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Difficulties With Drug Conspiracies in Singapore: Can You Conspire to Traffic Drugs to Yourself?

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# DIFFICULTIES WITH DRUG CONSPIRACIES IN SINGAPORE: Can You Conspire to Traffic Drugs to Yourself?

Kenny Yang

## ABSTRACT

If Person A delivers drugs to Person B at the latter's request, Person A is liable for drug trafficking—a serious offense in many jurisdictions. However, the liability of Person B for drug trafficking is unclear as much may depend on Person B's intention with the drugs. The Singaporean Courts recently had to grapple with this issue in *Liew Zheng Yang v. Public Prosecutor* and *Ali bin Mohamad Bahashwan v. Public Prosecutor* and other appeals. Prior to these two cases, the position in Singapore was clear—Person B should be liable for drug trafficking as an accessory to Person A, in line with Singapore's strong stance against drug offenses. However, since these cases, the Singaporean Courts have taken a contrary position and held that Person B may not be liable if the drugs were for his/her own consumption.

This Article examines the law with respect to this drug conspiracy offense in Singapore, looking at its history, the primary legislation and similar cases. It also scrutinizes the judicial reasoning in the two cases above and considers whether this can be reconciled with the Courts' prior position on the issue. In this analysis, the Article also investigates the position taken in other comparable common law jurisdictions—including the UK, Australia, Canada and the United States—and concludes that the Singaporean Courts' reasoning in the aforementioned two cases may not be tenable and warrant a reexamination.

## ABOUT THE AUTHOR

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## INTRODUCTION

Inchoate criminal offenses are controversial and problematic due to the criminalization of acts which in and of themselves may not amount to substantive criminal offenses. These include attempted acts and conspiring to engage in criminal behavior—essentially, they focus on the *mens rea* of the criminal activity and can be seen as the criminalization of mere thoughts. Naturally, this attracts much debate and controversy. This controversy is compounded when the subject matter of the substantive criminal offense is serious and attracts severe penalties—such as the offense of trafficking in controlled drugs. In some jurisdictions, like Singapore, this carries hefty mandatory minimum terms of imprisonment and even capital punishment.

This Article examines the legal issues surrounding a typical drug courier scenario in Singapore—a drug courier (Person A) is intercepted by enforcement agencies with drugs in his/her possession, with the intent of delivering them to Person B. The offenses made out with respect to Person A are relatively straightforward. The liability of Person B may be more problematic. Since Person B was not in possession of the drugs, the Prosecution will not be able to rely on any of the presumptions (such as the presumption of knowledge, possession and trafficking) set out in Singapore's Misuse of Drugs Act.<sup>1</sup>

Before 2017, the state of the law in Singapore would allow Person B to be liable for conspiring with Person A to have drugs delivered, as a secondary offender. This can be seen on a plain reading of the elements set out in section 12 of the Misuse of Drugs Act and in several cases on the issue.

Since 2017, however, the High Court and Court of Appeal in Singapore have taken the view that the pre-2017 position is no longer tenable. The Courts have introduced an additional element to the conspiracy offense in its application to drug trafficking—it must be shown that Person B had *further* intended to pass the drugs on to a third party.

The first Part of this Article sets out the position pre-2017, including a brief overview of the offense of engaging in a conspiracy, which is encapsulated in Singapore's general Penal Code and also reflected in its Misuse of Drugs Act, before moving on to review the decisions reached in *Liew Zheng Yang v. Public Prosecutor*<sup>2</sup> and *Ali bin Mohamad Bahashwan v. Public Prosecutor* and other appeals,<sup>3</sup> which fundamentally altered the traditional understanding of a conspiracy to traffic in drugs, and to examine the difficulty this poses.

The Article then offers a critique of the Court's reasoning in *Liew* and *Ali*, and then undertakes a crossjurisdictional analysis of the United Kingdom (UK), Australia, Canada and the United States (US),

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1. Misuse of Drugs Act of 1971, Singapore, Cap 185 (after 2008 amendment).
2. [2017] SGHC 157.
3. [2018] 1 SLR 610.

to examine whether similar issues have been encountered there and if so, what lessons could be drawn from these instances.

Finally, having considered the position internationally, the Article highlights that there are jurisdictions that would convict Person B for engaging in a conspiracy to traffic to himself—namely, the UK and the US (Florida). Further, the Article points out that in both *Liew* and *Ali* the Court failed to take into account several issues that have been the subject of some judicial consideration overseas, including (a) the lack of clarity on whether the supplier knew or agreed that the recipient would further traffic the drugs to a third party, (b) the broad phrasing of trafficking under Singapore’s Misuse of Drugs Act,<sup>4</sup> and (c) the overly broad reading of the “victim rule” in *Tyrell*.<sup>5</sup> The Article concludes with a suggestion that the issue be raised in a future criminal reference on a question of law of public interest to the Court of Appeal to ensure clarity in the law moving forward.

## I. UNDERSTANDING DRUG CONSPIRACIES IN SINGAPOREAN LAW

### A. *Significance and History of a Conspiracy*

A conspiracy in criminal law is generally an agreement between two or more individuals to commit an offense. The precise elements required—for example, whether an additional act is required towards that conspiracy, or whether an agreement towards an unlawful purpose suffices—may differ across jurisdictions.<sup>6</sup> Nonetheless, most agree that the object of criminalizing a conspiracy is to prevent commission of the substantive offense before the stage of an attempt.<sup>7</sup> This offers law enforcement agencies a significant advantage in the prevention and prosecution of offenses.

The offense of conspiracy has its origins in England between 1250 and 1300, although it was limited to certain offenses against the administration of justice.<sup>8</sup> In the seventeenth century, the offense was expanded to include other crimes such as immoral acts.<sup>9</sup> Given that the ambiguity

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4. Cap 185 (after 2008 amendment).

5. [1894] 1 QB 710. This ruling is explained in greater detail in Part II below.

6. In Singapore, unlike in English common law, abetment by conspiracy requires additional proof of an act or illegal omission in pursuance of the conspiracy—see STANLEY YEO ET AL., *CRIMINAL LAW IN MALAYSIA AND SINGAPORE* 914 (3rd ed. 2018).

7. *Board of Trade v. Owen* [1957] 1 All ER 411 per Lord Tucker (followed *Director of Public Prosecutions v. Nock* [1978] 2 All ER 654, 660–1 per Lord Scarman; *Peters v. R* (1998) 192 CLR 493 [64] per McHugh J; *R v. Turner* (No 8) (2001) 162 FLR 251 [17] per Blow J; YEO ET AL., *supra* note 6, at 893. See also Michael Cahill, *Inchoate Crimes*, in *OXFORD HANDBOOK OF CRIMINAL LAW* (Mark Dubber & Tatjana Hörnle eds., 2014) for a detailed analysis of the reasoning behind criminalizing inchoate offenses.

8. Francis Sayer, *Criminal Conspiracy*, 35 HARV. L. REV. 393, 394–396 (1921–1922).

9. *Id.* See *Jones’ Case* (1832) 4 Barnewell & Adolphus’ King’s Bench Reports 345, 349.

of the term “unlawful purpose” could potentially encompass civil wrongs, on the recommendation of the Law Commission, the UK enacted the Criminal Law Act 1977, which confined conspiracies to agreements to commit an offense.<sup>10</sup>

In Singapore, the offense is codified in section 107(b) of the Penal Code,<sup>11</sup> which itself was drawn from the Indian Penal Code.<sup>12</sup> A significant difference between this and the UK’s understanding of conspiracy is that the Singapore offense requires a further act or illegal omission to take place in pursuance of the conspiracy—the agreement itself is insufficient to form an offense under section 107(b) of the Penal Code.<sup>13</sup> It should be noted that section 120A of the Penal Code does allow an offense to be disclosed purely on the basis of an agreement, without the need to prove the additional act or illegal omission. However, this section remains controversial and is rarely used,<sup>14</sup> with some calling for it to be removed from the Penal Code entirely.<sup>15</sup> This Article will therefore only focus on conspiracy as understood under section 107(b) of the Penal Code.

### B. *The Elements of Abetment*

Before embarking on an in-depth analysis of the issue, it is first necessary to set out the traditional understanding of the elements constituting a conspiracy in Singaporean law. The law set out below encompasses the

10. *Id.* at 4–5. Some conspiracies, for example, to corrupt public morals, to outrage public decency and to defraud remain an offense. See SHARON SAMUELS & GILL MCKINNON, CANADIAN BAR ASSOCIATION NATIONAL CRIMINAL JUSTICE SECTION COMMITTEE ON CRIMINAL CODE REFORM, CONSPIRACY, WORKING PAPER #14 1–3 (1992).

11. Misuse of Drugs Act of 1971, Singapore, Cap 185 (after 2008 amendment) section 107(b).

12. YEO ET AL., *supra* note 6, at 914.

13. *Id.* 914. See also *Chai Chien Wei Kelvin v. Public Prosecutor* [1998] 3 SLR(R) 619 [75], which states:

The distinction between abetment by conspiracy under section 107(b) of the *Penal Code* and criminal conspiracy under section 120A of the *Penal Code* was pointed out by the Supreme Court of India in *NMMY Momin v. The State of Maharashtra* (1971) Crim. L.J. 793 at 796:

Criminal conspiracy postulates an agreement between two or more persons to do, or cause to be done, an illegal act or an act which is not illegal, by illegal means. It differs from other offences in that mere agreement is made an offence even if no step is taken to carry out that agreement. Though there is close association of conspiracy with incitement and abetment the substantive offence of criminal conspiracy is somewhat wider in amplitude than abetment by conspiracy as contemplated by section 107 of the Indian Penal Code.

14. To date, there are only three reported decisions concerning section 120A of the Penal Code of Singapore of 1871, Cap 224 (after 2008 amendment): *Gan Leong Gee and another v. Public Prosecutor*, [1968–1970] SLR(R) 436; *Quek Hock Lye v. Public Prosecutor*, [2012] 2 SLR 1012; *Tay Huay Hong v. Public Prosecutor*, [1998] 3 SLR(R) 290. Some of the controversy stems from its overlap with section 107(c) of the Penal Code and the fact that its ambiguity extends liability for agreements to commit civil wrongs—see CHAN WING CHEONG ET AL., *CRIMINAL LAW FOR THE 21ST CENTURY: A MODEL CODE FOR SINGAPORE* 160 (2013).

15. YEO ET AL., *supra* note 6, at 916. CHAN WING CHEONG ET AL., *Id.*, at 161.

normative understanding of the law prior to *Liew Zheng Yang*. The relevant provision in the Penal Code reads:

*Abetment of the doing of a thing*

107. A person abets the doing of a thing who—

(a) instigates any person to do that thing;

(b) engages with one or more other 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.

There are thus three distinct forms of abetment in Singaporean law—abetment by instigation under section 107(a) of the Penal Code, abetment by engaging in a conspiracy under section 107(b) of the Penal Code and abetment by aiding under section 107(c) of the Penal Code.<sup>16</sup> As provided for in *Govindarajulu Murali and Another v. Public Prosecutor*<sup>17</sup> and section 2 of the Interpretation Act,<sup>18</sup> abetment under section 12 of the Misuse of Drugs Act<sup>19</sup> thus encompasses all three forms of abetment under section 107 of the Penal Code.

### 1. Abetment by Instigation Under Section 107(a) of the Penal Code

Abetment by instigation, as held by the Court of Appeal in *Chan Heng Kong and Another v. Public Prosecutor*,<sup>20</sup> must contain some form of “active suggestion, support, stimulation or encouragement” of the primary offense—instigation could come in the form of “express solicitation or . . . hints, insinuations or encouragement.” It requires not merely “the placing of temptation to do a forbidden thing but actively stimulating a person to do it.”<sup>21</sup>

As indicated by *Ratanlal’s* commentary, the word “instigate” means to goad or urge forward or to provoke, incite, urge or encourage to do an act.<sup>22</sup> A mere intention to instigate is insufficient to constitute the offense under section 107(a) of the Penal Code. The offense is complete as soon as the abettor has incited another to commit a crime, whether the latter consents or not, regardless of whether the predicate offense is committed.

16. Cap 185 (after 2008 amendment) section 107(c).

17. [1994] 2 SLR(R) 398.

18. Cap 1 (after 2002 amendment) section 2(1) states “‘abet’, with its grammatical variations and cognate expressions, has the same meaning as in the Penal Code (Cap 224).”

19. Cap 185 (after 2008 amendment).

20. [2012] SGCA 18.

21. *Public Prosecutor v. Lim Tee Hian*, [1991] 2 SLR(R) 393.

22. *KT THOMAS & M A RASHID, RATANLAL & DHIRAJLAL’S THE INDIAN PENAL CODE* 546 (35th ed. 2017).

## 2. Abetment by Conspiracy Under Section 107(b) of the Penal Code

Abetment by conspiracy, as confirmed by *Chai Chien Wei Kelvin v. Public Prosecutor*, requires that (a) an accused has engaged in a conspiracy, (b) the conspiracy is for doing the thing abetted, and (c) an act took place in pursuance of the conspiracy in order to the doing of that thing.<sup>23</sup> The punishment provision in section 109 of the Penal Code makes clear that abetment (whether by a conspiracy or otherwise) is only punishable if it is towards an offense in the Penal Code or some other law in force at that time.<sup>24</sup> A conspiracy, on a plain reading of the word, implies an agreement between parties. In *Public Prosecutor v. Yeo Choon Poh*,<sup>25</sup> the Court noted that “the essence of a conspiracy is agreement,” and that one way of proving a conspiracy would be to show that the words and actions of the parties indicate their concert in the pursuit of a common object or design. This proposition finds support in *Ratanlal’s* commentary on the Indian equivalent of Singapore’s section 107(b) Penal Code.<sup>26</sup>

It is trite that the “act that took place,” as an element of abetment, need not be the actual act abetted.<sup>27</sup> Indeed, the actual predicate offense need not have taken place at all for the inchoate offense of abetment to be made out. This is clear from Explanation 2 to section 108 of the Penal Code, which reads<sup>28</sup>:

Explanation 2.—To constitute the offence of abetment, it is not necessary that the act abetted should be committed, or that the effect requisite to constitute the offence should be caused.

The issue was covered in *Chua Kian Kok v. Public Prosecutor*.<sup>29</sup> The Court stated that<sup>30</sup>:

It may perhaps be argued that it is illogical to convict an accessory when an offence has not been committed. *This is because the liability of an accessory is derivative in nature.* If the principal is not guilty of the offence that is abetted (as he would only be guilty of another offence, or at most for the attempt of the offence) how can it be said that the accessory, who is even more “removed” from the offence, is guilty of abetting it? . . .

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23. [1998] 3 SLR(R) 619 [76].

24. Penal Code of Singapore of 1871, Cap 224 (after 2008 amendment) sections 40(2) and 109.

25. [1994] 2 SLR 867 at 873; *see also* Lee Yuen Hong v. PP, [2000] 1 SLR(R) 604.

26. According to KT THOMAS & MA RASHID, *supra* note 22, at 546: “Conspiracy consists in the agreement of two or more [persons] to do an unlawful act, or to do a lawful act by unlawful means.” This is relevant given the shared history between the Indian Penal Code and The Penal Code of Singapore.

27. YEO ET AL., *supra* note 6, at 914.

28. Penal Code of Singapore of 1871, Cap 224 (after 2008 amendment), section 108.

29. [1999] 2 SLR 542 [53]–[54].

30. *Id.*



This objection can be dealt with in the following way. *The principle that an accessory's liability is derivative is a common law principle.* Our criminal law is codified in the form of the Penal Code. Sections 107(b), 109, 115 and 116 of the Code clearly state that an accessory *can be guilty even though the actual offence is not committed.*

From the above, there is no requirement for the principal offender to carry out the predicate offense; neither is it relevant if the principal offender was convicted of a different offense from that which the accused was charged with abetting. All that is required is that the abettor conspired with the principal offender and that an act (any act—which does not have to be the predicate offense) was done in consequence of the conspiracy.<sup>31</sup>

The *mens rea* elements for the offense of abetment by conspiracy are that the abettor (a) must have intended to be party to an agreement to do an unlawful act, and (b) must have known the general purpose of the common design and that it is unlawful.<sup>32</sup> In the case of a consuming-buyer who conspired with his supplier to deliver drugs for the buyer's own consumption, there is no *prima facie* problem establishing the above *mens rea* requirements. Prior to the High Court's decision in *Liew Zheng Yang*, it was trite law that an abettor does not need to share the same *mens rea* as the primary offender so long as there is knowledge of some common design.<sup>33</sup>

### 3. Abetment by Aiding Under Section 107(c) of the Penal Code

Abetment by aiding is aptly illustrated in Explanation 2 of the Penal Code, which states that<sup>34</sup>:

*Explanation 2.*—Whoever, either prior to or at the time of the commission of an act, does anything in order to facilitate the commission of that act, and thereby facilitates the commission thereof, is said to aid the doing of that act.

