Lim Chee Huat *v* Public Prosecutor
[2019] SGHC 132

Case Number : Magistrate's Appeal No 9269 of 2018

Decision Date : 24 May 2019

Tribunal/Court : High Court

Coram : Aedit Abdullah J

Counsel Name(s) : Zero Geraldo Mario Nalpon (Nalpon & Co) for the appellant; Isaac Tan and Chin Jincheng (Attorney-General's Chambers) for the respondent.

Parties : Lim Chee Huat — Public Prosecutor

Courts and Jurisdiction – Court judgments

Criminal Procedure and Sentencing – Appeal

24 May 2019 Judgment reserved.

Aedit Abdullah J:

Introduction

1 In the present appeal, the appellant was not only dissatisfied with his conviction under s 8(*b*)(ii) of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) ("MDA"), but also with the written grounds of the first instance judge (the "District Judge"), which substantially copied the Prosecution's closing submissions in the trial below.

2 I find that as substantial copying had occurred, the grounds of the decision below could not be said to contain any determination of issues or a making of a decision by the District Judge. It therefore could not be relied upon to support the appellant's conviction. Nonetheless, having considered the submissions and the record of proceedings, there are sufficient grounds for this court sitting in appeal to determine the issues raised. There is sufficient evidence to convict the appellant on a charge for consumption of methamphetamine under s 8(*b*)(ii) of the MDA, punishable under s 33(1) of the MDA, particularly as the presumption in s 22 of the MDA operating against him is not rebutted. There is thus no need for the case to be remitted, contrary to what was sought by the appellant. As the District Judge's sentence of 11 months' imprisonment is not manifestly excessive, I also dismiss the appeal against sentence.

Background facts and evidence

3 I begin with a summary of the facts which are material to this appeal.

4 The statement of agreed facts is set out in *Public Prosecutor v Lim Chee Huat* [2018] SGDC 272 ("GD") at [3]. It was not disputed that a team of Central Narcotics Bureau ("CNB") officers conducted a house visit at the appellant's residence on 14 November 2016. The appellant reported to Ang Mo Kio Police Division Headquarters on 15 November 2016, where his urine samples were procured in accordance with procedures set out in the First Schedule to the Misuse of Drugs (Urine Specimens and Urine Tests) Regulations (Cap 185, Rg 6, 1999 Rev Ed). His urine samples were tested by the Health Sciences Authority ("HSA") and found to contain methamphetamine.

5 The appellant's case at the trial below was that he did not knowingly consume methamphetamine. He had only consumed medication purchased from a man at Blk 322, Hougang Avenue 5 on 13 November 2016; this medication was found to contain traces of methamphetamine, cocaine and ketamine. [note: 1] He alleged that the CNB officer who recorded his statement – Prosecution Witness 2 SSSgt Andrew John Joachim ("PW2 SSSgt Joachim") – had not recorded the fact that he had consumed medications prescribed by a *sinseh* and medications from Tan Tock Seng Hospital and the National Skin Centre. [note: 2] He called on his daughter and wife to give evidence as to his good character.

6 The Prosecution's case at the trial below was that s 22 of the MDA operated such that the appellant was presumed to have consumed methamphetamine in contravention of s 8(*b*) of the MDA. The appellant failed to rebut this presumption on the balance of probabilities. His defence was contradicted by evidence from two storeowners working in the vicinity of Blk 322, Hougang Avenue 5 – PW8 Mr Heng Chee Kiong ("PW8 Mr Heng") and PW9 Mdm Tan Buay Hoon ("PW9 Mdm Tan") – that no *sinseh* sold medicine in the location identified by the appellant. PW2 SSSgt Joachim had also confirmed that he had recorded two of the appellant's statements accurately. Finally, the appellant's defence was internally inconsistent and implausible.

Decision below

7 The District Judge found the Prosecution witnesses credible and accepted their evidence: GD at [20] to [24]. He accepted the Prosecution's submissions that no weight should be placed on the Defence witnesses' testimony: the appellant's daughter's evidence was irrelevant, and his wife's inconsistent and unreliable: at [25] to [34]. The relevant HSA certificates showing the presence of methamphetamine in the appellant's urine samples were admitted into evidence under s 16 of the MDA. The s 22 presumption operated thereafter, with the appellant presumed to have contravened s 8(*b*) of the MDA: at [35] to [40].

8 The District Judge agreed with the Prosecution that the appellant failed to rebut the presumption on a balance of probabilities: at [41] to [61]. Considering that the appellant was a first-time offender and had claimed trial, the District Judge sentenced him to 11 months' imprisonment: at [63] to [71].

The parties' cases

The appellant's case

The issue of judicial copying

9 The appellant submitted that the District Judge had plagiarised the Prosecution's closing submissions and that his GD was therefore "worthless". The District Judge had a duty to ensure that he gave due regard to both parties' arguments, especially when the appellant was to be given the benefit of the doubt. However, he omitted to mention the Defence's salient arguments. This methodology made a "mockery of the judiciary". The resultant GD disclosed "clear bias" in favour of the Prosecution. [note: 3]

10 The appellant undertook a detailed comparison of the GD *vis-à-vis* the Prosecution's submissions. He concluded that the District Judge had plagiarised 27 of the 43 paragraphs in the substantive portion of the GD, in the section under the heading "Analysis and assessment of evidence" (GD at [19] to [61]). In sum, the District Judge had substantially replicated the

Prosecution's submissions, opting only to rearrange the sequence of the paragraphs and make minor paraphrases. The District Judge's plagiarism of the Prosecution's submissions extended to the reproduction of a typographical error: for instance, [32] of the GD replicated para 57 of the Prosecution's closing submissions, even including the Prosecution's typographical error "once against": [note: 4]

