Devendran a/l Supramaniam *v* Public Prosecutor
[2015] SGCA 25

Case Number	: Criminal Appeal No 7 of 2014
Decision Date	: 05 May 2015
Tribunal/Court	: Court of Appeal
Coram	: Chao Hick Tin JA; Andrew Phang Boon Leong JA; Quentin Loh J
Counsel Name(s)	: Wendell Wong, Priscylia Wu (Drew & Napier LLC) and Ramachandran Shiever Subramanium (Grays LLC) for the appellant; Ng Cheng Thiam and Joshua Lim (Attorney-General's Chambers) for the respondent.
Parties	: Devendran a/l Supramaniam — Public Prosecutor

Criminal Law – Statutory offences – Misuse of Drugs

Criminal Procedure and Sentencing – Appeal

5 May 2015 Judgment reserved.

Chao Hick Tin JA (delivering the judgment of the court):

Introduction

1 On 12 May 2011, Devendran A/L Supramaniam ("the Appellant") rode into Singapore on his motorcycle from across the Singapore-Johor Causeway. He was stopped at the Singapore Customs where his motorcycle was searched by customs officers. Six packets of powdery substance were found concealed in the seat of his motorcycle. The substance was established to contain 83.36 grammes of diamorphine. The trial judge ("the Judge") held that the Appellant failed to rebut the statutory presumption that he knew the nature of the diamorphine. The Judge therefore convicted the Appellant on the charge of importing a controlled drug into Singapore. The Prosecution informed the court that it would not be issuing a certificate of substantive assistance. As mandated under the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) ("the MDA"), the Judge sentenced the Appellant to suffer the punishment of death. The Appellant appeals to this court against both his conviction and sentence.

Background

Agreed facts

2 The Appellant was about 26 years old at the time of the offence. On the said date, at about 4.45am, the Appellant rode into Singapore from Johor on his motorcycle bearing registration number JMV 4571. When he produced his passport at the Woodlands Checkpoint, he was stopped by the Screening Officer of the Immigration and Checkpoints Authority ("ICA"). Shortly thereafter, officers from the Central Narcotics Bureau ("CNB") arrived and searched his motorcycle.

3 The physical search and police dog search yielded no results. The Appellant was then asked to push his motorcycle to the ICA detention yard. There, a backscatter scan was conducted. A backscatter scan, based on similar technology behind scanners in airports, is used to detect if anything is concealed in the subject. The scan indicated that foreign objects were concealed in the

motorcycle seat. The CNB officers proceeded to dismantle the motorcycle seat and found six bundles of powdery substance wrapped in newspaper concealed therein. The Appellant was placed under arrest for the importation of drugs.

4 The six bundles were sent to the Health Sciences Authority ("HSA") for analysis. The gross weight of the substance in the six bundles was 2,728.1 grammes. The substance contained 83.36 grammes of diamorphine.

The charge

5 The Appellant was, accordingly, charged under s 7 of the MDA. The charge reads as follows:

> YOU ARE CHARGED at the instance of the Public Prosecutor and the charge against you is:
>
> That you, DEVENDRAN A/L SUPRAMANIAM,
>
> are charged that you, on the 12th day of May 2011 at or about 5.48 a.m, at Woodlands Checkpoint, Singapore ("the said place"), while riding a Malaysian registered motorcycle bearing registration no JMV4571, did import into the said place a controlled drug specified in Class A of the First Schedule to the Misuse of Drugs Act, Chapter 185 ("the said Act"), to wit, six (6) packets of granular/powdery substances weighing 2728.1 grams which was analysed and found to contain not less than 83.36 grams of diamorphine, without authorisation under the said Act or the Regulations made thereunder, and you have thereby committed an offence under section 7 and punishable under section 33 of the said Act, and further upon your conviction under section 7 of the said Act, you may alternatively be liable to be punished under section 33B of the said Act.

6 Section 7 of the MDA provides as follows:

> **Import and export of controlled drugs**
>
> **7.** Except as authorised by this Act, it shall be an offence for a person to import into or export from Singapore a controlled drug.

7 Controlled drugs are defined in the First Schedule to the MDA. Diamorphine is listed as a Class A drug in the First Schedule. The punishment for an offence under s 7 of the MDA is provided for in s 33, which refers to the Second Schedule. According to the Second Schedule, where importation of more than 15 grammes of diamorphine is concerned, the punishment is the death penalty. However, the court has the discretion not to impose the death penalty pursuant to s 33B of the MDA.

The Appellant's account

8 The Appellant claimed trial to the charge. He did not contest the *actus reus* of the offence, *ie* the physical carrying of the diamorphine from Malaysia into Singapore. He only contested the *mens rea*. He argued that he did not know that the six bundles concealed in his motorcycle seat contained diamorphine. He did not call any witnesses. His main case was that someone else had planted the drugs in his motorcycle seat. He expounded two theories to substantiate his claim of ignorance.