It has been noted that the term “aid” is to be given its plain and ordinary meaning.<sup>35</sup> The *actus reus* of intentional aid consists of either doing an act or illegally omitting to do it to assist the commission of the offense.

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31. This proposition also finds support in HALSBURY'S LAWS OF SINGAPORE: CRIMINAL LAW [90.053] (2015).

32. *Nomura Taiji and Others v. Public Prosecutor*, [1998] 1 SLR(R) 259 [107]–[110].

33. See Penal Code of Singapore of 1871, Cap 224 (after 2008 amendment), Illustration 5 and *Ang Ser Kuang v. Public Prosecutor*, [1998] 3 SLR(R) 316 [31]. While the High Court in *Liew Zheng Yang v. Public Prosecutor*, [2017] SGHC 157 [39] found that it was necessary to share the same *mens rea* for the offense to be made out, the Court of Appeal in *Ali bin Mohamad Bahashwan v. Public Prosecutor* and other appeals, [2018] 1 SLR 610 [33] disagreed with the High Court on this point.

34. Penal Code of Singapore of 1871, Cap 224 (after 2008 amendment), section 107.

35. ENGLAND AND WALES COURT OF APPEAL, ATTORNEY-GENERAL'S REFERENCE (No. 1 of 1975 (1975)).

A typical scenario of abetment by aiding is found in *Jimina Jacee d/o C D Athanasias v. Public Prosecutor*,<sup>36</sup> where the accused had procured and distributed air tickets for the principal offenders to use to obtain boarding passes for flights to Australia, which were then given to others—who would not have been able to obtain their own boarding passes as they did not possess the requisite visas. The principal offenders were convicted of cheating airport officials and the accused was initially charged with abetment by instigating the principal offenders to cheat airport officials. The Court found that there was insufficient evidence to make out abetment by instigation given the absence of any active stimulation on the part of the accused. However, the Court did find that providing the principal offenders with the air tickets could constitute abetment by aiding under section 107(b) of the Penal Code.

It should be noted that of the three forms of abetment, abetment by conspiracy is arguably the easiest to prove, given that it merely requires an agreement, whereas abetment by instigation and abetment by aiding require active suggestion and some form of aid, respectively.

### C. *Abetment Under the Misuse of Drugs Act*

Section 12 of Singapore’s Misuse of Drugs Act provides that any person who abets the commission of an offense under the Misuse of Drugs Act shall be guilty of that offense and shall be liable on conviction to the punishment provided for that offense.<sup>37</sup> There is no definition of “abet” in the Misuse of Drugs Act. However, “abet” is taken to have the same meaning as in the Penal Code. In *Govindarajulu Murali and Another v. Public Prosecutor* it was stated that<sup>38</sup>:

s 2 of the Interpretation Act (Cap 1) provides that the word “abet” as appearing in statutes is, unless otherwise expressly provided, to have the same meaning as in the Penal Code.

All three forms of abetment under section 107 of the Penal Code are thus subsumed within section 12 of the Misuse of Drugs Act.<sup>39</sup> Further, as confirmed by *Mohd Zin bin Atan and Another v. Public Prosecutor*, the standard of the *mens rea* for abetment by conspiracy to traffic is “knowing participation” in the conspiracy.<sup>40</sup> The conspiracy in the hypothetical case described previously is the illegal act of trafficking from Person B to Person A, as illustrated in the Figure below:

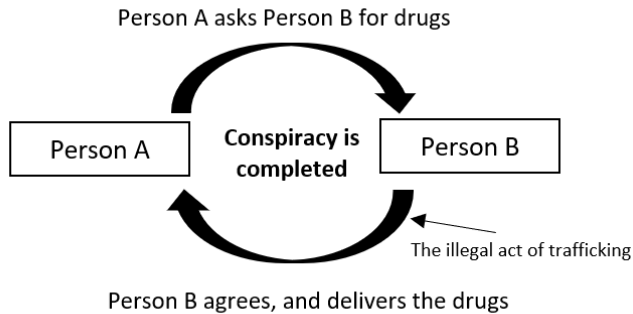
36. [1999] 3 SLR(R) 826.

37. Cap 185 (after 2008 amendment) section 12.

38. [1994] 2 SLR(R) 398 [44].

39. Cap 185 (after 2008 amendment) section 12, which reads: “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.”

40. *Mohd Zin bin Atan and another v. Public Prosecutor*, [1999] SGCA 56 [77].

**Figure 1: Hypothetical Conspiracy**

The conspiracy is for Person B to deliver drugs to Person A, which is an act of trafficking under section 5(1)(a) of the Misuse of Drugs Act,<sup>41</sup> such that Person B would have thus committed the offense of trafficking, and would have engaged in an agreement with Person A to do so. The conspiracy between Person A and B is thus completed.

#### D. *The Use of “Mock Drugs” and “Sting Operations”*

Mock drugs are essentially bundles which contain sand and/or other legal substances, created by the Central Narcotics Bureau to resemble real drug bundles. These mock drugs are subsequently used to substitute the real drug bundles for enforcement operations. Mock drugs are typically used when officers from the Central Narcotics Bureau intercept drug bundles (containing actual drugs) en route to their intended destination. Officers will arrest the person(s) with the drug bundles but then go on to create mock drug bundles for use in a subsequent sting operation to enable the arrest of the individuals who were to receive the drug bundles.

The obvious reasons for preferring the use of mock, as opposed to real drugs, are twofold: (a) to secure the real drugs as soon as they come into the Central Narcotics Bureau’s possession so as to minimize any risk of real drugs being lost and circulated within Singapore—which is a real risk given the fluid nature of such drug enforcement operations; and (b) to ensure unnecessary further handling of the real drugs so as to establish an untampered chain of custody at trial.

Individuals arrested with the real drugs will be charged with possession for the purpose of trafficking under section 5(1)(a) read with section 5(2) of the Misuse of Drugs Act.<sup>42</sup> The intended recipients of the drug bundles arrested in the subsequent sting operation will be charged with accessory liability—either with abetment by engaging in a conspiracy,

41. Cap 185 (after 2008 amendment) section 5(1)(a).

42. Cap 185 (after 2008 amendment) section 5.

abetment by instigation or abetment by aiding the primary offenders to traffic in the drugs.

E. *Cases Applying this Traditional Position*

1. *Chan Heng Kong and Another v. Public Prosecutor*

In *Chan Heng Kong and Another v. Public Prosecutor*,<sup>43</sup> one of the accused persons, Sng, was charged with abetting the trafficking of 17.70 g of diamorphine by instigating Choon Peng to be in possession of drugs for the purpose of trafficking.<sup>44</sup> Sng claimed that half of the heroin he ordered was for his own consumption while the other half was for sale.

The High Court found that Sng's consumption defense was irrelevant to the charge of abetting trafficking by instigation. Even if all the heroin was intended for Sng's consumption, the charge would be made out.

The Court of Appeal affirmed the High Court's findings regarding the irrelevance of the consumption defense. The Court also amended Choon Peng's charge to that of abetment by intentional aiding.

2. *Public Prosecutor v. Vejiyan a/l Muniandy and Another*

In *Public Prosecutor v. Vejiyan a/l Muniandy and Another*,<sup>45</sup> the first accused person (Vejiyan) was convicted of importing controlled drugs. He was to deliver these drugs to the second accused person (Razak). Vejiyan was arrested as he attempted to enter Singapore at Tuas Checkpoint with the drugs.

Following Vejiyan's arrest, the CNB conducted a followup operation to arrest the intended recipient of the drugs. Vejiyan was asked to arrange a meetup with the recipient—this was done through a third party, one "Sasi," and using a certain phone number. While the actual transaction never took place, CNB officers arrested Razak and Saleh in the rear passenger seats of a car close to the meetup point. A mobile phone linked to the same number used by Vejiyan and "Sasi" was seized from Saleh. Razak was also found with SGD\$2100.95 on him.

The Judge found that Razak was the intended recipient and had thus conspired with Vejiyan and "Sasi" to traffic in at least 22.41 g of diamorphine. This case shows that a recipient of drugs can be convicted for being part of a conspiracy to traffic to himself.

3. *Public Prosecutor v. Mohamad Shafiq bin Ahmad*

Another case where an accused person who had placed orders and was supposed to receive drugs was convicted of abetting by engaging in a conspiracy to traffic to himself under section 12 with section 5(1)(a)

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43. [2012] SGCA 18.

44. Under the Second Schedule of the Misuse of Drugs Act, 15g or more of diamorphine attract the death penalty.

45. [2016] SGHC 76.

of Singapore's Misuse of Drugs Act<sup>46</sup> is *Public Prosecutor v. Mohamad Shafiq bin Ahmad*.<sup>47</sup>

In that case, the accused person was to receive 91.29 g of methamphetamine from one Abdullah. Abdullah worked for one "Jaga." Pursuant to "Jaga's" instructions, Abdullah was to deliver the drugs to the accused in Kembangan and collect a sum of SGD\$8000–SGD\$9000. Abdullah was arrested by enforcement officers. A followup operation was conducted and the accused was arrested in Kembangan with SGD\$8250 on his person. Abdullah identified the accused as the person who was supposed to receive the drugs.

The Court held that a conspiracy to traffic was made out and that each party played a specific role. The accused was the buyer, "Jaga" was the seller and Abdullah was the courier. The District Judge convicted the accused of the charge. This conviction was upheld by the High Court in Magistrate's Appeal 43 of 2015, heard on 24 July 2015.<sup>48</sup>

As indicated above, this issue has previously arisen in numerous other cases in the District Courts, High Court and the Court of Appeal—and in none of these cases has the Court doubted that a consuming-buyer could be liable in law for abetment of trafficking. This was the state of affairs until the High Court's decision in *Liew Zheng Yang*.

## II. THE LIEW ZHENG YANG POSITION

### A. *Facts of Liew Zheng Yang*

The facts of *Liew Zheng Yang* are as follows: Liew (twenty-two-years-old) had asked a friend of his, Fanyu (twenty-years-old), to sell him a brick of cannabis for SGD\$400. Fanyu agreed and went to Johore Bahru in Malaysia to purchase the cannabis. Fanyu returned to Singapore, intending to deliver the cannabis to Liew, but was stopped at the Immigration Checkpoint—and was arrested. Liew was subsequently arrested and did not dispute that he had indeed ordered the drugs from Fanyu. Liew was charged under section 5(1)(a) read with sections 5(2) and 12 of the Misuse of Drugs Act with abetting Fanyu by engaging in a conspiracy with him to traffic in 34.54 g of cannabis and 68.21 g of cannabinol and tetrahydrocannabinol,<sup>49</sup> and in pursuance of that conspiracy, Fanyu had in his possession the said cannabis, which was to be delivered to Liew, at the Woodlands Checkpoint.<sup>50</sup>

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46. Cap 185 (after 2008 amendment) section 12 and section 5(1)(a).

47. [2015] SGDC 81.

48. *Mohamad Shafiq bin Ahmad v. Public Prosecutor*, (MA 43/2015, unreported).

49. The two charges stem from the fact that the brick of vegetable matter contained not only cannabis, but also cannabinol and tetrahydrocannabinol; all these are listed as Class A controlled drugs.

50. Liew was also charged and convicted of consumption of a cannabis derivative but this is not significant to the main trafficking charge.

Liew denied the charge and claimed trial. Fanyu was called as a Prosecution witness.<sup>51</sup> Liew did not dispute the facts advanced by the Prosecution but instead put forward the argument that the drugs he had ordered from Fanyu were for his own consumption, and the conspiracy to traffic could not be made out given that there was no “common objective” between the two to traffic in the drugs.<sup>52</sup> Liew also argued that as he did not have the requisite cash of SGD\$400 to pay for the drugs, the transaction could not have been completed.<sup>53</sup>

As outlined above, Liew’s defense that the substantive transaction of Fanyu selling the drugs to Liew had not occurred was of no merit given the current state of the law in Singapore, where it is not necessary for the predicate offense to have been completed—only that the parties have engaged in a conspiracy to commit the predicate offense and that *an act* has taken place in pursuance of that conspiracy.<sup>54</sup> As for Liew’s argument that the conspiracy could not be made out given that he had intended the drugs for his own consumption, and that he and Fanyu therefore never shared a common objective to traffic in the drugs, the prosecution submitted that regardless of Liew’s intent to consume the drugs, the trafficking referred to the intended delivery of drugs from Fanyu to Liew—and both Liew and Fanyu were in agreement as far as this object was concerned. The offense was therefore made out. The District Judge agreed, noting that it was the agreement and common object of both to deliver the drugs to Liew—this was enough to constitute an agreement to traffic in the drugs. The District Judge further noted two cases where drug recipients were liable for engaging in a conspiracy to traffic drugs to themselves.<sup>55</sup> The District Judge therefore convicted Liew on the charge of engaging in a conspiracy to traffic in cannabis. Liew was sentenced to the mandatory minimum of five years’ imprisonment with five strokes of the cane in respect of this charge.<sup>56</sup>

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51. Fanyu had previously pleaded guilty to importing 69.36 g of cannabis under section 7 of the Misuse of Drugs Act of 1971, Singapore, Cap 185 (after 2008 amendment). The amount of cannabis of which Fanyu was convicted is higher than the amount indicated in the charge against Liew because Fanyu had purchased two blocks of cannabis—one for Liew and one for himself. Given Fanyu’s age, he was sentenced to probation.

52. Public Prosecutor v. Liew Zheng Yang, [2017] SGDC 21 [16]–[18].

53. *Id.* at [17].

54. *Id.* at [39]–[46].

55. Public Prosecutor v. Vejayan a/l Muniandy and another, [2016] SGHC 76; Public Prosecutor v. Mohamad Shafiq bin Ahmad, [2015] SGDC 81 (affirmed by the High Court on appeal in MA 43/2015).

56. *Liew Zheng Yang*, SGDC 21 [52]–[53]. The sentence for the other trafficking charge was the same and ordered to run concurrently to the first. Liew was also sentenced to six months’ imprisonment in respect of his consumption of the cannabis derivative—to run consecutively with his trafficking charge, making a total effective sentence of five years and six months’ imprisonment with five strokes of the cane.

## B. *The Decision of the High Court*

Dissatisfied with the outcome in the District Court, Liew appealed to the High Court. Steven Chong JA was concerned with the District Judge's reasoning, noting that taken to its logical conclusion, this would mean that all buyers of drugs would almost always be liable for abetting in a conspiracy to traffic the drugs to themselves.<sup>57</sup> The High Court thus acquitted Liew of the trafficking charge—although he was convicted of an alternative, attempted possession charge with a far lower penalty. In his decision, Chong JA highlighted two points<sup>58</sup>:

First, in a situation where a person purchases drugs for his own consumption, he would not have the requisite *mens rea* to traffic in them since both seller and buyer must have the *common intention to traffic*. In such a scenario, given that the buyer's *mens rea* is to receive and not to traffic, the buyer has no *mens rea* to traffic in the drugs.

Second, Parliament had made a distinction between the drug trafficker and the drug consumer, with more severe penalties directed at the former. As such, this distinction cannot be blurred with prosecutorial discretion to charge a buyer for engaging in a conspiracy to traffic.

Chong JA went further to note that in order to determine whether an abetment to traffic charge can succeed, one must have regard to the final intended destination of the drugs, with the following three permutations<sup>59</sup>:

- (a) Where there is clear evidence that the drugs were for the buyer's own consumption.
- (b) Where the evidence is silent as to the destination of the drugs, in which case the presumption of trafficking (if the buyer had received the drugs and the quantity exceeds the threshold) will remain rebutted.
- (c) Where the court finds that the drugs were intended for onward sales.

The abetment offense would only be made out in scenarios (b) and (c). The High Court held that the *mens rea* for the offense of abetment of trafficking included an intention by the abettor to traffic drugs to a third party. Chong JA distinguished the cases of *Shafiq* and *Vejiyan* by noting that while they were prima facie buyers engaging in a conspiracy to traffic, the accused persons in those cases could not have plausibly claimed that the drugs were for their own consumption, given the large quantities found. Notably, Chong JA's decision did not address the case of *Chan Heng Kong*,<sup>60</sup> a Court of Appeal decision, which was binding on the High Court.

Essentially, Chong JA's decision has added a further element to the traditional concept of a conspiracy—in addition to the agreement that the buyer receives the drugs, the Prosecution must now show that the

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57. Liew Zheng Yang v. Public Prosecutor, [2017] 5 SLR 611 [18].

58. *Id.* at [39]–[47].

