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Possession and Knowledge in the Misuse of Drugs Act: Nagaenthran a/l K Dharmalingam v. Public Prosecutor

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POSSESSION AND KNOWLEDGE IN THE MISUSE OF DRUGS ACT

Nagaenthran a/l K Dharmalingam v. Public Prosecutor[1]

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When the Court of Appeal rendered the decision of Tan Kiam Peng *in 2008, it was unable to come to a conclusive determination of the correct interpretation of s. 18(2) of the Misuse of Drugs Act, a provision pertaining to the presumption of an accused's knowledge of the nature of the controlled drugs in his possession. This issue was presented to a differently constituted Court of Appeal in* Nagaenthran*, which seemingly ruled in favour of the narrow interpretation of s. 18(2) as opposed to the broader interpretation.* Nagaenthran*, however, did not address the questions raised by* Tan Kiam Peng vis-à-vis *s. 18(2) in a comprehensive fashion. Indeed, there are various angles in which light can be shed on the prism that is s. 18(2), and in this paper, three separate and distinct heads will be considered, paying particular regard to cases and perspectives that could have impacted* Nagaenthran*, but were not discussed or elaborated therein: (a) whether there is a practical difference between the two interpretations; (b) what more can be said about the purposive interpretation of s. 18(2) undertaken in* Tan Kiam Peng *and other interpretive issues that may arise for consideration; (c) whether cases from Hong Kong, which has legislation similar to s.18 of the* MDA*, can offer assistance.*

I. OVERVIEW

The challenge of defining the exact contours for the offence of possessing controlled drugs in Singapore has always received great attention from the legal fraternity, perhaps more so in the last few years.[2] Section 18 of the *Misuse of Drugs Act*,[3] which deals with the presumptions of possession and knowledge of controlled drugs, is central to the discourse:

> 18. —(1) Any person who is proved to have had in his possession or custody or under his control —
>
> (a) anything containing a controlled drug;

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1 [2011] 4 Sing. L.R. 1156 [*Nagaenthran*].

2 See *e.g.*, Michael Hor, "Misuse of Drugs and Aberrations in the Criminal Law" (2001) 13 Sing. Ac. L.J. 54 [Aberrations in the Criminal Law]; Michael Hor, "Managing Mens Rea in Singapore" [2006] 18 Sing. Ac. L.J. 314; Toh Yung Cheong, "Knowing, Not Knowing and Almost Knowing" [2008] 20 Sing. Ac. L.J. 677 [Knowing, Not Knowing and Almost Knowing].

3 Cap. 185, 2008 Rev. Ed. Sing. [*MDA*]. Sections 18(3) and 18(4) are omitted.

(b) the keys of anything containing a controlled drug;

(c) the keys of any place or premises or any part thereof in which a controlled drug is found; or

(d) a document of title relating to a controlled drug or any other document intended for the delivery of a controlled drug,

shall, until the contrary is proved, be presumed to have had that drug in his possession.

(2) Any person who is proved or presumed to have had a controlled drug in his possession shall, until the contrary is proved, be presumed to have known the nature of that drug.

Recent judgments have attempted to advance the jurisprudence regarding s. 18 of the *MDA*,[4] one of which is the Court of Appeal's fairly succinct judgment in *Nagaenthran*. The court, in a judgment delivered by Chan C.J., seemed to affirm that the trial judge was correct in adopting the narrow interpretation of s. 18(2) of the *MDA*, *viz*., where the presumed knowledge is knowledge of the precise nature of the controlled drug in question, as opposed to the broad interpretation, *viz*., where the presumed knowledge is knowledge that the drug concerned was a controlled drug without more.[5] However, the court further stated that there is *no* practical distinction between the narrow and broad interpretations of s. 18(2) insofar as the rebutting of the presumption of knowledge is concerned, because the material issue in s. 18(2) is the *non-existence* of the accused's knowledge of the controlled drug. Therefore, to rebut the presumption of knowledge, the accused has to prove on a balance of probabilities that he *did not know* the nature of the controlled drug referred to in the charge.[6]

It is apparent that *Nagaenthran* wanted to provide conclusive clarifications[7] of certain *dicta* found in the Court of Appeal's seminal judgment (delivered by Andrew Phang J.A.) in *Tan Kiam Peng*.[8] There, the court surveyed (and tried to reconcile) virtually all the key precedents before it, and promulgated – while inviting future cases to shed more light on the dichotomy – the broad and narrow interpretations of s. 18(2). While recognising that the *general policy* underlying the