Prosecution's submissions	Grounds of decision
57 Mdm Wong similarly provided conflicting testimony on the accused's return from the Malaysian KTV back home. In the course of cross-examination, Mdm Wong provided three different timings for when the accused returned back to Singapore. She first stated that the accused came back home at midnight. When confronted with the accused's statement, Mdm Wong then changed her testimony, and stated that the accused returned to Singapore after 2.00 a.m. in the morning. She provided no explanation whatsoever for this change in timing, but confirmed that this timing was accurate. Finally, when confronted with the immigration records of the accused, Mdm Wong once against changed her testimony, and merely stated that the accused returned in the wee hours of the morning. Given the inconsistencies in Mdm Wong's testimony, it is clear that she is not a reliable or credible witness.	32 I had also noted that Mdm Wong had similarly provided conflicting testimony on the accused's return home from the Malaysian KTV lounge. In the course of cross-examination, Mdm Wong provided three different timings for when the accused returned back to Singapore. She first stated that the accused came back home at midnight. When confronted with the accused's statement, Mdm Wong then changed her testimony, and stated that the accused returned to Singapore after 2.00 a.m. in the morning. She provided no explanation whatsoever for this change in timing, but confirmed that this timing was accurate. Finally, when confronted with the immigration records of the accused, Mdm Wong once against changed her testimony, and merely stated that the accused returned in the wee hours of the morning. Given the inconsistencies in Mdm Wong's testimony, it was clear that she could not be considered to be totally reliable nor a credible witness.

11 The appellant orally submitted that the deficiencies in the GD necessitated the remittal of the case for retrial before a different judge, as the District Judge who had heard the original trial demonstrated bias in favour of the Prosecution. While the High Court had the power to rehear the case on the evidence before it, it would not be able to consider the demeanour of the witnesses, which was at issue in this case.

The substantive appeal

12 As regards the substantive appeal against conviction and sentence, the appellant submitted that the District Judge erred in fact and law by, *inter alia*: (a) finding that the testimonies of PW8 Mr Heng and PW9 Mdm Tan were credible and finding that they had "never seen" any *sinseh* selling medication at Blk 322, Hougang Avenue 5; (b) finding that the appellant's testimony was "riddled with inconsistencies" and dismissing the appellant's defence as "palpably improbable" and "inherently logical"; (c) ignoring the "unique circumstances" as regards the CNB officers' failure to arrest the appellant on the day of the house visit and his willingness to report to a police station the day after; and (d) failing to give consideration to the appellant's waiver of litigation and matrimonial privilege.

The Prosecution's case

The issue of judicial copying

13 The Prosecution accepted in its oral submissions that the District Judge's GD was "strikingly similar" to the Prosecution's closing submissions but argued that the arguments pertaining to the form of the GD were irrelevant. For one, the GD did refer to matters that were not in the Prosecution's submissions, demonstrating the District Judge's consideration of the matters at trial. At [47], the District Judge noted that the Defence could have called the *sinseh* as a Defence witness; this was not discussed in the Prosecution's submissions. In any case, judges are not obliged to address every single issue that arises in the course of a trial.

14 As for whether the matter should be remitted for retrial, the Prosecution submitted that the High Court was entitled to review the merits of the conviction. The demeanour of the witnesses did not play a large role in the consideration of this case, as the inconsistencies of the appellant's evidence were material. Alternatively, the matter could be remitted to the same District Judge for him to offer fuller grounds of decision. The appellant's assertion of the District Judge's bias in favour of the Prosecution was not supported. The District Judge had allowed the Defence to call two witnesses at trial despite its non-compliance with s 231 of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) ("CPC"), and had taken care to ensure that the appellant understood the concepts of litigation privilege and matrimonial privilege.

The substantive appeal

15 The Prosecution argued that the appellant's conviction should not be disturbed. The presumption in s 22 of the MDA had not been rebutted. The appellant's defence was contradicted by the extrinsic evidence. Further, his testimony was internally inconsistent. It was also inherently incredible that a *sinseh* would have sold capsules containing illicit substances in the manner described by the appellant. The appellant's demeanour at the time of arrest was irrelevant, as he had not been told that he would be subjected to a urine test before he reported to the police station as directed.

16 The Prosecution also noted in oral submissions that the appellant had failed to mention the existence of a *sinseh* in his statements to PW2 SSSgt Joachim, and tried to blame his omission on PW2 SSSgt Joachim's failure to record his statements accurately. The capsules allegedly purchased from the *sinseh* were also only submitted for testing some eight months after the appellant's urine tested positive for methamphetamine. Reviewing the evidence in its totality, the appellant's claim was inherently unbelievable and his conviction should be upheld.

My decision

17 Having considered the submissions and the relevant case law, I find that the District Judge had copied the Prosecution's submissions to such a degree that I can only give minimal weight to his decision on conviction and sentence. However, I agree with the Prosecution that this court is still capable of weighing the evidence on record to determine if the appellant's conviction should be upheld. Having done so, I find that the appellant's conviction under s 8(*b*)(ii) of the MDA should not be disturbed, and that a sentence of 11 months' imprisonment is appropriate in the circumstances.

Issue 1: The effect of judicial copying on a judgment

18 The question of copying was not raised in the appellant's petition of appeal, but as there was no question of the Prosecution being caught by surprise by this aspect of the appellant's case, the appellant was allowed to invoke the District Judge's copying as a basis for the decision below to be set aside. I further note that the appellant's counsel indicated that he was only aware of the copying when his appeal submissions were being prepared.

The role of a judgment

The role of a judgment

19 I first consider the function of a legal decision. In *Thong Ah Fat v Public Prosecutor* [2012] 1 SLR 676 ("*Thong Ah Fat*"), the Court of Appeal set out the rationale for the judicial duty to give reasoned decisions (at [20] to [25]):

> (a) First, the recognition of a duty to give reasons encourages judges to make well-founded decisions: judges are reminded that they are accountable for their decisions, which should lead to increased care in the dealing with submissions and analysis of evidence.
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> (b) Second, the duty ensures that parties are made aware of why they have won or lost. This also enables practitioners, legislators and members of the public to ascertain the basis upon which like cases will be decided in the future.
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> (c) Third, it ensures that the appellate court has the proper material to understand why the first instance decision was made in a particular way, and preserves and facilitates any right of appeal a party may have.
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> (d) Fourth, the duty to articulate reasons curbs arbitrariness.
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> (e) Fifth, it allows justice to be seen to be done and increases the transparency of the judicial system.

