

IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2022] SGCA 71

Criminal Appeal No 12 of 2020

Between

Punithan a/l Genasan

... Appellant

And

Public Prosecutor

... Respondent

In the matter of Criminal Case No 2 of 2018

Between

Public Prosecutor

And

Punithan a/l Genasan

FOUNDATIONS OF DECISION

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

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Punithan a/l Genasan

v

Public Prosecutor

[2022] SGCA 71

Court of Appeal — Criminal Appeal No 12 of 2020
Sundaresh Menon CJ, Andrew Phang Boon Leong JCA and Tay Yong Kwang JCA
30 June 2022

31 October 2022

Tay Yong Kwang JCA (delivering the grounds of decision of the court):

Introduction

1 The appellant, Punithan a/l Genasan, faced one charge of trafficking in diamorphine, in furtherance of the common intention of himself, V Shanmugam a/l Veloo (“Shanmugam”) and Mohd Suief bin Ismail (“Suief”). We refer to Shanmugam and Suief collectively as the “Couriers”. The appellant and Shanmugam are Malaysians and they resided in Malaysia. Suief, a Singaporean, resided in Singapore.

2 The appellant was tried and convicted on the following charge (the “Charge”) under s 5(1)(a) read with s 5(2) of the Misuse of Drugs Act (Cap 185,

2008 Rev Ed) (“MDA”) and s 34 of the Penal Code (Cap 224, 2008 Rev Ed) (“PC”):¹

That you, Punithan a/l Genasan, on 28 October 2011, in Singapore, together with one [Shanmugam] and [Suief], in furtherance of the common intention of you all, did traffic in a Class A controlled drug listed in the First Schedule to the [MDA], *to wit*, that on 12 October 2011, at the West Coast McDonald’s carpark you had introduced the said [Shanmugam] to one [Suief] to facilitate an impending drug transaction, and pursuant to this meeting between the three of you, on 28 October 2011, [Shanmugam], acting under your direction, came into Singapore driving a motor vehicle JLT8467 and met up with [Suief], and [Shanmugam] did have in his possession, with your knowledge and consent, 10 packets of granular/powdery substance which were analysed and found to contain not less than 28.50g of diamorphine, which is a Class A controlled drug listed in the First Schedule to the [MDA], for the purposes of trafficking in the said controlled drug with [Suief], and the possession and intended transaction of the said controlled drug was without authorisation under the [MDA] or the Regulations made thereunder, and you have thereby committed an offence under section 5(1)(a) of the [MDA] read with section 5(2) of the [MDA] and section 34 of the [PC], and the offence is punishable under s 33(1) of the [MDA].

3 It was not disputed that the transaction on 28 October 2011 involving the Couriers took place. That was a matter determined after a joint trial of the Couriers before Choo Han Teck J on 3 February 2015 (see *Public Prosecutor v Shanmugam a/l Veloo and another* [2015] SGHC 33 (respectively, the “2014 Trial” and the “Trial Judgment on the Couriers”). The Couriers were convicted at the 2014 Trial. Shanmugam was sentenced to life imprisonment and 15 strokes of the cane while Suief was sentenced to death. This Court upheld the convictions and respective sentences of the Couriers in *Mohd Suief bin Ismail v Public Prosecutor* [2016] 2 SLR 893 (the “Appellate Judgment on the Couriers”).

¹ Record of Proceedings (“ROP”) Vol 2 at p 1.

4 In the course of investigations, Shanmugam identified the appellant as the mastermind behind the drug transaction that took place on 28 October 2011. The appellant was arrested in Malaysia subsequently and extradited to Singapore on 21 January 2016. His trial proceeded in 2018 before another Judge of the General Division of the High Court (the “Judge”) and he was eventually convicted on the Charge (see *Public Prosecutor v Punithan a/l Genasan* [2020] SGHC 98 (respectively, the “2018 Trial” and the “Judgment”). The Judge found that the Prosecution had proved beyond reasonable doubt that the appellant introduced Shanmugam to Suief at West Coast McDonald’s on 12 October 2011 for the purpose of facilitating the impending drug transaction (at [111]–[112]). The appellant was sentenced to suffer the mandatory death penalty. CA/CCA 12/2020 (“CCA 12”) is the appellant’s appeal against his conviction and sentence.

5 In this appeal, we were not concerned about the events that took place on 28 October 2011 in relation to the Couriers. Those matters have already been dealt with in the Trial Judgment on the Couriers and in the Appellate Judgment on the Couriers. Based on the Charge against the appellant, the appellant’s involvement in the drug transaction on 28 October 2011 was that he had introduced the Couriers to each other at the West Coast McDonald’s carpark on 12 October 2011 (the “Alleged Introductory Meeting”). The central question in this appeal was whether there was such a tripartite meeting on 12 October 2011 because that was the link alleged between the appellant and the drug transaction involving the Couriers that took place on 28 October 2011. As is evident from the Charge set out above, the Prosecution alleged that it was “pursuant to this meeting” that the Couriers carried out the said drug transaction. It was therefore incumbent on the Prosecution to prove beyond reasonable doubt that the Alleged Introductory Meeting did take place as alleged in the Charge in order

to prove the common intention of the appellant and the Couriers to traffic in the drugs.

6 There were discrepancies in evidence as to the date and the time of day of the Alleged Introductory Meeting at the 2014 Trial and the 2018 Trial. Before the substantive hearing of CCA 12 before us, the appellant filed two criminal motions. CA/CM 35/2020, filed on 9 December 2020, and CA/CM 8/2021, filed on 29 January 2021, were the appellant’s applications for leave to adduce the following fresh evidence:

- (a) the investigation statements recorded from Suief between October and December 2011;
- (b) the investigation statements recorded from Shanmugam between October and December 2011;
- (c) the Singtel call trace report for Suief’s mobile phone;
- (d) the Immigration and Checkpoints Authority (“ICA”) travel movement records of Shanmugam from 1 January to 12 October 2011; and
- (e) the ICA travel movement records of Shanmugam’s foster mother, foster daughter (for the month of October 2011) and the appellant’s brother, Mathan Genasan (for 1 January to 12 October 2011) (“Mathan”) (collectively, the “New Evidence”).

