Chan Heng Kong and another *v* Public Prosecutor
[2012] SGCA 18

Case Number	: Criminal Appeal No 11 of 2010
Decision Date	: 06 March 2012
Tribunal/Court	: Court of Appeal
Coram	: Chan Sek Keong CJ; Andrew Phang Boon Leong JA; V K Rajah JA
Counsel Name(s)	: Cheong Aik Chye (A C Cheong & Co) and Loo Khee Sheng (K S Loo & Co) (both assigned) for the first appellant; Wong Siew Hong (Infinitus Law Corporation) and Daniel Koh (Eldan Law LLP) (both assigned) for the second appellant; Kan Shuk Weng and Gail Wong (Attorney-General's Chambers) for the respondent.
Parties	: Chan Heng Kong and another — Public Prosecutor

Constitutional Law

Criminal Law

[LawNet Editorial Note: The decision from which this appeal arose is reported at [2011] 3 SLR 437.]

6 March 2012 Judgment reserved.

V K Rajah JA (delivering the judgment of the court):

Introduction

1 This is an appeal by two persons, Chan Heng Kong ("Chan") and Sng Chun Heng ("Sng"), who were convicted and sentenced to the mandatory punishment of death in Criminal Case No 3 of 2009 for committing the following offences:

(a) *vis-à-vis* Chan, the offence of drug trafficking under s 5(1)(*a*) of the Misuse of Drugs Act (Cap 185, 2001 Rev Ed) ("the MDA"); and

(b) *vis-à-vis* Sng, the offence under s 5(1)(*a*) read with s 5(2) and s 12 of the MDA of abetting his younger brother, Sng Choong Peng ("Choong Peng"), to traffic in drugs by *instigating* the latter to be in possession of drugs for the purpose of trafficking.

2 The respective offences which Chan and Sng were convicted of both related to the same events that occurred on 23 January 2008, and the drugs involved consisted of not less than 17.70g of diamorphine.

The background facts

The parties involved in the events of 23 January 2008

3 There were a total of four persons involved in the events that occurred on 23 January 2008, namely, Chan, Sng, Choong Peng and one Ang Cheng Wan ("Ang"). All four are Singaporeans. As mentioned earlier, Choong Peng is Sng's younger brother.

4 Choong Peng was separately charged and convicted in Criminal Case No 1 of 2009 ("CC 1/2009") for his involvement in the events of 23 January 2008. However, unlike Sng, he was charged with trafficking in only "not less than 14.99 grams of diamorphine" [note: 1] [emphasis in original omitted], and was eventually sentenced to 22 years of imprisonment and 15 strokes of the cane. Ang, on the other hand, was initially charged with trafficking in 243.90g of granular substance believed to contain diamorphine. This charge was, however, subsequently withdrawn by the Public Prosecutor during the second pre-trial conference on 30 September 2008. Thereafter, a new charge of drug consumption was preferred against Ang in the Subordinate Courts.

The Prosecution's summary of the events of 23 January 2008

5 On the morning of 23 January 2008, two teams of Central Narcotics Bureau ("CNB") officers conducted surveillance at Block 12 Kampong Arang Road ("Block 12"), where Sng and Choong Peng resided, as well as at Woodlands Checkpoint. At the time, the CNB officers were acting on intelligence received that three Chinese men would, later that day, be receiving illegal drugs from a courier from Malaysia travelling in a silver car with a vehicle registration number containing the digits "702".

6 At about 1.20pm on the same day, Sng and Choong Peng were seen at the void deck of Block 12. At about 1.45pm, Ang appeared and joined Sng at the void deck of Block 12 while Choong Peng headed in the direction of a nearby circular pavilion located between Block 12 and Block 14 Kampong Arang Road ("Block 14"). Shortly thereafter, Chan was seen driving a silver Toyota Corolla bearing vehicle registration number EP 702P ("EP 702P") into the car park of Block 12. Chan stopped EP 702P next to the pavilion between Block 12 and Block 14 ("the Pavilion"), alighted and placed a red plastic bag near a rubbish bin at the Pavilion. Chan then returned to EP 702P and parked the car near the lift landing of Block 14.

7 A short while later, Choong Peng was seen approaching EP 702P. He entered the front passenger door of EP 702P and was observed engaging in a short conversation with Chan in the car. Choong Peng then alighted from EP 702P and moved towards the Pavilion to retrieve the red plastic bag that had been placed there earlier by Chan. After picking up the red plastic bag, Choong Peng joined Sng and Ang at the car park entrance near Block 12. From there, Sng, Ang and Choong Peng together took a taxi to a public housing estate at Chai Chee Avenue. The CNB officers trailed the trio and arrested them when the taxi stopped at Chai Chee Avenue.

8 After the arrest of Sng, Ang and Choong Peng, the red plastic bag which Choong Peng had earlier retrieved from the Pavilion was seized and was found to contain a pack of "Mamee Monster" snacks. Inside this "Mamee Monster" snack pack were smaller packs of "Mamee Monster" snacks containing a total of 30 sachets of white granular substance. The white granular substance was analysed by the Health Sciences Authority ("the HSA") and was found to contain not less than 17.70g of diamorphine.

9 Chan was arrested separately in Geylang on the same day after his encounter with Choong Peng at Block 12. After his arrest, EP 702P was searched by the CNB officers. During the search, a black sling bag containing $7,500 worth of cash in Singapore currency was retrieved from the front passenger seat. Four packs of "Mamee Monster" snacks, each containing smaller "Mamee Monster" snack packs with drug items in them, were also found in a white paper bag bearing the label "Estebel 1833" ("the 'Estebel 1833' bag") on the rear passenger seat. These drug items were analysed by the HSA and were found to contain not less than 71.57g of diamorphine.

10 Subsequent to the arrest of Sng, Choong Peng, Chan and Ang, a search was also conducted at Sng's bedroom in his residence at unit #04-11 of Block 12 ("the Flat"), in the course of which more

drugs were found. These drugs were analysed by the HSA and were found to contain not less than 11.97g of diamorphine.

