Wilful Blindness in the Context of the Presumption of Knowledge:
***Gobi a/l Avedian v Public Prosecutor* [2021] 1 SLR180**

I. Executive Summary

Under section 7 of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) (the "**MDA**"), it is an offence, with consequences that may extend to the mandatory death penalty, to import into or export from Singapore controlled drugs. As part of proving the charge, the Prosecution must prove that the accused was both in possession of, and had knowledge of the controlled nature of the drugs involved. Further, under section 18 of the MDA,the Prosecution is also allowed to rely on a presumption -under certain circumstances- that the accused did indeed have said possession (section 18(1)) and knowledge (section 18(2)). If the accused is unable to rebut these presumptions, the elements of possession and knowledge are made out under section 7.

In the prior case of *Adili Chibuike Ejike v Public Prosecutor* [2019] 2 SLR 254 ("***Adili***"), the Court of Appeal ("**CA**") made certain rulings with regard to the interplaybetween the presumption of possession under *section 18(1)* of the MDA and the doctrine of wilful blindness.[1]In*Gobi a/l Avedian v Public Prosecutor* [2021]1 SLR 180, the CA further explored the interplay between the presumption of knowledge of the nature of the drugs under *section 18(2)* of the MDAand the doctrine of wilful blindness.

As part of its decision, the CA also clarified under what circumstances an appellate (or higher) court should exercise its power of review of an earlier appellate decision,under the newly enacted section394I of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) (the "**CPC**").

II. Material Facts

Gobi wasa Malaysian citizen working in Singapore at the time of the offence. In 2014, he approached his friend ("**Guru**") for suggestions as to a part-time job, as he needed funds for his daughter's operation. Guru introduced Gobi to an acquaintance ("**Vinod**"), who told Gobi that he could earn some money by delivering drugs to Singapore. Vinod further told Gobi that the drugs were mixed with chocolate and were to be used in discos and that they were "ordinary" and "not serious". Vinodassured Gobi that if he wereapprehended, he would receive "just a fine or a small punishment".

Gobi initially refused Vinod's offer as he was "scared". However, as the date of his daughter's operation approached, he became "desperate" as he had not raised enough money. He approached another friend ("**Jega**"), and asked Jega whether Vinod's offer "would be a problem". Jega responded that suchdrugs were "not…very dangerous" and "should not be a problem". Gobi testifiedthat he had no reason to disbelieve Jega since Jega frequented discos and would have no motive to lie to him. In addition, Jega did not know eitherVinod or Guru. Thus, Gobi decided to accept Vinod's offer and proceeded to deliver drugs for him. He was paid RM500 for each delivery. On each occasion, he would collect the packets of drugs from Vinod's brother. In doing so, he observed that the drugs did indeed look like they had been mixed with chocolate.

In December 2014, Gobi was stopped at Woodlands Checkpoint in the middle of a delivery. He later directed Central Narcotics Bureau ("**CNB**") officers to the drugs in his motorcycle. Subsequently, hewas charged with one count of importing not less than 40.22g of diamorphine, a Class A controlled drug, an offence under section 7 of the MDA. He was thensentenced to death.

III. Procedural History

[1]Generally, wilful blindness refers to the deliberate shutting of one's eyes to an obvious situation.

At trial, the High Court ("**HC**") accepted Gobi's defence that he believed the drugs to be a mild form of "disco drugs" mixed with chocolate, rather than diamorphine (a controlled drug under the MDA). The HC held that as such, Gobi had rebutted the section 18(2) presumption, and acquitted him of the capital charge under section 7 of the MDA.However, the HC found that Gobi was nonetheless still guilty of the offence of attempting to import a Class C controlled drug (under the MDA), and thus sentenced him to 15 years' imprisonment and 10 strokes of the cane instead.

The Prosecution appealed the HC's decision to the CA. In its 2019 decision (the "**2019 decision**"), the CAdisagreed with the HC's finding that Gobi had rebutted the section 18(2) presumption. As the Public Prosecutor did not issue Gobi a certificate of substantive assistance,[2] the CA imposed the mandatory death penalty for Gobi.

Following the concluded appeal, Gobifiled a criminal motion pursuant to section 394I of the CPC for the CA to review its2019 decision. It argued that the 2019 decision was called into question by the CA's decision in *Adili*, which was handed down after the 2019 decision.