7 On 10 May 2021, we heard both applications and allowed the New Evidence to be adduced for the appeal. This case was then remitted by us to the Judge for him to consider whether the New Evidence would affect his earlier

decision in the 2018 Trial that the Alleged Introductory Meeting took place in the morning of 12 October 2011.

8 The ICA travel movement records of Shanmugam from 1 August to 28 October 2011 were admitted in evidence at the 2018 Trial.² For the month of October 2011, Shanmugam was in Singapore on 1, 12, 18, 24, 25 and 28. It was not disputed that the records showed that Shanmugam was in Singapore from 7.24am to 9.36am on 12 October 2011, having entered and later exited through the Woodlands Checkpoint. Similarly, the ICA travel movement records of the appellant from 1 August 2011 to 22 January 2016 were admitted in evidence at the 2018 Trial and these showed that for the month of October 2011, the appellant was in Singapore on only 11 October 2011 between 3.10pm and 10.47pm and on 12 October 2011 from 7.04am to 12.19pm.³ The appellant's next entry into Singapore was on 21 January 2016 when he was repatriated here by the Malaysian authorities. Therefore, what was particularly pertinent to the appeal before us was how Suief's and Shanmugam's 2011 investigation statements, which were not in evidence at the 2018 Trial and in which they asserted at various times that the Alleged Introductory Meeting took place in the afternoon or in the evening of a day sometime in October 2011, would fit with the objective ICA travel movement records of Shanmugam and of the appellant which showed that the only common date when both these men were in Singapore was 12 October 2011 and on that day, Shanmugam had exited Singapore by 9.36am and the appellant had left Singapore by 12.19pm.

9 After reviewing the New Evidence and the evidence which was adduced at the 2018 Trial, the Judge concluded in his further judgment of 13 December

² ROP Vol 2A at pp 632–633.

³ ROP Vol 2A at pp 634–635.

2021 (*Punithan a/l Genasan and Public Prosecutor* [2021] SGHC 284 (“Remittal Judgment”)) that his earlier decision was not affected by the New Evidence. In his opinion, the appellant did not raise a reasonable doubt as to the correctness of his earlier finding that the Alleged Introductory Meeting took place in the morning of 12 October 2011.

10 After considering the Judge’s Remittal Judgment and hearing the parties further in this appeal, we decided to allow the appellant’s appeal and to acquit him on the Charge. We now set out our reasons.

Background

The Couriers’ convictions and sentences

11 On 28 October 2011, officers from the Central Narcotics Bureau (“CNB”) saw Suief carrying a haversack to a bus stop outside the Haw Par Villa at Pasir Panjang Road at about 11.25am. About five minutes later, Shanmugam drove a vehicle bearing Malaysian registration number JLT8467 (“Kenari car”) to the bus stop and Suief got into the Kenari car. Shanmugam drove along Pasir Panjang Road, stopped at a hilltop car park at the National University of Singapore, before proceeding to an Esso petrol station along Pasir Panjang Road. The Kenari car left the petrol station at about 12.12pm and went along Pasir Panjang Road and West Coast Highway. It arrived and stopped at Block 405 Pandan Gardens (“Block 405”) (Trial Judgment on the Couriers at [3]–[5]).

12 Suief was seen leaving the Kenari car and walking to Block 405, carrying a black plastic bag. Subsequently, CNB officers arrested both Suief (who was then outside his mother’s apartment at Block 405) and Shanmugam (who was still in the Kenari car). The haversack that Suief carried when he first entered the Kenari car was found on the floor mat of the front passenger seat. It

contained three black plastic bundles, two plastic bags and one bundle wrapped in newspaper. The bundles were found to contained granular substances. The black plastic bag that Suief carried when he went up Block 405 was found among some flowerpots on the staircase landing between the seventh and eighth floors. It contained three newspaper wrapped bundles containing granular substances. The granular substances in all of the drug exhibits were analysed and found to contain a total of not less than 28.50g of diamorphine (Trial Judgment on the Couriers at [6]–[7]).

13 The Couriers were charged with trafficking in diamorphine in furtherance of their common intention (Appellate Judgment on the Couriers at [10]):

That you, [Shanmugam / Suief],

on the 28th day of October 2011, at or about 12.06 p.m., together with one [Suief /Shanmugam ...], and in furtherance of the common intention of you both, did traffic in a controlled drug specified in Class A of the First Schedule to [the MDA], to wit, by transporting from the Esso Station along Pasir Panjang Road to the carpark of Block 405 Pandan Garden, inside a motorcar bearing registration number JLT8467, ten (10) packets containing 4497.7 grams of granular/powdery substance, which was analysed and found to contain **not less than 28.50 grams of diamorphine**, without authorization under [the MDA] or the Regulations made thereunder, and you have thereby committed an offence under section 5(1)(a) of [the MDA] read with section 34 of the [PC] and punishable under section 33 and 33B of [the MDA].

[emphasis in original in bold]

14 The charges against the Couriers related solely to the circumstances surrounding the transaction on 28 October 2011. The “common intention” stated in the charges referred to the Couriers’ common intention. The “common intention” did not include the appellant in the present case and he was not mentioned in the charges against the Couriers. Our judgment in the present

appeal therefore has no bearing on the findings in the earlier Appellate Judgment on the Couriers or the Trial Judgment on the Couriers.

15 At the trial, the Couriers raised the defence of ignorance. Shanmugam claimed that he did not know that the plastic bags contained drugs and that he had no common intention to traffic in drugs with Suief. His case was that the drug transaction was carried out by Suief and coordinated by one “Puni” (that is, the appellant in the present case). Shanmugam claimed that he had accepted the appellant’s offer to deliver the Kenari car to the appellant’s friend because his friend needed it to deliver some personal documents. According to Shanmugam, when he asked the appellant about the documents, the appellant showed Shanmugam documents seemingly related to property transactions. On 28 October 2011, the appellant showed him the documents and said that they were illegal and that was why they had to be hidden behind the speakers of the Kenari car. Shanmugam was told that his job was to drive the Kenari car from Malaysia to Singapore and pass the documents to “Ah Boy” (that is, Suief) and then wait for Suief to return the Kenari car to him. At the Esso petrol station, after buying drinks at the convenience store, he saw “some black coloured bundles on the front passenger seat” which he put into the haversack for Suief at Suief’s request to do so. Suief then asked Shanmugam to drive to Block 405 (Trial Judgment on the Couriers at [11] and [12]).