The charges against Sng and Chan

11 Multiple charges were initially preferred against Sng and Chan. [note: 2] However, all those charges, save for the ones which Sng and Chan were convicted of in the court below (see [1] above), were eventually stood down when the trial commenced. The charges proceeded with read as follows: [note: 3]

> **YOU ARE CHARGED** at the instance of the Attorney-General as Public Prosecutor and the charges against you are:
>
> That you, **SNG CHUN HENG**,
>
> on or about the 23rd day of January 2008 in Singapore, did abet one Sng Choong Peng in trafficking in a controlled drug specified in Class "A" of the First Schedule to the Misuse of Drugs Act, Chapter 185, to wit, by instigating Sng Choong Peng to be in possession for the purpose of trafficking 30 packets of substances containing not less than 17.70 grams of **diamorphine**, without any authorisation under the Misuse of Drugs Act or the regulations made thereunder, when you instructed him to collect the said drug from a certain person which he did on 23rd January 2008 at or about 1.55 p.m. in the vicinity of Kampong Arang Road, Singapore, and you have thereby committed an offence under section 5(1)(a) read with section 5(2) and section 12 and punishable under section 33 of the Misuse of Drugs Act.
>
> …
>
> That you, **CHAN HENG KONG**,
>
> on the 23rd day of January 2008 at about 1.55 p.m. at the vicinity of Kampong Arang Road, Singapore, did traffic in a controlled drug specified in Class "A" of the First Schedule to the Misuse of Drugs Act, Chapter 185, to wit, by delivering to one Sng Choong Peng 30 packets of substances containing not less than 17.70 grams of **diamorphine**, without any authorisation under the Misuse of Drugs Act or the regulations made thereunder, and you have thereby committed an offence under section 5(1)(a) and punishable under section 33 of the Misuse of Drugs Act.
>
> …
>
> [emphasis in original]

Sng's and Chan's respective cases at the trial

12 The case put forth by Sng at the trial was as follows:

(a) Sng claimed that he had ordered 20 and *not* 30 sachets of heroin to be delivered on 23 January 2008; [note: 4]

(b) Sng revealed that he was a consumer of heroin, and that half of the 20 sachets which he had allegedly ordered were for his own consumption while the other half were for sale; [note: 5]

(c) Sng alleged that there was a mix-up and contamination of the drug exhibits at the CNB's premises, which rendered it unsafe for the court to convict him of a capital charge; [note: 6]

(d) Sng challenged the admissibility of and the weight (if any) to be attached to the statements which he gave to the CNB officers after his arrest; and

(e) Sng claimed that he did not instigate Choong Peng to be in possession of the drugs for the purpose of trafficking. [note: 7]

13 As for the case advanced by Chan at the trial, it was as follows:

(a) Chan did not dispute that he had possession of the five packs of "Mamee Monster" snacks which he brought from Malaysia to Singapore in EP 702P on 23 January 2008 (*viz*, the pack found in the red plastic bag which Choong Peng retrieved from the Pavilion (see [8] above) and the four packs found in the "Estebel 1833" bag in EP 702P (see [9] above)), one of which (*viz*, the pack mentioned at [8] above) he placed near a rubbish bin at the Pavilion on 23 January 2008. [note: 8] However, he denied having knowledge that these "Mamee Monster" snack packs contained illegal drugs. In particular, Chan raised the following points during the trial to establish his lack of *mens rea* for the offence charged:

(i) he thought he was only engaged in an illegal moneylending transaction on 23 January 2008;

(ii) he had no reason to think that the "Mamee Monster" snack packs contained illegal drugs because "the manee [*sic*] noodles also probably could be kind of 'code' 'signal' used by those involved in illegal money transactions"; [note: 9]

(iii) he had taken steps to satisfy himself that the "Mamee Monster" snack packs did not contain illegal drugs by feeling the contents of one of the snack packs with his fingers, and had found nothing suspicious about that pack [note: 10] (on appeal, however, Chan stated that the checking had been done in respect of "Mamee Monster" snack packs which he had delivered on a previous occasion, and not in respect of the "Mamee Monster" snack packs which he brought from Malaysia to Singapore in EP 702P on 23 January 2008 (see [19] below));

(iv) if he really had knowledge that the "Mamee Monster" snack packs contained illegal drugs, he would not have left them in a visible position on the rear passenger seat of EP 702P when he was passing Woodlands Checkpoint on 23 January 2008; [note: 11] and

(v) the fact that he did not put up a struggle when he was arrested also suggested that he had no knowledge that the "Mamee Monster" snack packs contained illegal drugs. [note: 12]

(b) Apart from the lack of *mens rea*, Chan also alleged that his statements to the CNB officers were inaccurately recorded. [note: 13]

(c) In addition, like Sng, Chan alleged that there was a mix-up and contamination of the drug exhibits at the CNB's premises, which rendered it unsafe for the court to convict him of a capital charge. [note: 14]

14 The above arguments of Chan and Sng were rejected by the trial judge ("the Judge"), who convicted the two men of the respective capital charges brought against them (see *Public Prosecutor v Sng Chun Heng and another* [2011] 3 SLR 437 ("the GD")). Both Chan and Sng appealed. The appeal was heard on 16 March 2011, at the end of which we reserved judgment. On 7 April 2011, counsel for Sng, Mr Wong Siew Hong ("Mr Wong"), obtained leave to file further written submissions, which submissions were subsequently filed on 20 April 2011. The Prosecution's reply to Sng's further written submissions was filed on 3 May 2011. As one of the central arguments made by Mr Wong – *viz*, that relating to the exercise of the Attorney-General's prosecutorial discretion (see [16] below at sub-para (c) as well as [40] below) – had also been raised in Criminal Motion No 60 of 2011 ("CM 60/2011"), we deferred the determination of this appeal until we had decided the outcome of CM 60/2011 (see *Ramalingam Ravinthran v Attorney-General* [2012] SGCA 2 ("*Ramalingam Ravinthran v AG*") for our decision on that matter).