IV. Issues on Appeal

The CA first discussed thestatutory framework governing applications to reopen concluded criminal appeals, before applying it to the current appeal.While the CA rejected Gobi's arguments for re-opening the case, it ultimately decided that there were legal arguments, based on the changes in the law arising from the*Adili*decision, that provided the CA a basis for re-opening the case.

A. Application to review an earlier decision in a concluded criminal appeal

(i) Framework governing applications to reopen concluded criminal appeals

The CA first established that there were two stages to the court's inquiry in a review application. At the first stage, the court considers whether it should exercise its power of review to *reopen* a prior decision in a concluded criminal appeal. If the court is satisfied that it should exercise its power, at the second stage of the inquiry, it considers whether the conviction or sentence in the previous decision can stand in the light of the material put forth in the review application.

Under the first stage, the legal test for re-opening a prior decision is whether there is "sufficient material … on which the appellate court may conclude that there has been a miscarriage of justice". This comprises two elements: sufficiency of material, and a potential miscarriage of justice.

1. Sufficient material. The material put forward in the review application must be "sufficient", meaning that it must satisfy all the requirements laid out in section 394J(3).*First*, the material must not have been canvassed at any point in the criminal matter in respect of which the earlier decision was made, before the filing of the current application.*Second*, even with reasonable diligence, the material could not have been adduced in court earlier.*Third*, the material should be compelling, in that it is reliable, substantial, powerfully probative, and capable of showing almost conclusively that there has been a miscarriage of justice in the criminal matter in respect of which the earlier decision was made. Further, where the material consists of legal arguments, these arguments must be based upon a *change in the law* that arose from any decision made by a court,*after* the conclusion of all proceedings relating to the criminal appeal that is sought to be re-opened.

[2] A certificate of substantive assistance may be granted by the Attorney-General's Chambers to drug-trafficking offenders if the Public Prosecutor certifies that the offender has "substantially assisted" the CNB in disrupting drug trafficking activities within or outside Singapore. If granted, the certificate gives the court the discretion to reduce an offender's sentence from the death penalty to life imprisonment and 15 strokes of the cane.

2. Potential miscarriage of justice. This is a *substantive* requirement. It is not necessary for the court to definitively concludethat there has been in fact a miscarriage of justice;the legal test is satisfied as long as there is sufficient material on which the court "may" conclude that there has been a miscarriage of justice. The court may only come to that conclusion if the decision in the criminal appeal that is sought to be reopened is "demonstrably wrong", i.e. the court finds it apparent, based only on the evidence tendered in support of the review application and without further inquiry, that there is a "powerful probability", and not just a "real possibility" that that decision is wrong.

(ii) Present application to reopen the case

The CA decided there was sufficient legal basis for it to reopen the 2019 decision.Pursuant to section394J of the CPC, there was a "powerful probability" that the 2019 decision was "demonstrably wrong" in the light of legal arguments which are now but were not then available (under section 394J(5)(*a*) read with section 394J(6) of the CPC).

TheCA's analysis revolved around *Adili*, which analysed and restated a number of points pertaining to the presumption of possession under section 18(1) of the MDA and the relevance (or lack thereof) of the doctrine of wilful blindness in that context.The CA noted that *Adili* restated the law in two ways: *first*, the need to keep the concepts of actual knowledge and wilful blindness "separate and distinct"; and *second*, that the doctrine of wilful blindness is "a legal concept or construct" involving "a question of mixed law and fact", whereas the section 18 presumptions are "presumptions of fact".