16 Similarly, Suief raised the defence of ignorance. He had taken a ride from an Indian man (that is, Shanmugam) and when they arrived at Block 405, Shanmugam took out a black plastic bag and passed it to Suief. He was instructed to leave it at the staircase of the sixth or seventh floor. According to Suief, he met Shanmugam on 28 October 2011 with the intention of having lunch with him. The Couriers had only met once prior to 28 October 2011 (Trial Judgment on the Couriers at [13]).

17 Choo J in the 2014 Trial rejected the Couriers’ defence of ignorance and found them guilty on their respective charges (Trial Judgment on the Couriers at [20]). Shanmugam, who was found to be only a courier and who was issued a certificate of substantive assistance, was sentenced to the mandatory life imprisonment and 15 strokes of the cane. Suief, who was also found to be only a courier but who was not issued a certificate of substantive assistance, was sentenced to the mandatory death penalty (at [24]).

The Couriers’ appeal

18 Shanmugam’s appeal against his sentence was dismissed as his sentence was the mandatory minimum of life imprisonment and 15 strokes of the cane (Appellate Judgment on the Couriers at [2]). On appeal, Suief conceded that the defence of ignorance was bound to fail and instead submitted that he had no common intention with Shanmugam to traffic in all ten bundles of drugs. Rather, he only had an individual intention to traffic in three bundles of drugs which he had taken with him in the black plastic bag (at [15] and [17]–[18]).

19 This Court noted that Suief’s defence on appeal was “wholly inconsistent with the defence which had been proffered” at the trial (which was an “outright denial of knowledge that all the black plastic bags contained the drugs”) (at [34]). This Court held that Suief’s alternative defence was not reasonably available to him based upon the evidence at the trial and was instead a mere afterthought (at [35]–[36]). Rather, the relevant evidence was “***completely contrary to this particular argument***” that he had only intended to traffic in three bundles of drugs [emphasis in original] (at [42]). Suief’s appeal against conviction and sentence was dismissed accordingly (at [43]).

Findings related to the appellant and the Alleged Introductory Meeting

20 The determination of the Couriers’ trial and their appeal clearly did not depend on the Alleged Introductory Meeting. However, Choo J remarked that it was Shanmugam’s case that the transaction on 28 October 2011 was “coordinated by one Puni” (Trial Judgment on the Couriers at [11]). Choo J also found that the appellant had “previously hidden documents in the speakers” (at [17]).

21 On appeal from the 2014 Trial, this Court noted that Shanmugam had driven the Kenari car “on the instructions of one Puni” and that the Couriers were “introduced to each other through Puni”. Before 28 October 2011, the Couriers had “only met each other once at the carpark of the McDonald’s outlet located at West Coast” (Appellate Judgment on the Couriers at [3]). This Court also found that the appellant appeared to be using the phone number “+60164978192”, which was saved on Suief’s phone as “Boyz”, to communicate with Suief on 28 October 2011. On that day, Suief had “numerous short phone conversations with Puni prior to his arrest” (at [41]). Suief’s evidence that he “merely had “casual talks” and was only joking with Puni” on that day appeared to be “implausible” given that 13 phone calls were made in under two hours, with the duration of each call being relatively short. This Court instead found that Suief had been “communicating with Puni directly for the purposes of discussing the drug deal and potentially to receive instructions from Puni in that regard” (at [41]). There was no finding concerning the date on which the Couriers were introduced to each other at the McDonald’s West Coast outlet carpark in the earlier judgments.

22 In the course of investigations prior to the 2014 Trial, Shanmugam implicated the appellant as being the mastermind behind the drug transaction on

28 October 2011. On 25 February 2014, the Investigating Officer, Assistant Superintendent Xie Junhao, applied for a warrant of arrest for the appellant. The appellant was eventually arrested in Malaysia on 16 January 2016, extradited to Singapore on 21 January 2016 and arrested by CNB officers at the Woodlands Checkpoint (Judgment at [8]). The appellant’s trial in the High Court started in 2018.

The 2018 Trial

23 The Prosecution’s case was that the appellant was the mastermind who introduced Shanmugam to Suief on 12 October 2011 to facilitate an impending drug transaction and who directed Shanmugam to drive the Kenari car into Singapore on 28 October 2011 to meet up with Suief (Judgment at [14]). The appellant’s case was that he “did not even know [the Couriers]” and thus could not have coordinated the drug transaction that took place on 28 October 2011 (Judgment at [16] and [19]). The appellant claimed that he entered Singapore on 11 and 12 October 2011 to collect payments for debts due to a Malaysian registered moneylending company called “Pinjaman Berlesen Wang”. He asserted that he did not go to the McDonald’s West Coast outlet on 12 October 2011 because he was pre-occupied with such debt collection (at [18]).

24 The Judge rejected the appellant’s case. Both Couriers had provided detailed and cogent accounts of their respective relationships with the appellant. The Judge concluded that the appellant had a relationship with each of the Couriers but the Couriers did not have any relationship with each other prior to the appellant’s personal introduction on 12 October 2011. The Alleged Introductory Meeting led to the Couriers’ second meeting with each other 16 days later on 28 October 2011 when they were arrested for drug trafficking activities. The appellant asserted that he had no connection to them but was

unable to explain how the Couriers knew personal details about him (Judgment at [43]). The Judge held that the appellant had proved on a balance of probabilities that he was in Singapore on 12 October 2011 to collect debt payments but that did not assist him to prove that he was not present at the Alleged Introductory Meeting. This was because the appellant had “ample time on 12 October 2011 to meet the Couriers and collect the debt moneys” (at [108]–[109]).