9 The first is the "Alagendran Theory". The day before his arrest, on 11 May 2011, around 5.00–6.00pm, the Appellant lent his motorcycle to a friend named Alagendran. Alagendran returned the motorcycle to the Appellant at 8.30pm, at which point he informed the latter that at around 6.30pm, he had a fight with someone who was armed with a parang, and that the motorcycle was damaged in

the process. There were cuts on the front cover near the handle bar as well as the seat cushion. Because of the damage caused, he took the motorcycle and had it repaired. By the time the Appellant saw the motorcycle at 8.30pm, the repairs had already been done. Based on this theory, the drugs could have been concealed in the seat while Alagendran had the use of the motorcycle, or while the motorcycle was sent by Alagendran for repair.

10 The second is the "Kumar Theory". On 9 May 2011, the Appellant was informed that his step-brother was arrested in Kedah, Malaysia. Bail of RM2,000 was required to secure his release. The Appellant managed to borrow only RM500 from his friend, Agilan. He then met another friend, Suria, with whom he had previously worked at a shipyard in Pasir Gudang. Suria referred the Appellant to Kumar, who was a fellow colleague at the shipyard in Pasir Gudang. The three met at an eating place in Ulu Tiram, Johor Bahru ("the Shop"). Kumar used his hand phone to call an individual named Gobi and then passed the phone to the Appellant. It bears noting that the Appellant only identified Gobi in his further statement dated 16 May 2011. In his initial statement, he simply referred to his counterpart in that phone conversation as "the person". Also, the Appellant claimed to have met Gobi twice before, but he was not close to Gobi. [note: 1]

11 Gobi asked the Appellant for a few details such as whether he had a Singapore passport, and whether he owned any property. The Appellant replied that he owned the motorcycle. Gobi told the Appellant he would lend him RM1,500 if he was willing to pledge the motorcycle as security. The Appellant agreed, and was instructed to meet Kumar the next day, 11 May 2011, at 10.00pm.

12 On 11 May 2011, at around 10.00pm, he rode his motorcycle to the Shop to meet Kumar. There, Kumar told him that Gobi wanted to see the motorcycle to check if it was stolen before granting the loan. Kumar rode away with the motorcycle.

13 Two hours later, around midnight, Kumar called the Appellant and informed him that he was back at the Shop. The Appellant went to the Shop to meet him. There, the Appellant took possession of his motorcycle from Kumar who then instructed the Appellant to ride the motorcycle into Singapore around 4.30am the next day (12 May 2011) to meet "Kumar and a Chinese man" at a Caltex petrol kiosk along Kranji Road. He was then to hand his motorcycle to them. His motorcycle would be returned to him at the bus stop near the Caltex petrol kiosk at around noon that same day. The loan would only be given to him that day after he had returned to Johor Bahru. After receiving Kumar's instructions, the Appellant rode his motorcycle home. When he rode over bumps on the road, he felt the seat was harder than usual. However, he did not check the seat. On this theory, the drugs could have been concealed while the motorcycle was with Kumar.

14 In the morning of 12 May 2011, the Appellant rode into Singapore where at Woodlands Checkpoint he was arrested.

The decision below

15 The Judge convicted the Appellant and sentenced him to death. The grounds for the Judge's decision are reported as *Public Prosecutor v Devendran A/L Supramaniam* [2014] SGHC 140 ("the GD"). His reasons can be stated in brief as follows:

(a) The *actus reus* of the offence was made out (the GD at [26]).

(b) To establish the *mens rea* of the offence, the Prosecution relied on the presumptions in ss 18 and 21 of the MDA. The first was that the Appellant was presumed to have been in possession of the diamorphine because it was found in his motorcycle seat, pursuant to either

s 18(1)(*a*) or s 21. The second, following on from the first, was that the Appellant was presumed to have known the nature of the diamorphine by virtue of having the diamorphine in his possession (the GD at [27]).

(c) The Appellant contested the second presumption. He had to prove, on a balance of probabilities, that he had no knowledge that the bundles contained diamorphine (the GD at [28]).

(d) The Alagendran Theory was unpersuasive. This is for two reasons:

(i) First, the story was likely an afterthought. The Appellant only mentioned the events relating to Alagendran on 15 November 2011, around six months after he was arrested. This was despite the fact that the events surrounding Alagendran happened on 11 May 2011, one day before his arrest, and should have been fresh in his mind upon arrest (the GD at [30]–[31]).

(ii) Second, the story itself was incredible. It was unexplained why the motorcycle had to be repaired with such urgency. Furthermore, the Appellant never arranged to meet Alagendran in Singapore, and hence it could not have been the case that Alagendran was making use of the Appellant to transport the drugs. The only other possible explanation, that Alagendran was trying to frame the Appellant, was even more incredible. The Appellant gave no evidence indicating any reason or motive on the part of Alagendran in wanting to set him up. In fact, the Appellant's evidence pointed at an amicable relationship between them (the GD at [32]–[34]).

(e) The Kumar Theory was similarly unpersuasive. This is for two reasons.