The CA referred tocertain of Gobi's arguments based on *Adili*. *First*,Gobi argued thatthe doctrine of wilful blindness should be irrelevant to, and excluded from, any attempt to invoke the 18(2) presumption of knowledge, and therefore from the analysis of whether the presumption had been rebutted. The Prosecution should thus not have been entitled to invoke the section 18(2) presumption of *actual* knowledge if its case at trial was of wilful blindness. *Second*, the Prosecution's case at trial was in fact*not* of actual knowledge, in that Gobi did not in fact believeVinod and Jega. Rather, the Prosecution's case was at most one of wilful blindness, based on the contention that Gobihad *no reason to believe* either Vinod or Jega and therefore *ought not* to have believed them. Thus, the Prosecution could not have invoked the section 18(2) presumption of *actual* knowledge. *Third*, though the Prosecution changed the basis of its case from wilful blindness (at trial) to actual knowledge (on appeal), Gobi argued that the CA should proceed on the basis of the Prosecution's actual case at trial – that he was reckless, negligent, or otherwise wilfully blind to the nature of the drugs – rather than proceeding on the presumption that he had knowledge of the nature of the drugs.And since recklessness and negligence were not sufficient to make out the requirement of intent for the capital charge, and wilful blindness was not made out, Gobi argued that his conviction for the capital charge should be set aside, and that he should instead be convicted of the amended (and lesser) charge of attempting to import a Class C drug.

The CA held that these arguments satisfied the requirement of "*sufficiency*" under section 394J of the CPC. These legal arguments were not canvassed in the 2019 decision because given the state of the law then, they could not have been raised even with reasonable diligence. The requirement of a "*potential miscarriage of justice*" had also been satisfied: if the CA decided in this criminal motion to apply the *Adili*principles in relation to the doctrine of wilful blindness to the section 18(2) presumption, and held that wilful blindness was not encompassed within that presumption, and if it further found that the Prosecution's case at the trial was one of wilful blindness, then the Prosecution could not have invoked the section 18(2) presumption against Gobi.In that light, the 2019 decision could be considered to be demonstrably wrong, insofar as it was based on the ground that Gobi*had failed to rebut* the section 18(2) presumption.

As such, the CA held there was a need to reconsider the 2019 decision and exercise its power of review under section 394J of the CPC, to assess whether the outcome there would still be the same despite subsequent legal developments. Specifically:whether to extend the approach laid down in *Adili* regarding the section 18(1) presumption to the issues that arose in the 2019 decision; and, if theProsecution's case at the trial was indeed one of wilful blindness, whether the Prosecution could prove beyond a reasonable doubt that Gobi was wilfully blind to the nature of the drugs.

B. Reviewing the 2019 decision

The CA considered three main issues:

(i) the interplay between the section 18(2) presumption and the doctrine of wilful blindness;
(ii) whether there was a change in the Prosecution's case at trial and on appealregarding Gobi's knowledge of the nature of the drugs involved; and
(iii)Gobi's conviction in the 2019 decision.

(i) Interplay between the section 18(2) presumption and the doctrine of wilful blindness

1. Relevance of wilful blindness to the section 18(2) presumption. The CA first noted that there was no reason in principle why the *Adili* holdings in respect of the section 18(1) presumption should not be extended to the section 18(2) presumption.*First*, the inquiry as to whether an accused is wilfully blind to certain matters should be kept separate from the question of whether he has rebutted the presumption of knowledge under section18(2). This was because the statutory presumptions under sections 18(1) and 18(2) were evidential presumptions that operated to presume specific facts, where the section 18(2) presumption operated to presume the *fact* that the accused person had *actual knowledge* of the nature of drugs in his possession. In contrast, whether an accused person is wilfully blind is a question of *mixed law and fact*,involving an intensive fact-sensitive inquiry. Thus, the question of whether one is wilfully blind cannot be the subject of an *evidential presumption.*Moreover, wilful blindness is a state which falls short of actual knowledge, but is nevertheless treated as the legal equivalent of actual knowledge. Thus, an evidential presumption concerning actual knowledge cannot be invoked to establish a fact which is accepted not to be true. These points, which were all noted in *Adili* in the context of the section 18(1) presumption, applied with equal force to the section 18(2) presumption.

Second, as a matter of procedural fairness in criminal proceedings, keeping the two inquiries separate and distinct is important to ensure that an accused knows the case he has to meet. An accused should not have to run a potentially inconsistent defence in an attempt to address the Prosecution's undifferentiated, conflated allegations of both actual knowledge and wilful blindness.

The CA thus held that the knowledge that was presumed under section18(2) was confined to *actual knowledge* of the nature of the drugs in the accused's possession, and did not encompass knowledge of matters to which the accused person was said to be wilfully blind. It followed that the Prosecution could not invoke the section 18(2) presumption to presume that the accused was wilfully blind to the nature of the drugs in his possession.The doctrine of wilful blindness was therefore irrelevant to the analysis of whether the section 18(2) presumption has been rebutted.