4 See e.g., *Public Prosecutor v. Tan Kiam Peng*, [2007] 1 Sing. L.R. (R.) 522 [*Tan Kiam Peng* (High Court)]; *Tan Kiam Peng v. Public Prosecutor*, [2008] 1 Sing. L.R. (R.) 1 [*Tan Kiam Peng*]; *Public Prosecutor v. Lim Boon Hiong*, [2010] 4 Sing. L.R. 696 [*Lim Boon Hiong*]; *Public Prosecutor v. Phuthita Somchit*, [2011] 3 Sing. L.R. 719 [*Phuthita Somchit*].

5 *Nagaenthran*, *supra* note 1 at paras. 20–23.

6 *Ibid.* at para. 24.

7 See *Thong Ah Fat v. Public Prosecutor*, [2011] SGCA 65 at paras. 3–5 [*Thong Ah Fat*]; *Chan Heng Kong v. Public Prosecutor*, [2012] SGCA 18 at para. 22 [*Chan Heng Kong*].

8 *Tan Kiam Peng* was preceded by a fairly detailed judgment as well: see *Tan Kiam Peng* (High Court), *supra* note 4.

MDA may be undermined as a result, and that cases existed that seemed to support the contrary, the court proposed that given the literal words of the provision and the potential harsh punishment that follows conviction, the narrow interpretation of s. 18(2) ought to be preferred.[9] The broad interpretation, although being more consistent with the general policy underlying the *MDA* and finding support in some precedents, ought to be rejected.[10]

It is respectfully submitted that given its conclusive tone,[11] *Nagaenthran* should have addressed the questions raised by *Tan Kiam Peng vis-à-vis* s. 18(2) with greater comprehensiveness. Indeed, there are various angles in which light can be shed on the prism that is s. 18(2), and this analysis will proceed on three separate and distinct heads, paying particular regard to cases and perspectives that could have impacted *Nagaenthran*, but were not discussed or elaborated therein: (a) whether there is a practical difference between the two interpretations; (b) what more can be said about the purposive interpretation of s. 18(2) undertaken in *Tan Kiam Peng* and other interpretive issues that may arise for consideration; (c) whether cases from Hong Kong, which has legislation similar to s.18 of the *MDA*, can render assistance.

II. COMMENTARY

A. *Whether there is a Practical Difference*

The most apparent question that emerges once *Tan Kiam Peng* and *Nagaenthran* are compared is whether the narrow or broad interpretation of s. 18(2) of the *MDA* is correct – assuming, of course, that there is a practical difference. Indeed, shortly after *Nagaenthran*, the Court of Appeal reiterated in *Thong Ah Fat* that there is no practical difference between the two interpretations insofar as the rebutting of the presumption of knowledge is concerned.[12] This view may be more easily explained and understood with a hypothetical scenario of an accused who is charged with trafficking heroin but claims he was in possession of another (controlled) drug. To avoid a conviction, the accused must establish the non-existence of knowledge of heroin; he is not, however, required to anticipate the Prosecution's case and additionally show that he did not know that what he possessed was cocaine, or that it was any other controlled drug. An accused rebutting an allegation of trafficking in a particular drug does not need to show in the affirmative that what he possessed is another particular drug, since the charge must refer to and identify the drug in question – the nature of the drug being a particular (although not an ingredient) of the offence which must be specified.

9 *Tan Kiam Peng*, *supra* note 4 at paras. 83–95.
10 *Ibid*.
11 *Supra*, note 7.
12 *Thong Ah Fat*, *supra* note 7 at paras. 3–5. See also *Chan Heng Kong*, *supra* note 7 at para. 22.