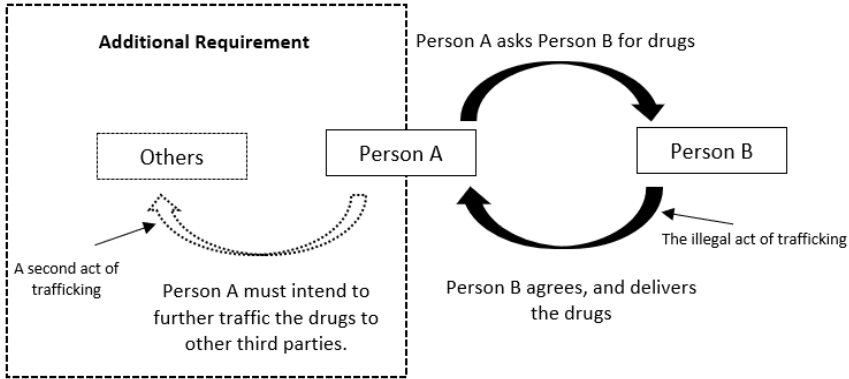
59. *Id.* at [37].

60. [2012] SGCA 18.



intention was for the drugs, after having been received by the buyer, to be *further trafficked* to a third party. Without this additional element, a simple buyer-consumer is not liable for abetment to traffic drugs to himself. Chong JA's decision is illustrated in the Figure below:

**Figure 2: Conspiracy to Traffic**



The decision of the High Court is problematic for several reasons. Chong JA relied on *Ong Ah Chuan*<sup>61</sup> in stating that the phrase “to traffic” is restricted to “for the purpose of distribution to someone else,” and thus that Liew could not have trafficked to himself.<sup>62</sup> This interpretation in *Ong Ah Chuan* was not in relation to a conspiracy to traffic but pertained to an ordinary reading of the term “traffic,” which must mean a transaction between at least two parties. As is obvious from the facts in *Liew Zheng Yang*, there were two parties, Liew and Fanyu, and the latter had intended to deliver drugs to the former, making out the offense under section 5(1)(a) read with section 5(2) of the Misuse of Drugs Act, in any logical reading of the offense.

With this reasoning, the High Court has gone on to add elements to the traditional concept of abetment, against the weight of authorities in both the High Court and the Court of Appeal. Even so, it is unclear which party bears the onus of proof with respect to this additional requirement. For example, is this an issue for the Prosecution to prove beyond reasonable doubt, or is the defense of consumption to be raised by the accused? Notably, in scenario (b) as set out in the Grounds of Decision, the Court stated that where the evidence is silent as to the destination, the presumption of trafficking (if the buyer had received the drugs and the quantity exceeded the threshold) applies. This appears to suggest that a court may have regard to the weight of the drugs and the presumption of trafficking under section 17 of the Misuse of Drugs Act, notwithstanding that the abettor may not have been in physical possession of the drugs.

61. [1979–1980] SLR(R) 710.

62. *Liew Zheng Yang*, 5 SLR 611 [40].



The High Court ultimately acquitted Liew of the offense of engaging in a conspiracy to traffic in drugs and substituted this with a conviction for attempted possession of controlled drugs.<sup>63</sup> Liew was sentenced to twenty-six months' imprisonment,<sup>64</sup> a far lower penalty than the minimum of five years' imprisonment with five strokes of the cane had he been convicted for conspiring to traffic in drugs.

### C. *The Decision of the Court of Appeal*

In Singapore's system of a one-tier appeal,<sup>65</sup> the matter should have ended there. However, given the significance of the decision and its potential impact on law enforcement operations, the Prosecution asked for leave to file a criminal reference on a question of law of public interest with respect to *Liew Zheng Yang*.<sup>66</sup> Coincidentally, a case with similar facts was heard in the Court of Appeal at around the same time—*Ali bin Mohamad Bahashwan v. Public Prosecutor and Others*.<sup>67</sup> In that case, three accused persons—Ali, Selamat and Ragunath—were charged with trafficking in 27.12 g of diamorphine, an amount warranting the death penalty.<sup>68</sup> Ragunath had handed the bundle of drugs to Selamat, who was to deliver it to Ali, pursuant to Ali's instructions. Selamat was arrested before he could do so. All three were charged and convicted in the High Court—Ragunath for trafficking the drugs to Selamat; Selamat for being in possession of the drugs for the purpose of trafficking them by delivering them to Ali; and Ali for abetting Selamat by instigating him to traffic in the drugs under section 5(1)(a) read with section 5(1) and read with section 12 of the Misuse of Drugs Act.<sup>69</sup>

Because of the similarities in Ali's position, the Court of Appeal took the unusual approach of asking the Prosecution to address the Court on the recent decision of *Liew Zheng Yang*, and also asked Counsel for *Liew Zheng Yang* to do the same. This was unusual as *Liew Zheng Yang* was not before the Court of Appeal given that it had already been dealt with on appeal by Chong JA in the High Court. In the published decision on *Ali bin Mohamad Bahashwan*, the Court of Appeal commented

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63. The Court was entitled to do so under sections 390(4) and 390(8)(a) of the Criminal Procedure Code of Singapore of 1955, Cap 68 (after 2012 amendment); *Liew Zheng Yang*, 5 SLR 611 [60].

64. *Liew Zheng Yang*, 5 SLR 611 [60].

65. Singapore only provides for a single appeal from a trial court to an appellate court. See the Criminal Procedure Code of Singapore of 1955, Cap 68 (after 2012 amendment) section 377.

66. The Prosecution was entitled to do so under section 397 of the Criminal Procedure Code of Singapore of 1955, Cap 68 (after 2012 amendment), although this provision should be exercised cautiously and only in cases involving genuine questions of law that are of public interest, as indicated by the court in *Huang Liping v. Public Prosecutor*, [2016] 4 SLR 716.

67. [2018] 1 SLR 610.

68. Trafficking in 15 g or more of diamorphine attracts the death penalty. See Second Schedule of the Misuse of Drugs Act, *supra* note 44.

69. Cap 185 (after 2008 amendment) section 12.

significantly on *Liew Zheng Yang* and agreed generally with the decision of Chong JA that a typical drug-consuming recipient incurs no liability under section 5 read with section 12 of the Misuse of Drugs Act, albeit with some caveats. Perhaps acknowledging the ambiguity in the burden of proof with respect to the additional requirement to further traffic, the Court of Appeal made clear that in order to make out the offense, it was for the Prosecution to prove *beyond reasonable doubt* that the recipient had *further* intended to traffic the drugs to a third party.<sup>70</sup> While the Court of Appeal agreed with Chong JA's second point on the different treatment of drug consumers and drug traffickers as intended by Parliament, it disagreed with the first—that there is an absence of a shared *mens rea* between buyer and seller. Instead, the Court of Appeal found that the general law on abetment does not require both abettor and the person abetted to share the same *mens rea*. All that is required is for them to (a) be party to an agreement to do an unlawful act; and (b) know the general purpose of the common design. As such, Liew and Fanyu need not have the same *mens rea* to traffic; all that is required is for both to have intended an unlawful act—Fanyu's act of trafficking drugs—to take place.

In agreeing with Chong JA on the treatment of drug consumers and drug traffickers as intended by Parliament, the Court of Appeal took pains to delve into the legislative intent and rationale for the dichotomy between the two types of drug offenders. The Court of Appeal's reasoning may be surmised in the points outlined below.

### 1. Accessory Liability for Drug-Consuming Recipients

The Court of Appeal questioned whether the intent of section 12 of the Misuse of Drugs Act<sup>71</sup> was to render an abettor liable as if he had committed an offense when he as principal could not, by the very terms of that offense, have committed it.<sup>72</sup> Given that the drug-consuming recipient would have intended to consume the drugs, the argument here is that the drug-consuming recipient could not have committed the offense of trafficking as there was never an intent to transport the offending drug to someone other than himself.<sup>73</sup> In coming to this decision, the Court took guidance from *Ong Ah Chuan*,<sup>74</sup> noting that for the offense of trafficking to be made out, the offender must have intended to transport the offending drug to *someone other than himself*.<sup>75</sup>

The Court noted that the fundamental question was whether the drug-consuming recipient should have liability extended to him because of some morally significant reason to regard him as a trafficker and punish him as one.<sup>76</sup> Concluding that this should not be the case, the Court of

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70. *Ali bin Mohamad Bahashwan*, 1 SLR 610 [76]–[77].

71. Cap 185 (after 2008 amendment) section 12.

72. *Ali bin Mohamad Bahashwan*, 1 SLR 610 [39].

73. *Id.* at [39].

74. [1979–1980] SLR(R) 710.

75. *Id.* at [10] and [12].

76. *Ali bin Mohamad Bahashwan*, 1 SLR 610 [40].

Appeal highlighted that Singapore's legislature has made that value judgment through the clear policy of a statute containing the primary offense in question, and the Courts should thus be slow to extend liability for trafficking to mere drug-consuming recipients.<sup>77</sup>

In further fortifying this conclusion, the Court of Appeal took reference from Australia's *Maroney*,<sup>78</sup> where Maroney, an inmate in prison, arranged with others outside to supply him with heroin. Maroney was charged with unlawfully counselling others to supply a dangerous drug to him under section 6(1) of the Drugs Misuse Act 1986 (Qld) read with section 7(1)(d) of the Criminal Code 1899 (Qld). The relevant provisions are set out below.

*Section 6(1) of the Drugs Misuse Act 1986 (Qld)*

*Supplying Dangerous Drugs*

A person who unlawfully supplies a dangerous drug to another, whether or not such other person is in Queensland, is guilty of a crime.

*Section 7(1)(d) of the Criminal Code 1899 (Qld)*

*Principal Offenders*

(1) When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say—

...

(d) any person who counsels or procures any other person to commit the offence.

Maroney argued that it would be “artificial and against reason” to construe this to result in his conviction of supplying heroin to himself.<sup>79</sup> He contended that given the wording “a person who unlawfully supplies a dangerous drug *to another*” under section 6(1) of the Drugs Misuse Act 1986 (Qld), the phrase “to another” must necessarily mean that the drugs were to be supplied to someone *other than* himself.<sup>80</sup> Maroney further highlighted that the Drugs Misuse Act 1986 (Qld) punished drug consumers less severely than drug suppliers and it would be inappropriate for him to be punished as if he were a trafficker, given that had the offense been completed, he would at most be liable for possession of the heroin.<sup>81</sup>

Kirby J found merit in Maroney's arguments and held that by the terms of the offense, the offender cannot be on both sides of the supplier and recipient equation, as it is an essential element that the offender must be the supplier and not the recipient of the drugs.<sup>82</sup> Singapore's Court of Appeal agreed with Kirby J and adopted this reasoning.<sup>83</sup>

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77. *Id.*

78. *Maroney v. Queen*, (2003) 216 CLR 31 (Austl).

79. *Id.* at 34.

80. *Id.*

81. *Id.* at 34–35.

82. *Id.* at 45.

83. *Ali bin Mohamad Bahashwan*, 1 SLR 610 [41].

## 2. The Victim Rationale and Inevitable Incidental Conduct

The Court of Appeal also found justification in the common law rule that exempted victims from liability from offenses for which they would have been inevitably involved with as a victim—for example, in cases of statutory rape. This rule is best illustrated in the English decision of *R v. Tyrell*,<sup>84</sup> where the accused, who was below the age of sixteen, was charged with aiding and abetting a man to obtain unlawful carnal knowledge of her, an offense under section 5 of the Criminal Law Amendment Act 1885 (UK). The accused's conduct was inevitably incidental to the substantive offense of unlawful carnal knowledge. Her conviction was thus quashed on appeal, with Lord Coleridge CJ noting that the offense served to protect women and girls and it was thus impossible for it to have intended liability against the very same persons.<sup>85</sup>

This rule is trite and well established in case law and a wealth of academic commentary.<sup>86</sup> The rationale is that it is necessary to infer how Parliament had intended to regard different parties to a criminal conspiracy. Applying this to the consumer-recipient dilemma, the Court of Appeal noted that as the legislature had not intended criminalization through the offense of drug trafficking, liability as accessories to drug trafficking offenses should not be extended to consumer-recipients.<sup>87</sup> The Court of Appeal endorsed Professor Brian Hogan's view that the "appropriate test" in establishing accessory liability would be to consider whether such a move would "defeat the purpose of the statute."<sup>88</sup>

## 3. The Reduced Culpability of the Consumer-Recipient

Given the obvious repercussions that the decision would have on law enforcement and prosecutions, the Prosecution submitted on the fact that if the Court's reasoning were to be adopted, there would be the potential for substantial and unjustifiable disparity in sentencing outcomes as between a drug-consuming recipient and his supplier when their culpability is largely similar. The Court of Appeal disagreed with this argument, noting that it was unclear as to how the culpability of two such offenders would be "largely similar."<sup>89</sup> The Court of Appeal further noted that prescribed penalties for the two are different, with trafficking

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84. *R v. Tyrell* [1894] 1 QB 420 at 710.

85. *Id.* at 712.

86. DAVID ORMEROD, SMITH & HOGAN'S CRIMINAL LAW 240 (13th ed. 2011); Regina v. Wilson, [2013] EWCA (Crim) 2544 [19] (Eng.); Glanville Williams, *Victims and other exempt parties in crime*, 10 LEG. STUD. 245 (1990); *R v. Murphy*, [1981] AJ No 22; Brian Hogan, *Victim as Parties to Crime*. CRIM. L. REV. 683, 690 (1962); Andrew Ashworth, *Child Defendants and the Doctrines of the Criminal Law*, in ESSAYS IN CRIMINAL LAW IN HONOUR OF SIR GERALD GORDON 47 (James Chalmers ed., 2010); Michael Bohlander, *The Sexual Offences Act 2003 and the Tyrell Principle—Criminalizing the Victims?* CRIM. L. REV. 701 (2005).

87. *Ali bin Mohamad Bahashwan*, 1 SLR 610 [57].

88. *Id.* at [53], citing Hogan, *supra* note 86, at 683.

89. *Ali bin Mohamad Bahashwan*, 1 SLR 610 [84].

being retributive as well as deterrent in nature (and of course, with significantly higher penalties).

#### 4. Efficacy of Drug Enforcement and Prosecution

Prosecutors had also asked the Court to consider the inherent difficulties in proving the additional requirement—that the recipient had intended the drugs to be further trafficked to a third party.<sup>90</sup> Arguably, Parliament had long acknowledged the inherent difficulty with proving an intention to traffic: the drafting of the Misuse of Drugs Act provided for the presumption of trafficking under section 17 of the Misuse of Drugs Act, which can be triggered if an accused person is shown to be in possession of drugs above the threshold presumption amount. This presumption would not apply in an abetment-to-traffic scenario where law enforcement officers had intercepted the drugs before they reached the recipient. The Court also dismissed this concern, finding the argument “circular” in nature given that it presupposes accessory liability in the first place. It further held that the burden of proving the elements of a criminal offense beyond a reasonable doubt has always been on the Prosecution and there was thus no mischief in requiring the Prosecution to have sufficient evidence to submit that an accused person had intended to further traffic the drugs to a third party.<sup>91</sup>

#### 5. Prior Case Law

Further, notwithstanding the aforementioned authorities supporting the proposition that an accused can be liable for abetment to traffic drugs to himself, particularly the previous Court of Appeal decision in *Chan Heng Kong*,<sup>92</sup> the Court of Appeal took the opportunity to note that the correctness of this particular issue in law “was not argued before this Court in that case” and can therefore be distinguished. For avoidance of doubt, the Court of Appeal went further to hold that in any event, *Chan Heng Kong* should no longer be followed as far as this issue on accessory liability is concerned. The Court of Appeal has essentially exercised its inherent powers as declared in its 1994 Practice Statement to recede from its own prior decision.<sup>93</sup>

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90. *Id.*

91. *Id.*

92. [2012] SGCA 18.

93. *See* Practice Statement (Judicial Precedent) [1994] 2 SLR 689 (CA) which states:

We recognize the vital role that the doctrine of stare decisis plays in giving certainty to the law and predictability on its application to similar cases. However, we also recognize that the political, social and economic circumstances of Singapore have changed enormously since Singapore became an independent and sovereign republic. The development of our law should reflect these changes and the fundamental values of Singapore society. Accordingly, it is proper that the Court of Appeal should not hold itself bound by any previous decisions of its own or of the Privy Council, which by the rules of precedent prevailing prior to 8 April 1994 were binding on it, in any case where adherence to such prior decisions would cause injustice in a particular

#### IV. CRITICISMS OF THE DECISION

##### A. *Accessory Liability for Drug-Consuming Recipients*

One difficulty with the Court of Appeal's decision in *Ali bin Mohamad Bahashwan*<sup>94</sup> is that while it relied heavily on the legislature having made a value judgment on the issue through the clear policy of a statute, the Court failed to consider the wording of the trafficking offense in the Misuse of Drugs Act. This would appear to suggest that Parliament had indeed intended to extend liability to persons in situations similar to *Liew Zheng Yang*. Essentially, while the Court's interpretation of sections 5 and 12 of the Misuse of Drugs Act is that the person instigating the trafficking cannot, by the very terms of the offense in question, have committed the offense, and that the trafficking must be to *another*, a close examination of the wording of section 5 of the Misuse of Drugs Act does not appear to support this interpretation. Section 5 of the Misuse of Drugs Act is set out below:

*Trafficking in controlled drugs*

5.—(1) Except as authorised by this Act, it shall be an offence for a person, on his own behalf or on behalf of any other person, whether or not that other person is in Singapore—

- (a) to traffic in a controlled drug;
- (b) to offer to traffic in a controlled drug; or
- (c) to do or offer to do any act preparatory to or for the purpose of trafficking in a controlled drug.