Where the Prosecution's case was that the accused was wilfully blind to the nature of the drugs in his possession, it must prove its case beyond a reasonable doubt, such that he should be treated as though he had actual knowledge of that fact. These were discrete inquiries which should notbe conflated.

2. The nature of the inquiry into whether the section 18(2) presumption has been rebutted. It was undisputed that to rebut this presumption, the accused is only required to establish that he did not know the nature of the drugs in his possession. In addition, where the accused seeks to prove that he lacked the actual knowledge presumed under section 18(2), he must produce*sufficient evidence*of the basis upon which has arrived at that subjective state of mind. It is notnecessary for

the accused to establish that he held a firm belief as to, or actually knew, what the thing in his possession was.

There are two broad categories of cases where an accused has successfully rebutted the presumption. The *first* iswhere the accused is able to prove he believed he was carrying something innocuous,even if he is unable to specify exactly what that was.This may occur where an accused, who is asked by a friend to deliver some bundles, does not even suspect that anything was amiss or that he had been asked to do anything illicit. Thiswould be incompatible with the belief that the bundles contained controlled drugs, much less the specific drugs in question. The *second*is where the accusedis able to prove that he was in possession of a contraband item other than the specific drug in his possession. This may occur where the accused has a consistent pattern in dealing in drugs of a sort or quantity that did not attract the death penalty. Conversely, where an accusedhas a history of working with a known drug syndicate leader, and was promised substantial monetary rewards for bringing "bundles" into Singapore, it would be incredible that such an accused would have accepted at face value that said bundles only contained contraband tobacco and not the actual controlled drug. The section 18(2) presumption would not be rebutted there.

Finally, an assertion or finding of *ignorance*or *indifference*is insufficient to rebut the presumption. An accused who is *indifferent* to what he is carrying cannot be said to believe that the nature of the thing in his possession is something other than or incompatible with the specific drug he is in possession of. He is simply nonchalant about what that thing is, and therefore cannot have formed any view as to what the thing *is* or *is not*.To elaborate, being indifferent would mean that the accused had the ready means and opportunity to verify what he was carrying, but failed to take the steps that an ordinary reasonable person would have taken to establish the nature of the thing, and also failed to provide any plausible explanation for that failure.If the Prosecution invokes the presumption and the court concludes that the accused was in fact indifferent to the nature of what he was carrying, then he will be treated as *not* having rebutted the presumption.

3. The requirements of wilful blindness in the context of knowledge of the nature of the drugs. The doctrine of wilful blindnessis justified by the need to deal with accused persons who attempt to escape liability by deliberately avoiding actual knowledge.To prove wilful blindness, the CA set up the following framework, whichthe Prosecution must prove beyond a reasonable doubt:

> (a) The accused had a clear, grounded and targeted suspicion of the fact to which he is said to have been wilfully blind, as opposed to mere indifference. The accusedmust have personally suspected the truth and thus deliberately chosen not to investigate his suspicions. Where possession has been proved or presumed, the *circumstances* in which the accused came into possession of the thing in question would have led him to form a view as to what it was or was not. Nonetheless, if the Prosecution proves that the accusedhad harboured a suspicion that he had not been apprised of the truth, he will be found to have the requisite level of suspicion such that he ought to have investigated further.
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> (b) There werereasonable means of inquiry available to the accused which if taken, would have led him to the truth he sought to avoid. The inquiry would generally be more robust than in the context of knowing possession: it would minimally require him to visually inspect the thing he is carrying. The stronger his suspicions, the more he should have inquired into the truth of what he suspects. Finally, it would not suffice for an accused to claim that he would not have been able to verify the proper name or the scientific name or formulation of the controlled drug in his possession.
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> (c) The accused must have deliberately refused to pursue the reasonable means of inquiryavailable to establish the truth as to what he was carrying.This is satisfied where the

> Prosecution proves the accused chose not to use the reasonable means of inquiry available to him, because he wanted to avoid any adverse consequences of being affixed with such knowledge. Here, the accused already knows that he is carrying an item and suspects that the truth as to its nature is being hidden from him. Thus, he would anticipate that grave and adverse legal consequences will follow from his possession of that item. He should therefore *not* be entitled to refuse to make inquiries, just so that he can profess an ultimately implausible denial of knowledge of the nature of the item.Moreover, the refusal to inquire must have been deliberate and not merely because ofindolence, negligence or embarrassment.