25 The ICA travel movement records showed that both the appellant and Shanmugam were in Singapore on 12 October 2011. The appellant entered Singapore at 7.04am and left at 12.19pm (5 hours and 15 minutes) while Shanmugam entered Singapore 20 minutes later at 7.24am and left at 9.36am (2 hours and 12 minutes) (Judgment at [87] and [109]). The Judge reasoned that, even assuming that the appellant left the McDonald’s West Coast outlet only after Shanmugam had left Singapore at 9.36am that day, the appellant would have about 2 hours and 43 minutes to travel to Ang Mo Kio (where he collected the debt payments) and then to the Woodlands Checkpoint. The Judge added that if he assumed that the appellant and Shanmugam left the McDonald’s West Coast outlet at about the same time and Shanmugam needed about 36 minutes to travel to the Woodlands Checkpoint, both of them would have left the McDonald’s West Coast outlet at around 9am. On this assumption, the appellant would have some 3 hours and 19 minutes to collect the debt payments and to travel to the Woodlands Checkpoint. Factoring in the possibility of adverse traffic conditions, the entire journey by car should take no longer than 2 hours. Even after taking into consideration the defence witnesses’ evidence about the approximate timing of the various events that took place that morning, the Judge was of the view that there would have been ample time for the appellant to be at the Alleged Introductory Meeting at the McDonald’s West Coast outlet

during the entire period that Shanmugam was there and to collect the debt payments thereafter (Judgment at [109]).

26 The Judge believed that when the appellant entered Singapore on 12 October 2011 for his work assignment to collect the debt payments, it would be very convenient to use that opportunity to introduce Shanmugam to Suief. This was because if the appellant had travelled to Singapore just to introduce the Couriers to each other, it “would be a complete waste of time, effort and petrol” (at [110]).

27 The Judge also found (Judgment at [89]) that the Couriers gave “consistent accounts of the material aspects” of the Alleged Introductory Meeting:

- (a) the timing of the meeting (being “2 to 3 weeks” prior to Deepavali which fell on 26 October 2011 according to Suief and “about 3 weeks before the arrest” which occurred on 28 October 2011 according to Shanmugam) and the location at the McDonald’s West Coast outlet;
- (b) the purpose of the meeting (which was to introduce the Couriers to each other because Shanmugam would be taking over the task of driving the Kenari car from the previous driver, the appellant’s brother Mathan, to send diamorphine into Singapore); and
- (c) the manner in which the introduction took place (specifically, that Shanmugam arrived later and was driving the Kenari car and the Couriers introduced themselves).

28 In contrast, the Judge considered the inconsistencies in the Couriers’ testimonies “immaterial” and did “not go to the heart of the matter” (Judgment at [90]). In his view, the most obvious inconsistencies were:

- (a) whether Shanmugam had brought his foster mother and foster daughter to the Alleged Introductory Meeting;
- (b) whether Suief took the Kenari car for 45 minutes before returning it after the Alleged Introductory Meeting; and
- (c) whether the appellant came into Singapore on a motorcycle or in a car.

The Judge concluded on the totality of the evidence that the Couriers’ relationship began with the Alleged Introductory Meeting on 12 October 2011 which was for the purpose of linking up the Couriers to form the courier chain for the appellant (at [112]).

29 Apart from the findings in relation to the circumstances on 12 October 2011, the Judge made other findings in relation to the events that took place on 27 and 28 October 2011. Although such findings gave a fuller picture of the events leading up to the drug transaction on 28 October 2011 involving the Couriers, they were not material to the issue squarely before us, which was whether the appellant was at the Alleged Introductory Meeting of 12 October 2011.

30 The Judge found that the Prosecution had proved its case beyond reasonable doubt that the appellant was complicit in the drug transaction on 28 October 2011 by: (a) recruiting Shanmugam and Suief to be his drug couriers; (b) introducing the Couriers to each other on 12 October 2011 for the

purpose of facilitating an impending drug transaction; (c) providing the Kenari car containing the diamorphine to Shanmugam on 27 October 2011; and (d) coordinating the transport and delivery of the diamorphine on 28 October 2011 by giving instructions to the Couriers. Accordingly, the Judge convicted the appellant on the Charge (Judgment at [163]). As the appellant was found not to be a courier and he did not receive a certificate of substantive assistance, the Judge sentenced him to the mandatory death penalty.

31 On 22 May 2020, the appellant appealed against the Judge’s decision in respect of both conviction and sentence.⁴

The evidence as to the date and time of the Alleged Introductory Meeting

32 As the matter stood at that stage of the proceedings, there were discrepancies in the evidence regarding the date and the time of the Alleged Introductory Meeting. In respect of the date of the Alleged Introductory Meeting, the Couriers’ evidence was inconsistent individually (when each was asked at different points in time) and when their evidence was compared with each other’s. The table below shows their various accounts:⁵

⁴ ROP Vol 1 at pp 3–5 (Notice of Appeal dated 22 May 2020).

⁵ Appellant’s Further Submissions at Annex A (Agreed Table of Evidence).

	Shanmugam’s evidence	Suief’s evidence
2011 Statements	<p>On 31 October 2011, Shanmugam stated that he had first met Suief “two days ... after [he] met Puni, which is sometime 3 days before Deepavali on 26 October”.</p> <p>This could either mean <u>23 October 2011</u> (being three days before 26 October 2011) or <u>25 October 2011</u> (being two days after 23 October 2011).⁶ However, Shanmugam later appeared to suggest that the meeting had taken place on <u>24 October 2011</u>.⁷</p>	<p>On 30 October 2011, Suief stated that he had first met Shanmugam at West Coast McDonald’s on the day after Deepavali, <i>ie</i>, <u>27 October 2011</u>.⁸</p>
2014 Trial	<p>Shanmugam testified that the introductory meeting had in fact taken place “[t]hree weeks before Deepavali”, and that his 31 October 2011 statement had been inaccurately recorded.⁹</p> <p>Three weeks before Deepavali was <u>5 October 2011</u>.</p>	<p>Suief testified that the appellant had introduced him to Shanmugam at West Coast McDonald’s on <u>25 October 2011</u>.¹⁰</p>

⁶ Appellant’s Core Bundle (“ACB”) Vol 1 at p 168 (Shanmugam’s long statement dated 31 October 2011 at para 18).

⁷ ACB Vol 1 at pp 169–170 (Shanmugam’s long statement dated 31 October 2011 at paras 22–24).

⁸ ACB Vol 1 at pp 107–108 (Suief’s long statement dated 30 October 2011 at paras 17–18).