(2) For the purposes of this Act, a person commits the offence of trafficking in a controlled drug if he has in his possession that drug for the purpose of trafficking.

Section 2 of the Misuse of Drugs Act further defines “trafficking”:

“traffic” means—

- (a) to sell, give, administer, transport, send, deliver or distribute; or
  - (b) to offer to do anything mentioned in paragraph (a),
- otherwise than under the authority of this Act, and “trafficking” has a corresponding meaning.

As can be seen, there is no definition, either in section 5 of the Misuse of Drugs Act or in the conspiracy provisions found in section 12 of the Misuse of Drugs Act read with section 107(b) of the Penal Code, which requires there to be a further limb of an intent to traffic to be “to another.” As will be elaborated on later, this can be contrasted to the position in the UK and some Australian states, which have included the phrase “to another,” or words to similar effect, in their statutory definitions of trafficking.

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case or constrain the development of the law in conformity with the circumstances of Singapore. Therefore, whilst this court will continue to treat such prior decisions as normally binding, this court will, whenever it appears right to do so, depart from such prior decisions. Bearing in mind the danger of retrospectively disturbing contractual, proprietary and other legal rights, this power will be exercised sparingly.

94. *Ali bin Mohamad Bahashwan*, 1 SLR 610.

Central to the Court's reasoning is its reliance on *Ong Ah Chuan*<sup>95</sup> for the proposition that Parliament had made a distinction between drug consumers and drug traffickers and that section 5(1)(a) of the Misuse of Drugs Act requires the offender to have intended to transport the drug to someone *other than himself*. While this is correct, the Court of Appeal then erroneously applied the same restriction to *abettors* of drug trafficking. *Ong Ah Chuan* is a distinct case in that Ong was in possession of the offending drugs and no question of accessory liability had arisen—Ong was the primary offender and the issue that concerned the Privy Council was whether Ong had the drugs in his possession for trafficking or for his own consumption.

In Liew's case, the primary offender was Xia and so the inquiry is whether Xia had intended to traffic in the drugs in the meaning of the term that warrants culpability. As noted in *Ong Ah Chuan*, it is necessary to determine Xia's purpose—whether he had intended to “part with possession of the drug or any portion of it to some other person whether already known to him or a potential purchaser whom he hopes to find.”<sup>96</sup> The answer to this is clearly in the affirmative. Given Xia had clearly intended to deliver the drugs to Liew, the second question then turns on whether Liew had abetted Xia as an accessory offender. Again, the answer would clearly be in the affirmative.

As *Ong Ah Chuan* shows, Parliament had intended a clear distinction between persons merely in possession of drugs for their own consumption and drug traffickers.<sup>97</sup> *Ong Ah Chuan* also shows that in order to bring into operation the accessory liability for trafficking in section 10 of the Misuse of Drugs Act 1973<sup>98</sup> (in pari materia to the present section 12 of the Misuse of Drugs Act), “some further step or overt act by the accused is needed.” This “further step” can arguably be the abetment of some other person to engage in trafficking. This is not inconsistent with the dichotomy in treatment between drug consumers and drug traffickers. It is one thing to be in possession of drugs for one's own consumption; it is quite another, however, to involve another person in the distribution of drugs—whether to the requestor or to other persons. The culpability of one who involves others in the drug trade is more severe than that of a mere consumer. Indeed, as will be elaborated on below, even within the category of abettors of drug trafficking, further granulations of culpability can be discerned.

The Court of Appeal had also relied heavily on Kirby J's views in *Maroney*, a case involving section 6(1)(d) of the Drugs Misuse Act 1986 (Qld) and section 7(1)(d) of the Criminal Code 1899 (Qld). While Kirby J did indeed hold that one cannot at the same time be the person “who supplies” and “the person to whom the thing is supplied,” he was in the

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95. [1979–1980] SLR(R) 710.

96. *Id.* at [12].

97. *Id.*

98. Act 5 of 1973.



minority. The majority, comprising Gleeson CJ, McHugh, Callinan and Heydon JJ, disagreed with Kirby J and found that given that Watson (the supplier) had unambiguously committed an offense, Maroney had also done so given that he had procured Watson to commit the offense, even though Maroney did not commit the offense as the principal. The majority was thus correct in first assessing the liability of Watson, the primary offender, before turning to whether the accessory had aided, abetted or procured Watson to commit the offense.

Additionally, it should be highlighted that Kirby J's dissent was at least arguable in that the wording of section 6(1)(d) of the Drugs Misuse Act 1986 (Qld) could support his position. As indicated above, section 6(1)(d) of the Drugs Misuse Act 1986 (Qld) states that "a person who unlawfully supplies a dangerous drug to another, whether or not such other person is in Queensland, is guilty of a crime." The phrase "to another" here could possibly make all the difference in that it is the legislature's intent for the offense to be made out only if the person to whom the drugs were supplied is *another person*. As will be explored further, the UK's Misuse of Drugs Act also appears to contain a similar phrasing. By contrast, the Singapore Misuse of Drugs Act contains no such restrictions. The equivalent trafficking offense and definition are worded broadly—arguably, deliberately so.

#### B. *The Victim Rule, Inevitable Incidental Conduct and Policy of the Misuse of Drugs Act*

A second difficulty with the decision lies in the Court of Appeal's overly broad adoption of the *Tyrell* principle. The Court had considered the principle that barred a victim from being held liable as an accessory for an offense which he/she had abetted, where the said offense was intended for the protection of the victim. The Court held that this was an indicator of Parliament's intent not to penalize the victim whose conduct was inevitably incidental to the primary offense. This principle stemmed from English common law since *Tyrell*, as the Court of Appeal noted, was recently applied in *R v. Wilson*.<sup>99</sup> Importantly, this rule has now been encapsulated in statute by virtue of section 2 of the UK's Criminal Law Act 1977, which states that<sup>100</sup>:

##### *Exemptions from liability for conspiracy.*

(1) A person shall not by virtue of section 1 above be guilty of conspiracy to commit any offence if he is an intended victim of that offence.

(2) A person shall not by virtue of section 1 above be guilty of conspiracy to commit any offence or offences if the only other person or persons with whom he agrees are (both initially and at all times during the currency of the agreement) persons of any one or more of the following descriptions, that is to say

99. *Regina v. Wilson*, [2013] EWCA (Crim) 2544 [19] (Eng.), Attorney General's Reference (No.53 of 2013), cited in *Ali bin Mohamad Bahashwan*, 1 SLR 610 [51].

100. Criminal Law Act 1977, c. 45, § 2 (Eng.).



... (c) an intended victim of that offence or of each of those offences.  
[emphasis added]

First, it is unclear if this exception should even apply in Singapore. Unlike the UK, Singapore's legislature has not codified such a principle in its statutes. Indeed, academics have argued that the victim rule should not apply, as whether the victim is a party to the conspiracy or not does not change the character of what the parties have agreed on, and thus none should escape liability.<sup>101</sup> Of course, the prosecution can exercise its discretion not to proceed against the victim.<sup>102</sup> This is logical in that while the prosecution can choose not to proceed against the victim, it does not change the fact that the victim, by his/her actions, has committed an offense in law.

Second, even if this exception should be applied, arguably the Court of Appeal has overly broadened the scope of the victim rule in *Tyrell*. As the English Supreme Court has noted in *R v. Gngango*, the term "victim" should be confined to persons of a class that the relevant statute is intended to protect.<sup>103</sup> This principle is illustrated well in *Tyrell*, where the Court saw fit not to extend liability to an underage girl for abetting a man to have unlawful carnal knowledge of her as well as in *Wilson*,<sup>104</sup> where the Court again declined to extend liability to a thirteen-year-old girl for abetting a man to engage in sexual activity with her. In these cases, the secondary offenders are the victims themselves and thus the very persons that the offense sought to protect. This is clear from the primary offense-creating statutes and evident on a reading of section 2 of the Criminal Law Amendment Act 1977 (UK).

Glanville Williams, who was cited by the Court of Appeal in support of their reasoning, states that the court must ask whether the statute was passed for the protection of the accused or for the wider public purpose.<sup>105</sup> Williams then goes on to give the example of drugs, stating that the object of criminalizing their possession is in the interest of the wider public purpose—to remove these things from people's reach—and so *the victim rule should not apply*.<sup>106</sup> This position is supported by English law. The English courts have noted that one must have regard to the public interest and policy intent behind the offense in question.<sup>107</sup> The UK Supreme Court in *Gngango* declined to extend the *Tyrell* exception to protect an accused who was intended to be harmed by the very crime he committed. The Court noted, by way of example, the sadomasochistic maiming in *R v. Brown*<sup>108</sup> and stated that it is not in the public

101. YEO ET AL., *supra* note 6, at 919.

102. *Id.*

103. *R v. Gngango* [2011] UKSC 59, [2012] 2 All ER 129 [49] (Eng.).

104. *See also* *R v. Whitehouse*, [1977] 3 All ER 737 (Eng.) for a similar case.

105. Williams, *supra* note 86, at 248.

106. *Id.*

107. *R v. Brown* [1993] 2 All ER 75 (Eng.) cited in *Gngango*, 2 All ER 129 [49] and [53].

108. *See also* Attorney General's Reference, (No. 6 of 1980) [1981] 2 All ER 1057 (Eng.).

interest that people should try to cause each other harm for no good reason.<sup>109</sup> Michael Allen agrees with this view, highlighting that in such a situation, the masochist would still be liable for abetting the sadist to wound him as there is no public interest in justifying the actions.<sup>110</sup> If the *Tyrell* exception applies, it should thus be limited in scope to “victims” and this should only encompass the class of persons whom the statute is intended to protect.

While some jurisdictions may consider drug consumers as “victims,” Singapore has never taken this position. While there are some differences in the sentencing treatment for drug consumers and drug traffickers under the Misuse of Drugs Act, it cannot be said that drug consumers are a class of persons that Parliament had intended to protect with the enacting of the Misuse of Drugs Act. Singapore has long made clear that the purpose of the Misuse of Drugs Act was two-pronged—to tackle both drug supply and drug demand. At the Second Reading of the Misuse of Drugs Bill in 1973, Chua Sian Chin, then Minister for Home Affairs, explained that the tough penalties in the Misuse of Drugs Act were there by design in order to suppress the drug trade on both the addiction (demand) front and the trafficking (supply) front.<sup>111</sup> This was reiterated during the Second Reading of the Misuse of Drugs (Amendment) Bill in 1977<sup>112</sup>:

We are attacking the drug problem on *two main fronts*, namely, *the supply and the demand*. . . . There will be no let-up in the efforts to eradicate the illegal supply of controlled drugs in Singapore. However, *equally important in this war against the drug problem is the need to curb the demand for the drugs*. As long as there is high demand, there will be some people who will continue to risk the heavy penalties to meet the demand. [emphasis added]

The Minister also emphasized the importance of tackling the problem of drug trafficking from the demand side in response to a Parliamentary question as follows<sup>113</sup>:

It is a complex problem. It is a question of supply and demand. If we want to solve the problem, we must not only tackle the demand side but also the supply side. With heavy penalties and strict enforcement, we are able to contain the trafficking to some extent. But *at the same time if the demand for drugs increases, it means that more and more drug addicts get into the scene. Then, of course, trafficking will also increase, as there is money to be made*. [emphasis added]

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109. *Gnango*, 2 All ER 129 [53].

110. MICHAEL ALLEN, TEXTBOOK ON CRIMINAL LAW 256 (12th ed. 2013).

111. SINGAPORE PARLIAMENTARY DEBATES, OFFICIAL REPORT, column 420 (volume 32, February 16, 1973).

112. SINGAPORE PARLIAMENTARY DEBATES, OFFICIAL REPORT, columns 168–170 (volume 37, November 9, 1977).

113. SINGAPORE PARLIAMENTARY DEBATES, OFFICIAL REPORT, column 36 (volume 37, May 25, 1977).

Singapore has continued to maintain a comprehensive and tough approach to tackling the drug challenge “dealing with both demand and supply,” and the Singapore Government has taken pains to ensure that this message is conveyed in Parliament. For example, in Deputy Prime Minister Teo Chee Hean’s speech during the Second Reading of the Misuse of Drugs (Amendment) Bill in 2012, he reiterated the importance of Singapore’s approach in addressing both drug supply and demand.<sup>114</sup>

This comprehensive and tough approach to tackling both supply and demand in the drug trade can be seen in the penalties for drug consumers set out in the Misuse of Drugs Act.<sup>115</sup> For convenience, a table outlining the various penalties is set out below:

	<i>Penalty</i>	
<i>First-Time Drug Consumer</i>	Mandatory minimum of one year’s imprisonment <sup>116</sup>	Compulsory rehabilitation at a drug rehabilitation center for a minimum period of twelve months and a maximum period of four years <sup>117</sup>
<i>Second-Time Drug Consumer</i>	Mandatory minimum of three years’ imprisonment <sup>118</sup>	
<i>Third-Time Drug Consumer</i>	Mandatory minimum imprisonment of five years with three strokes of the cane <sup>119</sup>	
<i>Fourth-Time Drug Consumer</i>	Mandatory minimum imprisonment of seven years with six strokes of the cane <sup>120</sup>	
<i>Thereafter</i>	Mandatory minimum imprisonment of seven years with six strokes of the cane (though likely more than the sentence previously received), <sup>121</sup>	

From the above, it can be seen that repeat drug consumers may receive a mandatory minimum imprisonment term of up to seven years, with six strokes of the cane.<sup>122</sup> By way of comparison, first-time traffick-

114. SINGAPORE PARLIAMENTARY DEBATES, OFFICIAL REPORT (volume 89, November 14, 2012).

115. Singapore, Cap 185 (after 2008 amendment).

116. *See Id.* at section 33(3A).

117. *See Id.* at section 34(3). It should be noted that the Drug Rehabilitation Centers are located within the Singapore Prison Complex—see the Misuse of Drugs (Approved Institutions) Notifications 2018. Note: drug consumers will be sent to the rehabilitation centre instead of prison only if they admit to the offence—see SINGAPORE PARLIAMENTARY DEBATES, OFFICIAL REPORT (volume 96, January 15, 2019).

118. *See Id.* at section 33(4).

119. *See Id.* at section 33A(1).

120. *See Id.* at section 33A(2).

121. It is trite that where an offender has previously been convicted for the same offense, any subsequent sentence on a similar offense must be the same of higher than the sentence previously meted out—see *Public Prosecutor v. Ali bin Bakar* and another appeal, [2012] SGHC 83.

122. Caning is a form of judicially sanctioned corporal punishment imposed as part of a sentence in Singapore—see Timothy Austin, *Crime and Custom in an Orderly Society: The Singapore Prototype* 25(2) CRIMINOLOGY 279, 281 (1987) for a history of its

ers will receive a mandatory minimum of five years' imprisonment and five strokes of the cane. Singapore's Parliament has thus made a value judgment through the clear policy of deterrent penalties in the Misuse of Drugs Act that drug consumers, particularly repeat consumers, are part of the problem that the Misuse of Drugs Act seeks to address. It is thus difficult to see how Parliament might also have intended to classify drug consumers as "victims" that the Misuse of Drugs Act is intended to protect. As indicated by Professor Brian Hogan, whose view was approved by the Court of Appeal in *Ali bin Mohamad Bahashwan*, the appropriate test for accessory liability is whether a move would "defeat the purpose of a statute."<sup>123</sup> With this in mind, it is arguable that shielding drug consuming-recipients from accessory liability when they are party to a trafficking conspiracy to supply themselves with drugs would render the Misuse of Drugs Act less effective given that traffickers will always be motivated by demand and requests from drug-consumers.

### C. *The Reduced Culpability of the Consumer-Recipient*

The Prosecution had submitted that the culpability of drug-consuming recipients and their drug supplier is "largely similar."<sup>124</sup> This argument was rejected by the Court of Appeal.<sup>125</sup> Both the Prosecution and the Court of Appeal had arguably failed to consider the varying levels of culpability within the respective situations of the drug-consuming recipient and his drug trafficker. It is not always the case that the drug-consuming recipient has reduced culpability when compared to his or her drug supplier. First, and as outlined at length earlier, the drug consumer and drug supplier are two sides of the same coin: drug consumers drive up the demand for drugs which in turn incentivizes drug suppliers. Second, there are a wide number of permutations with varying levels of culpability. One must have regard to:

- Offender-specific factors—these are factors with respect to the offender that increase culpability; and
- Offense-specific factors—these are factors with respect to the offense itself that increase culpability.