The issues in the present appeal

15 Having regard to the arguments raised by counsel for Chan, Mr Cheong Aik Chye ("Mr Cheong"), and the Prosecution, the key issues to be determined in this appeal in so far as Chan is concerned are as follows:

(a) whether Chan had the requisite *mens rea* for the offence which he was charged with; and

(b) whether there was a mix-up and/or contamination of the drug exhibits at the CNB's premises such that it would be unsafe for Chan's conviction to be upheld.

16 As for the issues to be determined in respect of Sng, they are as follows:

(a) whether the Judge was correct in holding that the defence of consumption raised by Sng at the trial was irrelevant to the offence which Sng was charged with;

(b) whether the Judge was correct to accept that there was abetment by instigation on Sng's part;

(c) whether the Prosecution could choose between prosecuting Sng for abetting the trafficking of a quantity of heroin which carried the capital punishment on conviction and prosecuting him for abetting the trafficking of a (smaller) quantity of heroin which did not carry such punishment on conviction; and

(d) whether there was a mix-up and/or contamination of the drug exhibits at the CNB's premises such that it would be unsafe for Sng's conviction to be upheld.

17 We will deal with the issues in the order stated above, beginning with the issues relating to Chan's conviction.

Our analysis and decision

Apropos Chan

Whether the mens rea for the offence was present

18 As mentioned earlier, Chan denied having knowledge of the true contents of the "Mamee

Monster" snack pack (*ie*, the big "Mamee Monster" snack pack containing the smaller "Mamee Monster" snack packs) which he delivered to Choong Peng at the Pavilion on 23 January 2008. His counsel, Mr Cheong, argued that "[t]he learned trial judge erred by failing to consider or give sufficient weight to the fact and evidence that half the content[s] of the 'mamee' packet in question actually contained dried noodles". [note: 15]

19 In particular, Mr Cheong pointed out that prior to the delivery on 23 January 2008, Chan had on 19 January 2008 been similarly involved in another delivery of some "Mamee Monster" snack packs in exchange for $8,500 in cash. On that earlier occasion, it was claimed, Chan had checked the contents of one of the "Mamee Monster" snack packs by touching and feeling the snack pack with his fingers, and had been satisfied that it contained noodles and seasoning. [note: 16] This, Mr Cheong contended, caused Chan to believe that the "Mamee Monster" snack packs which he subsequently brought from Malaysia to Singapore in EP 702P on 23 January 2008 were what they purported to be. Chan maintained that he honestly believed that he was engaging in money collection, with the "Mamee Monster" snack packs being nothing more than some kind of "'code' 'signal'" [note: 17] that was required in order for the transaction to be consummated.

20 This argument was dealt with quite extensively by the Judge and we see no reason to disturb his decision to reject it. At [75]–[77] of the GD, the Judge explained his reasons for dismissing this argument as follows:

> 75 Chan was not a naïve young man stepping out into the working world. He had been in business in the USA and was an experienced 47-year-old adult at the material time. Any person of average intelligence and honesty would have realised immediately that the task given to Chan was not merely one of collecting money. No reason was given to Chan as to why he had to drive to Malaysia, have some cheap common foodstuff placed in his car and to deliver the packets to Singapore. The fact that relatively large amounts of cash were handed over to Chan each time he passed those seemingly worthless and lightweight foodstuff to its intended recipient would have awakened him to the reality that he was delivering illegal goods and very likely drugs, judging by the light weight and the small size of the items.
>
> 76 It was also obvious that Chan was given no instructions on how much money to collect and the person(s) to collect it from. In fact, strangers met him in Malaysia each time in suspicious circumstances. Further, the payment Chan received for merely driving across borders to pass small and light packages was surely totally disproportionate to the efforts and time involved. The manner of delivery on 23 January 2008 was also highly suspicious as a plastic bag containing foodstuff was to be left near a rubbish bin unattended. Further, after Choong Peng handed over the cash, Chan drove his car away without counting the money. He could not have been in such a hurry to meet his friends for lunch, as he claimed. It was more likely that he was anxious to leave the location knowing that he had delivered illegal substances. As he said in one of his statements to the CNB, "I was simply concerned about making the money and not get arrested".
>
> 77 Clearly, Chan ought to have been highly suspicious about the nature of his work and the things that were placed in his car in Malaysia. However, he did not bother to enquire because the reward was good and he needed the money. His conduct amounted to wilful blindness and he must therefore be taken to have known the nature of the drugs that he was in possession of and which he delivered. Although he did not hand the package physically to Choong Peng, what he did that day at Kampong Arang Road was sufficient delivery in law as possession was transferred and in the manner arranged between the two men.

21 Most of the above findings by the Judge were based on Chan's long statements recorded on 25, 27 and 29 January 2008, [note: 18] the admissibility of which was not challenged at the trial (only the *accuracy* of these statements were challenged by Chan at the trial (see [13] above at sub-para (b) as well as [23] below)). We should also add that Chan repeatedly admitted to having suspected that the delivery which he was tasked to carry out at the material time involved the smuggling of illegal drugs. In his contemporaneous statement recorded on 23 January 2008, [note: 19] Chan replied to the question posed to him as follows:

> Q11:*Are you awared* [*sic*] *that all the packets that were found on you and the last consignment packets you delivered to and also earlier the delivery you made were contain* [*sic*] *drugs*.
>
> Ans:*I believed so, because of the handsome rewards/transport fee that I received*.
>
> [emphasis added]

In his cautioned statement recorded on 24 January 2008, [note: 20] Chan stated:

> *I have nothing to say to this charge. When I deliver the things to them I know that they could be drugs.* Should I be sentenced to death due to this, I will accept it. [emphasis added]