(i) First, there were significant omissions in the Appellant's evidence, which caused the Judge to disbelieve the theory. The Appellant did not name either Kumar or Gobi in his cautioned statement, which was recorded on the day of his arrest. He only referred to three different individuals, "a friend of mine", "another friend", and "a man". [note: 2] On hindsight, the first was Agilan, the second was Suria, and the third was likely Kumar. Not only was Kumar not named, Gobi was not even referred to. In his statements on 14 and 15 May 2011, the Appellant referred to "an unknown character". Only in his statement on 16 May 2011 did he identify this character as Gobi. When he did so, he stated that he knew the person was Gobi because when he spoke to him over the phone, Gobi told the Appellant his name. The Appellant explained that he left Gobi out because he did not want to implicate him in this case. This was despite the fact that the Appellant had first met Gobi only ten days before his arrest although he had known Kumar for four years. Also, after the Appellant gave the contact details of Gobi to the CNB officer, CNB located the user of the phone number and obtained his photograph. The Appellant was asked to identify Gobi from a series of photographs (which included the person who was the owner of that contact number) but was unable to do so (the GD at [35]–[43]).

(ii) Second, the theory was rife with suspicious circumstances. First, the Appellant simply allowed Kumar to take his motorcycle, worth about RM2,500, for about two hours in the night of 11 May 2011, without any assurance it would have been returned. Second, the Appellant never questioned why he had to ride the motorcycle into Singapore to pass it to Kumar, as opposed to simply allowing Kumar to ride the motorcycle into Singapore. Third, the Appellant did not check the seat of the motorcycle when he felt the unusual hardness upon the motorcycle being returned to him by Kumar. This failure to check was especially suspicious given that the Appellant knew he was going to ride the motorcycle into Singapore,

and ought to have ensured that there were no contraband items or drugs hidden therein. The Appellant's reasons for not checking – that it was late, and he was more concerned about his step-brother – were unpersuasive as a check would not have taken much time.

(f) As neither theory was made out, the Appellant failed to rebut the presumption under s 18(2).

(g) Even if the Kumar Theory were to be true, the Appellant was wilfully blind towards the presence of diamorphine in the motorcycle seat. Such wilful blindness, premised on the Appellant's failure to check the motorcycle seat despite the suspicious circumstances, was proven beyond reasonable doubt. As wilful blindness equates to actual knowledge, this satisfies the *mens rea* of the offence (the GD at [50]–[53]).

(h) The Appellant's incriminating statements recorded on 15 and 16 May, in which he evinced a desire to plead guilty and stated that he was ready to face death, confirmed his guilt. Neither of these statements was recorded involuntarily.

16 After the Judge convicted the Appellant on 14 July 2014, the Prosecution informed the court that although it took the view that the Appellant was a drug courier, it would not be issuing the certificate of substantive assistance ("the Certificate") to the Appellant pursuant to s 33B(2)(*b*) of the MDA. However, if the Appellant were willing to provide any further information, the Prosecution was prepared to review its position with regard to issuing the Certificate. [note: 3] Counsel for the Appellant requested time to consider the proposal. Further hearing was adjourned to 29 July 2014.

17 On 29 July 2014, the Prosecution maintained its position that it was not issuing the Certificate to the Appellant. The Judge accordingly sentenced the Appellant to suffer the punishment of death.

The arguments on appeal

18 On appeal, the Appellant was represented by Mr Wendell Wong whose main contention was a reiteration of the case before the Judge, namely, that the Appellant did not know that the packages stuffed in his motorcycle seat contained diamorphine. Much of Mr Wong's case hinged on the following two points:

(a) First, the Judge erred in finding that the Appellant was wilfully blind.

(b) Second, the Judge erred in finding that the presumptions were not rebutted.

19 Based on Mr Wong's own characterisation, he was not running a "positive case" for the Appellant. He was proffering possible counter-theories in a bid to raise a reasonable doubt on the Appellant's guilt.

Our decision

20 Based on the arguments raised before us, we are unable to find that the Judge erred in convicting the Appellant. We will set out the reasons for our holding below.

Analysis

21 Before engaging the main arguments raised by Mr Wong, we need to address three preliminary issues.

Preliminary issues

22 The first two preliminary issues relate to matters of evidence. The third concerns the Appellant's confessions.

Photographs of the motorcycle

23 The first issue concerns the photographs which were tendered in evidence. During oral submissions, there was some confusion as to whether the photographs showed the motorcycle seat before the drugs were removed, or after. It transpired that they were, in fact, photographs of the seat after the drugs were removed. There were no photographs taken of the seat before the removal of the drugs. Such photographs would have greatly assisted both the Judge and this court in a case like this, where much of the disagreement between the parties was as to how peculiar the seat looked (and felt) when the drugs were embedded therein. However, no such photographs were available to assist the court.

Hardness in the seat

24 The second issue relates to the exact time at which the Appellant first felt the hardness in the motorcycle seat. As stated above, the Appellant posited two theories to explain how the drugs could have made their way into the seat. If it was Alagendran who placed the drugs into the motorcycle seat, it should follow that the Appellant would have first felt the hardness in the seat after Alagendran returned the motorcycle (at 8.30pm on 11 May 2011). If it was Kumar (or Gobi) who placed the drugs into the motorcycle seat, it should follow that the Appellant would only have felt the hardness in the seat after Kumar returned the motorcycle to him (at midnight on 11 May 2011).