Offender-specific factors would include considerations such as the offender's prior involvement in drug offenses (and if extant, the nature and degree of those drug offenses), the offender's involvement (if any) in a drug syndicate and the offender's history (if any) of involving others in drugs. Offense-specific factors would include considerations such as the quantity of drugs requested, any degree of pressure or coercion exerted on the supplier to agree to the supply, whether the supplier is already in

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origins.

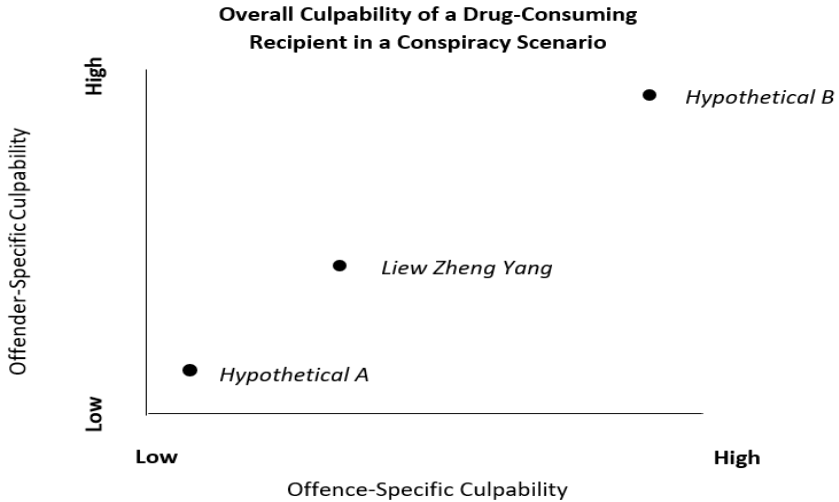
123. Brian Hogan, *Victim as Parties to Crime* CRIM. L. REV. 683, 690 (1962), as endorsed by *Ali bin Mohamad Bahashwan v. Public Prosecutor* and other appeals, [2018] 1 SLR 610 [53].

124. *Ali bin Mohamad Bahashwan*, [2018] 1 SLR 610 [83].

125. *Id.*

the drug trade, and whether the supplier is under 21.<sup>126</sup> This can be illustrated as follows:

**Table 1: Overall Culpability of a Drug-Consuming Recipient in a Conspiracy Scenario**



The Hypothetical A scenario would involve a drug-consuming recipient with minimal offender-specific and offense-specific factors—for example, a first-timer teenager with no criminal record requesting drugs from a seasoned and willing drug supplier out of curiosity. Hypothetical B would involve a drug-consuming recipient with heavy involvement in drug syndicates, with a history of ordering drugs for personal consumption as well as for further trafficking, and who ropes in individuals under twenty-one that might not have otherwise entered the drug trade to courier drugs to him. It is evident that the offense in Hypothetical B is far more serious than that in Hypothetical A. Indeed, in Hypothetical B, it may be argued that the drug-consuming recipient is even more culpable than the courier of the drugs. *Liew Zheng Yang* falls somewhere in the middle but on the less severe side of the spectrum because of the following factors:

Offender-Specific Culpability	Offense-Specific Culpability
History (albeit with no convictions) of trafficking	Fanyu was under twenty-one years old Fanyu was not usually involved in the drug trade

126. The reference to twenty-one-years-old is because of section 33(4B) of the Misuse of Drugs Act, which provides for a mandatory minimum of ten years’ imprisonment and ten strokes of the cane if the intended recipient is below twenty-one years of age. This is a clear indication by Parliament that those under twenty-one should be shielded from drug activities, and that those who involve these minors in such cases should be subject to greater punishment.

There is thus a myriad of scenarios with varying degrees of culpability, even in a situation where a drug-consumer recipient orders drugs for his own consumption. The Court of Appeal was thus wrong to dismiss the Prosecution's submissions that the culpability of a drug-consuming recipient can be similar to that of his supplier, or as illustrated above, potentially even greater.

D. *Efficacy of Drug Enforcement and Prosecution*

The third difficulty with the Court of Appeal's decision is its failure to consider the repercussions on drug enforcement and prosecutions, notwithstanding the Prosecution's submissions. The Prosecution argued that the decision would undermine the efficacy of the Misuse of Drugs Act, because it would make it nearly impossible for the Prosecution to prove that an accused person charged with abetting another to traffic in drugs had further intended for the drugs to be delivered to a third party.

Before delving too deeply into this issue, some background information on the substantive offense of trafficking and the presumptions within the Misuse of Drugs Act should be laid out. As explained above, the offense of trafficking under section 5(1)(a) of the Misuse of Drugs Act (read with section 2 of the Misuse of Drugs Act) is broadly phrased and encompasses:

selling, giving, administering, transporting, sending, delivering, distributing; or  
doing anything preparatory to the above.

Further, section 5(1)(2) of the Misuse of Drugs Act also makes it an offense to have drugs in one's possession for the purpose of trafficking. Controversially, there are also presumptions within the Misuse of Drugs Act that reverse the traditional burden of proof—the twin presumptions of possession and knowledge, and the presumption of trafficking.

The twin presumptions of possession and knowledge are found in section 18(1) and (2) of the Misuse of Drugs Act. Section 18(1) operates to presume that if an accused person is in possession, control or custody of items containing controlled drugs, the accused person is in possession of the controlled drugs.<sup>127</sup> Section 18(2) then operates to further presume that the accused person knew the nature of the drugs in his possession (whether that possession is proved or presumed).<sup>128</sup> Once these presumptions are triggered, it is then incumbent on the accused person to prove on a balance of probabilities that he did not have the drugs in his possession and/or he was unaware of the nature of the drugs.<sup>129</sup> These two presumptions were introduced to overcome the practical difficulty faced by the Prosecution of proving possession and knowledge on the part of the accused.<sup>130</sup>

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127. *Obeng Comfort v. Public Prosecutor*, [2017] 1 SLR 633 [35]–[41].

128. *See id.* at [36] for an explanation of how the presumptions operate.

129. *Id.* at [35]–[41].

130. *Tan Kiam Peng v. Public Prosecutor*, [2008] 1 SLR(R) 1 [55].

Once an accused person is proved or presumed to have the drugs in his/her possession, along with the requisite requirement of knowledge, the Prosecution can then seek to prove that the drugs in the accused's possession were for trafficking or should the amount exceed a certain threshold, utilize section 17 of the Misuse of Drugs Act, which operates to presume that the drugs were for trafficking.<sup>131</sup> It should be noted that the Prosecution can rely either on the twin presumptions of possession and knowledge or the presumption of trafficking, but not on both.<sup>132</sup>

The advantage that the statutory presumption of trafficking offers to law enforcement officers and the Prosecution is clear. At the law enforcement and operations stage, the presumption allows for arrest of suspects if they are in possession of the drugs. In the absence of the presumption, law enforcement officers would face the unenviable choice of either waiting for an actual trafficking transaction to occur so as to arrest the parties in the midst of the transaction (which carries risks in it and of itself), or spending time and resources gathering evidence that the drugs in the accused's possession were for trafficking. This advantage continues at trial, where the presumption obviates the need for the Prosecution to lead positive evidence that the accused had intended to traffic in the drugs. Instead it requires the accused to give evidence, on a balance of probabilities, to rebut this presumption.

In a buyer-abettor situation such as in *Liew Zheng Yang*, the presumption would not apply given that law enforcement officers had intercepted the drug package and arrested the buyer-abettor prior to his receipt of the drugs. The buyer-abettor would thus not have received the drugs, and would not have had the opportunity to further traffic them, if that was his intent. The law on inchoate offenses is intended to address such situations, allowing for the detection, arrest and prevention of offenses prior to their occurrence. The Court of Appeal's decision would frustrate this; first, the requirement of proof beyond reasonable doubt that the buyer-abettor had further intended to traffic in the drugs is a conflation of the traditional elements of a conspiracy; second, such proof will be practically impossible to obtain. A buyer-abettor who had intended to further traffic the drugs to a third party but was arrested before he came to be in possession of the drugs can game the system by simply remaining silent on his arrest—both during the investigations and at trial. The Prosecution will then be unable to meet their burden, resulting in the buyer-abettor ultimately being liable only for mere possession—as *Liew Zheng Yang* was.<sup>133</sup> Cognizant of this, law enforcement officers may

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131. Section 17 of the Misuse of Drugs Act of 1971, Singapore, Cap 185 (after 2008 amendment) sets out the relevant thresholds. *Zainal bin Hamad v. Public Prosecutor* and another appeal, [2018] 2 SLR 1119 [27]. The issue of the constitutionality of this presumption of trafficking is controversial but has been upheld by the Privy Council—see [1979–1980] SLR(R) 710.

132. *Aziz bin Abdul Kadir v. Public Prosecutor*, [1999] 2 SLR(R) 314 [42]–[44].

133. Singapore does allow for the court to draw an adverse inference where an accused elects to remain silent. However, in the absence of any other evidence that



have to resort to waiting until the drug trafficking transaction is occurring (either from the supplier to the buyer-abettor or when the buyer-abettor makes the further onward trafficking transaction) before making the arrests. Due to the unpredictable nature of such operations, this significantly decreases the likelihood of a successful arrest and increases the likelihood that the drugs are not seized and are thus allowed to be circulated in Singapore.

### E. *Difficulties in Departing From Established Case Law*

The prior understanding of a conspiracy, as determined by *Chan Heng Kong*,<sup>134</sup> was sound and logical. The offense is disclosed when (a) the parties engage in a conspiracy, (b) the conspiracy is for doing the thing abetted (which must be towards an offense in the Penal Code or any other law in force at that time),<sup>135</sup> and (c) any act which took place in pursuance of the conspiracy in order to the doing of that thing. When applied towards a transaction between the drug-consuming recipient and supplier, the elements fall into place logically—the agreement between the parties is for drugs to be trafficked from the supplier to the drug-consuming recipient, as illustrated in Figure 1.

The Court of Appeal thus decided *Ali bin Mohamad*<sup>136</sup> against prior, well-established case law on the issue, including its own prior decision in *Chang Heng Kong*.<sup>137</sup> As indicated earlier, in the 1994 Practice Statement, the Court of Appeal declared that it was at liberty to depart from its own prior decisions. This is consistent with the position of other common law superior courts.<sup>138</sup> Notwithstanding this, there is a strong

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points towards further onward trafficking, this would be unlikely to be enough to satisfy any court that a conviction is warranted.

134. [2012] SGCA 18.

135. Penal Code of Singapore of 1871, Cap 224 (after 2008 amendment) sections 40(2) and 109.

136. [2018] 1 SLR 610.

137. *Chang Hen Kong*, SGCA 18.

138. The UK House of Lords was initially reluctant to depart from its own prior decisions, as indicated in *London Street Tramways Co Ltd v. London Country Council*, [1898] AC 375 (HL) (appeal taken from Eng.). However, since its own Practice Statement in 1966, it indicated that while prior judgments of the House of Lords are binding, the Court may depart from previous decisions in certain circumstances—see (Practice Statement (Judicial Precedent), [1966] 1 WLR [first page] 1234. The UK Supreme Court (the successor of the House of Lords), considers this Practice Statement as part of the established jurisprudence and it has as much effect on the Supreme Court as it did on the House of Lords—see Practice Direction 3 of the Supreme Court of the United Kingdom and *Austin v. Mayor and Burgesses of the London Borough of Southwark*, [2010] UKSC 28, [24]–[25] (appeal taken from Eng.). In Australia, the High Court is also able to depart from its own prior decisions—see *Australian Agricultural Co v. Federated Engine-Drivers and Firemen's Association of Australasia*, (1913) 17 CLR 261 (Austl.) and *Brodie v. Singleton Shire Council*, (NSW) [2001] HCA 29 (Austl.) as well as *Matthew Harding and Ian Malkin, Overruling in the High Court of Australia in Common Law Cases* 34(2) MELB. U. L. REV. 239 (2010). Similar to the UK case, the Supreme Court of Canada had initially taken the position that it was bound by its own precedents until *Stuart v. Bank of Montreal*, [1904] 41 S.C.R. 516



argument for this power to be exercised sparingly, given the public interest in ensuring some certainty and consistency in law such that individuals are able to order their affairs.<sup>139</sup> This is arguably most crucial in criminal law, as affirmed by the UK House of Lords' 1966 Practice Statement, which declares that while the House may depart from precedent when it appears right to do so, it will bear in mind the "especial need for certainty as to the criminal law."<sup>140</sup>

### 1. Additional Elements in a Conspiracy to Traffic

As a result of *Ali bin Mohamad Bahashwan*,<sup>141</sup> proving a conspiracy to traffic in drugs is now arguably as difficult as establishing mere possession for the purpose of trafficking, if not more so, as it requires proof of not only the conspiracy between recipient and supplier, but also the additional element of an intent to further traffic the drugs to a third party. This defeats the entire purpose of criminalizing inchoate offenses, which cannot be Parliament's intent.

This difficulty is best illustrated when contrasting the offenses of engaging in a conspiracy to traffic in drugs and engaging in a conspiracy to import drugs. It should be noted that Liew could have been charged for both offenses, given that Xia had gone to Malaysia to obtain the drugs and then returned to Singapore with the drugs in order to hand them to Liew.<sup>142</sup> Both are arguably similar in culpability given their punishment provisions, with a mandatory minimum of five years' imprisonment and three strokes of the cane for any first-time offender, escalating to a mandatory minimum of ten years' imprisonment and ten strokes of the cane for subsequent offenders, and potentially the death penalty if the weight of the drugs found crosses the statutory threshold.<sup>143</sup> Prior to *Liew Zheng Yang* and *Ali bin Mohamad Bahashwan*, the position in law was clear—the prosecution needs to establish a conspiracy between the parties to engage in the act either of trafficking or importing controlled drugs and then establishing that an act had taken place in pursuance of this conspiracy. This is illustrated in the Figure below:

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(Can.)—see Esten Williams, *Stare Decisis* 4 CAN. B. REV. 289, 295 (1926). The United States Supreme Court appears to have taken the position that it can depart from its own previous decisions as far back as 1844—see *Louisville, Cincinnati, and Charleston R.R. Co. v. Letson*, 43 US 497 (1844).

139. NEIL DUXBURY, *THE NATURE AND AUTHORITY OF PRECEDENT* 123 (2011).

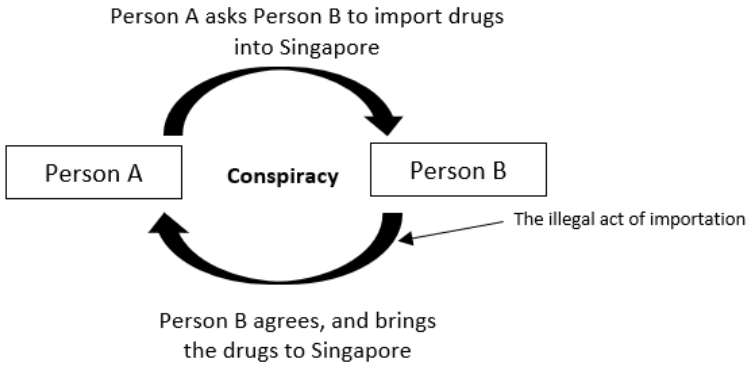
140. *Practice Statement (Judicial Precedent)*, 1 WLR [first page] 1234.

141. *Ali bin Mohamad Bahashwan*, 1 SLR 610.

142. Liew was not ultimately charged with engaging in a conspiracy as there was insufficient evidence to establish beyond a reasonable doubt that Liew knew Xia was obtaining the drugs from Malaysia.

143. See section 7 of the Misuse of Drugs Act of 1971, Singapore, Cap 185 (after 2008 amendment).

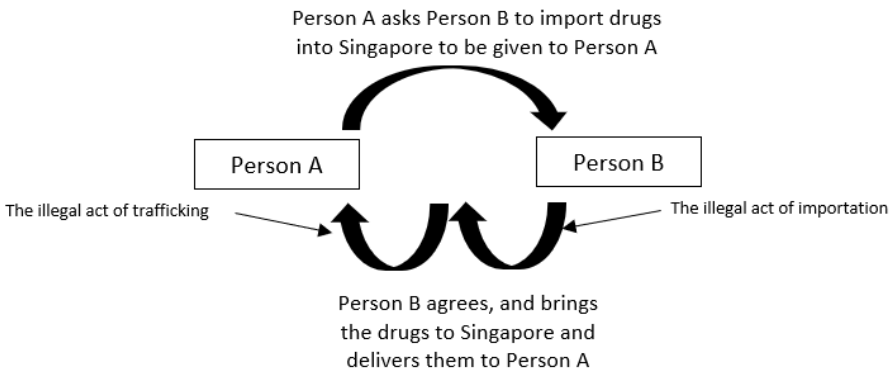
Figure 3: Conspiracy to Import



As seen above, it is common sense that the parties had conspired to import the drugs illegally into Singapore, and it is this act of importation that has been agreed upon by both parties. When contrasting Figure 3 (conspiracy to import) with Figure 2 (conspiracy to traffic), it is clearly illogical to add an additional intent on the part of Person A, such that he/she had further intended to traffic the drugs to a third party. Doing so results in significantly more difficulty in proving a conspiracy to traffic than proving a conspiracy to import, which is against any reading of the statute and cannot be the intent of Parliament.