Finally, in his long statements recorded on 25, 27 and 29 January 2008, Chan stated: [note: 21]

> 10. About two months ago about November 2007, I met … [a] person … [who] introduced himself to me as 'Franky'. This was at the Casino ship at Harbour Front. … Franky came up and started a conversation. He asked me whether I wanted a job. I asked him what job it was and he said delivery. I said ok and I passed him my number. I told him to call me when there is a need. He did not tell me what kind of delivery. *I suspected that it was smuggling of things*. Franky also did not tell me about the payment. He did say the payment would be handsome. …
>
> …
>
> 17. Back at home, on the same day, on the 19 January [2008], I counted the stack of notes [this was after Chan made the delivery mentioned at [19] above]. There was $8500 altogether. I feel that I had delivered something illegal but I do not know exactly what it was. *I thought it may be drugs but I cannot be sure*. Tommy [a person who had given instructions to Chan over the phone on 18 and 19 January 2008] had told me over the phone that I do not have to ask too many things and just do the delivery. *I did not want to think about it too as I know that it was something illegal.*
>
> …
>
> 20. I did not hear from Tommy till the 23 January [2008]. On 23 January, Wednesday, in the morning at about 9am to 10am, Tommy called. He called using a Malaysian number. … I received two other calls that morning, '93850885' and '97891172', these two numbers are from personal friends. They are 'Jason' and 'Wong'. *I did not save their numbers in my phone although they are close friends as since I started doing this delivery of illegal things, I do not want to get my friends implicated*. …
>
> …

> 22. … Ah Boy [one of Tommy's contemporaries] told me that there are five 'bigs' and two 'smalls' in the white paper bag [*viz*, the "Estebel 1833" bag found in EP 702P after Chan's arrest]. To me, I understand that the 'big' means the packets of Mamee noodles and the 'small' means the packets of 'Pagoda' peanuts. I did check in the white paper bag and I confirm that there were five packets of Mamee noodles and two packets of 'Pagoda' peanuts. I thought that it was something illegal and *I thought that they were drugs but I do not want to go and think about it*. …
>
> …
>
> 27. I then drove towards Lorong 25A Geylang. I wanted to go for the Teochew porridge there. During this time, the white paper bag with five packets of Mamee and two packets of Pagoda peanuts were still in my car. *In my heart, I know that it is drugs but I did not ask Tommy or Ah Boy what exactly was inside*. To me, this is simply there [*sic*] method of packing the stuff. I was simply concerned about making the money and not get arrested.
>
> …
>
> [emphasis added]

22 It is clear from the aforesaid statements given by Chan that Chan knew "*[i]n [his] heart*" [note: 22] [emphasis added] that he was dealing with illegal drugs when he brought the "Mamee Monster" snack packs from Malaysia to Singapore in EP 702P on 23 January 2008. Needless to say, Chan's refusal to "want to go and think about it" [note: 23] in spite of such suspicion (see [21] above) clearly attracted the application of the doctrine of wilful blindness. We should mention that since this appeal was heard, this court has in *Nagaenthran a/l K Dharmalingam v Public Prosecutor* [2011] 4 SLR 1156 ("*Nagaenthran*") clarified the position on wilfulness. In *Nagaenthran*, we stated (at [23]) *vis-à-vis* the presumption of knowledge set out in s 18(2) of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed):

> In our view, while there may be a conceptual distinction between the broad view (that the knowledge in s 18(2) … refers to knowledge that the drug is a controlled drug) and the narrow view (that the knowledge in s 18(2) … refers to knowledge that the drug is a specific controlled drug, *eg*, heroin or "ice"), *the distinction has no practical significance for the purposes of rebutting the presumption of knowledge of the nature of the controlled drug. To rebut the presumption of knowledge, all the accused has to do is to prove, on a balance of probabilities, that he* ***did not know*** *the nature of the controlled drug referred to in the charge*. The material issue in s 18(2) … is ***not*** the ***existence*** of the accused's knowledge of the controlled drug, ***but*** the ***non-existence*** of such knowledge on his part. [emphasis in original in bold italics; emphasis added in italics]

23 We should also add that all the statements mentioned at [21] above were alleged by Chan at the trial to have been inaccurately recorded. In his petition of appeal, Chan similarly alleged that "several sentences were either twisted, misrepresented, recorded out of context or lacking in particulars". [note: 24] However, counsel for Chan, Mr Cheong, was not able to substantiate these allegations in either his written or his oral submissions for this appeal. We therefore reject this ground of appeal.

The alleged mix-up and/or contamination of the drug exhibits

24 We now turn to the issue of whether there was a mix-up and/or contamination of the drug

exhibits at the CNB's premises such that it would be unsafe for this court to uphold Chan's conviction of the capital charge brought against him. In the closing submissions for Chan at the trial, it was submitted: [note: 25]

> [Chan] testified there was pouring of drug exhibits all together into one container at the weighing room by ASP Senthil Kumaran and some white powdery substance spilling over on the table and onto the floor. It was put to ASP Kumaran that was so by [Chan]. [Chan] also told [ASP] Adam Tan of mixed up at the exhibit photo-taking room and weighing room but was ignored and this happened before [Sng] was brought in. It is humbly submitted as the net weight is 17.70 grams of diamorphine and the death penalty threshold for diamorphine trafficking is 15 grams, the mixed-up as submitted, no matter how slight the chances are of a mixed-up, it cannot be ruled out and therefore it is not safe to find [Chan] culpable as charged.

