neither appellant satisfies any of the requirements set out in s 33B of the MDA. The Judge therefore did not have the discretion to consider whether imprisonment for life and caning should be imposed instead of the

death penalty. Accordingly, I also affirm the Judge's decision to impose the mandatory death sentence on both appellants.

Tay Yong Kwang
Judge of Appeal

Chia Soo Michael and Hany Soh Hui Bin (MSC Law Corporation) and Sankar s/o Kailasa Thevar Saminathan (Sterling Law Corporation) for the appellant in Criminal Appeal No 38 of 2017;
Ramesh Chandr Tiwary (Messrs Ramesh Tiwary) and Luo Ling Ling (RHTLaw Taylor Wessing LLP) for the appellant in Criminal Appeal No 39 of 2017;
Tan Wen Hsien and Carene Poh (Attorney-General's Chambers) for the respondent in Criminal Appeals Nos 38 and 39 of 2017.