Given that importation is often only the first step to a second step of trafficking, Figure 4 below illustrates further problems when considering this in light of the decision in *Liew Zheng Yang* and *Ali bin Mohamad Bahashwan*.

Figure 4: Importation and Trafficking



As shown above, it would be absurd to suggest that while the illegal act of importation is sufficient to ground a conspiracy between the

parties, the illegal act of trafficking from B to A is insufficient, and that the Prosecution is then required to show some further proof that Person A intended to further traffic the drugs to a third party.

With *Liew Zheng Yang* and *Ali bin Mohamad Bahashwan*, the offense of engaging in a conspiracy to traffic in drugs is now significantly more difficult to establish than the offense of engaging in a conspiracy to import the drugs, with the former now requiring proof that the recipient had intended to further traffic the drugs. This dichotomy is unsatisfactory given the similarities between the offenses.

Finally, the additional elements in proving a conspiracy to traffic would result in this offense essentially being identical to the offense of attempted possession for the purpose of trafficking under section 8(a) read with section 12 of the Misuse of Drugs Act. In the attempted possession for trafficking offense, the prosecution is required to prove that the accused intended to come into possession of the controlled drugs and intended that the drugs be further distributed to a third-party. As is obvious, this is identical to the elements required in the revised law on engaging in a conspiracy to traffic, which is further evidence that this clearly cannot be Parliament's intent. The changes thus place this offense in an unsatisfactory state that does not sit logically with other offenses in the Misuse of Drugs Act—such as engaging in a conspiracy to import and attempted possession for trafficking.

## 2. A Cautionary Note From Adnan Bin Kadir

This is not the first time the courts have attempted to add elements to well-established drug offenses. In *Adnan bin Kadir*,<sup>144</sup> an accused person was arrested as he imported drugs from Malaysia into Singapore. He claimed that the drugs were for his own consumption (and not for wider distribution). On a plain and established reading of the offense, in line with the well-established jurisprudence on the issue, all that was required to make out importation was for the accused to have knowingly brought drugs from outside Singapore into Singapore.<sup>145</sup> Adnan pleaded guilty and was convicted accordingly. On appeal—and it should be noted that it was an appeal against sentence only—then Chief Justice Chan Sek Keong overturned the conviction, finding that in order for the offense of importation to be made out, the Prosecution had to establish that the accused had brought the drugs into Singapore and had further intended to traffic in them, as it could not have been Parliament's intent to punish drug consumers who import drugs for their own consumption.<sup>146</sup> The Prosecution brought a criminal reference to the Court of Appeal.<sup>147</sup> In something of a reversal compared to *Liew Zheng Yang* and *Ali bin Mohamad Bahashwan*, the Court of Appeal disagreed with Chan CJ's approach, finding that the

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144. [2013] 1 SLR 276.

145. *Id.*

146. *Id.*

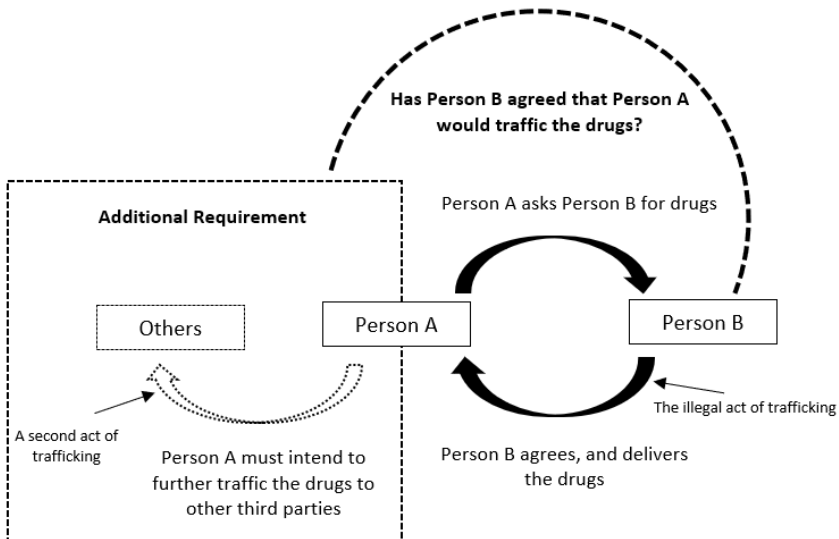
147. A criminal reference is a provision in section 397 of the Criminal Procedure Code of Singapore of 1955, Cap 68 (after 2012 amendment) that allows a party to bring a question of law of public interest for the Court of Appeal's determination.

term “import” was clear in its plain and ordinary meaning and there was no basis to require the additional element that the accused had intended to traffic in the drugs.<sup>148</sup> The Court of Appeal noted that Chan CJ’s approach would have been tantamount to judicial legislation given the absence of any exception or proviso in the Misuse of Drugs Act to support his interpretation.<sup>149</sup> The Court of Appeal emphasized that any reform in this regard should properly come from Parliament and not the courts.<sup>150</sup>

### 3. No True Meeting of the Minds in Agreement to Further Traffic in the Drugs

The additional element of the intention to further traffic the drugs to a third party lacks clarity, which further compounds this difficulty in departing from the prior established case law. In *Ali bin Mohamad Bahashwan*, the Court of Appeal stated that the Prosecution needed to prove beyond a reasonable doubt that the drug-consuming recipient had intended to traffic in the drugs.<sup>151</sup> This would suggest that the intention need only be shown with respect to the drug-consuming recipient and not his/her supplier. However, this reading would then be inconsistent with the concept of a conspiracy in criminal law, in which an agreement and meeting of the minds between the parties is a cornerstone. This difficulty is illustrated below:

**Figure 5: Additional Requirement to Conspiracy**



Adopting the Court of Appeal’s approach would raise the issue of whether there was a true meeting of the minds and agreement between

148. *Public Prosecutor v. Adnan bin Kadir*, [2013] SGCA 34.

149. *Id.*

150. *Id.*

151. [2018] 1 SLR 610 [75].

supplier and recipient, given that the supplier was unaware of or had not agreed to the recipient's intent with the drugs. Neither *Liew Zheng Yang* nor *Ali bin Mohamad Bahashwan* offers any insight into this, although, as will be seen below, it is an issue that has plagued courts in other jurisdictions.

## V. A CROSSJURISDICTIONAL COMPARISON

Given the difficulties and contention of the issue in Singapore, this chapter turns to an examination of other common law jurisdictions which have encountered similar difficulties, and the potential solutions which those jurisdictions offer. This chapter investigates the UK, Australia, Canada and US cases and highlights some relevant issues not considered by Singaporean courts.

### A. *The UK*

In the UK, there is some authority to suggest that the courts are willing to find that both drug-consumer and supplier are equally liable in a conspiracy to traffic. In *R v. Drew*<sup>152</sup> and *R v. Jackson*,<sup>153</sup> the Court of Appeal found that there was no barrier to premising a conviction on an accused conspiring to supply himself with drugs (with no required additional element that the drugs were intended to be further delivered to another party), provided that the charge is properly drafted.

Notwithstanding this, a preliminary examination shows some obvious potential difficulties with charging a drug-consuming recipient for engaging in a conspiracy to traffic to himself. These difficulties include that:

- (a) The codification of the victim rule in *Tyrell* arguably makes it difficult to convict a drug-consuming recipient for engaging in a conspiracy to traffic to himself.
- (b) The phrasing of the trafficking offence requires trafficking to be "to another."

However, notwithstanding these issues,

The primary legislation in question is the Misuse of Drugs Act 1971 (UK),<sup>154</sup> which creates several offenses, including:

*Restriction of . . . supply of controlled drugs.*

(1) . . . it shall not be lawful for a person— . . .

(b) to supply or offer to supply a controlled drug to another . . .

The UK, like Singapore, has codified the offense of criminal conspiracy, which is found in section 1 of the Criminal Law Act 1977 (UK).<sup>155</sup> The first potential difficulty with charging a drug-consuming recipient with engaging in a conspiracy to traffic drugs to himself is the aforementioned *Tyrell* principle and section 2 of the Criminal Law Act 1977

152. [2000] 1 Crim. App. 91 (Eng.).

153. [2001] 1 Crim. App. 97 (Eng.).

154. Misuse of Drugs Act 1971, c. 38 § 4 (U.K.).

155. Criminal Law Act 1977, c. 45 § 1 (U.K.).

(UK), which bars liability from “victims” of the offense. As articulated above, it is difficult to see how drug-consuming recipients are “victims” in this regard. It may be argued that had Parliament intended to exclude drug-consuming recipients from liability, they would have broadened the definition in section 2 of the Criminal Law Act 1977 (UK) or included a similar provision in the Misuse of Drugs Act 1971 (UK). In *R v. Drew*, the Court of Appeal also referred to this argument, noting that “it would be a misuse of language to describe the appellant as a victim” for the purpose of section 2 of the Criminal Law Act 1977 (UK).<sup>156</sup>

The second difficulty lies in the wording of the UK’s trafficking offense provision in section 4 of the Misuse of Drugs Act 1971 (UK), which states that it shall not be lawful to supply or offer to supply a controlled drug “to another.” One argument could be that the term “another” must refer to persons other than the accused persons.<sup>157</sup>

In *Smith (Brian Hugh William)*, the Prosecution’s case was that Smith, together with Diane Wilkins, had engaged in a conspiracy to supply Smith with drugs. There was no evidence to suggest that Smith had intended to further traffic the drugs to another. The charge against Smith reads as follows<sup>158</sup>:

Brian Hugh William Smith, between the 1<sup>st</sup> day of January 1981 and the 24<sup>th</sup> day of April 1981 did conspire with Diane Wilkins to supply a Class B controlled drug, namely cannabis or cannabis resin to another.

The Court acquitted Smith on the basis that the charge as it was drafted could not have encompassed the drugs being supplied to Smith. In the words of Griffiths LJ, as the charge used the phrase “to another” this clearly does not refer to Smith but refers to some other party.<sup>159</sup> More importantly, Griffiths LJ noted that had the prosecution properly drafted the charge against Smith as reflected in their case, Smith’s conduct “could have been charged as a conspiracy and would, of itself, have been an offence.”<sup>160</sup>

Thus, while the term “another” in the substantive offense of supplying arguably operates to restrict a charge against an accused who was engaged in a conspiracy to supply drugs to himself, the Court’s real concern appears to have been more on the drafting of the charge rather than any real impediment of liability against a drug-consuming recipient. This position appears to have been reaffirmed in *R v. Drew*,<sup>161</sup> where the accused had planned with his girlfriend (Jones) to have another person (Mayo) provide drugs to Jones so that Jones could hand the drugs to the

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156. *Drew*, 1 Crim. App. at 96.

157. See RUDI FORTSON, *MISUSE OF DRUGS AND DRUG TRAFFICKING OFFENCES* 261 (6th ed. 2012); Paolo Ferrara (July 17, 1984, CA; unreported).

158. *Smith (Brian Hugh William)* (February 14, 1983, unreported) cited in *Drew*, 1 Crim. App. 91; See also FORTSON, *supra* note 157, at 262.

159. *Smith*, (February 14, 1983, unreported) cited in *Drew*, 1 Crim. App. 91.

160. FORTSON, *supra* note 157, at 262.

161. *Drew*, 1 Crim. App. 91.

accused. There was no evidence to suggest that the accused had intended to further pass the drugs to another person. The charge against Drew was better particularized than the charge against Smith. It reads:<sup>162</sup>

Samantha Jane Jones, Christian Mayo and Martin Ralph Drew on a day between the 2nd day of June 1997 and the 6<sup>th</sup> day of June 1997 conspired together to supply a controlled drug of Class A, diamorphine to Martin Ralph Drew.

The Court of Appeal examined several other authorities, including *Smith (Brian Hugh William)*, and concluded that the offense as it was drafted—such that Drew was engaging in a conspiracy to supply drugs to himself—could be made out. The Court of Appeal distinguished *Smith (Brian Hugh William)* on the basis that the charge drafted in the case was defective while the charge in *Drew* was proper and “in our judgment, there is no basis why such a charge is not a lawful charge within section 1(1) of the Criminal Law Act 1977.” The Court went on to note that *Smith (Brian Hugh William)* was not made out because the charge had merely stated the phrase “to another” without any specificity, while in *Drew*, the charge did specifically state the individual to whom the drugs were to be trafficked.<sup>163</sup> It would appear that notwithstanding the legislation indicating the phrase “to another,” the English courts are prepared to read this to include the drug-consuming recipient who instigated the trafficking, so long as this is made clear in the charge and the prosecution’s case.

This decision was also followed in the case of *R v. Jackson*.<sup>164</sup> In *R v. Jackson*, the accused was an inmate in prison and was not permitted family visits.<sup>165</sup> However, he conspired with his wife and several others, including his cellmates, for drugs to be delivered by his wife to his cellmates and ultimately to him, for his own consumption.<sup>166</sup> The Court of Appeal applied *R v. Drew*, and held that Jackson could be liable for conspiring to traffic to himself.<sup>167</sup>

Notwithstanding the use of the term “to another” in the phrasing of the substantive offense of supplying drugs in the Misuse of Drugs Act 1971 (UK), the UK courts have been prepared to convict drug-consuming recipients for conspiring to supply themselves with drugs, although the charge must be worded carefully. Essentially, the charge must specify the individual to whom the drugs would be trafficked to—even if this was the drug-consuming recipient who instigated the trafficking—and not merely make a vague allusion that the drugs were to be trafficked “to another.” Further, the Court of Appeal in *R v. Drew* noted that section 2 of the Criminal Law Act 1977 (UK), which stemmed from the common law rule

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162. *Id.* at 92.

163. *Id.* at 95.

164. 1 Crim. App. 97.

165. *Id.*

166. *Id.*

167. *Id.*



in *Tyrell* to exclude victims of an offense from liability, does not extend to accused persons who conspire to supply themselves with drugs.<sup>168</sup>

## B. *Australia*

The Australian courts appear to be reluctant to premise a conviction on a conspiracy to traffic or supply drugs to oneself. This is likely due to the following difficulties:

- (a) Some jurisdictions require that the predicate offense to “supply” drugs includes an agreement to supply.
- (b) The term “to another” is problematic in the definition of some predicate supply/trafficking offenses.
- (c) The Courts have thus held that a conspiracy to traffic must involve a further intent on the part of both supplier and recipient to further supply or traffic the drugs to another party.

It should be noted that the terminology varies across different states, with New South Wales, Queensland, Western Australia, the Northern Territory and the Australian Capital Territory using the term “supply” in respect of the criminal act of distributing or delivering drugs, while Victoria, South Australia and Tasmania use the term “traffic.”<sup>169</sup>

Engaging in a conspiracy to commit an offense is itself an offense across the various states within Australia, though whether this is codified may vary depending on the jurisdiction. In South Australia and New South Wales, it is generally a common law offense.<sup>170</sup> In Victoria, Western Australia and Queensland, it has been codified in the respective criminal codes.<sup>171</sup> Similarly, it is a common-law offense in South Australia and New South Wales, and a statutory one in Victoria, Western Australia and Tasmania.<sup>172</sup> For a conspiracy to be made out, it must be established that

168. *Drew*, 1 Crim. App. 91.

169. *Drug Misuse and Trafficking Act 1985* (N.S.W.) s 25 (Austl.); *Misuse of Drugs Act 1981* (W. Austl.) s 6 (Austl.); *Drugs, Poisons and Controlled Substances Act 1981* (Vict.) s 71A (Austl.); *Controlled Substances Act 1984* (S.A.) s 4 (Austl.); *Misuse of Drugs Act 2001* (Tas.) s 12 (Austl.); *Drugs Misuse Act 1986* (Queensl.) s 9B (Austl.); *Medicines, Poisons and Therapeutic Goods Act 2008* (Austl. Cap. Terr.) s 26 (Austl.); *Misuse of Drugs Act 2006* (N. Terr.) ss 5 & 5A.

170. JOHN ANDERSON & MARY HEATH, *CRIMINAL LAW GUIDEBOOK: NEW SOUTH WALES, VICTORIA AND SOUTH AUSTRALIA* 254 (2nd ed. 2016). See also *R v. Rogerson* (1992) 174 CLR 268, 280–81 (Austl.) and *R v. LK* (2010) 241 CLR 177, 207 (Austl.). See also *Lipohar v. The Queen*, (1999) 200 CLR 485 (Austl.); HALSBURY’S LAWS OF AUSTRALIA [130–7400] (2018).