It should be noted that Sng likewise complained that there was a mix-up and contamination of the drug exhibits at the CNB's premises. Like Chan, Sng alluded to the possibility of contamination of the drugs found inside the red plastic bag which Chan delivered to Choong Peng at the Pavilion on 23 January 2008. Sng alleged that during the weighing process at the CNB's premises, "some *peh hoon* dropped onto the floor around the weighing scale" [note: 26] and "[the] *peh hoon* … that dropped was collected and put back onto the weighing scale". [note: 27] Sng also claimed that there was a possibility of a mix-up between the three batches of drugs seized on 23 January 2008 because there was a break in the chain of custody of: (a) the drugs seized from Chan (*ie*, the drugs found in the "Estebel 1833" bag in EP 702P (see [9] above)); (b) the drugs seized from the taxi which Sng, Ang and Choong Peng took to Chai Chee Avenue (*ie*, the drugs found in the red plastic bag which Chan delivered to Choong Peng at the Pavilion (see [8] above)); and (c) the drugs seized from Sng's bedroom in the Flat (see [10] above).

25 However, it was revealed during Sng's cross-examination that the alleged spillage was not a spillage which involved the drugs spilling out of the sachets in which they were contained: [note: 28]

> Q Now, Mr Sng, right, coming to the part about what you witnessed in the measuring room. Now, are you sure what you saw was not a case where the *peh hoon* [*ie*, heroin] that was still in plastic bag being put on the weighing scale for weighing?
>
> A What I saw was the heroin were in the – in – in the bags – in the bags and they poured – and they poured it onto the weighing scale. They were in sachets.
>
> Q Now so – which means that the drugs were not in direct contact with the weighing scale, it was still in the respective bags. Are you trying to tell us that?
>
> A Yes, they were in sach – the heroin were in sachets and some dropped.
>
> Q Okay. So now you have clarified that the drugs were still in the sachet bags, right, it's not – not in its powdery form on the weighing scale
>
> A No, in sachet.

The implication of this evidence is that, assuming the alleged drug spillage did indeed occur, it was not material to the quantity of heroin in the sachets that was later determined to be present by the HSA. We also agree with the Judge's finding that there was no mix-up between the drug exhibits seized from the different locations on 23 January 2008. As pointed out by the Prosecution in its

closing submissions for the trial, [note: 29] the three batches of drug exhibits seized on 23 January 2008 were all different in form and packaging. [note: 30] Further, it is evident from the photographs tendered at the trial [note: 31] that the drug exhibits were methodically unpacked, photographed and weighed (see the GD at [13]). Lastly, we note that Sng and Chan declined to call Choong Peng and Ang (who were present when the photographs of the drug exhibits were taken) as witnesses to corroborate their allegations even though the Prosecution invited them to do so. [note: 32]

26 In the circumstances, Sng's and Chan's allegations regarding the possible contamination and mix-up of the drug exhibits were, in our view, without substance.

Apropos Sng

The defence of consumption raised by Sng

27 We turn now to the issues pertaining to Sng's conviction. In respect of the defence of consumption raised by Sng at the trial, the question which we have to decide is whether this defence is relevant to the offence which Sng was charged with. The Judge rejected this defence, holding (at [71] of the GD):

> Sng claimed in court that he consumed some five straws of heroin per day. Firstly, the charge against Sng relates to instigation and the trafficking of heroin alleged concerns Choong Peng. There was no doubt that Choong Peng was collecting the heroin on Sng's behalf and would pass it on to him. That amounted to delivery of, or at least an offer to deliver, the heroin (see the definition of "traffic" in s 2 MDA). *Sng's intention concerning the heroin and his alleged addiction and consumption habit would therefore be irrelevant to the charge. As the Prosecution observed, even if all 30 sachets in question were meant for Sng's consumption, the charge would have been made out*. … [emphasis added]

28 We agree with the Judge's decision on this point. We also agree with the Judge that Sng's defence of consumption was not factually tenable. The Judge carefully evaluated Sng's purported heroin consumption pattern against the other evidence to test the veracity of Sng's assertion (*viz*, that he consumed some five straws of heroin daily) before concluding that this assertion was not true. The Judge's reasoning was as follows (see the GD at [71]):

> … In any event, there was no credible evidence of a discernible consumption pattern. The medical examination of Sng revealed only mild drug withdrawal symptoms. In his statements, he started with a claim of one straw over two days and moved upwards to four to five straws per day or one eight-gram sachet of heroin per day. Sng's assertion that he set aside ten sachets for his own consumption only crystallised in his statement of 19 February 2008, almost a month after his arrest. Initially, he merely said that the 30 sachets were for sale and for consumption without specifying the proportions. In the later statement, he stated that ten sachets out of 30 ordered were for consumption. The evidence changed to ten sachets out of 20 ordered when he gave his testimony in court. I found his self-serving estimate of his consumption pattern hard to believe in view of the constant changes in his evidence. Further, his alleged consumption habit would not be sustainable considering his income. According to him, he had to borrow between $3,500 and $5,000 for each purchase of heroin.

29 Before us, counsel for Sng, Mr Wong, sought to modify the argument made at the trial *vis-à-vis* consumption, claiming that at least 2.71g of the 17.70g of heroin found in the red plastic bag delivered by Chan to Choong Peng on 23 January 2008 was intended for Sng's own consumption:

[note: 33]

41. …

…

g. The amount of drugs consumed by [Sng] (either 4 straws per day or 5 straws per day) is corroborated by the medical report of Dr Choo. Dr Choo had reported that [Sng] is an addict consuming 4 to 5 straws per day. Assuming each straw would contain about 0.1g nett of heroin and 2.71g therefore represents only 5½ days. …

42. Considering the totality of the evidence, it is clear that the learned Trial Judge erred in fact and in law to give due weight to this evidence, namely that [Sng] was clearly a drug addict and that of the drugs seized, some of it must certainly been [*sic*] apportioned for his personal consumption … It is submitted that on a balance of probabilities, at least 2.71g of the seizure was intended for his own consumption, bringing the aggregate amount for sale to be not more than 14.99g.

[underlining in original]

30 We are not persuaded by this argument because it relies on the very same estimate of Sng's drug consumption pattern (*ie*, consumption at the rate of four to five straws of heroin per day) which the Judge rightly found to be incredible.