⁹ ROP Vol 2A at p 975 (Transcript dated 12 March 2014 at p 2, line 12); ROP Vol 2A at p 976 (Transcript dated 12 March 2014 at p 3, lines 9–18).

¹⁰ ROP Vol 2A at p 1008 (Transcript dated 12 March 2014 at p 35, lines 19–22).

<p>Additional statements before 2018 Trial</p>	<p>On 22 January 2016, Shanmugam stated that the appellant had introduced him to Suief “sometime 3 weeks before the arrest”.¹¹ Three weeks prior to the arrest was <u>7 October 2011</u>.</p>	<p>On 5 January 2018, Suief stated that the appellant had introduced him to Shanmugam at West Coast McDonald’s “[a]bout two weeks before Deepavali 2011”,¹² which was <u>12 October 2011</u>.</p>
<p>2018 Trial</p>	<p>Shanmugam testified during his examination-in-chief and cross-examination that the appellant had introduced him to Suief “[a]bout 3 weeks before the arrest”,¹³ which was <u>7 October 2011</u>.</p>	<p>Suief testified during his examination-in-chief that the appellant had introduced him to Shanmugam at West Coast McDonald’s “[a]bout 2 weeks before Deepavali”, which was <u>12 October 2011</u>.¹⁶</p>

¹¹ ROP Vol 2A at p 644 (Shanmugam’s 22 January 2016 Statement at para 7).

¹² ROP Vol 2A at p 708 (Suief’s 5 January 2018 Statement at para 6).

¹³ ROP Vol 1 at p 294 (Transcript dated 9 July 2018 at p 30, line 31); ROP Vol 1 at p 423 (Transcript dated 10 July 2018 at p 34, lines 15–20).

¹⁶ ROP Vol 1 at pp 105–106 (Transcript dated 12 January 2018 at p 37, line 31–p 38, line 11).

	<p>During re-examination, Shanmugam abruptly changed tack and insisted that it was “Raja” (and not the appellant) who had introduced him to Suief.¹⁴ However, he did not deny that there had been an introductory meeting and stood by his earlier evidence that the introductory meeting had taken place “about 3 weeks prior to [his] arrest”, which was <u>7 October 2011</u>.¹⁵</p>	<p>Upon cross-examination, Suief testified that the meeting took place “2 weeks before” he was arrested on 28 October 2011 but could not remember if it was <u>14 October 2011</u>.¹⁷</p> <p>During re-examination, Suief testified that the first meeting with Shanmugam took place “a few weeks prior to the 20th of October”.¹⁸</p>
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33 The Couriers’ evidence as to the time that the Alleged Introductory Meeting took place was also inconsistent:¹⁹

	Shanmugam’s evidence	Suief’s evidence
2011 Statements	<p>On 31 October 2011, Shanmugam stated that the Alleged Introductory Meeting had taken place <u>between 1pm and 3pm</u>.²⁰</p>	<p>On 30 October 2011, Suief stated that the Alleged Introductory Meeting had taken place “at about <u>5 plus in the evening</u>” [emphasis added].²¹</p>

¹⁴ ROP Vol 1A at p 655 (Transcript dated 21 November 2018 at p 10, lines 7–20).

¹⁵ ROP Vol 1A at p 654 (Transcript dated 21 November 2018 at p 9, lines 1–3).

¹⁷ ROP Vol 1 at p 160 (Transcript dated 12 January 2018 at p 92, lines 21–23).

¹⁸ ROP Vol 1 at p 278 (Transcript dated 18 January 2018 at p 27, lines 7–9).

¹⁹ Appellant’s Further Submissions at p 92 (Agreed Table of Evidence regarding “Positive statement of **time** of the Alleged Introductory Meeting”).

²⁰ ACB Vol 1 at pp 168–170 (Shanmugam’s long statement dated 31 October 2011 at paras 19 and 22).

²¹ ACB Vol 1 at p 108 (Suief’s long statement dated 30 October 2011 at para 18).

	Shanmugam’s evidence	Suief’s evidence
2014 Trial	Not mentioned.	Suief testified that the meeting had taken place at around <u>4pm to 5pm</u> . ²²
Additional statements before 2018 Trial	On 22 January 2016, Shanmugam stated that the meeting had taken place sometime after he cleared Woodlands Checkpoint “at about <u>1 plus in the afternoon</u> ” [emphasis added]. ²³ After the meeting, Shanmugam drove the car back to Malaysia and arrived at his house in Malaysia at around 3pm. ²⁴	On 5 January 2018, Suief stated that the meeting had taken place <u>in the evening</u> and that he and the appellant had waited about two hours for Shanmugam to come over. ²⁵
2018 Trial	Shanmugam testified that he did not know what time the meeting had taken place but recalled that it was “definitely <u>not at night</u> ” [emphasis added]. ²⁶ It was “[t]hereabout in the <u>evening</u> ” when he drove back to Malaysia [emphasis added]. ²⁷	Suief testified that he had gone to West Coast McDonalds at about <u>2pm to 3pm</u> . ²⁸

²² ROP Vol 2A at p 1010 (Transcript dated 12 March 2014 at p 37, line 1).

²³ ROP Vol 2A at p 644 (Shanmugam’s 22 January 2016 statement at paras 6–8).

²⁴ ROP Vol 2A at p 645 (Shanmugam’s 22 January 2016 statement at para 10).

²⁵ ROP Vol 2A at p 708 (Suief’s 5 January 2018 statement at para 6).

²⁶ ROP Vol 1A at p 524 (Transcript dated 11 July 2018 at p 19, line 13).

²⁷ ROP Vol 1A at pp 532–533 (Transcript dated 11 July 2018 at p 27, line 31–p 28, line 1).

²⁸ ROP Vol 1 at p 161 (Transcript dated 12 January 2018 at p 93, lines 30–32).

Remittal to the Judge

34 As mentioned earlier, before the substantive hearing of CCA 12, the appellant filed two criminal motions to adduce the New Evidence for the appeal. On 10 May 2021, we heard both applications and allowed the New Evidence to be adduced for the appeal. To reiterate, the New Evidence related to: (a) the Couriers’ investigation statements given in 2011; (b) a call trace report for Suief’s mobile phone 98944870; and (c) the ICA’s travel movement records of Shanmugam, Shanmugam’s foster mother, Shanmugam’s foster daughter and Mathan for the material period.