20 The Supreme Court of Canada also discussed this issue in *Leo Matthew Teskey v Her Majesty The Queen* [2007] 2 SCR 267 ("*Teskey*"). At [14], the majority referred to the decision in *R v Sheppard* [2002] 1 SCR 869 ("*Sheppard*") as regards the requirement and the purpose of giving judicial reasons:

> … Mr. Teskey was entitled to know why he was convicted. The reasons were also necessary to inform the grounds of his appeal from conviction properly. Interested members of the public were also entitled to see for themselves whether justice was done here. Furthermore, in the particular context of the appeal, the reasons were necessary to provide a meaningful review of the correctness of the decision.

21 The reasons in *Thong Ah Fat* and *Teskey* are readily transposable to the present question as to the purposes for which judicial reasons or judgments are needed. The primary role of a judgment or grounds of decision is to convey the reasons for the outcome or result in a particular case. This requires the court to address the arguments raised by the parties, with the qualification that it is not necessary for a judge to address all points that are raised. Judgments need not be all-encompassing, and no breach of the rules of natural justice arises from a judge's omission of specific points. This is unlike the position in respect of arbitral awards and decisions, which may be set aside for breach of natural justice if they are insufficiently reasoned: see *AUF v AUG and other matters* [2016] 1 SLR 859 at [78] to [80].

The effect of judicial copying

22 As noted above, one of the roles of a judgment is to give assurance to parties and the public that justice has been done, through the exposition of reasons that become part of the public record and are accessible to all. Practices that undermine confidence in the judicial process are thus to be avoided.

23 The issue to be determined in this case is whether a judge can be said to properly discharge his

duty to give reasons when he incorporates passages copied from a party's submissions in his judgment. The main difficulty that arises is that the extensive copying of submissions from one side creates the material and substantial risk of a suspicion of bias on the judge's part. The wholesale adoption of one side's arguments without weighing and considering the merits of the submissions engenders the perception that either no thought was given to the issues raised, or that there was unquestioned adoption of those arguments by the judge. The latter may on occasion result simply from the fact that no contrary position could be brooked, especially in a hopeless case. But in most cases, the more likely perception is that there was prejudgment or bias on the judge's part.

24 As such, even where a party's arguments are sound, the court must demonstrate judgment and considered determination by weighing the parties' arguments and expressing why it preferred one side's position to the other. This effort necessarily entails the use of the court's own analysis and language; it is antithetical to wholesale copying.

25 In a judgment, it would generally be expected that submissions from one side would find favour over the other. No specific formula can be laid down as to whether a judge in a given case demonstrates sufficient consideration and deliberation in preferring one side to the other. But as will be discussed further below, the District Judge's judgment in the present case clearly fell short of what would have been expected, given the substantial similarities between his GD and the Prosecution's closing submissions in the court below.

26 Indeed, reusing passages suggests a lack of application and attention to the specifics of the case at hand. That such practice is to be discouraged is evident from the case of *Yap Ah Lai v Public Prosecutor* [2014] 3 SLR 180 ("*Yap Ah Lai*"), which concerned an appeal brought against a district judge's decision which replicated three crucial passages of reasoning from another of his decisions. Sundaresh Menon CJ observed at [69]:

> … In my judgment, a sentencing judge runs a considerable risk when he reproduces entire passages either from the submissions of the parties or, as in this case, from another of his decisions without attribution or explanation. It is one thing to cite submissions or cases at length while making it clear why they are being cited and how they might or might not be relevant to the case at hand. However, it is quite another thing for a judge to reproduce whole passages from another case or matter which he has decided, with neither attribution nor explanation. The main objection is that when the similarities are discovered the parties and other readers are left with the impression, whether or not this was intended, that the judge had not after all considered each matter separately, thoroughly or even sufficiently. As noted by Simon Stern, "Copyright Originality and Judicial Originality" (2013) 63 UTLJ 385 at 388, the concern here is not so much that the judge is taking credit for the ideas of another but rather that it raises:
>
> > … questions about the judge's attention to the dispute at hand. Too much cutting and pasting, without modification, may give the appearance of a 'mechanical act' with a canned solution that ignores the particularities of the parties' conflict and lacks the disinterested perspective that the adjudicator should bring to bear.

Responses in other jurisdictions

27 Various jurisdictions have considered the effect judicial copying has on judgments delivered. The common thread that spans these jurisdictions is that a judge's failure to properly attribute source material cannot alone justify setting aside a decision or allowing an appeal. Even plagiarism, in the sense of passing off another's work as one's own, would not be a reason in itself for overturning a decision. Rather, the mischief that results from such practice is the undermining of confidence in the

judicial process; the judge would not appear to have exercised his mind properly in respect of the issues in the case, instead adopting wholesale, and mindlessly, the position of one side. In other words, the concern is that a judgment copied from one side's submissions discloses no act of judgment or discernment by the judge. That being said, the approaches taken in the surveyed jurisdictions differ slightly.

Canada

28 In the case of *Eric Victor Cojocaru, an infant by his Guardian Ad Litem, Monica Cojocaru, and Monica Cojocaru v British Columbia Women's Hospital and Health Centre and F. Bellini and Dale R. Steele, Jenise Yue and Fawaz Edris* [2013] 2 SCR 357 ("*Cojocaru*"), the Supreme Court of Canada considered whether a trial judge's decision in a medical negligence case should be set aside because the reasons for judgment incorporated large portions of the plaintiffs' submissions. The Supreme Court concluded that the trial judge's decision could stand: at [3]. Beverley McLachlin CJ, delivering the judgment of the Court, stated at [1]:

> … [W]hile it is desirable that judges express their conclusions in their own words, incorporating substantial amounts of material from submissions or other legal sources into reasons for judgment does not without more permit the decision to be set aside. Only if the incorporation is such that a reasonable person would conclude that the judge did not put her mind to the issues and decide them independently and impartially as she was sworn to do, can the judgment be set aside.