The charge of abetment against Sng

31 We now turn to the issue of whether there was abetment by instigation on Sng's part on 23 January 2008. In this regard, Mr Wong initially argued that Sng's statements were taken irregularly and also recorded inaccurately. For example, it was argued that Sng never said the words, "It was me to ask him [*ie*, Choong Peng] to collect from someone" [note: 34] and "I will ask my brother [*ie*, Choong Peng] collect for me" [note: 35] as recorded in a statement taken from Sng on 23 January 2008 – words which Mr Wong accepted were material to whether the offence of abetment by instigation was made out. [note: 36] Instead, it was argued, Sng used the words, "He [*ie*, Choong Peng] went down to collect on his own" [note: 37] and "He [*ie*, Choong Peng] went down on his own" [note: 38] respectively. However, these complaints were abandoned in Mr Wong's further written submissions filed on 20 April 2011, where it was stated: [note: 39]

It is not disputed that [Sng] had asked/instructed [Choong Peng] to collect the drugs from [Chan], to which request/instruction [Choong Peng] had agreed. It was submitted that all that [Sng] had done was to make a simple request to [Choong Peng]. There was no " ***active*** " suggestion, encouragement, incitement or urging on the part of [Sng] to get [Choong Peng] to agree to collect the drugs, which the word "instigation" necessarily implies … [emphasis in original in bold italics; emphasis added in italics]

32 The offence of abetment under the MDA is provided for in s 12 of the same Act as follows:

Abetments and attempts punishable as offences

12. Any person who abets the commission of or who attempts to commit or does any act preparatory to, or in furtherance of, the commission of any offence under this Act shall be guilty

of that offence and shall be liable on conviction to the punishment provided for that offence.

33 In *Iwuchukwu Amara Tochi and another v Public Prosecutor* [2006] 2 SLR(R) 503 at [8], this court held that the word "abet" in s 12 of the MDA had the same meaning as that word in s 107 of the Penal Code (Cap 224, 1985 Rev Ed) ("the Penal Code (1985 Rev Ed)"):

> The Prosecution's case against the second appellant was based on s 12 of the [MDA] which creates the offence of abetment. Unlike the abetment provision in s 107 of the Penal Code [(1985 Rev Ed)], s 12 of the [MDA] does not provide any specific definition of abetment. It merely states that:
>
> > Any person who abets the commission of or who attempts to commit or does any act preparatory to, or in furtherance of, the commission of any offence under this Act shall be guilty of that offence and shall be liable on conviction to the punishment provided for that offence.
>
> Abetment under the Penal Code [(1985 Rev Ed)] is defined to include instigation, conspiracy, and aiding in the following terms:
>
> > A person abets the doing of a thing who —
> >
> > (*a*) instigates any person to do that thing;
> >
> > (*b*) engages with one or more person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or
> >
> > (*c*) intentionally aids, by any act or illegal omission, the doing of that thing.
>
> However, the word "abetment" in its ordinary sense and usage includes instigation, conspiracy, and aiding. Thus, we are of the view that the penal provision in the [MDA] must be given the same meaning as that in the Penal Code [(1985 Rev Ed)]. …

34 To make good the offence of abetment by instigation, there has to be "active suggestion, support, stimulation or encouragement" of the primary offence (see, *eg*, *Public Prosecutor v Lim Tee Hian* [1991] 2 SLR(R) 393 at [51] and *Balakrishnan S and another v Public Prosecutor* [2005] 4 SLR(R) 249 at [66]). In *Public Prosecutor v Ng Ai Tiong* [2000] 1 SLR(R) 1, it was stated at [23] (quoting from the Indian case of *Baby John v State* [1953] Cri LJ 1273 at 1274) that instigation could come in the form of "express solicitation or … hints, insinuations or encouragement".

35 In several local cases, the courts have held that the circumstances showed that no form of instigation was made out. For instance, in *Jimina Jacee d/o C D Athananasius v Public Prosecutor* [1999] 3 SLR(R) 826 ("*Jimina Jacee*"), the High Court found that the charge against the appellant of abetment by instigation of cheating was not made out because the principal offenders had prior knowledge of the appellant's elaborate scam to get certain Sri Lankans on board a Sydney-bound aircraft without the requisite entry visas. At [32] of *Jimina Jacee*, Yong Pung How CJ held:

> In this instance, it was undisputed that the principal offence of cheating which the appellant had abetted was committed by each principal offender. The question was whether she had abetted the commission of the offence by instigation. Reverting to the particulars of the respective charges, all that was alleged was that the appellant had delivered the air tickets to the principal

offender and had collected the boarding pass from him on 15 April 1997 at T1 [*ie*, Chang Airport Terminal 1]. The Prosecution submitted in the court below that these acts were sufficient to constitute active support or encouragement of the commission of the offence of abetment by instigation. In my opinion, these acts would not *per se* constitute abetment by instigation. Apart from Karnan [one of the principal offenders] who testified that the appellant had told each of the principal offenders that they would get paid after they had given her their boarding passes, none of the other principal offenders gave evidence of such a promise. The only reasonable explanation why they obeyed the appellant's instructions to check-in was because they already knew about the scam from Karnan before they arrived at T1 and were prepared to carry it out, once they obtained the air tickets from the appellant. In my view, it could not be said that the appellant had actively stimulated or encouraged the principal offenders to commit the offence of cheating by the act of distributing the tickets and collecting the boarding passes from them.