Indeed, in a charge of trafficking, the mode of trafficking is another particular which must be specified. So, consistent with the practice where the charge alleges possession of heroin for the purposes of trafficking, if an accused genuinely believed that he was in possession of something other than a controlled drug, or a controlled drug other than heroin, he would succeed in avoiding conviction. What he must prove is the non-existence of knowledge of heroin and it does not matter whether he does this by focusing on showing that there was no knowledge of any controlled drug at all, or that there was no knowledge of the particular controlled drug which is specified or referred to in the charge. That said, if the broad interpretation applies, the accused is only presumed to have knowledge that the drug concerned was a controlled drug, without more. The accused will therefore be acquitted of trafficking in heroin if he can raise *reasonable doubt* as to his alleged knowledge that the controlled drug in question was heroin. On the other hand, if the narrow interpretation applies, the accused is presumed to have knowledge that the drug concerned was a controlled drug, namely heroin. The accused will therefore be acquitted of trafficking in heroin only if he can rebut that presumption on a *balance of probabilities.* This *heavier burden* can be construed as a practical difference.

Notably, in *Lim Boon Hiong*, the High Court, citing *Tan Kiam Peng*, held that the narrow interpretation should be preferred in interpreting the knowledge requirement for establishing the possession element, despite the fact that in *Tan Kiam Peng*, the broad and narrow interpretations were considered primarily in the context of s. 18(2) rather than the offence of trafficking *per se*.[13] In so doing, the court observed that there was no indication in *Tan Kiam Peng*, or the *MDA*, that s. 18(2) required a different approach to knowledge than that of the knowledge requirement for the establishment of the offense of drug trafficking.[14] The court further suggested that the difference between the narrow and broad interpretations may be minimised because *Tan Kiam Peng* had clarified that actual knowledge under the *MDA* entails wilful blindness as well:

> "[O]nce an accused person has a firm … suspicion that he is in possession of a controlled drug, and then deliberately refrains from confirming that suspicion, he will not only be held to know, via wilful blindness, that he is in possession of a controlled drug (the broad approach) – he will, ineluctably, also be held to know, via wilful blindness, that he is in possession of the specific drug in question (the narrow approach), since wilful blindness is the legal equivalent of actual knowledge ..."[15]

13 *Lim Boon Hiong*, *supra* note 4 at paras. 60–62.
14 *Ibid*.
15 *Ibid*. at para. 66.

In *Nagaenthran*, the Court of Appeal, in relation to wilful blindness, departed from its previous position where it drew a distinction between "actual knowledge in its purest form" (a term employed in *Tan Kiam Peng*) or "actual knowledge *simpliciter*" (a term employed in *Lim Boon Hiong*) and wilful blindness, a lesser form of knowledge, although both amount, *legally*, to actual knowledge.[16] Referring to the use of the terms "actual knowledge in its purest form" and "actual knowledge *simpliciter*", the court cautioned that there is no need for "unnecessary refinement of the *mens rea* of knowledge" and, further, that wilful blindness would be "merely 'lawyer-speak' for *actual knowledge* that is *inferred* from the circumstances of the case".[17] The court's own conceptualisation, in essence, was that there is only actual knowledge, which is *directly* proved (where the "inference of knowledge is *irresistible* and is the *only rational inference* available *on the facts*") or *indirectly* proved (via the doctrine of wilful blindness).[18] This theoretical clarification may have little or no practical ramifications, however, as there was no hint from the court that more would be required to establish wilful blindness.

In relation to the rebutting of the presumption in s. 18(2), the Court of Appeal in *Nagaenthran* was of the view that an accused has to prove on a "balance of probabilities" that he had no knowledge of the nature of the controlled drug referred to in the charge – the nature of the drug being "*the actual controlled drug*".[19] This appears to be *consistent with the narrow interpretation* as set out in *Tan Kiam Peng*, for if the broad interpretation applies, as earlier mentioned, the accused would only have to raise a *reasonable doubt* as to knowledge of the nature of the drug in question. Therefore, without explicitly saying so, the court seemed to endorse the narrow interpretation (as did *Lim Boon Hiong*, notwithstanding its view that the two interpretations yield little practical difference).[20] However, and perhaps of *greater significance*, is the fact that *Nagaenthran* failed to address the *reasoning* behind the views expressed in *Tan Kiam Peng* on s. 18(2). Specifically, the *approach* adopted in *Tan Kiam Peng* in interpreting s. 18(2) placed greater emphasis on the literal text of the provision, rather than its *purpose*. Additionally, to use the words of the court in *Tan Kiam Peng*, "it might even be argued that there is no ambiguity in the statutory language and that the literal language is … the strongest argument in favour of the [narrow] interpretation".[21] The court had stated this, despite earlier stating that "the literal wording of this provision is also (at

16 *See* Knowing, Not Knowing and Almost Knowing, *supra* note 2 at paras. 29–31. See also Yeo, Morgan, and Chan, *Criminal law in Malaysia and Singapore*, 2d ed. (LexisNexis, 2012) at 95–96.