171. See *Crimes Act 1958* (Vict.) s 231 (Austl.); *Criminal Code Act 1899* (Queensl.) ss 541 & 542 (Austl.); *Criminal Code Compilation Act 1913* (W. Austl.) ss 558, 560 (Austl.); *Criminal Code Act 1924* (Tas.) s 297 (Austl.). HALSBURY’S LAWS, *supra* note 170 at [130–7400].

172. See *Crimes Act 1958* (Vict.) s 324C (Austl.), which abolishes the common law provisions—these are replaced by *Crimes Act 1958* (Vict.) ss 323(1)(a), 323(1)(b), & 324(1) (Austl.). *Criminal Code Compilation Act 1913* (W. Austl.) ss 553(2) & 555A(1) (Austl.) and *Criminal Code Act 1924* (Tas.) s 298 (Austl.). Queensland’s code no longer contains incitement as an offense—see JOHN DEVEREUX & MEREDITH BLAKE, *CRIMINAL LAW IN QUEENSLAND AND WESTERN AUSTRALIA* 247 (Joy Window ed., 9th ed.



two or more persons had agreed to an unlawful purpose and each had intended for the unlawful purpose to be carried out.<sup>173</sup>

The first difficulty with establishing the offense of engaging in a conspiracy to traffic/supply to oneself, at least in New South Wales, is the definition of the predicate “supply” offense, which is defined to also include an agreement to supply. Given that agreeing to supply is contained within the predicate offense, the courts have held that it would be inappropriate to find that a conspiracy existed, as a conspiracy requires an agreement between the parties which is anterior in time to the doing of the unlawful act which is the object of the conspiracy.<sup>174</sup> In other words, given that the agreement to supply is the unlawful act in this situation, there cannot be a conspiracy—the appropriate charge (against the intended supplier at least) is supply under section 25 of the Drug Misuse and Trafficking Act 1985 (NSW).<sup>175</sup> Given the varying definitions of the term “supply”—or, indeed, “traffic”—across the various jurisdictions in Australia, it is unclear whether this difficulty is confined to New South Wales.

The second difficulty lies in the statutory definition of the substantive offense of supplying drugs in Western Australia and Queensland. In both, the substantive offense of supply is phrased specifically to mean the supply of drugs *to another*. This may suggest that Parliament did not intend to criminalize the act of conspiring to supply drugs to *oneself* (or even abetting this):

Section 6 of the Misuse of Drugs Act 1981 (WA) states:

Offences concerned with prohibited drugs generally

(1) A person commits a crime if the person—

(a) with intent to sell or supply it to another, has in his or her possession a prohibited drug; or

(b) manufactures or prepares a prohibited drug; or

(c) sells or supplies, or offers to sell or supply, a prohibited drug to *another person*.

[emphasis added]

*s 9B of the Drugs Misuse Act 1986 (Qld) states:*

*Supplying relevant substances or thing*

(1) A person who unlawfully supplies a relevant substance or thing as defined under *section 9A (2) to another*, whether or not the other person is in Queensland, for use in connection with the commission of a crime under *section 8*, commits a crime. [emphasis added]

Kirby J highlighted this obstacle in his dissenting judgment in *Maroney*. He states that since the indictment alleged that the accused unlawfully supplied a dangerous drug to another, it was absurd to suggest

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173. *R v. Trudgeon*, (1988) 39 A Crim R 252, 262 (Austl.); *Ahern v. The Queen*, (1988) 165 CLR 87 (Austl).

174. *R v. Chow*, (1987) 11 NSWLR 561, 570 (Austl.); *Trudgeon*, 39 A Crim R 252; *R v. Carusi*, (1989) 17 NSWLR 516 (Austl.).

175. *Chow*, 11 NSWLR 561; HALSBURY'S LAWS, *supra* note 170, at [130–11290].

he might be found guilty of supplying a dangerous drug to himself.<sup>176</sup> According to Kirby J, this would “do violence to the English language and be an affront to common sense.”<sup>177</sup> Kirby J noted that Parliament had included the words “to another” in its definition of supply and its intent and application was thus obvious. Given that Maroney had not intended to supply the drug to another, the offense could not be made out. While the charge against Maroney was that of procuring the supply of drugs and not a conspiracy offense, Kirby J’s concern for the language of the statutory offense would apply with equal force in a conspiracy offense. Nevertheless, the majority of the Court disagreed with Kirby J and found that given that Watson (the supplier) had unambiguously committed an offense and given that Maroney had procured Watson to commit the offense, both were liable for the conspiracy.

Australian courts have thus taken the position that a simple request for drugs from a drug-consuming recipient to his supplier, on its own, cannot amount to a conspiracy. In *R v. Trudgeon*,<sup>178</sup> the accused had ordered a large quantity of heroin from Kam Hung Cheung. The heroin was intercepted by the police who substituted it with plaster of Paris, some of which was later found on the accused.<sup>179</sup> Given the large amount of heroin, it was found that the accused had intended to further supply the drugs to another person or persons.<sup>180</sup> The Court found that the agreement between Cheung and Trudgeon for the former to supply the latter alone with drugs was insufficient to establish a charge of conspiracy to supply against Cheung and Trudgeon.<sup>181</sup> The Prosecution must also further establish that both Cheung and Trudgeon had also agreed for Trudgeon to further supply the drugs to another person or persons.<sup>182</sup> Significantly, the court found that even though Cheung may have expected or even known that Trudgeon intended to further supply the drugs to others, this was not enough to ground a conspiracy.<sup>183</sup> It was necessary to prove that Cheung agreed with Trudgeon for this to be done.<sup>184</sup> Perhaps

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176. *Maroney v. The Queen*, (2003) 216 CLR 31 (Austl.).

177. Kirby J borrowed the words of Mantel LJ in *R v. Barker* (Unreported, Court of Appeal of England and Wales), March 27, 1998), who cited *R v. Drew*, [2001] 1 Crim. App. 91, 94 (Eng.) per Waller JA, in a case in which the appellant and another man, by a combined effort, obtained indecent photographs of children from the internet and were charged with having ‘conspired together to distribute indecent photographs of children’ contrary to section 1 of the Criminal Law Act 1977 c. 45 (U.K.) and the substantive offense of conspiring contrary to the Protection of Children Act 1978 c. 37 (U.K.), which provides that ‘a person is to be regarded as distributing an indecent [photograph] . . . if he . . . exposes or offers it for acquisition by *another person*’.

178. (1988) 39 A Crim R 252 (Austl.).

179. *Id.* at 253, 259.

180. *Id.* at 263.

181. *Id.* at 256–57 per Gleeson CJ and 263–65 per Lee CJ at CL.

182. *Id.*

183. *Id.*

184. A similar position was adopted in *R v. Moran & Mokbel* (1988) 104 A Crim R 47 (Austl.), where the Court stated that mere recklessness as to what the recipient intended to do with the drugs is insufficient.

acknowledging the difficulty of this for the prosecution, Lee CJ at CL did note that while a conspiracy was not made out, the prosecution could still charge Trudgeon for aiding and abetting Cheung in the offense of supplying heroin, notwithstanding that the Poisons Act 1966 (NSW)<sup>185</sup> does not make it an offense to buy heroin.<sup>186</sup>

It would thus appear that while Australian courts are reluctant to convict a drug recipient for a simple request to his supplier for drugs, they are more ready to premise a conviction on an abetting, procuring or inciting of the supply.<sup>187</sup> This was seen in *Maroney*, where the accused was convicted for procuring the supply of drugs to himself under ss 4 and 6 of the Drugs Misuse Act 1986 (Qld) read with section 7 of the Criminal Code (Qld).<sup>188</sup> This would also be consistent with the position stated by Lee CJ at CL in *Trudgeon*,<sup>189</sup> as well as with *R v. Eade*<sup>190</sup> and *Castle v. Olen*.<sup>191</sup>

A final point worth highlighting is that even when incitement or procurement is concerned, there must be more than a mere request from a recipient to a supplier. This was illustrated in *R v. Eade*,<sup>192</sup> where the accused was charged for inciting one Ms. Hart to supply him with drugs. Counsel for the accused submitted that a request from A to B to supply drugs to A cannot amount to inciting supply, otherwise every addict who requests drugs would be liable.<sup>193</sup> The court agreed to some degree and noted that if the supplier had held himself/herself out as ready, willing

185. The predecessor of the current *Drug Misuse and Trafficking Act 1985* (N.S.W.) (Austl.). Like the *Poisons Act 1966* (N.S.W.) (Austl.), the current *Drug Misuse and Trafficking Act 1985* (N.S.W.) (Austl.) does not make it an offense to purchase drugs.

186. *R v. Trudgeon*, (1988) 39 A Crim R at 262 (Austl.).

187. The varying terminology is due to the difference in the statutes across the various jurisdictions. For example, in New South Wales the offense under section 27 of the *Drug Misuse and Trafficking Act 1985* states that any person who aids, abets, counsels, procures, solicits or incites the commission of an offense is guilty of an offense. In Queensland, the offense under section 7(1)(d) of the *Criminal Code Act 1899* states that 'any person who counsels or procures any other person to commit an offence' . . . may be charged with committing it; in Western Australia, see section 553(1) of the *Criminal Code Compilation Act 1913* (W. Austl.); In Victoria, see sections 323(1) (a), (b) and 324(1) of the *Crimes Act 1958* (Vict.). See also the definition of aiding, abetting and counselling: *Giorgianni v. The Queen*, (1985) 156 CLR 473 (Austl.); *R v. Wong*, [2005] VSC 96 (Austl.); *Likiardopoulos v. The Queen*, (2010) 30 VR 654, [2010] VSCA 344 (Austl.); *Arafan v. The Queen*, (2010) 31 VR 82, [2010] VSCA 356 (Austl.); *R v. Russell*, [1933] VLR 59 (Austl.); but cf *A-G's Reference (No. 1 of 1975)* [1975] QB 773 (Eng.). In *R v. Massie* [1999] 1 VR 542 at 554, (1998) 103 A Crim R 551 at 563 (Austl.), Brooking JA, with whom Winneke P and Butt JA agreed, said of "incite" that "[c]ommon forms of behaviour covered by the word are: 'command,' 'request,' 'propose,' 'advise,' 'encourage,' or 'authorize.'"

188. *Maroney v. The Queen*, (2003) 216 CLR 31 (Austl.).

189. 39 A Crim R 252.

190. (2002) 131 A Crim R 390 (Austl.).

191. [1985] 3 NSWLR 26 (Austl.).

192. 131 A Crim R at, 401.

193. *Id.*

and able to supply the drugs, then incitement may not have been made out, given that no real incitement had been required on the part of the requestor of the drugs.<sup>194</sup> An extra element of incitement must thus occur so as to induce the supplier to become ready, willing and able to make the supply.

This approach is also consistent with the position in *Castle v. Olen*, where Yeldham J stated that a mere request to a friend to obtain and supply drugs is insufficient to constitute “causing” that friend to supply drugs.<sup>195</sup> The accused must have done more, either having some authority over the supplier or exerting some pressure on him so as to cause or incite him to supply the drugs.<sup>196</sup>

Thus, in Australia, in order to premise a conviction against an accused for conspiring to traffic/supply drugs to himself/herself it is necessary that those drugs be further trafficked/supplied to other individuals. The Prosecution is also required to prove that it is the agreement of the supplier and recipient that the latter intended to further traffic/supply the drugs received to others—mere knowledge or even an expectation on the part of the supplier that the recipient would do so is insufficient. Further compounding this difficulty is the phrasing of the varying statutes across the different states. In New South Wales, the predicate offense of supply encompasses an agreement to supply, which would cause problems when read with a charge of conspiracy, which itself requires an agreement between the parties. In other states like Western Australia and Queensland, the term “to another” in the substantive offense may offer further difficulties and only fortify the position that the recipient must have intended to traffic/supply another for the offense to be made out. Because of these issues, the general practice has been to charge drug-consuming recipients with incitement or causing another to traffic/supply drugs to the recipient.

#### A. *Canada*

In Canada, the jurisprudence suggests that there must be an intention for a recipient of drugs to further traffic in those drugs for a conspiracy between him/her and his/her supplier to be made out. However, the courts are split as to the requisite level of knowledge or agreement that needs to be shown between recipient and supplier.

This tension is illustrated in *R v. Sokoloski*,<sup>197</sup> where Sokoloski was charged with conspiracy to traffic in methamphetamine. The police had initially arrested Davis and proceeded to search his home. In the midst of that search, Sokoloski had called Davis’s telephone, which was answered by a police officer posing as Davis. In the telephone conversation that followed, Sokoloski had asked for confirmation of delivery of drugs from

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194. *Id.*

195. 3 NSWLR 26.

196. *Id.* at 30.

197. [1977] 2 S.C.R. 523 (Can.).

Davis and arrangements were made for Sokoloski to make payment of C\$1100 on receipt of the drugs. Sokoloski was eventually arrested.

At trial, evidence emerged that the resale value of the drugs was C\$9000. The trial judge was thus prepared to find that Sokoloski had purchased the drugs for the purpose of resale, but acquitted Sokoloski as there was insufficient evidence to find that Davis had agreed to such a resale.<sup>198</sup> The case was then heard on appeal. The Ontario Court of Appeal found that the trial judge was wrong in holding that it was incumbent on the prosecution to prove Davis had agreed to the resale. The Court of Appeal convicted Sokoloski and held that every essential element of a conspiracy to traffic in the drugs had been made out. However, the Court did not articulate which agreement had constituted the conspiracy, that is, whether it was the mere agreement between Davis and Sokoloski for the former to sell drugs to the latter, or whether it was something more.<sup>199</sup> Peter MacKinnon suggests that the Court of Appeal's decision may be interpreted as holding that any agreement of purchase and sale necessarily involves an agreement to transport and deliver the drugs, and thus that, in any case where a purchaser solicits a purchase of drugs, a conspiracy to traffic has been made out.<sup>200</sup>

Sokoloski appealed to the Supreme Court of Canada. Justice Martland, on behalf of the majority of the Court, dismissed the appeal. The majority held that Sokoloski's purchase of the drugs was for the purpose of resale and that this constituted a conspiracy to traffic. In a judgment that continues to be the subject of debate, the majority in the Supreme Court stated that it was "an error in law to hold that in order to establish a conspiracy, as charged, it was necessary to prove an agreement between the parties jointly to . . . sell . . . or deliver a controlled drug," but then went on to state that "with respect for those members of this Court who have taken the contrary view, [we] do not regard the view expressed by the Court of Appeal in this case as resulting in the proposition that any purchaser of a controlled drug, perhaps a school boy, is party to a conspiracy to traffic in that drug regardless of the quantity sold."<sup>201</sup> This appears to suggest that the other members in the minority took the view that a drug-consuming recipient may be liable for engaging in a conspiracy to traffic where he makes an order of drugs from a supplier, but this does not seem to be reflected in the minority's judgment.

The minority, led by Chief Justice Laskin, held that the appeal should be allowed and the acquittal restored. As for the Singapore Court of Appeal in *Ali bin Mohamad Bahashwan*, one part of Chief Justice Laskin's reasoning was that the statutory framework of the present issue strongly suggests that Parliament, having made clear the liability of

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198. *Id.*

199. Peter MacKinnon, *The Contract as Conspiracy: A Critique of Regina v. Sokoloski*, [1977] 2 S.C.R. 523, 13 N.R. 191 10 OTTAWA L. REV. 448 (1978).

200. *Id.* at 450-51.

201. *Sokoloski*, 2 S.C.R. at 535.

a seller of a controlled drug, was content to limit the culpability of the buyer to situations in which his purchase was for resale.<sup>202</sup> It would thus be inappropriate to convict Sokoloski of a conspiracy, as this would be an overreaching of policy unintended by Parliament. The other part of the Chief Justice's reasoning was premised on his finding that a seller and buyer are not parties to the same promise—the agreement between the two reflects different promises in a bilateral contract.<sup>203</sup>

This case demonstrates the difficulty of the matter. As the table below illustrates, there was variance in the reasoning of the judges at each level of the Canadian court system:

Court	Outcome and Reasoning
Trial Judge (Judge Shea)	Acquittal as there was insufficient evidence to find that the seller (Davis) had agreed to the buyer's subsequent resale of the drugs
Court of Appeal (Dubin JA)	Conviction as all elements of a conspiracy to traffic had been made out
Supreme Court of Canada (minority) (Laskin CJ, Judson, Spence and Dickson JJ)	Acquittal as (1) Parliament had not intended to criminalize the purchase of drugs and (2) in any event, an agreement between buyer and seller is not the same as the promise required to constitute a conspiracy
Supreme Court of Canada (majority) (Martland, Ritchie, Pigeon, Beetz and de Grandpre JJ)	Conviction as the buyer (Sokolovski) had intended to resell the drugs

The Supreme Court of Canada's decision has not escaped criticism.<sup>204</sup> One obvious difficulty, as expressed aptly by Paciocco J in the subsequent case of *R v. Meyer*, is that the majority in *Sokoloski* does not describe what is required for conviction; it simply comments on what is *not* required.<sup>205</sup>

Peter MacKinnon identified three possible interpretations<sup>206</sup>:

- (1) a conspiracy exists in the simple agreement between a seller and buyer to engage in a narcotics transaction, or
- (2) a conspiracy exists where the seller knows that the buyer intends to resell the narcotics, or
- (3) a conspiracy exists only where the seller and buyer both agree to become part of the supply chain of the other or otherwise undertake a narcotic enterprise in common.