36 Similarly, in the case of *Whang Sung Lin v Public Prosecutor* [2010] 2 SLR 958 ("*Whang Sung Lin*"), where the appellant was charged with abetting by instigation the sale of a kidney, Tay Yong Kwang J held at [37]:

> The appellant could hardly be said to be "actively suggesting, supporting, stimulating or encouraging" them [*ie*, Tang, the intended recipient of the kidney, and Wang, who was prepared to source for a willing kidney donor in return for remuneration] to do the transaction, although his wish must be that they would do so and at the price agreed between him and Wang earlier. … [N]either Tang nor Wang needed any goading or encouragement. They only needed to be introduced to each other and everything flowed smoothly and quickly from then on without any input from the appellant. The only goading that the appellant did was to tell Wang to charge more in Tang's case but that was in the context of "If Tang needed a kidney, (the appellant) asked me to charge a fee". It was certainly not to urge a reluctant or ambivalent Wang to enter into the transaction. It was at the meeting (at the Ya Kun food outlet at Funan Centre) when the appellant was going to pass Wang's mobile telephone number to Tang that the figure of $300,000 was suggested by the appellant and agreed between him and Wang. If the suggestion to charge $300,000 was an instigation, it is clear that the illegal transaction was not "committed in consequence of the instigation" (see the words in the Explanation to s 109 of the Penal Code [(Cap 224, 2008 Rev Ed) ("the Penal Code (2008 Rev Ed)")] …) as Wang was already going to do the transaction if Tang should call, with or without that suggestion. As mentioned above, the suggestion came about only because Tang was a wealthy man and both Wang and the appellant obviously hoped to make as much money out of his ill health as possible. Clearly, the offence was committed "with the aid" (see again the words in the Explanation to s 109 and also Explanation 2 in s 107 of the Penal Code [(2008 Rev Ed)] …) or help of the appellant in introducing Tang to Wang in return for a fee.

In both *Jimina Jacee* and *Whang Sung Lin*, the High Court amended the charges against the respective appellants to that of abetment by *aiding* and convicted them of the amended charges.

37 Returning to the present appeal, at the hearing before us, Mr Wong argued that Sng should not have been charged with the offence of abetment by instigation. We agree with this submission for the following reasons. First, there was no need for Sng to goad or encourage Choong Peng into collecting the heroin that was delivered by Chan on 23 January 2008. Based on Sng's long statement recorded on 28 January 2008, Choong Peng had already previously collected heroin for Sng on two to three occasions prior to 23 January 2008: [note: 40]

> In the beginning, I would do the collecting of the peh hoon [*ie*, heroin]. However, Ah Peng, my younger brother [*ie*, Choong Peng], has collected the peh hoon for me on two to three occasions.

> I did tell Ah Peng before that the thing that he is collecting from [*sic*] me is peh hoon.

This statement confirms that Choong Peng was already in the habit of collecting heroin for Sng by 23 January 2008, and, as such, would not have needed any goading or encouragement to collect the heroin delivered by Chan on 23 January 2008.

38 Second, Choong Peng had prior knowledge of the contents of the red plastic bag which he collected from Chan on 23 January 2008. Although Sng initially claimed in his cautioned statement recorded on 24 January 2008 that Choong Peng "did not know about the heroin", [note: 41] this was plainly contradicted by Sng's subsequent long statement recorded on 28 January 2008 where Sng stated: [note: 42]

> … [After Choong Peng collected the red plastic bag from Chan,] I saw [Choong Peng] walking towards me with [the] plastic bag. I knew that he has collected the peh hoon [*ie*, heroin]. I asked him whether he wants to go to Chai Chee with me. [Choong Peng] said ok as he had nothing to do. … I asked [Choong Peng] whether he has passed the $5500 to the man [*ie*, Chan]. He said yes. *[Choong Peng] and I then talked about this person who delivered the peh hoon. We agreed that it was not the 'brother' from previous deliveries*. [emphasis added]

In any case, the statement of facts which Choong Peng accepted without qualification in CC 1/2009 clearly indicated that Choong Peng was well aware that he was collecting heroin on behalf of Sng on 23 January 2008. Paragraph 7 of that statement of facts reads as follows: [note: 43]

> Investigations reveal that sometime before noon on 23 January 2008, [Choong Peng] was asked by [Sng] to collect *peh hoon* [*ie*, heroin] on his behalf. [Sng] informed [Choong Peng] that someone will be delivering the drugs to him. [Sng] passed a handphone … to [Choong Peng]. [Sng] told [Choong Peng] that the drug courier will call up on the handphone to arrange for the delivery of the drugs. [Sng] also handed over to [Choong Peng] a stack of $50 notes which amounted to S$5,500 with the instruction to pass the money to the courier for payment of the drugs. [Choong Peng] was to hand over the drugs to [Sng] subsequently.

39 On this evidence, it would be difficult for the court to agree that there was abetment by instigation on Sng's part. Mr Wong argued that based on the evidence, the charge against Sng should be amended to one of drug trafficking in furtherance of a common intention between Sng and Choong Peng to traffic. [note: 44] However, we are of the view that the proven facts show, more appropriately, abetment by aiding on Sng's part as Sng gave Choong Peng the $5,500 in cash which had to be paid to Chan in order to take delivery of the drugs from Chan on 23 January 2008. Accordingly, just as the court did in *Jimina Jacee* and *Whang Sung Lin* (see [36] above), we order that the charge against Sng be amended from that of abetment by instigation to that of abetment by aiding, and convict Sng of the amended charge.

The Prosecution's decision to bring a capital charge against Sng but not against Choong Peng

40 Another ground based on which Mr Wong sought to challenge Sng's conviction was that the Prosecution violated Art 12 of the Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint) ("the Constitution") in charging Sng with a capital offence and Choong Peng with a non-capital offence when the charges arose from the same events that led to both men (among others) being arrested on 23 January 2008. [note: 45] This argument was recently rejected by this court in *Ramalingam Ravinthran v AG*, and we do not propose to repeat what this court stated at [70]–[72] of that judgment. As Mr Wong was unable to substantiate his case that the Attorney-

General, in his capacity as the Public Prosecutor, had exercised his prosecutorial discretion based on irrelevant considerations, we dismiss this argument.