17 *Nagaenthran*, *supra* note 1 at para. 30 [emphasis in original].

18 *Ibid.* at para. 30 [emphasis in original].

19 *Ibid*. at para. 24 [emphasis added]. In a case that came after *Nagaenthran*, *viz*., *Dinesh Pillai a/l K Raja Retnam v. Public Prosecutor*, [2012] SGCA 24, the Court of Appeal reiterated at para. 18 "that the words 'the nature of that drug' in s 18(2) of the MDA were simply a reference to the actual controlled drug which was proved or presumed to be in the possession of the accused at the material time."

20 See also *Public Prosecutor v. Mas Swan bin Adnan* [2012] SGCA 29 at paras. 64–79.

21 *Tan Kiam Peng*, *supra* note 4 at para. 91.

least arguably) consistent with [the broad] interpretation".[22] Indeed, as will be argued below, the difficulty in interpreting a statutory provision purposively has troubled our courts for a very long time; insofar as all statutory provisions must be interpreted purposively *first and foremost,* and insofar as lives – and not mere liberties – are at stake in the context of the *MDA*, it is of *paramount importance* that the courts achieve a correct purposive interpretation of s. 18(2).

B. *Exploring the Purposive Approach and Other Interpretive Issues*

Turning to the *purposive* interpretation of s. 18(2), it is necessary to begin by considering a High Court case decided just prior to *Nagaenthran*. The case is *Phuthita Somchit*, and it had – through a purposive lens – expressed an opinion on which view is preferred, though it was not cited in *Nagaenthran* and *Thong Ah Fat*. In this case, it was held that:

> "… Considering the [*MDA*] as a whole, and the parliamentary debates … It would not be inaccurate to state that the general policy underlying the Act is that of reducing and even eradicating narcotic drug abuse in Singapore ... the [broad] interpretation would make it much easier for the Prosecution to secure a conviction... But it is quite a different thing to say that making it easier for the Prosecution to secure a conviction would promote the general policy of the Act … Our system of criminal justice requires the Prosecution to prove an accused person's guilt beyond reasonable doubt ... The presumption in s 18(2) of the Act shifts the burden of proof of knowledge to the accused person once the conditions therein are met. The legislature had decided where the line should be drawn in relation to that burden. If … the ordinary meaning of the words in s 18(2) point to the [narrow] interpretation … there cannot be room for any consideration as to whether this meaning "undermines the general policy" of the Act as Parliament had decided on this line as the appropriate balance between burden on the Prosecution and on the accused.
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> Even if there is an ambiguity in s 18(2) … this is a criminal provision … as the punishments for offences under the Act are harsh and even encompass the death penalty, any ambiguity in the statutory language ought to be resolved in favour of the accused …
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> …

22 *Ibid*. at para. 90.

> Under s 18(1), an accused is presumed to have possession of the controlled drug if it is proved that he had possession of the keys to a place or premises or even a document intended for delivery. Under s 18(2), once this presumption of possession is operative, the presumption of knowledge is invoked. Section 18(2) therefore involves a presumption upon a presumption, a further reversal of the burden of proof from the Prosecution to the accused … "the [narrow] interpretation" of s 18(2) that the CA in *Tan Kiam Peng* had considered … to be "the more persuasive" one must be the correct one..."[23]

Although *Phuthita Somchit* and *Tan Kiam Peng* are consistent with regard to the existence of a real difference between the broad and narrow interpretation and the preference for the narrow interpretation, they differ slightly in their reasoning in relation to s. 18(2). The point of divergence between the two cases is how s. 18(2) is to be interpreted purposively – the purposive approach, of course, being one that is mandated statutorily.[24] In this regard, it has been observed that while the local cases have used many terminologies to determine what constitutes the purposive approach of statutory interpretation, there remains "some conceptual misunderstanding of the true meaning of the purposive approach."[25] Three questions that emerge from the conceptual misunderstanding are pertinent for present purposes.[26]

The first is whether all other approaches in statutory interpretation must yield to the purposive approach. There are a number of prominent cases that sit on both sides of the fence. For instance, *Public Prosecutor v. Low Kok Heng* affirmed that the purposive approach takes precedence over all other approaches, with the interesting caveat being that the interpretation of the express words must remain reasonable.[27] Yet, *Public Prosecutor v. Manogaran s/o R Ramu* held that if the provision

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23 *Phuthita Somchit*, *supra* note 4 at paras. 24–25, and 30.