35 On 30 June 2021, we remitted the matter to the Judge to consider: (a) whether his finding that the Alleged Introductory Meeting took place (in the morning of 12 October 2011) was affected by the New Evidence; and (b) if so, whether that affected the appellant’s conviction. We also directed that, in addressing these questions, the Judge was free to decide what evidence he wished to reconsider (if any). By that time, it was abundantly clear to both parties that the focus of the inquiry was whether the Alleged Introductory Meeting really took place in the morning of 12 October 2011. This was because the appellant and Shanmugam were in Singapore for only the specified periods of time according to the ICA’s travel movement records and, in contrast, the Couriers’ 2011 investigation statements (given soon after the Alleged Introductory Meeting and very soon after their subsequent arrest) all pointed to the Alleged Introductory Meeting having taken place sometime in the afternoon or in the evening. It can be seen from the tables above that such timing was reinforced by the Couriers’ testimony during the 2014 Trial and the 2018 Trial.

36 A pre-trial conference (“PTC”) was called on 9 July 2021. At that PTC, counsel for the appellant proposed that the Judge could decide whether to assess

the New Evidence on the face of the documents or whether there was a need to recall the witnesses. The Prosecution stated that the Judge could decide the matters in the remitted questions after looking at the documents comprising the New Evidence and the documents submitted in CCA 12. At that time, both Couriers were in custody and were available to testify if the need arose. Eventually, counsel for the appellant took the view that “the witnesses need not be called subject to Judge’s consideration”. The Prosecution agreed with this position.

37 At the remittal hearing before the Judge on 30 July 2021, the parties agreed that they need not call any witnesses and would merely make submissions on the available evidence. Accordingly, the Couriers were not called to give further testimony. The Judge therefore merely heard further submissions by the parties, with particular focus on whether the Prosecution had proved beyond reasonable doubt that the Alleged Introductory Meeting took place in the morning of 12 October 2011. The appellant emphasised that 12 October 2011 was the only “overlapping” date on which both the appellant and Shanmugam were in Singapore.²⁹ The Prosecution accepted that “the reason why the 12th October was chosen was because it’s objective facts that all three of them were there at the same time”.³⁰

38 For the remittal hearing, the parties tendered substantially the same submissions that they had made to this Court for the appeal notwithstanding that the questions posed by this Court to the Judge were specific and limited in scope. The Judge found that the appellant’s arguments did not raise a reasonable doubt as to whether the Alleged Introductory Meeting took place on 12 October

²⁹ ROP (Remittal) Vol 1 at p 37 (Transcript dated 30 July 2021 at p 37, lines 5–8).

³⁰ ROP (Remittal) Vol 1 at p 58 (Transcript dated 30 July 2021 at p 55, lines 3–7).

2011. The Judge’s earlier finding about the Alleged Introductory Meeting was therefore unaffected by the New Evidence and it followed that the appellant’s conviction was also unaffected (Remittal Judgment at [3], [11] and [48]).

39 The Judge rejected the appellant’s submissions that the newly adduced 2011 statements from the Couriers were “*extremely critical*” and dispositive [emphasis in original].³¹ The appellant had argued that these statements were recorded within three weeks of the Alleged Introductory Meeting and that the time of that meeting would have been fresh in the Couriers’ minds then. The appellant submitted there was no reason for the Couriers to admit to the Alleged Introductory Meeting but lie about its timing. However, the Judge was of the view that these statements suffered from the same issues of credibility that he had attributed to the Couriers’ evidence given at the Couriers’ 2014 Trial. This was because in 2011 and 2014, the Couriers would have been attempting to avoid incriminating themselves and their statements “must be taken with the proverbial pinch of salt”. Even if the 2011 statements were taken at face value, the Judge noted that there was a considerable difference between Shanmugam’s evidence and Suief’s evidence in relation to the time of day of the Alleged Introductory Meeting (Remittal Judgment at [15]–[17]). “If the time of the Alleged Introductory Meeting were to be so fresh in their minds”, the Judge would have expected their evidence to be much more similar. Moreover, neither Courier was individually consistent about the time of that meeting in their respective evidence from their 2011 statements up to the 2018 Trial. Accordingly, the Judge did not find the Couriers’ evidence in relation to the timing of that meeting to be reliable.

³¹ Appellant’s Written Submissions dated 7 June 2021 at para 62.

40 However, the Judge found that the Couriers were “entirely consistent and reliable” in their evidence at the 2018 Trial of a meeting sometime in October 2011 at the West Coast McDonald’s outlet carpark where the appellant was present and personally introduced Shanmugam to Suief. It was not surprising to the Judge “that the Couriers might have correctly remembered these facts while misremembering the time of the Alleged Introductory Meeting”. Based on the ICA travel movement records of the appellant and Shanmugam, “the only possible time and date for that meeting was the morning of 12 October 2011” (Remittal Judgment at [18]). The Judge rejected the appellant’s argument that any introductory meeting between the Couriers was more likely to have taken place sometime between 24 and 25 October 2011 because the appellant was not present in Singapore then and so could not have been part of any such meeting (at [29]).

41 The Judge also rejected the appellant’s argument that there was simply not enough time for the Alleged Introductory Meeting and the events related to it to have taken place between 7.24am and 9.36am on 12 October 2011 (Remittal Judgment at [44]). These events would include Shanmugam having to drive from the Woodlands Checkpoint to the West Coast McDonald’s outlet car park, the period of about 45 minutes when Suief was said to have driven the Kenari car away (which Suief denied) and Shanmugam then having to drive the same car back to the Woodlands Checkpoint during peak hour traffic. We reiterate that, as seen from the ICA travel movement records, the only window of time when both the appellant and Shanmugam were in Singapore was between 7.24am and 9.36am on 12 October 2011 because Shanmugam was recorded as having entered Singapore at 7.24am and having left Singapore by 9.36am that morning. These 2 hours and 12 minutes were therefore the only window of time for the Alleged Introductory Meeting involving the appellant, Shanmugam and Suief to have taken place.