29 It is helpful to consider McLachlin CJ's reasoning in some detail. She first affirmed at [16] the presumption of judicial integrity and impartiality articulated in *Teskey* at [19] (*per* Charron J for the majority). The presumption is rebutted if it is shown that a reasonable person would conclude that the judge failed to deal with the issues independently and impartially. In the present case, the issue was not only whether the reasons given by the trial judge were sufficient; this was a complaint about process and whether the presumption of judicial impartiality had been rebutted: at [26].

30 McLachlin CJ further noted that judicial copying is "a long-standing and accepted practice", albeit one which may, if carried to excess, raise problems: at [30]. Judicial copying does not by itself render a judgment suspect; lack of attribution is irrelevant to the determination as to whether the judge put her mind to the issues addressed in that copying: at [31]. The concern, rather, is that copying may be evidence that the reasons for judgment do not reflect the judge's thinking: at [35]. As summarised at [36]:

> … [E]xtensive copying and failure to attribute outside sources are in most situations practices to be discouraged. But lack of originality and failure to attribute sources do not in themselves rebut the presumption of judicial impartiality and integrity. This occurs only if the copying is of such a character that a reasonable person apprised of the circumstances would conclude that the judge did not put her mind to the evidence and the issues and did not render an impartial, independent decision.

31 McLachlin CJ found that the position that copying is acceptable and does not, without more, require the judge's decision to be set aside is adopted in England, various Commonwealth countries, and the US: at [37]. Two leading cases by the Ontario Court of Appeal also supported the view that copying does not in itself establish procedural unfairness:

> (a) In *R v Gaudet* (1998) 40 OR (3d) 1 (CA), the trial decision was upheld even though over 90% of its content was adopted from the Crown's submissions. There was no reason to conclude that the trial judge did not do what he claimed to have done, *ie*, conduct an independent review

of the evidence: at [43].

(b) In *Sorger v Bank of Nova Scotia* (1998) 39 OR (3d) 1 (CA), nearly 125 pages of a 128-page trial judgment were transcribed from the parties' submissions. The Court of Appeal cast this as a matter of procedural fairness, setting aside the trial judge's decision on the ground that the copying, viewed in terms of the judgment as a whole, would satisfy a reasonable observer that the judge failed to grapple independently and impartially with the issues before him: at [44].

32 The test adopted by McLachlin CJ was laid out at [49] and [50]:

> In summary, … copying in reasons for judgment is not, in itself, grounds for setting the judge's decision aside. However, if the incorporation of the material of others would lead a reasonable person apprised of all the relevant facts to conclude that the trial judge has not put his or her mind to the issues and made an independent decision based on the evidence and the law, the presumption of judicial integrity is rebutted and the decision may be set aside.
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> This does not negate the fact that, as a general rule, it is good judicial practice for a judge to set out the contending positions of the parties on the facts and the law, and explain in her own words her conclusions on the facts and the law. The process of casting reasons for judgment in the judge's own words helps to ensure that the judge has independently considered the issues and come to grips with them. As the cases illustrate, the importance of this may vary with the nature of the case. In some cases, the issues are so clear that adoption of one party's submissions or draft order may be uncontroversial. By contrast, in complex cases involving disputed facts and legal principles, the best practice is to discuss the issues, the evidence and the judge's conclusions in the judge's own words. The point remains, however, that a judge's failure to adhere to best practices does not, without more, permit the judge's decision to be overturned on appeal.

33 The presumption of judicial integrity was not displaced in *Cojocaru* as there was adequate demonstration that the trial judge addressed his mind to the issues he had to decide: at [3]. The trial judge's copying was extensive: only 47 of the 368 paragraphs were in his own words; the balance of 321 paragraphs was copied from the plaintiffs' submissions with editorial changes made: at [53]. However, and importantly, the trial judge did not accept all of those submissions, wrote some original paragraphs and made findings contrary to the plaintiffs' submissions: at [55]. The judge also copied a portion of the plaintiffs' submissions that contained an error as to a date, but this was a technical error that was not of substance, and did not show that he did not put his mind to the substance of what was copied: at [57] and [58]. Ultimately, the quality of the copying would not lead a reasonable person to conclude that the copied material did not reflect the trial judge's own thinking and views: at [63].

34 McLachlin CJ also considered *obiter* the issue of judicial copying in criminal cases. In the criminal context, reasons for judgment that do not fulfil the basic function of advising parties and the public of the reasons for the decision and providing a basis for appeal may result in a judgment being set aside if the appellate court concludes that it was a case of unreasonable verdict, error of law, or miscarriage of justice within the meaning of the Criminal Code, RSC 1985, c C-46 (Can) s 686(1)(*a*): at [23] and [24], citing *Sheppard*. The nature of the case is also relevant in assessing whether judicial copying rebuts the presumption of judicial integrity and impartiality. Criminal cases, where the liberty of the accused is at stake, demand a high level of scrutiny: at [67].

Hong Kong

35 In *Nina Kung v Wong Din Shin* (2005) 8 HKCFAR 387, the Hong Kong Court of Final Appeal allowed an appeal against the Hong Kong Court of Appeal's decision to uphold the trial judge's decision that signatures on certain wills were forgeries.

36 The initial trial lasted 172 days over a 14-month period. The trial judge's decision involved the extensive copying of submissions from both sides. At the Court of Appeal, William Waung J (dissenting) estimated that in respect of the analysis and evaluation of the handwriting evidence led at trial, 95% of the trial judge's judgment was copied; these estimates were not challenged. The appellant complained that this demonstrated that no independent judicial judgment had been exercised, and that she was entitled to a re-trial: at [445], *per* Robert Ribeiro PJ.