25 The first time the Appellant mentioned that he "felt something hard" was in a statement taken on the day soon after he was arrested. The relevant portions read: [note: 4]

> Q3) Are you aware that there was something stuffed inside your motorbike seat?
>
> A3) Yes.
>
> Q4) How do you know that something was stuffed inside your motorbike seat?
>
> A4) I felt something hard, when I sat on my motorbike seat.
>
> Statement ended on 12.05.2011 at about 0633hrs.

On this statement, it was unclear when exactly he first felt the hardness in the seat.

26 In a further statement recorded on 15 May 2011, the Appellant stated that the first time he felt the hardness in the seat was after he got the motorcycle back from Kumar on the night of 11 May 2011. The relevant portion read: [note: 5]

> 20. … After getting all these instructions from Kumar, he asked me to leave… When I sat on my motorcycle, I did not feel any different… However, when I was riding the motorcycle back to my rented place, I went through some bumps and only then, I realized that the seat was a little hard. …

27 In a further statement recorded on 15 November 2011, however, the Appellant seemed to have

changed his account. He stated that the first time he felt the hardness was after Alagendran returned his motorcycle. We have to observe that this statement of 15 November 2011 was the first time the Appellant brought up the matter of Alagendran borrowing the Appellant's motorcycle. The relevant portions of the statement read: [note: 6]

> 51. At about 8.30pm, Alagendran came back with my motorcycle all done up. He had replaced the damaged parts. He had changed the front cover near the handlebar and also the cushion of the seat… Alagendran then left and then I rode my motorcycle to see Kumar after that. I did not notice anything unusual about my motorcycle as I was riding fast. I only felt that the seat was a little hard but did not think much about it because it is a new seat that was changed by Alagendran.
>
> 52. I have known Alagendran for the past 7 years… I am very close with their family…

28 During cross-examination, the Appellant changed his position again. This can be gleaned from, first, a portion of the exchange between the Appellant and the Deputy Public Prosecutor ("DPP") during cross-examination on the third day of trial: [note: 7]

> Q: So Mr Devendran, what you are saying is that as you were riding home and going through some humps, you noticed the seat was harder than usual?
>
> A: Only at certain parts on the humps. After that, it was normal.
>
> Q: And you noticed this hardness when you were riding home and that would be about midnight on the 12th of May?
>
> A: Yes.

29 This point was further clarified by the exchange between the Appellant and the Judge on the fourth day of the trial: [note: 8]

> Court: Mr Devendran, you told us that you felt hardness on the motorcycle seat when you went over humps…
>
> Witness: There will be holes and humps. It only---only when I went on it---only when I went on it, I felt a bit of hardness.
>
> Court: No. My point here is yes, I know you felt the hardness. But do you---why didn't you want to find out what caused the discomfort?
>
> Witness: It was already very late. And the only thing I was thinking about was about my brother. Not only that, I've to go for an interview the next morning. That's the reason, Your Honour.

30 The two exchanges indicate that it was likely the Appellant first felt the hardness in the seat only after Kumar returned the motorcycle. Not only did he fail to clarify with the DPP that it was not at midnight but around 8.30pm that he first felt the hardness in the seat, his response to the Judge's question that it was "already very late" was consistent with his other version of evidence that he first felt the hardness in the motorcycle seat after Kumar returned the motorcycle at about midnight on 11 May 2011.

31 If it were at 8.30pm that he first felt the hardness of the seat, he could possibly have checked it between then and 10.00pm, when he rode the motorcycle to meet up with Kumar. Admittedly, this involves speculation on our part. Furthermore, as Mr Wong was not running a positive case, it seemed anything could have been possible – it was equally conceivable that Alagendran was responsible for placing half the amount of the drugs in the seat and Kumar the other half. Equally conceivable, and equally unlikely.

32 It was also conceivable that the hardness had nothing to do with the drugs, and that it was due simply to how the new seat was made. This, however, runs contrary to the Appellant's own statement that he knew something was in the seat because of the hardness (see above at [25]).

33 In short, although it is likely the hardness in the seat had to do with the concealed drugs, it was unclear when exactly the Appellant first felt the hardness. Given that it was unclear when exactly the Appellant first felt hardness in his seat, and that his own evidence seems to be inconsistent, his theories are even more difficult to believe.

The Appellant's confessions

34 The third issue relates to the Appellant's confessions. As noted above (at [15]), the Judge dealt with the matter of *mens rea* in three stages. First, he noted that the burden was on the Appellant to rebut the presumption that he knew of the drugs in the motorcycle seat. He found that the Appellant failed to do so. Second, he found that the Appellant was wilfully blind. Third, he found that the Appellant's confessions "confirmed [his] decision" (the GD at [62]). It is this third point which we now wish to consider.