42 In the Judge’s view, it would be a mistake to focus too much on how tightly the various events had to fit into the said window of time in the morning of 12 October 2011. The Judge stated that the “better way to think about this would be from Shanmugam’s perspective: he came to Singapore specifically for this meeting and had no reason to tarry”. He would therefore have taken “precisely and only as much time as he needed at each step before making a speedy departure”. The Judge reiterated his earlier decision where he considered the possibility that Shanmugam might have been telling the truth about Suief taking the Kenari car away for about 45 minutes. He explained that he did not make a finding on whether this happened because it was not necessary for the purposes of the Charge against the appellant. He opined that even if this event did take place, it was possible that Shanmugam had overestimated the period of time involved (Remittal Judgment at [44]–[46]). He therefore concluded that the appellant did not raise a reasonable doubt as to whether the Alleged Introductory Meeting took place on 12 October 2011 (Remittal Judgment at [47] and [48]).

Issue to be determined

43 As alleged in the Charge, the Alleged Introductory Meeting on 12 October 2011 was the important link between the appellant and the drug transaction on 28 October 2011 carried out by the Couriers. The Alleged Introductory Meeting was important because it was alleged in the Charge that the common intention, among the appellant, Shanmugam and Suief, to traffic in drugs began from there and that it was “pursuant to this meeting between the three of you” that the Couriers then carried out the drug transaction on 28 October 2011. While the Charge identified the date and the location of the Alleged Introductory Meeting, it did not state the specific or the approximate

time of day of that meeting. It was therefore not necessary for the Prosecution to prove the time of day of that meeting at the trial.

44 However, in the light of the ICA travel movement records of the appellant and Shanmugam, it was clear that the Alleged Introductory Meeting could only have taken place sometime in the early part of the morning of 12 October 2011. This was because the Alleged Introductory Meeting was alleged to be a physical one held in Singapore and was not a virtual one and because the undisputed ICA travel movement records showed that there was only a specific window of 2 hours 12 minutes between 7.24am and 9.36am on 12 October 2011 when both the appellant and Shanmugam were in Singapore. Accordingly, the time of day of the Alleged Introductory Meeting became pivotal in this case.

45 Unlike the case against the Couriers, the Prosecution could not rely on any statutory presumption under the MDA to prove its case against the appellant since none was applicable to the facts here. The appellant was not in Singapore on 28 October 2011, the date of the drug transaction carried out by the Couriers. He was arrested in Malaysia and extradited to Singapore only in January 2016, more than 4 years after the Alleged Introductory Meeting on 12 October 2011 and the drug transaction on 28 October 2011. On the evidence, the appellant's presence at the Alleged Introductory Meeting, from which the common intention to traffic in drugs allegedly arose, could only be proved through the evidence of the Couriers. Following from the above, it became incumbent on the Prosecution to prove beyond reasonable doubt through the Couriers' evidence that the Alleged Introductory Meeting took place in the morning of 12 October 2011, sometime between 7.24am and 9.36am.

The parties' cases

46 On the issue of the date and time of the Alleged Introductory Meeting, the appellant submitted that the Judge erred in law and in fact in finding that the Prosecution had proved beyond reasonable doubt that the appellant introduced Shanmugam to Suief on 12 October 2011 for the purpose of facilitating an impending drug transaction. First, the Judge failed to give sufficient weight to the consistent and unchallenged evidence of the Couriers that the meeting took place sometime in the afternoon. The Judge also found erroneously that the Couriers could have misremembered the timing of the Alleged Introductory Meeting despite there being no evidence of this.³² Second, the Judge erred in disregarding the discrepancies arising from the Couriers' evidence in their 2011 statements and at the 2014 Trial relating to the date of the Alleged Introductory Meeting.³³ Third, the Judge's finding did not "sit well with" the fact that Shanmugam was only in Singapore from 7.24am to 9.36am on 12 October 2011. It was "extremely unlikely" that the events immediately prior to and after the Alleged Introductory Meeting on 12 October 2011 (including Shanmugam driving from the Woodlands Checkpoint to the McDonald's outlet at the West Coast and then back to the said checkpoint) could possibly have happened in that short span of 2 hours 12 minutes.³⁴ The appellant submitted that the evidence led instead to the conclusion that it was more likely that any introductory meeting took place on 24 October 2011, based on the Couriers' testimony and their mobile phone records, and the appellant was not even in Singapore on that day.³⁵

³² Appellant's Further Submissions at paras 34–35 and 39.

³³ Appellant's Further Submissions at paras 41–42.

³⁴ Appellant's Further Submissions at paras 34 and 58–59.

³⁵ Appellant's Further Submissions at paras 43–48 and 50–56.

47 The Prosecution submitted that the evidence did not point to a meeting on 24 October 2011. The Couriers’ evidence was not consistent in respect of the date or the time of day of the meeting. The Prosecution echoed the Judge’s observation that “the greater likelihood is that the Couriers had incorrectly recalled the time of the meeting” such that “imperfect recollections and the fallibility of human memory would explain the inconsistencies in the Couriers’ testimonies in respect of the time of the meeting”.³⁶

48 Both parties also made submissions in respect of other issues but there would be no need to address those submissions if the Prosecution could not even prove the important link stated in the Charge from which the common intention among the appellant and the Couriers to traffic in drugs was alleged to have arisen. We now consider the question whether the Prosecution had proved beyond reasonable doubt through the Couriers that the Alleged Introductory Meeting took place sometime between 7.24am and 9.36am on 12 October 2011.

Our decision

Burden of proof

49 The principles relating to the Prosecution’s burden of proof were explained by this Court in *Public Prosecutor v GCK and another matter* [2020] 1 SLR 486 (“*GCK*”). The principle of proof beyond reasonable doubt is simply that upon a consideration of all the evidence presented by the Prosecution and/or the Defence, the evidence must be sufficient to establish beyond reasonable doubt each and every element of the offence with which the accused person is charged (at [129]). This legal burden is always borne by the Prosecution (at [130]).

³⁶ Respondent’s Further Submissions at paras 13–26.

50 A reasonable doubt is one for which a reason can be given, so long as the reason given is logically connected to the evidence and the existence of a reasoned doubt is a necessary condition for an acquittal (*GCK* at [131]). In contrast to the legal burden, the evidential burden is the burden to adduce sufficient evidence to raise an issue for the consideration of the trier of fact. The evidential burden can shift to the opposing party once it has been discharged by the proponent. The opposing party must then call evidence or take the consequences, which may or may not be adverse (at [132]).