37 As regards judicial copying, Ribeiro PJ observed at [446] as follows:

> There is of course nothing wrong with a judge accepting the submissions of one party or the other where he agrees with them. It is an everyday occurrence that a judge will adopt arguments made by one side or the other, often quoting verbatim a passage from a written argument. Usually, of course, this is openly acknowledged with the judge saying that he accepts the submission which was put in the way set out. However, the copying may occur to such a degree and in such a manner that serious questions may arise as to whether the judge has abdicated his judicial function or at least as to whether his conduct is such that justice has not been seen to be done by an independent judicial tribunal.

38 On the facts, legitimate concerns about whether the trial judge did bring an independent mind to his judicial function did arise, particularly as there were contradictions in the portions copied with positions he had taken prior to and during the course of trial: at [453]. These instances suggested that the trial judge had reproduced the copied material without giving any real thought to the issues in question: at [454].

39 However, even accepting that the appellant had legitimate grounds for doubting if she received a fair trial, it was accepted by both sides that the Court of Appeal was, after a 28-day hearing, in as good a position as the trial judge to draw the necessary inferences and to make the ultimate conclusion of fact. Moreover, the appellant's complaint was academic since the appeal succeeded on substantive grounds: at [456]. The lower courts had applied the wrong burden of proof, and the appellant had, on the evidence, discharged her burden of proving that the will in question was valid: at [439].

The US

40 It is widespread practice in some US jurisdictions for trial courts to request (by case order or local rule) for parties to propose findings of fact and conclusions of law, and to subsequently adopt the prevailing party's proposed findings: *Federal Rules of Civil Procedure: Rules and Commentary* vol 2 (Thomson Reuters, 2017 Ed) at pp 44 and 45; Douglas R Richmond, "Unoriginal Sin: The Problem of Judicial Plagiarism" (2013) 45 Ariz St LJ 1077 ("Richmond") at 1078 and 1079. Such findings of fact and conclusions of law are somewhat different from those in judgments issued in Singapore: they are made by a court in bench trials without juries, as required under rule 52(a)(1) of the Federal Rules of Civil Procedure. Findings of fact will only be set aside if they are clearly erroneous: rule 52(a)(6). This practice of adopting wholesale parties' proposed findings and conclusions has been frowned upon by the appellate courts; such findings may be subject to special scrutiny or afforded less deference: Richmond at 1088, citing *Sealy, Inc v Easy Living, Inc* 743 F 2d 1378 at 1385 n 3 (9th Cir, 1984) and *Cuthbertson v Bigger Bros, Inc* 702 F 2d 454 at 459 (4th Cir, 1983). As seen from the two cases below, the concern of the US courts has been whether there is anything to show that the judge

exercised his mind on the matters in the present case.

41 In the leading judgment *Anderson v City of Bessemer City* 470 US 564 (1985), the US Supreme Court expressly disapproved of the practice of judges adopting findings drafted by the winning party, but affirmed that such findings of fact will still stand and may be reversed only if clearly erroneous: at 572. The district court had issued a preliminary memorandum setting forth its essential findings. It then directed the appellant's counsel to submit a more detailed set of findings of fact and conclusions of law consistent with its memorandum, which it adopted as its own, with amendments made. On the facts, the Supreme Court was satisfied that the first instance judge had exercised his own mind in the matter, and had not uncritically accepted the findings prepared by the prevailing party. The findings were drafted within a framework laid down by the trial judge, and the final form and content of the findings were varied by the judge. There was no reason to doubt that the findings represented the judge's considered conclusions: at 572 and 573.

42 The Supreme Court's decision stands in contrast to that in *Bright v Westmoreland County* 380 F 3d 729 (3d Cir, 2004). The district court had adopted the appellees' proposed memorandum opinion and order, making only two substantive changes. Judge Richard Nygaard for the US Court of Appeals, Third Circuit, noted at 731 and 732:

> We have held that the adoption of proposed findings of fact and conclusions of law supplied by prevailing parties after a bench trial, although disapproved of, is not in and of itself reason for reversal. … However, we made clear that the findings of fact adopted by the court must be the result of the trial judge's independent judgment.
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> …
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> Judicial opinions are the core work-product of judges. They are much more than findings of fact and conclusions of law; they constitute the logical and analytical explanations of why a judge arrived at a specific decision. They are tangible proof to the litigants that the judge actively wrestled with their claims and arguments and made a scholarly decision based on his or her own reason and logic. When a court adopts a party's proposed opinion as its own, the court vitiates the vital purposes served by judicial opinions. …
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> …
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> Courts and judges exist to provide neutral fora in which persons and entities can have their professional disputes and personal crises resolved. Any degree of impropriety, or even the appearance thereof, undermines our legitimacy and effectiveness. We therefore hold that the District Court's adoption of the appellees' proposed opinion and order, coupled with the procedure it used to solicit them, was improper and requires reversal with a remand for the court to reevaluate the appellees' motion to dismiss in a procedure consistent with this opinion.
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> [internal citations omitted]

England and Wales

43 Criticism of the practice of judicial copying was made in *Crinion and Another v IG Markets Ltd* [2013] EWCA Civ 587 ("*Crinion*"). Out of the various jurisdictions surveyed, the English Court of Appeal perhaps took the strongest line.