35 The "confessions" were made in the statements recorded on 15 and 16 May 2011. The "confession" contained in the statement recorded on 15 May 2011 reads as follows: [note: 9]

> … I want the court to quickly deal with the matter and after I am being hanged, to send my body back to my parents as early as possible because my father is a heart patient and my father's 2nd wife is also not in good health. My family is in great difficulties and they will not be in a position to come and visit me very often. As such, I do not want to cause problem to my family, the officers who are involved in this case, the Singapore government. I want to plead guilty to the offence as quickly as I could and I also want to be punished as early as possible. I do not want to be punished very late after I had already pleaded guilty because if my father comes to know about this matter in the meantime, he may die of the shock. For the past 14 years, I have been away from my family and have been staying with them only for the past 4 months. I do not want to hear of my parent's death while I am alive. Even now while I am in the lock up here, I could hear my parent's voice crying and weeping for me. If I remain in the lock up for long, I will get mad. Hence, when I appear in Court on the 20th of this month, I will admit to the charge and I want to be punished immediately. I request the recording officer in this matter to help me do this favour. I am prepared to fall on your feet to seek this favour. That's all.

To appreciate the statement in the preceding paragraph in its proper context, it should be noted that this was said when the Appellant was asking the interviewer "two questions". The first question was "[i]f I admit to the charge, how quickly would I be dealt with the matter, and punished by the judge?" In response, the interviewer stated "[i]t depends on the court". This led on to the second "question", which was in essence the Appellant's "confession" as transcribed and replicated above.

36 The "confession" contained in the statement recorded on 16 May 2011 reads as follows: [note:

10]

> 39 … One of the 2 persons, either Kumar or Gobi had made use of my situation of needing a loan and put me in this situation. Since I rode the motorcycle into Singapore, and the drugs were taken from my motorcycle, I am to be blamed and that is the reason I wish to plead guilty. By remaining in custody, I do not want to waste time and cause worries to my parents as I had been living with them only for the past 4 months. I have been an orphan for 14 years and after my death, I do not want to go away as an orphan. Hence, I wish to plead guilty early and have my punishment early. **In order to prove myself innocent, I cannot remain in prison for 3 or 4 years to prove that.** And moreover, by then my parents would have died because both of them are sick. **Even though if I am able to prove my innocence**, I would at least be punished for 10 years because that drugs were found in my motorcycle. I am ready to face death and the earlier the better. [emphasis added in bold]

37 Although we agree with the Judge that the voluntariness of these statements are beyond reproach, we have our doubts as to whether these portions can truly be construed as his confessions within the meaning of s 17 of the Evidence Act (Cap 97, 1997 Rev Ed), that is, "[admissions]… stating or suggesting the inference that he committed [the] offence". Just because the Appellant said he wanted to plead guilty does not necessarily mean he was admitting to the commission of the offence. As pointed out by Mr Wong, it seemed that the Appellant's intent to "plead guilty to the offence" as stated in the "confessions" was motivated more by a desire on the part of the Appellant that he wished his "ordeal to be over in the quickest possible way" [note: 11] and to return to his parents rather than by a desire to come clean. In particular, we observe that his reference to "in order to prove my innocence, I cannot remain in prison for 3 or 4 years", shows that he was far from admitting his guilt. For these reasons, we find that the statements do not bear out a clear admission of his wrongdoing and as such we do not think it is safe to rely on them in reviewing the entire case.

38 Having dealt with the three preliminary issues, we propose to analyse the key points of Mr Wong's case. To recapitulate, he was not running a positive case before us. Rather, he sought to raise "alternative theories" to explain how the drugs *could have* made their way into the seat of the Appellant's motorcycle. All these theories had been raised before, and considered by, the Judge. As such, the burden he faced was not simply to convince us of those theories, but to satisfy us that the Judge had wrongly rejected them.

39 We start with Mr Wong's arguments relating to the Alagendran Theory.

The Alagendran Theory

40 Mr Wong's main arguments in relation to the Alagendran Theory are two-fold. First, he seeks to explain away the six-month delay between the time when the Appellant was arrested and when he first mentioned about Alagendran (see above at [15(d)(i)]). Mr Wong's reason was that after the Appellant recorded his further statement on 17 May 2011, he had made repeated requests to meet the Investigating Officer but these were in vain; the Investigating Officer was only able to meet him on 15 November 2011 to record a further statement. It was during the recording of that statement on 15 November 2011 that the Appellant first brought up Alagendran. The Judge concluded from this that "it had taken the accused about 6 months before he decided to inform the investigation officer about Alagendran" (the GD at [30]).

41 We accept Mr Wong's point that the Appellant might have wanted to tell the Investigating Officer about Alagendran earlier. The fact that he requested to meet the Investigating Officer between 17 May 2011 and 15 November 2011 was not disputed by the Prosecution. We therefore

accept that the six-month lapse should not be fatal to the Alagendran Theory. That said, it is curious why the Appellant had not brought Alagendran up between 12 and 17 May 2011. Mr Wong's explanation that "[h]e did not think that the events surrounding Alagendran would be relevant" [note: 12] is hardly credible. If he were innocent, why did he not state the events concerning Alagendran if that were the truth? He could not have forgotten those events which happened on the day before he left for Singapore. If they were not relevant at that time (between 12 and 17 May), how did they "become" relevant later on? If anything, this supports the notion that the Alagendran Theory was simply an afterthought. Mr Wong's reply to this was that the Appellant only managed to collect his thoughts in prison, and it was only then that he recalled the events surrounding Alagendran. [note: 13] We find this strange indeed. Even more curious is the fact that when the Appellant did eventually bring up Alagendran, he introduced him as "Agilan's younger brother". [note: 14] However, he first mentioned "his friend Agilan" as early as 14 May 2011. [note: 15] Agilan featured not only as his housemate but his creditor on at least two occasions – he borrowed RM1,000 from him to purchase his motorcycle and, more recently, RM500 to post bail for his step-brother. Why did he not mention Alagendran and the fight he was involved in when the Appellant talked about Agilan?