The unique circumstances in the present case

51 Ordinarily, the precise date and time stated in a charge are not necessarily the pivotal part of the charge. It is not uncommon for a charge to be framed with reference to an approximate time frame by stating that an event took place “on or about” a date or “at or about” a point in time. However, the same could not be said in the unique circumstances of this case. Although the Charge specified only the date of the Alleged Introductory Meeting and not the time of day, the time of day became a highly important issue in the present case. This was because the objective ICA travel movement records showed that the Alleged Introductory Meeting could only have taken place in the morning of 28 October 2011 while the Couriers’ 2011 investigation statements stated that the time of the Alleged Introductory Meeting was in the afternoon or in the evening. These investigation statements were given very soon after their arrest on 28 October 2011 and within three weeks after the Alleged Introductory Meeting on 12 October 2011.

52 In his statement of 30 October 2011, Suief stated that the Alleged Introductory Meeting took place “at about 5 plus in the evening”. On 31 October 2011, Shanmugam gave a statement in which he claimed that the Alleged

Introductory Meeting took place between 1pm and 3pm. In their respective statements and in their oral testimony, the Couriers did not allude to the possibility that the said meeting could have been in the morning.

53 Although this issue concerning the Couriers' investigation statements was not cleared up at the 2018 Trial, the Prosecution was given a further opportunity at the remittal hearing to ask the Couriers why they asserted in those investigation statements that the Alleged Introductory Meeting took place in the afternoon or in the evening. However, the Prosecution chose not to do so and decided instead to rely on only submissions to explain the discrepancy in its evidence against the appellant.

Reasonable doubt as to the time of the Alleged Introductory Meeting

54 At the resumed hearing before us, the Prosecution accepted that it was incumbent on the Prosecution to establish that the Alleged Introductory Meeting involving the appellant and the Couriers took place in the morning of 12 October 2011. As the Couriers were available but not re-called to explain their assertions in their 2011 investigation statements, there remained the lingering discrepancy as to the time of day of that meeting. Instead of conjecturing about whether the Couriers were untruthful in their statements or were genuinely mistaken as to the time of day of the Alleged Introductory Meeting, the Couriers could have been asked directly at the remittal hearing why they stated what they did in those statements. Whether they maintained that the meeting was in the afternoon or evening or accepted that they could have been made an honest mistake in their statements, the appellant could then cross-examine them further and the Judge could then decide on their credibility based on the full evidence before him instead of having to hypothesise on incomplete evidence as he did, as shown below.

55 In the Remittal Judgment at [46], the Judge stated that it was “not at all clear that each and every one” of the alleged events leading to and immediately following the Alleged Introductory Meeting must have happened during the time span of 7.24am to 9.36am on 12 October 2011. He considered that although Shanmugam had testified that the ICA officers performed a “thorough check” on the Kenari car at Woodlands Checkpoint when he was entering Singapore, he did not mention how long this check took. The Judge also stated that it was “also not clear whether this check was performed before or after Shanmugam was registered as having entered Singapore at 7.24am”. The Judge next considered the possibility that Shanmugam might have been telling the truth about Suief taking away the Kenari car for 45 minutes after their introduction. He reiterated that he did not make a finding on whether this had truly happened because it was not necessary for the purposes of the Charge. However, the Judge went on to opine that even if the Kenari car had been taken away by Suief that morning, it was “possible that Shanmugam could have overestimated the period of time involved”. In our judgment, this line of reasoning reinforced our point that the Couriers could and should have been re-called at the remittal hearing to clear these doubts. Whether or not Shanmugam would have continued to be a hostile witness towards the Prosecution (as he was during his cross-examination at the 2018 Trial), the necessary inferences could then be made.

56 Even though the Couriers’ evidence was, as the Judge found in the Judgment at [89], consistent in other material aspects such as the location and the purpose of the Alleged Introductory Meeting, these were insufficient to prove the Charge beyond a reasonable doubt. We reiterate that the Couriers’ evidence was not individually or collectively consistent with each other on the date and the time of day of the Alleged Introductory Meeting. On the available evidence, the Couriers did not even suggest that the Alleged Introductory Meeting could have been in the morning. Instead, the Couriers had attested

positively that the Alleged Introductory Meeting took place in the afternoon or in the evening.

57 As matters stood, we did not know even after the remittal hearing why the Couriers stated in their 2011 investigation statements that the Alleged Introductory Meeting took place in the afternoon or in the evening when it was obvious from the ICA travel movement records that the only time that the meeting could have taken place was in the early part of the morning of 12 October 2011. Accordingly, there remained a lingering reasonable doubt as to the time of the Alleged Introductory Meeting and therefore a reasonable doubt about whether the Couriers were indeed testifying about the meeting of 12 October 2011. As explained earlier, the Alleged Introductory Meeting was a pivotal element in the Charge against the appellant.

Conclusion

58 In the unique circumstances of this case, we found that there remained a reasonable doubt whether the Alleged Introductory Meeting took place in the morning of 12 October 2011. As this was the link which the Prosecution had to prove to sustain the Charge against the appellant because the alleged common intention to traffic in drugs stemmed from that meeting, we found the Charge not proved beyond reasonable doubt. We therefore allowed the appeal and acquitted the appellant accordingly.

59 We emphasise here that our decision in this appeal was focused on the Alleged Introductory Meeting and would have no effect whatsoever on the Couriers' conviction and their appeals. The appellant and the Alleged Introductory Meeting did not feature at all in the charges against the Couriers. The Couriers' charges alleged a common intention between them to traffic in drugs. They were found to be in possession of the drugs and in the process of

distributing them. The statutory presumptions in the MDA also applied against them. Therefore, whether or not the Alleged Introductory Meeting took place on 12 October 2011 involving the appellant and the Couriers and whether or not the appellant was involved in the drug transaction on 28 October 2011, the Couriers were guilty and convicted correctly on their charges.

Sundaresh Menon
Chief Justice

Andrew Phang Boon Leong
Justice of the Court of Appeal

Tay Yong Kwang
Justice of the Court of Appeal

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