44 In *Crinion*, the submissions of the respondent were adopted almost entirely by the judge. The

judge retained the structure, headings and much of the text of the submissions, making changes only to adapt them into a judgment and to insert some new material: at [5] to [10]. As it was, the file properties indicated that the "author" of the Microsoft Word version of the judgment was the respondent's counsel: at [11]. In considering the appellants' case that the judgment could not stand, Lord Justice Nicholas Underhill emphasised that what was important in a judgment was not just the reasons pointing to a decision, but those reasons rejecting at least the most substantial contrary arguments. At [16], he stated as follows:

> In my opinion it was indeed thoroughly bad practice for the Judge to construct his judgment in the way that he did, … [A]ppearances matter. For the Judge to rely as heavily as he did on [the respondent's counsel's] written submissions did indeed risk giving the impression that he had not performed his task of considering both parties' cases independently and even-handedly. … The more extensive the reliance on material supplied by only one party, the greater the risk that the judge will in fact fail to do justice to the other party's case – and in any event that that will appear to have been the case. …

Of concern therefore was that the judge would not have been seen to have been impartial.

45 Sir Stephen Sedley, concurring, similarly noted at [39]:

> Information technology has made it seductively easy to do what the judge did in this case. It has also made it embarrassingly easy to demonstrate what he has done. In principle, no doubt, it differs little from the modus operandi of the occasional judge, familiar to an earlier generation of counsel, who would pick up his pen (sometimes for the first time) and require the favoured advocate to address him at dictation speed. But in practice, for reasons which Lord Justice Underhill has described, the possibility of something approaching electronic plagiarism is new, and it needs to be said and understood that it is unacceptable. Even if it reflects no more than the judge's true thinking, it reflects poorly on the administration of justice: for, as Lord Justice Underhill says, appearances matter.

46 As it was, the Court of Appeal found that there was sufficient basis to show that the judge did in fact exercise his judgment, finding that it was apparent from the judgment why the contrary arguments were not accepted or regarded as material; in particular, the judge had included a summary of the other side's submissions and paragraphs of his own drafting rejecting those submissions: at [18] and [37].

The approach to be adopted in Singapore

47 The Canadian presumption of judicial integrity and impartiality has not attracted examination in Singapore. There is perhaps some sense in adopting a similar approach, but that question does not need to be determined in this case. What can be usefully taken away from the Canadian approach is the formulation of the issue at hand: namely, whether a reasonable person would have concluded in the circumstances that a judgment reflected the judge's own views. Inherent in this inquiry is that, in reflecting the judge's own views, the judgment would disclose on its face the consideration and weighing that would have gone into its writing.

48 The common thread across the jurisdictions is that the judge must have exercised some judgment or thought. Where it appears that a judgment was crafted substantially based on a single party's submissions, the question for the appellate court is whether the trial judge exercised his mind on the facts and circumstances of the case before him, such that it could be said that he exercised the discretion and judgment required by his judicial office. A striking similarity of the reasons for

judgment to submissions will not in itself be a reason to set aside a lower court's decision, as long as it is discernible that the judge exercised his own weighing of the arguments and evidence.

49 The practice of copying to adopt submissions as the court's reasoning should not be undertaken, for it raises two separate concerns. First, that the judge is biased or at least appears to be biased in favour of the party whose submissions are adopted. This ties into the second reason: it creates substantial doubt about the judge's independent exercise of judgment and discernment.

50 There is at least an implicit recognition of this – thankfully, few judges engage in the unattributed copying of submissions, and the occasion for appellate intervention on this basis seems to be few and far between. We do not have the US practice of courts requesting parties to draft findings of fact and conclusions of law for the court's consideration or adoption. In any event, this would appear to be discouraged in the US.

The status of the decision below

51 In the present case, the District Judge must have either extensively typed out the Prosecution's closing submissions or had someone else do so, which would have been an utter waste of time and effort; or he must have cut and pasted the submissions into his judgment. Either raises the questions of whether any consideration was given to the Defence's arguments and if the District Judge properly weighed the strength of the parties' submissions.

52 Considering the extent of the copying of the Prosecution's submissions in the District Judge's GD, which included a typographical error present in the submissions, and the absence of any part in the GD indicating an assessment of the submissions from both sides, particularly any weighing of one side against the other, I do not find that the District Judge here was shown to have exercised his mind on the matters before him. This was not merely an error of the exercise of judgment but a judgment in name only that was not the exercise of any consideration and weighing. Importantly, the operative part of the GD substantially reproduced the Prosecution's submissions, including the structure and content of the sections on the weight to be given to the Defence witnesses' testimonies (GD at [26] to [34]) and whether the appellant's defence that he had purchased capsules from a *sinseh* was to be believed (GD at [44] to [58]). There was no assessment or sifting of the arguments made, or consideration of the arguments on the other side that would have been put in by the Defence. The matters in the judgment which were not in the Prosecution's submissions, such as the failure to call the *sinseh* as a Defence witness, were peripheral and did not lessen the effect of the substantial copying and unprocessed adoption of those submissions.

53 I acknowledge that the conclusion which I have reached here differs from those reached in the other cases on copying discussed above. This reflects that judicial copying occurs as a matter of degree and that the copying that took place here was substantial and significant.

54 The reasons for the District Judge, who is neither a new nor a junior judge, copying so substantially are not before me. Pressures of work are not a sufficient reason. While judging is certainly not the sinecure that some may think it is, all jobs these days are stressful and demanding. The usual bane of first instance judges, worry about being overruled, could not have been a factor in the present case either: one would have thought that adopting one side's arguments wholly and without discussion and weighing would raise an immediate red flag obvious to anyone. A trial judge needs to consider the arguments, weigh them and decide. Often, in written form, to make it comprehensible to the reader, the evidence and submissions need to be summarised and sometimes recounted at some length. But all of these are only the prelude to the meat of the judgment, namely, the determination of the issues. On scrutiny, judgments may be found inadequate or insufficient in

that determination: that is simply part of the appellate process. Many trial judgments are found inadequate by the appellate court. It is our role as trial judges, both at the State Courts and the High Court, to learn from the guidance of the appellate court and strive to do better the next time. Here, however, the judgment was not merely insufficient. Here, the exercise of judgment was entirely absent. Here, the judge, at least as can be seen from his written judgment, did not judge at all.

55 I was thus satisfied that there is reason to conclude that the District Judge failed to fully appreciate the material that was before him.