In this regard, the CA emphasised the distinction between the analysis of whether the section 18(2) presumption of *actual knowledge* has been rebutted, and whether a finding of *wilful blindness* should be made.An accused who is indifferent to what he was carrying will not be able to displace the presumption. In contrast, wilful blindness only comes into play where the accused claims he was led to believe something about the nature of the thing he was carrying and the court finds that he suspected that what he was told or led to believe was untrue but nonetheless chose not to investigate his suspicions, because he wanted to avoid any adverse consequences of doing so.

The CA also distinguished the way in which the section 18(1) and section 18(2) presumptions operated. For the latter, where the Prosecution runs a case based on wilful blindness, the question of the accused's knowledge of the nature of the drugs in his possession only arises *after* it has been established that he had possession of the thing that turns out to be drugs, and knew that he had possession. At that stage, where an accused suspects that the thing in his possession is not what he has been told or led to believe it is, then in certain circumstances, he will be expected to verify what that thing is.

(ii) Whether there was a change in the Prosecution's case at trial and on appeal

The CA first noted that there was no dispute that the Prosecution relied on the section 18(2) presumption both at trial and on appeal. Further, there was no dispute that the Prosecution's case on appeal was one of actual knowledge, based on the contention that Gobi did not in fact believe the assurances he had been given by Vinod and Jega as to the nature of the drugs.However, the structure of the Prosecution's closing submissions indicated that its case at the trial was one of wilful blindness *in substance*, and that it sought to establish this through the section 18(2) presumption. As such, the Prosecution's case at the trial was not one of actual knowledge.

The CA then examined whether any *prejudice* was caused to Gobi as a result. In light of the change in the legal position effected by *Adili*, the CA concluded that the Prosecution's change in its case on appealprejudiced Gobi. Gobi argued that Vinod said the drugs were "a mild form of drugs mixed with chocolate for [use] in discos" and would not attract the death penalty. He also believed that this was true in the light of Jega's subsequent assurance that the drugs were "not ... very dangerous" and "should not be a problem". This description of the drugs wasnot compatible with being understood as a reference to diamorphine. There was also nothing to suggest that Gobi subjectively believed the drugs to be diamorphine.Moreover, since the case he faced at trial was one of wilful blindness (not actual knowledge), he wasnever squarely confronted with the case that he did not in fact believe what he had been told by Vinod and Jega, and so could not have responded to such a case.As such, a separate inquiry would have to be taken to determine whether Gobi was wilfully blind to the nature of the drugs such that his conviction on the capital charge remained safe.

(iii) Gobi's conviction in the 2019 decision

TheCA noted that all three requirements under the framework it established must be satisfied for wilful blindness to be made out. The CA then found that the first requirement relating to suspicion was not made out. This was because Gobi had made certain inquiries into the nature of the drugs in question, where he was assured on separate occasions that the drugs were "not serious" ones.

Further, there was no evidence that Gobi had subjectively understood the drugs to be diamorphine; indeed, he had observed that they looked like they had been mixed with chocolate. Thus, given that the Prosecution did not establish, or even suggest, that Gobi had disbelieved what he had been told about the nature of the drugs, or suspected that what he had been told was untrue, his failure to make further inquiries was most negligence or recklessness. As such, wilful blindness could not be made out.The CA thus set aside Gobi's conviction on the capital charge.

V. Conclusion

The CA noted that Gobi acknowledged that he knew that the drugs were illegal and would attract penal consequences. Accordingly, the drugs must have been regulated under the MDA. Since the choice was between convicting Gobi of attempting to import a drug that fell into a category that did not attract the death penalty, against not convicting him of any amended charge at all, and since Gobi himself admitted to engaging in some form of activity that would involve importing a Class C drug, the CA held that the former option ought to be taken. Such an action would also be both consonant with the admitted illegality of his actions and least prejudicial to him. As such, the CA reinstated the sentence of 15 years' imprisonment and ten strokes of the cane that the HC imposed in respect of the amended charge, and backdated the sentence to the date of Gobi's remand.

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