42 The second point raised by Mr Wong is in relation to "proof" that the fight that caused the damage to the motorcycle seat did in fact take place. To prove this, he relied on a text message from an individual named Puspa. Mr Wong stated Puspa was Alagendran's elder sister. [note: 16] The relevant text messages that Mr Wong relied on were, first, a message sent from the Appellant to Puspa at 9.11pm on 11 May 2011. It read, "Don't wry I tc alagu ok relax". [note: 17] He also relied on what was presumably the reply from Puspa at 9.15pm on the same day, which read "Raja anna alagenrava partukunga anna sandaiku yellam pogatinga anna". According to Mr Wong's translation in his written submission, this was a request by Puspa for the Appellant to take care of Alagendran and make sure that Alagendran would not get involved in any more fights. [note: 18]

43 As is apparent, there are problems with this text message exchange. First, even if we accept that the entire text exchange is genuine, and that Mr Wong's translation is accurate, it does not necessarily lead to the conclusion the Appellant is seeking to establish. At best, a fight may have taken place. There is no indication that the motorcycle was indeed damaged in the fight. Neither is there any indication that the motorcycle was sent away for repairs. Second, the identity of Puspa is far from clear. Mr Wong claims Puspa was Alagendran's sister. However, in the Appellant's statement recorded on 17 May 2011, the Appellant identified Puspa as "my relative who stays in Johor Bahru". We find that this text message exchange does not assist the Appellant's case and, if anything, raises more questions than answers.

44 In sum, the fact that the Appellant failed to allude to the Alagendran events in his earlier statements does seriously undermine the genuineness of that claim. It is inconceivable that anyone, if innocent and placed in that situation could have missed mentioning such a crucial event. In any case, the theory was not plausible given the inconsistencies in the Appellant's evidence, most pertinently on when exactly he felt the hardness in the seat of the motorcycle and who Puspa was. There was also the larger question of why Alagendran would have wanted to "plant" the drugs in the motorcycle. Not only was their relationship amicable, [note: 19] there was no indication of an overarching plot that connected Alagendran and Kumar such that the transportation of the drugs was connected with the "planting" of the drugs in the motorcycle seat. We agree with the Judge that this theory was inherently unbelievable.

The Kumar Theory

45 Mr Wong's main point in relation to the Kumar Theory was that the Judge placed undue weight on the Appellant's failure to mention Gobi in his cautioned statement on 12 May 2011. The Appellant's account of the events touching on Gobi was disclosed in the following manner:

(a) In the Appellant's cautioned statement recorded on 12 May 2011, the Appellant's account left no room for Gobi. He stated that he "approached a friend of mine" to get some money. That friend took him to "another friend", from whom he could get more money. That other friend, in turn, took him to see "a man". His account of his interaction with the man (who was eventually revealed to be Kumar) was as follows: [note: 20]

> The man promised me that he will help me. He further asked me whether I have a motorcycle. When I said yes, he asked me to bring the bike to him. He also asked me whether I had been to Singapore. I told him I had ever been there. So at about 10pm yesterday, I rode my bike to a coffeeshop. The man told me to come back 2 hours later. So at about 12 midnight, I returned to the coffeshop.
>
> The man told me that I had to ride my motor into Singapore and told me to wait at a bus stop just before a Caltex petrol kiosk. He told me that someone would come and take my bike away. He told me to leave the place and to return to the same place at about 12 in the afternoon. The person who took away my bike will then return my bike. I did what he told me to do. He said that he would pay me when I go back to see him in the evening. He paid me the 1500 ringgits…

(b) It was only in the statement recorded on 14 May 2011, that the Appellant's account of events opened an avenue for Gobi to feature. In this statement, he identified Kumar as well. The relevant portion of the statement reads: [note: 21]

> 14 … Kumar then told me that he knew someone who lends money on interest and that he would talk to him first. Kumar then used his handphone and called someone. I overheard Kumar telling the other person that I was with him and that I have come to ask for a loan on an interest basis.
>
> 15 After talking to the person, Kumar handed his handphone to me and asked me to talk to the person also. I took over the handphone and spoke to the person who is a man…

"A man" is as close as the Appellant came to revealing the identity of Gobi in this statement.

(c) In the statement recorded on 15 May 2011, the Appellant made no mention of Gobi.

(d) In the statement recorded on 16 May 2011, the Appellant was shown his hand phone and asked to identify the person who asked him to do "this job". He identified the contact named "Vije maccan, spore", and stated that the person behind the contact went by the moniker "Gobi". The relevant portions reads: [note: 22]

> 33 … I wish to state that I have heard people calling this person as Gobi but I do not know whether this is his actual name.