56 As it could not be said that the GD was the product of the District Judge's exercise of judgment, it could not be given the deference usually accorded to first instance findings. However, acquittal does not follow simply from this finding. Nor did the appellant argue for this. In an appeal from a conviction, the choice lies between (a) an order for retrial or remittal to the trial court; or (b) disposal by this court: see s 390(1)(*b*) of the CPC. In *AOF v Public Prosecutor* [2012] 3 SLR 34 ("*AOF*"), the Court of Appeal considered the law in relation to acquittal, retrial and remittance to the trial judge, and classified categories of cases according to two extremes (at [277] and [296] to [298]):

(a) At one extreme, where the evidence adduced at the original trial was insufficient to justify a conviction, an acquittal and not a retrial should be granted save in exceptional circumstances.

(b) At the other end of the extreme, where the evidence against the appellant at the original trial was so strong that a conviction would have resulted, the *prima facie* appropriate course is to dismiss the appeal and affirm the conviction.

(c) Cases that fall between the two extremes include the following non-exhaustive situations: where critical evidence is no longer available; where the fairness of the trial below is compromised by the trial judge's conduct; or where the length of time before the putative retrial is disproportionate to the appellant's sentence or ongoing period of incarceration. The appellate court is to weigh the following non-exhaustive factors to determine if a retrial should be ordered: the seriousness and prevalence of the offence; the expense and length of time required for a fresh hearing; the extent to which a fresh trial will be an ordeal for the defendant; and whether the evidence that would have supported the appellant at the original trial would still be available.

57 Remittal should only be ordered in limited circumstances, *eg*, where the trial court is to consider new material and reach a final decision having regard to findings hitherto made at the original trial (see the comments made in *AOF* at [302]), or where there is some material procedural irregularity that requires the conviction to be quashed, the sentence set aside, and the case remitted for a fresh plea to be taken (*Public Prosecutor v Sinsar Trading Pte Ltd* [2004] 3 SLR(R) 240 at [37]). This is not the case here, as there is enough evidence for the appellate court to make a decision.

58 Neither was this a case that required a retrial. To my mind, the evidence here did not turn on the assessment of the demeanour of the witnesses. Given the nature of the Defence's case, the focus of the court's assessment of evidence in this case should be on the internal and external consistency and the inherent probabilities of the appellant's defence.

59 In the circumstances, I am satisfied that this court is in a position to weigh the evidence recorded and to determine the outcome of the present appeal. Intervention by an appellate court in respect of findings of fact and the exercise of discretion generally occurs only in limited circumstances, for instance, where the sentencing judge erred in failing to correctly appreciate the material that is before him: *Yap Ah Lai* at [58], citing *Public Prosecutor v UI* [2008] 4 SLR(R) 500 at

[12]. An appellate court should be slow to overturn the trial judge's findings of fact; it is in a less advantageous position as compared to the trial judge who has had the benefit of hearing the evidence of the witnesses in full and observing their demeanour. But, conversely, an appellate judge is as competent as any trial judge to draw any necessary inferences of fact from the circumstances of the case where the actual findings have been ascertained: *Yap Giau Beng Terence v Public Prosecutor* [1998] 2 SLR(R) 855 at [24].

60 I turn now to the substantive appeal against the appellant's conviction and sentence.

Issue 2: The substantive appeal

The appeal against conviction

The presumption in s 22 of the MDA

61 The appellant's case was that he had consumed methamphetamine unknowingly when he took medication that he had bought from a peddler selling traditional Chinese medication. [note: 5] It was not enough, however, for the appellant to raise a reasonable doubt by way of his defence. The two HSA certificates which were admitted under s 16 of the MDA stated that the appellant's urine samples were found to contain methamphetamine. The appellant thus had to prove on the balance of probabilities that he had not knowingly consumed methamphetamine, as the presumption in s 22 of the MDA applied:

> **Presumption relating to urine test**
>
> 22. If any controlled drug is found in the urine of a person as a result of both urine tests conducted under section 31(4)(*b*), he shall be presumed, until the contrary is proved, to have consumed that controlled drug in contravention of section 8(*b*).

62 In the circumstances, I find that the appellant did not rebut the s 22 presumption. The appellant's evidence that there had been a peddler who sold him drugs was weak, and there were extrinsic and intrinsic inconsistencies in his evidence. I am accordingly satisfied that his conviction under s 8(*b*)(ii) of the MDA should not be disturbed.

(1) The evidence and likelihood that there was such a peddler

63 The appellant relied greatly on the argument that there had indeed been such a peddler selling medication at the open space in front of Blk 322, Hougang Ave 5, and that the evidence of the Prosecution's witnesses left this possibility open. PW8 Mr Heng had only said that he "didn't see [a peddler]" outside his shop, and the Prosecution could not have relied on his evidence to prove that no such peddler existed. PW8 Mr Heng's evidence would only have been of value if he had been able to "view the said location and … to be always looking at the said location at regular intervals". [note: 6] The appellant also criticised the value of PW9 Mdm Tan's testimony as she said that she could not see the area in front of Blk 322 from inside her shop. [note: 7]

64 The Prosecution argued that the evidence instead showed that it was unlikely that there was indeed such a peddler who had been selling medication at the alleged location. It characterised the eyewitnesses as contradicting, not supporting, the appellant on this point, as they had given clear evidence that they had not seen anyone hawking at the location identified by the appellant. [note: 8] Further, the inherent probabilities pointed against the peddler being present and selling illicit

substances in that particular location without telling his customers that the medication sold contained illicit substances. A scrupulous *sinseh* would not have sold capsules containing methamphetamine, ketamine and cocaine; an unscrupulous *sinseh* who intended to scam his customers would also not have sold medication containing illicit substances, especially when the appellant had also produced pills allegedly purchased from the *sinseh* which did not include any illicit substances. [note: 9]

65 Considering the evidence, I accept that the appellant's evidence that there was such a peddler was weak, and that it went against the testimony of the eyewitnesses, PW8 Mr Heng and PW9 Mdm Tan. I note that the appellant took issue with their evidence, but I did not accept his arguments on this score.