41 Mr Wong also raised a separate argument on which Art 12 of the Constitution has a bearing. This argument concerns the interpretation of the words "that offence" in s 12 of the MDA (reproduced at [32] above), the full text of which is set out again below for ease of reference:

> **Abetments and attempts punishable as offences**
>
> **12**. Any person who abets the commission of or who attempts to commit or does any act preparatory to, or in furtherance of, the commission of any offence under this Act shall be guilty of *that offence* and shall be liable on conviction to the punishment provided for *that offence*. [emphasis added]

42 The expression "that offence" appears twice in s 12 of the MDA. From a textual reading of the section, "that offence" refers to "any offence under this Act". On this premise, Mr Wong contended that the words "that offence" in s 12 (and by extension, the words "any offence under this Act" as well) referred to the offence which Choong Peng committed. This, on Mr Wong's reading of s 12 of the MDA, meant that the quantity of diamorphine in respect of which Sng was charged as an abettor in the present case must be the same as the quantity of diamorphine which Choong Peng was convicted of trafficking in CC 1/2009 (*ie*, "not less than 14.99 grams of diamorphine" [note: 46] [emphasis in original omitted]).

43 We are unable to agree with this submission. In our view, the words "that offence" in s 12 of the MDA refer to the offence which the Prosecution is able to prove against an accused on the admissible evidence. In the present case, the offence that could have been proved against Choong Peng is that of trafficking in 30 packets of substance containing not less than 17.70g of diamorphine, and, accordingly, he too could have been charged with a capital offence. However, the commission of an offence by an offender does not necessarily result in his being charged for that particular offence. As fully explained by this court in *Ramalingam Ravinthran v AG*, the Attorney-General, as the Public Prosecutor, may exercise his prosecutorial discretion to charge two or more offenders engaged in the same criminal enterprise with different offences punishable with different punishments according to (*inter alia*) their culpability in the carrying out of that criminal enterprise. He is not required by law to charge all offenders involved in a criminal enterprise with the same offence, be it a capital offence or a non-capital offence, provided that his decision is neither biased nor made as a result of taking into consideration irrelevant matters (see *Ramalingam Ravinthran v AG* at [51]–[53]).

The alleged mix-up and/or contamination of the drug exhibits

44 As for the alleged mix-up and/or contamination of the drug exhibits at the CNB's premises, which Sng (like Chan) also raised as a ground of appeal (see sub-para (d) of [16] above), we discussed this earlier in respect of Chan's case and, as stated at [25]–[26] above, we are of the view that Sng's complaint in this regard likewise has no merit.

Conclusion

45 For the reasons stated above, we dismiss this appeal where Chan's conviction is concerned. As regards Sng's conviction for the offence of abetment by instigation of the trafficking of not less than 17.70g of diamorphine, we amend this charge to that of abetment by aiding of the trafficking of the same quantity of diamorphine and convict him of the amended charge. In the result, this appeal is dismissed in respect of both Chan and Sng.

[note: 1] See the charge sheet for CC 1/2009.

[note: 2] See Record of Proceedings ("RP") vol 6, pp 1–3.

[note: 3] *Ibid*.

[note: 4] See RP vol 6A, p 445 para 5.

[note: 5] See RP vol 6A, p 468 para 72.

[note: 6] See RP vol 6A, p 447 para 11 and p 458 para 39.

[note: 7] See RP vol 6A, pp 451–456.

[note: 8] See RP vol 6, pp 48–49 and RP vol 6B, p 779 para 22.

[note: 9] See RP vol 6B, p 796 para 49.

[note: 10] See RP vol 6B, p 797 para 49.

[note: 11] See RP vol 6B, p 789 para 37.

[note: 12] See RP vol 6B, p 800 para 53.

[note: 13] See RP vol 6B, p 782 para 28.

[note: 14] See RP vol 6B, p 803 para 58.

[note: 15] See Chan's Petition of Appeal, p 3 para 3(e).

[note: 16] See Chan's Skeletal Arguments, p 14 para 19.

[note: 17] See RP vol 6B, p 796 para 49.

[note: 18] See RP vol 6, pp 57–70.

[note: 19] See RP vol 6, p 52.

[note: 20] See RP vol 6, p 56.

[note: 21] See RP vol 6, pp 59–64.

[note: 22] See RP vol 6, p 64 para 27.

[note: 23] See RP vol 6, p 63 para 22.

[note: 24] See Chan's Petition of Appeal, p 5 para 3(k).

[note: 25] See RP vol 6B, p 803 para 58.

[note: 26] See the certified transcript of the notes of evidence ("the NE") for Day 15 of the trial (*viz*, 8 April 2010), p 15 lines 23–25 (in RP vol 4).

[note: 27] *Ibid*.

[note: 28] See the NE for Day 16 of the trial (*viz*, 9 April 2010), p 32 lines 15–27 (in RP vol 4).

[note: 29] See RP vol 6, p 187 para 70.

[note: 30] See RP vol 6B, pp 951–969 (showing the "Estebel 1833" bag and its contents), pp 970–974 (showing the red plastic bag and its contents) and pp 975–989 (showing the exhibits seized from Sng's bedroom in the Flat).

[note: 31] *Ibid*.

[note: 32] See RP vol 6, pp 187–188 para 73.

[note: 33] See Sng's Skeletal Submissions, pp 23–24.

[note: 34] See RP vol 6, p 75.

[note: 35] *Ibid*.

[note: 36] See Sng's Skeletal Submissions, p 40 para 80.

[note: 37] See Sng's Skeletal Submissions, p 39 para 79.

[note: 38] *Ibid*.

[note: 39] See Sng's Further Written Submissions, p 2 para 5(b).

[note: 40] See RP vol 6, p 83 para 17.

[note: 41] See RP vol 6, p 79.

[note: 42] See RP vol 6, p 85 para 22.

[note: 43] See the statement of facts for CC 1/2009.

[note: 44] See Sng's Further Written Submissions, pp 2–3 para 7.

[note: 45] See Sng's Skeletal Submissions, pp 12–13 paras 18–21.

[note: 46] See the charge sheet for CC 1/2009.