This issue is by no means settled in Canada, with courts taking differing approaches, as highlighted in the table below.

202. *Id.* at 529.

203. *Id.* at 528.

204. See MacKinnon, *supra* note 199; *R v. Meyer*, [2012] O.J. No. 6235 (Can. Ont. Ct. J.) (QL).

205. MacKinnon, *supra* note 199. The author sets out three distinct readings of the decisions in *Sokolovski*, one of which (supported by the Court of Appeal) is that a drug-consuming recipient can be liable for ordering drugs for himself.

206. *Id.* at 451.

Interpretation	Cases in Favor
(1) A conspiracy exists in the simple agreement between a seller and buyer to engage in a narcotics transaction	Court of Appeal in Sokoloski, [1977] 2 SCR 523; Trial Judge in R v. Sappier, [2017] NBJ No 254
(2) A conspiracy exists where the seller knows that the buyer intends to resell the narcotics	R v. Longworth, Freeman and Newton, (1982) 67 CCC (2d) 554 (Ont CA); R v. Sohrabian, [1993] OJ No. 4108 (Ont CA); R v. Chaulk, [1991] NJ No 144 (Nfld SC(CA)); R v. Gdanski, [1997] OJ No. 382 (Ont Gen Div); R v. Martin, [1993] NBJ No 385 (NBQB); R v. Topleh, (1977) 3 BCLR 304 (CA); R v. Rowbotham, (1984) 13 WCB 105 (Ont HCJ)
(3) A conspiracy exists only where the seller and buyer both agree to become part of the supply chain of the other or otherwise undertake a narcotic enterprise in common	Trial Judge in Sokoloski, [1977] 2 SCR 523; Supreme Court of Canada (minority) in Sokoloski, [1977] 2 SCR 523; R v. Meyer, [2012] OJ No 6235; R v. Forbes, (1985) 61 AR 316 (Alta CA); R v. Alcantara, [2008] AJ No 1577 (Alta Prov Ct); and R v. Kelly, [1984] SJ No 446 (Sask CA); In R v. Genser, [1987] 2 SCR 685; Court of Appeal in R v. Sappier, [2017] NBJ No 254

While the majority of cases appear to fall either under approach 2 or 3, *Sappier* illustrates that approach 1 is not out of the question.<sup>207</sup> In *Sappier*, the trial judge found a conviction premised on the simple agreement between buyer and seller, despite it being some forty years since *Sokoloski*. Thus, the issue is anything but trite. Further, there appears to be no consensus or clarity as to the requisite *mens rea*, even in cases that fall between approaches 2 and 3. Thus, while Canadian jurisprudence provides no definitive answers, it does illustrate the Courts' awareness of that the seller's knowledge as to the buyer's intent to further trafficking in the drugs is a key consideration.

Like Australia, Canada appears to find that the recipient must have intended to further traffic the drugs to a third party. However, unlike in Australia, the Canadian courts appear to be divided on the issue as to the level of knowledge or agreement required on the part of the supplier—is mere knowledge sufficient or must the supplier agree with the recipient that the latter will further traffic the drugs to other parties?

### B. *The United States*

The Courts in the United States appear to take the position that a mere buyer-seller agreement between a drug-consuming recipient and a drug supplier cannot amount to a conspiracy to traffic in the drugs.<sup>208</sup> In support of this conclusion, there are two main schools of thought. The first contends that in a buyer-seller relationship, there is an absence of a common illegal purpose given the difference in the buyer's and the

207. R v. Sappier, [2017] N.B.J. No. 254 (Can. N.B. C.A.).

208. U.S. v. Boidi, 568 F.3d 24, 30 (1st Cir. 2009); U.S. v. Gibbs, 190 F.3d 188, 199 (3d Cir. 1999); U.S. v. Mills, 995 F.2d 480, 485 (4th Cir. 1993); U.S. v. Delgado, 672 F.3d 320, 333 (5th Cir. 2012); U.S. v. Brown, 726 F.3d 993, 1001 (7th Cir. 2013); U.S. v. Donnell, 596 F.3d 913, 924–25 (8th Cir. 2010); U.S. v. Lennick, 18 F.3d 814, 819 (9th Cir. 1994); U.S. v. Bacon, 598 F.3d 772, 776–77 (11th Cir. 2010); U.S. v. Baugham, 449 F.3d 167, 171 (D.C. Cir. 2006).



seller's intentions—one aims to buy and the other to sell.<sup>209</sup> This is similar to the second part of Chief Justice Martland's minority decision in *Sokol-ski*.<sup>210</sup> As such, further evidence, such as a shared purpose to advance further distribution of the drugs, is required to complete a conspiracy.<sup>211</sup>

The second school of thought takes the position that when a buyer purchases illegal drugs from a seller, two persons have agreed to a concerted effort to achieve the unlawful transfer of drugs from seller to buyer; thus, a conspiracy is made out.<sup>212</sup> However, a limited "buyer-seller exception" is applied to exclude the buyer from liability. This exception operates to shield "street-level users" and consumers, given their lower culpability in the drug trade.<sup>213</sup> The scope of this exception appears to be extremely limited and the courts scrutinize the extent of the buyer's role and knowledge of the overall conspiracy in its application. Where the conspiracy is to further traffic in the drugs, the exception will obviously not apply. Interestingly, it should be noted that the courts have found that other factors could also push a drug-consuming recipient outside the scope of this exception—for example, where he/she introduces other buyers to the drug supplier, or where the drug-consuming recipient makes drug purchases from the supplier in such frequency or quantity that the drug-consuming recipient is dependent on the supplier as a source of supply, and thus has a stake in the supplier's continued success in supplying to others so as to ensure the continued availability of the supplier as a source.<sup>214</sup> This is a clear recognition, albeit a limited one, that drug-consuming recipients inevitably contribute to the problem of drug trafficking.

While uncommon in the United States, the proposition that a drug-consuming recipient can be liable for engaging in a conspiracy is not without basis. In *Hampton v. State*, law enforcement officers had secured wiretaps on a supplier's phone which exposed Hampton as a purchaser of cocaine.<sup>215</sup> Hampton was charged and convicted after trial for engaging in a conspiracy to traffic in cocaine. On appeal, the Florida Court of Appeal upheld the conviction and found that a conspiracy could exist between a drug-consuming recipient and his/her supplier. In supporting their decision, the Florida Court of Appeal noted that<sup>216</sup>:

[O]ur view is consistent with legislative intent. It does not appear that the Legislature intended to make it more difficult to establish conspiracy to commit trafficking than it would be to establish conspiracy to commit any other crime. [emphasis added]

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209. *Donnell*, 596 F.3d at 924–25; *Brown*, 726 F.3d at 1001; *U.S. v. Parker*, 554 F.3d 230, 234 (2d Cir. 2009); all cited in *State v. Allan*, 83 A.3d 326 (Conn. 2014).

210. *Sokoloski v. The Queen*, [1977] 2 S.C.R. 523, 528 (Can.).

211. *Donnell*, 596 F.3d at 924–25; *Brown*, 726 F.3d at 1001.

212. *Parker*, 554 F.3d at 234; *Delgado*, 672 F.3d at 333.

213. *Delgado*, 672 F.3d at 333.

214. *Parker*, 554 F. 3d at 239.

215. 135 So. 3d 440 (Fla. Dist. Ct. App. 2014).

216. *Id.* at 442.

The Florida Court of Appeal went on to highlight that in enacting § 893.135(5) (which is Florida's statutory offense of engaging in a conspiracy to traffic),<sup>217</sup> the Legislature had intended for trafficking conspirators to be punished just as harshly as actual traffickers. This reasoning is sound and logical. While courts across other jurisdictions appear to be eager to raise the bar for the prosecution in establishing a conspiracy against drug-consuming recipients, the Florida Court of Appeal offers a refreshing view premised on a plain reading and application of the law—as is the role of the courts. As indicated by the Florida Court of Appeal, in the absence of statutory phrasing to this effect, it is difficult to see how the Legislature had singled out the offense of engaging in a conspiracy to traffic to be more difficult to establish than any other offense. Indeed, it may be argued that given the enactment of a separate and distinct conspiracy provision (§ 893.135(5)) within the drug offenses chapter of the Florida Statutes, which is in addition to the general conspiracy provision in § 777.04(3) which applies to the chapter on general offenses, the legislative intent is to ensure that the conspiracy offenses apply with equal force in its plain reading against all drug offenses.

An argument may be made that this Floridian approach is compatible with Singapore. Singapore, like Florida, has its conspiracy provision in the Penal Code, which is applicable to general offenses, as well as in the Misuse of Drugs Act, indicating Parliament's clear intention to have it apply with equal force in its plain and ordinary meaning, and without further unnecessary elements imposed on it by the courts.

#### IV. REVISITING THE SINGAPORE POSITION

Having examined the major common law jurisdictions, the dissertation now returns to Singapore to revisit the issue, drawing on the salient issues observed internationally with a view to see if any learning points can be adopted. The issue at hand is whether a drug-consuming recipient can be liable for conspiring to traffic drugs to himself, or whether the approach taken in *Ali bin Mohamad Bahashwan* and *Liew Zheng Yang* is correct—that the Prosecution must show that the recipient had intended to further traffic the drugs to a third party.

First, the proposition that a drug-consuming recipient can be liable for engaging in a conspiracy to traffic to himself does find some support

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217. FLA. STAT. § 893.135(5) (2019) states:

Any person who agrees, conspires, combines, or confederates with another person to commit any act prohibited by subsection (1) commits a felony of the first degree and is punishable as if he or she had actually committed such prohibited act. Nothing in this subsection shall be construed to prohibit separate convictions and sentences for a violation of this subsection and any violation of subsection (1).

The primary offense is found in § 893.135(1), which states that:

Any person who knowingly sells, purchases, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of, in excess of [drug name and quantity], commits a felony of the first degree, which felony shall be known as 'trafficking in [drug name].'

internationally, particularly in the UK and in the United States—at least in Florida. One important point observed from the Floridian courts is that in the absence of express legislative intent as expressed in the words of a statute, the courts should be slow to read additional requirements into a statutory offense. It does not appear that Singapore’s legislature had intended to make the offense of conspiring to traffic any more difficult than any other conspiracy offense. Indeed, like Florida, in addition to the offense of conspiracy being encapsulated in the general Penal Code, Singapore’s legislature also saw fit to expressly include in the Misuse of Drugs Act a specific provision for conspiracy to commit any offenses under the Misuse of Drugs Act. If anything, this demonstrates Parliament’s intent to ensure that the conspiracy provisions should apply with equal force, in its plain and ordinary meaning, to drug offenses. As was stated in *Thompson v. Goold & Co*, “[i]t is a strong thing to read into an Act of Parliament words which are not there, and in the absence of clear necessity it is a wrong thing to do.”<sup>218</sup>

Second, unlike in some states in Australia and the UK, Singapore’s substantive offense of trafficking does not use the phrase “to another.” Even in the UK, as evinced in *R v. Drew and R v. Jackson*, the Courts have been prepared to convict accused persons for conspiring to supply drugs to themselves, without the additional requirement that the drugs be further supplied or trafficked to another.

Third, even if one were to adopt the *Liew Zheng Yang/Ali bin Mohamad Bahashwan* approach—that in order for a conspiracy to be made out, the Prosecution must show that the recipient had intended for the drugs to be further trafficked to a third party—both the High Court in *Liew Zheng Yang* and the Court of Appeal in *Ali bin Mohamad Bahashwan* failed to consider the requisite level of knowledge or agreement on the part of the supplier. Since a conspiracy necessitates an agreement between at least two parties, it is difficult to see how a conspiracy is established in the absence of the supplier’s agreement to this further act of trafficking. This was the approach in Australia, as articulated in *Trudgeon*.<sup>219</sup> In Canada, while the courts are split on whether knowledge suffices, there is at least judicial consideration of the issue. The judgments in *Liew Zheng Yang* and *Ali bin Mohamad Bahashwan* make no mention of it.

Fourth, *Ali bin Mohamad Bahashwan* adopted an overly broad approach to the victim rule in *Tyrell* to include drug-consuming recipients. This was certainly not the intent of Singapore’s Parliament, as evidenced by the strong reference in Parliamentary speeches to the intent of the Misuse of Drugs Act to criminalize both traffickers and consumers alike, with severe penalties for both trafficking and consumption of drugs. Even in the UK, where the victim rule in *Tyrell* applies and penalties for

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218. [1910] AC 409 (HL) 420 (appeal taken from Eng.) (U.K.).

219. (1988) 39 A Crim R 252 (Austl.).

consumption are arguably far less severe when compared to trafficking, it has been noted that this rule should not extend to drug consumers.<sup>220</sup>

Finally, as indicated in the illustrative graph “Overall Culpability of a Drug-Consuming Recipient in a Conspiracy Scenario,” there can be varying levels of culpability, and in some cases, the culpability of the drug-consuming recipient may exceed that of the courier-supplier. It may thus be in the public interest, in line with the overall aims of the Misuse of Drugs Act, to prosecute these individuals. The discretion on whether to proceed with such prosecution should lie with the Public Prosecutor, who is able to take into consideration both offender-specific and offense-specific factors, some of which may not be admissible in court (such as the drug history of the accused and any known intelligence on their involvement in drug syndicates). The Public Prosecutor already wields considerable discretion in whether to prefer charges against an individual for trafficking. Given the wide scope of the substantive trafficking offense, an individual who casually passes a single straw of heroin to a friend for consumption could potentially be charged, but it would be rare for such a case to be prosecuted. Prosecutors will consider the background of the accused and the individual facts of the case to come to a decision in the public interest. There is no reason why this discretion cannot be applied similarly to a drug trafficking conspiracy scenario.

The outcome of *Liew Zheng Yang* and the Court of Appeal’s reasoning on this in *Ali bin Mohamad Bahashwan* leaves much to be desired. While the decision requires the Prosecution to prove that the drugs were to be further trafficked to a third party, this is unfounded in law. Further, the decision does not address the level of knowledge or agreement required on part of the supplier. Singapore’s legislature had not intended to make engaging in a conspiracy to traffic any more difficult to prove than any other conspiracy offense. The original decision by the District Judge is arguably the approach which is the sounder approach in law and logic and more consistent with existing jurisprudence. Notwithstanding that the Court of Appeal has already made its views known via *Ali bin Mohamad Bahashwan*, a future criminal reference, with further consideration of the points raised above, may result in a different outcome. Even if it does not, at least further clarification on the issues raised would serve to provide greater certainty on the law with respect to conspiracy to traffic drugs.

## CONCLUSION

Since *Liew Zheng Yang* and *Ali bin Mohamad Bahashwan*, the law in Singapore on engaging in a conspiracy to traffic drugs has changed considerably. In addition to having to prove the conspiracy, prosecutors must now prove beyond reasonable doubt that the recipient of the drugs had intended to further traffic the drugs to a third party. The High Court

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220. Williams, *supra* note 86; R v. Drew [2000] 1 Crim. App. 91 (Eng.).

and Court of Appeal's reasoning for this is that it would be inappropriate to convict a drug-consuming recipient for conspiring to traffic drugs to himself. While this proposition finds support in some jurisdictions, support is not universal, as there are other jurisdictions which allow for such a conviction. In addition, even in the jurisdictions that do not allow for this, there is detailed reasoning on the requirement of the level of knowledge/agreement between the supplier and recipient with respect to the additional element that the recipient had intended to further traffic in the drugs. This reasoning is lacking in Singapore. In any event, depending on offender-specific and offense-specific considerations, the culpability of a drug-consuming recipient can be severe enough to warrant prosecution for conspiracy, and the Public Prosecutor should be given the discretion to prosecute if the public interest requires this.

In conclusion, it is envisioned that this change in the law will pose difficulties in enforcing and prosecuting drug offenses, which is not consistent with the purpose of the Misuse of Drugs Act and Singapore's well-known zero-tolerance approach to drug offenses. A future Court of Appeal should revisit the issues raised in *Liew Zheng Yang* and *Ali bin Mohamad Bahashwan* to ensure consistency in the law and to advance the *Misuse of Drugs*' purpose in deterring drug offenses.