(2) The internal inconsistencies of the appellant's case

66 I also find that the appellant's claims shifted to such a degree that his testimony was not credible. His most significant inconsistencies pertained to the rate at which he consumed the capsules allegedly purchased from the peddler.

67 As the Prosecution argued, the appellant initially claimed that he purchased 24 capsules from the *sinseh* in September 2016, and consumed two to three capsules a week. [note: 10] The Prosecution then asked the appellant why he still had eight capsules in his possession in July 2017, since this worked out instead to a consumption rate of one capsule every fortnight. The appellant explained that he had stopped consuming the capsules for over a month. [note: 11] When pressed on how this was inconsistent with his initial claim, the appellant finally asserted that he had consumed 14 capsules between September and December, and consumed only one to two capsules from February to July 2017. [note: 12]

68 I agree with the Prosecution that there was an unexplained vacillation and change in the appellant's evidence. Notably, these shifts all occurred within the same exchange when the appellant was under cross-examination. His response on appeal was only that the questioning was "designed for an educated and serious individual", and that his inconsistencies were attributed to his lack of education and inexperience in court. [note: 13] This explanation did not, however, suffice to prove his case on the balance of probabilities.

Conclusions on the appeal against conviction

69 In oral submissions, the Prosecution referred to Yong Pung How CJ's observations in *Cheng Siah Johnson v Public Prosecutor* [2002] 1 SLR(R) 839 at [15]:

> … [T]he statutory presumption in s 22 was twofold in that proof of the primary fact by the Prosecution, *ie* a controlled drug was found in the urine as a result of both urine tests in s 31, triggered the *actus reus* of consumption and the *mens rea* required for the offence. The burden of proof hence fell upon the Defence who would have to disprove either element on a balance of probabilities. It was insufficient if the appellant merely raised a reasonable doubt. It may be that, in most circumstances … the Defence would find it virtually impossible to rebut the presumption of consumption and would have to rely solely upon evidence to disprove intention or knowledge of consumption. Therein lies the reason why the defence of "spiking" and unknowingly consuming the drinks of strangers are so commonly utilised in cases of this kind. These are allegations that are extremely easy to make but which are almost impossible to debunk. Although it is not the law that a commonly-used defence will not be accepted, a judge may be obliged to approach such a defence with greater caution and circumspection than usual in the absence of any other credible

evidence: *PP v Hla Win* [1995] 2 SLR(R) 104. …

70 In the present case, I agree with the Prosecution that the appellant's case that a peddler sold him medication containing methamphetamine was a defence that would have been "almost impossible to debunk". The main plank of the appellant's defence was that the Prosecution had failed to entirely eliminate the possibility that a peddler may indeed have been present outside Blk 322, Hougang Ave 5 on one occasion in September 2016, and that the appellant could have purchased capsules from him. It may be that the evidence relied upon by the appellant would have been sufficient to raise reasonable doubt as to the Prosecution's case that the appellant had knowingly consumed methamphetamine. But that is not enough to rebut the presumption in s 22 of the MDA. The presumption has to be rebutted on the balance of probabilities. This the appellant did not do. I therefore uphold his conviction for a charge under s 8(*b*)(ii) of the MDA and punishable under s 33(1).

71 Furthermore, even if the appellant's case is to be believed, it is hard to envisage that someone might take medication bought in such circumstances without considering that there might be some risk of an illicit substance being present in the medication. Only perhaps the most trusting and naïve would consume the medication so unwittingly. It is hard to see this matching the probabilities of the situation here: the appellant was neither a young person nor a very old one.

The appeal against sentence

72 The range of sentences for offences of consumption under ss 8(*b*)(i) and 8(*b*)(ii) of the MDA starts at six months and extends up to 18 months for a first-time offender: *Dinesh Singh Bhatia s/o Amarjeet Singh v Public Prosecutor* [2005] 3 SLR(R) 1 at [38]. The appellant was not a young offender and had claimed trial. In these circumstances, I find that the sentence of 11 months' imprisonment imposed by the District Judge was within the usual range of sentences imposed for consumption offences under the MDA, and dismiss the appeal against sentence.

Conclusion

73 For the foregoing reasons, I find that the record did not sufficiently disclose that the District Judge had exercised his mind about the case at hand. This required the appellate court to intervene and consider the evidence on record to determine if the appellant's conviction should stand. On the facts and assessing the weight of the evidence, I am satisfied that the appellant has not rebutted the presumption in s 22 of the MDA. I therefore dismiss the appeals against conviction and sentence.

[note: 1] Record of Appeal ("ROA") at pp 154 and 214; Notes of Evidence ("NEs") (8 March 2018) at p 29 ln 11–30; NEs (9 March 2018) at p 35 ln 4–25.

[note: 2] ROA at pp 170 and 171; NEs (8 March 2018) at p 45 – p 46 ln 16.

[note: 3] Appellant's submissions at paras 1–3 and 84.

[note: 4] Appellant's submissions at paras 82–104; Prosecution's Closing Submissions dated 18 August 2017 at para 57.

[note: 5] Appellant's submissions at paras 4–6 and 48–49.

[note: 6] Appellant's submissions at paras 10–25.

[note: 7] Appellant’s submissions at paras 26–31.

[note: 8] Prosecution’s submissions at paras 39–44.

[note: 9] Prosecution’s submissions at paras 59–63.

[note: 10] ROA at p 199; NEs (9 March 2018) at p 20 ln 21–24.

[note: 11] ROA at p 200; NEs (9 March 2018) at p 21 ln 11–32.

[note: 12] ROA at pp 202–204; NEs (9 March 2018) at pp 23–25; Prosecution’s submissions at paras 46–58.

[note: 13] Appellant’s submissions at paras 33–36.