He also provided details of Gobi's appearance and stated that he had met Gobi on two previous occasions. Crucially, the Appellant stated that "when Kumar handed over the phone and asked me to speak to the person who was supposed to give me the loan… I knew the person is Gobi

when I spoke to him because he told me his name…" [note: 23] He explained that he did not mention Gobi in his earlier statements because he did not want to implicate him.

(e) During cross-examination, the Appellant was asked if he was close to Gobi at all. The Appellant replied that he was not. [note: 24] He was also asked why there was no contact by the name of "Gobi" saved in his hand phone. The Appellant replied that Gobi told him to save the number under the contact named "Vije maccan". [note: 25]

46 As we see it, the Appellant was less than forthright in advancing the Kumar Theory. It would be seen that he was reluctant to make full disclosure at the beginning. Mr Wong attempted to explain the situation by postulating that on 12 May 2011, the Appellant was in a "state of panic at having been arrested for an offence he was innocent of". [note: 26] Even if this were the case, it is hard to reconcile his initial "state of panic" with his subsequent explanation that he was all along, in a presumably calculated manner, attempting to shield Gobi from any possible implication (which is itself a problematic excuse as he was not even certain if "Gobi" were simply a moniker). Furthermore, according to the very first statement, it seems Kumar was the only person that the Appellant dealt with; there was no mention of Kumar calling anyone, let alone Gobi, on his hand phone.

47 There were further complications that arose. The phone number attributed to Gobi was traced and the registered owner was identified. However, the Appellant was unable to single out the photograph of the registered owner from a series of twelve photographs. Mr Wong argued that the Judge placed "undue weight on [the Appellant's] failure to identify Gobi" from this series of photographs. [note: 27] We accept Mr Wong's contention that Gobi's number may indeed have been registered under someone else's name. However, that misses the point.

48 It bears repeating that the burden was on the Appellant to prove that he did not have the *mens rea*. It was in his effort to discharge this burden that he attempted to construct an explanation of how the drugs could have made their way into his motorcycle seat. One of the explanations he relied on was the Kumar Theory, a key plank of which was "Gobi". The Appellant's failure to identify Gobi, along with the surrounding problematic issues (his questionable desire to shield Gobi from implication, the apparently inconsistent reasons at attempting to explain why Gobi was not mentioned in the earlier statements, and his unquestioning compliance to Gobi's request that he save his contact under a moniker) mean this key plank is of dubious origin. The onus is on the Appellant to establish his explanation (in this case, the Kumar Theory). Given these jarring gaps, he has failed to do so. This was what the Judge concluded (the GD at [42]), and rightly so. It was not simply the Appellant's failure to identify Gobi that was critical. Rather, his failure simply added on to the plethora of gaps in the Kumar Theory as to make it implausible.

Other suspicious circumstances

49 In the result, we find that the Judge was correct in dismissing either theory as implausible. We note that there are further suspicious circumstances that justify the Judge's finding that the Appellant was indeed wilfully blind.

50 First, the Appellant stated that on the night of 11 May 2011, Kumar told him to erase his contact details from his hand phone. The Appellant complied with this request. [note: 28] It is curious why the Appellant would have simply agreed to delete his phone records. At the very least, even if he chose to comply with the request, he should have been alerted that something was amiss. Mr Wong emphasised before us that the Appellant did not know how drug syndicates worked. Although he may not have known about the intricacies of drug trafficking, he had been exposed to drugs in the past.

On the Appellant's own account, he had consumed drugs before. [note: 29] He had also been arrested and jailed for drug consumption in 2009. [note: 30] At the very least, these previous encounters must have alerted him to the prevalence of drugs in the region.

51 Second, notwithstanding the suspicious circumstances around the "loan arrangement" (notably, Kumar's borrowing the motorcycle between 10.00pm and midnight on 11 May 2011, the need for the Appellant to ride into Singapore and *then* pass the motorcycle to someone else, and the need to delete phone records and use monikers) coupled with the Appellant's awareness of the hardness in the seat, the Appellant never once bothered to stop and check the seat. His reasons were that (1) the hardness was a minor issue, as he only felt it while going over humps, (2) he was in a rush, and (3) he was preoccupied with thoughts about his step-brother. Mr Wong proffered a fourth reason – investigating the cause of the hardness of the seat would have been tedious. [note: 31]

52 The first reason can be disposed of based on the Appellant's statement on 12 May 2011 that he "knew something was stuffed inside his motorcycle seat" because "he felt something hard". [note: 32] Even if he only felt the hardness while going over humps, it was clear that he was alerted to the possibility that something was hidden inside the seat and yet he chose to ignore it and embarked on a journey to Singapore with the unusual instructions that he was to let someone else have use of the motorcycle for some two hours after he had cleared Singapore Customs. The second and third reasons lose their appeal when juxtaposed with the chronology. If indeed it was Alagendran who placed the drugs in the seat, and that this was when the Appellant first felt the hardness, then he had some time (between 8.30pm and 10.00pm on 11 May 2011) to check the seat. If it was only after midnight when he first felt the hardness, at the very least he could have checked the seat when he stopped for a smoke break just before crossing the Johor Customs. [note: 33] As noted by the Judge, the Appellant was no stranger to the stringent process of clearance at the Singapore Woodlands Checkpoint, having hitherto travelled into Singapore on multiple occasions (the GD at [47]). Despite this, and the series of peculiar events that preceded his entry into Singapore, the Appellant chose to turn a blind eye.

53 We note also that Mr Wong's emphasis on the tediousness of the process of checking the seat – the fourth reason – may be overstated. Mr Wong relied on the process undertaken by the CNB officer to dismantle the seat to evince how cumbersome the process was. [note: 34] However, it took the CNB officer no longer than fifteen minutes to dismantle the seat. [note: 35] Furthermore, all the tools he used to effect the dismantling were found on the motorcycle. [note: 36]

54 Viewing the situation as a whole, the entire arrangement relating to the "loan" transaction would have aroused the suspicion of any reasonable person who was just a genuine borrower. The Appellant attempted to explain away certain portions; for instance, he stated that he had to come into Singapore for a job interview on the morning of 12 May 2011, [note: 37] and hence Kumar's request for him to travel to Singapore did not seem so outlandish, given that he had to make the trip in any case. However, and this is assuming there was indeed an interview in Singapore that the Appellant was headed to, the two points (Kumar's instructions on the one hand and the interview on the other) were at best tangentially related. It was not the Appellant's case, for instance, that Kumar had only asked him to ride into Singapore after having found out about his interview. Taking the Appellant's case at its highest, it may have *coincidentally* been less tedious for the Appellant to adhere to Kumar's instructions. However, that did not make Kumar's instructions any less suspicious. More importantly, this explanation of the Appellant's was characteristic of his approach throughout this case – he devised neat theories to seemingly patch up doubtful areas in his case. However, when looked at as a whole, the inconsistencies within and between theories, oft times amounting to

seeming contradictions, betrayed the true nature of these theories; they were simply afterthoughts.

55 We find that there is enough on the facts to give rise to suspicion. Yet, the Appellant made a deliberate decision not to investigate or inquire further. He opted to be wilfully blind towards the presence of diamorphine in the motorcycle seat (see *Tan Kiam Peng v Public Prosecutor* [2008] 1 SLR(R) 1 at [127]). In the circumstances, there is no basis for us to disturb the finding of the Judge that the Appellant has not discharged the burden, pursuant to s 18(2) of the MDA, of proving that he had no *mens rea* as to the existence of the drugs which was stuffed in his motorcycle seat. In any event, even reviewing the evidence afresh, we do not think the Appellant has discharged the burden, on a balance of probability, that he had no *mens rea* as to the diamorphine found hidden in his motorcycle seat.

Conclusion

56 For the reasons above, we dismiss the Appellant's appeal against conviction. As the appeal against sentence is purely consequential and no specific arguments have been raised by the Appellant as to the propriety of the sentence imposed, and as we also do not see that the sentence imposed is in any way improper, we would affirm the sentence and dismiss the appeal against sentence.

[note: 1] ROP Vol 1: Day 3, pages 24–25.

[note: 2] ROP Vol 2 at p 156.

[note: 3] ROP Vol 1: Day 6, page 18.

[note: 4] ROP Vol 2 at p 152.

[note: 5] ROP Vol 2 at p 169.

[note: 6] ROP Vol 2 at p 191.

[note: 7] ROP Vol 1: Day 3, page 44, lines 7–12.

[note: 8] ROP Vol 1: Day 4, page 13, lines 3–17.

[note: 9] ROP Vol 2 at pp 163–164.

[note: 10] ROP Vol 2 at pp 177–178.

[note: 11] The Appellant's subs at para 121.

[note: 12] The Appellant's subs at para 264.

[note: 13] The Appellant's subs at para 267.

[note: 14] ROP Vol 2 at p 191.

[note: 15] ROP Vol 2 at p 160.

[note: 16] The Appellant's subs at para 272.

[note: 17] ROP Vol 2 at p 130.

[note: 18] The Appellant's subs at para 273.

[note: 19] ROP Vol 2 at p 191.

[note: 20] ROP Vol 2 at pp 156–157.

[note: 21] ROP Vol 2 at p 162.

[note: 22] ROP Vol 2 at p 175.

[note: 23] ROP Vol 2 at p 176.

[note: 24] ROP Vol 1: Day 3, page 24, lines 30–31.

[note: 25] ROP Vol 1: Day 3, page 27, lines 18–24.

[note: 26] The Appellant's subs at para 228.

[note: 27] The Appellant's subs at para 235.

[note: 28] ROP Vol 1: Day 3, page 36, lines 3–11.

[note: 29] ROP Vol 2 at p 180.

[note: 30] ROP Vol 2 at p 148.

[note: 31] The Appellant's subs at para 214.

[note: 32] ROP Vol 2 at p 152.

[note: 33] ROP Vol 2 at p 180.

[note: 34] The Appellant's subs at paras 214–217.

[note: 35] See ROP Vol 2 at pp 233–234.

[note: 36] ROP Vol 1: Day 2, page 20, lines 25–31.

[note: 37] ROP Vol 2 at p 170.

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