24 See *Interpretation Act* (Cap. 1, 2002 Rev. Ed. Sing.) s. 9A(1): "In the interpretation of a provision of a written law, an interpretation that would promote the purpose or object underlying the written law (whether that purpose or object is expressly stated in the written law or not) shall be preferred to an interpretation that would not promote that purpose or object" [*Interpretation Act*]. See also Yeo Tiong Min, "Statute and Public Policy in Private International Law: Gambling Contracts and Foreign Judgments" (2005) 9 S.Y.B.I.L. 133 at 139: "The application of this section presupposes two conditions. First, there must be at least two plausible interpretations. The purposive approach presupposes that the 'words are sufficiently flexible to admit of some other construction by which [the statutory] intention will be better effectuated.' Secondly, one of the interpretations would promote the purpose or object of the written law, and the other would not."

25 Goh Yihan, "A Comparative Account of Statutory Interpretation in Singapore" (2008) 29 Stat. L. Rev. 195 at 203. See also Goh Yihan, "Statutory Interpretation in Singapore: 15 Years on from Legislative Reform" [2009] 21 Sing. Ac. L.J. 97 at para. 11 [Statutory Interpretation in Singapore].

26 See generally Statutory Interpretation in Singapore, *ibid*.

27 [2007] 4 Sing. L.R. (R.) 183 at paras. 41 and 52 [*Low Kok Heng*]. See also *Ho Sheng Yu Garreth v. Public Prosecutor*, [2012] SGHC 19 at paras. 44 and 55 [*Garreth Ho*]; *Public Prosecutor v. Mohammad Ashik bin Aris*, [2011] 4 Sing. L.R. 34 at paras. 190–194. *Cf. Constitutional Reference No 1 of 1995*, [1995] 1 Sing. L.R. (R.) 803 at para. 15, where it was said that the court *can modify* the legislative words of a

is unambiguous, then the court only needs to expound the words in their ordinary and natural sense;[28] *i.e.*, the literal approach can, in certain circumstances, be placed ahead of *and* in lieu of the purposive approach, contrary to the express words used in the *Interpretation Act*.[29] Closely related to this conundrum is the second question of whether the common law strict construction rule of penal statutes (as was applied in *Tan Kiam Peng* and *Phuthita Somchit*) can only be resorted to in limited circumstances – or even at all. *Low Kok Heng* stated that such a rule can be invoked if a provision remains ambiguous *after* the purposive interpretation has been exhausted.[30] Doubt has rightly been cast on whether it may be assumed that the purposive approach can be exhausted, because this suggests that the legislative intent simply cannot be found in some instances.[31] The third question is how purpose can be identified: for example, does it refer to the purpose of the statute generally, or the provision specifically? Jurisprudence supposedly favours the latter.[32] The more difficult question may be whether abstract or concrete purposes should be considered.[33]

The first and second questions can be dealt with in tandem. It can be said with some confidence that both *Phuthita Somchit* and *Tan Kiam Peng* take the view that the purposive approach does not necessarily take precedence over the literal approach and/or the strict construction approach, despite the clear language of the *Interpretation Act*. The *primary* reasons offered in both cases in support of the narrow interpretation were the literal language of s. 18(2), and the possibility of the death penalty resulting in the benefit of the doubt being given to the accused (even though *Phuthita Somchit* also placed weight on the presumption upon a presumption). However, it was not made clear in either case whether a literal reading of s. 18(2) is conducive to a reasonable/unreasonable interpretation (since *Low Kok Heng* suggests that the purposive approach may only be resorted to after this is exhausted), lends itself to a plain and clear meaning,[34] or how the strict construction approach co-exists with the purposive approach. Furthermore, in *Tan Kiam Peng*, the narrow interpretation was preferred despite there being cases that supported the broad interpretation *and more crucially*, despite the narrow interpretation tending to undermine the

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provision to achieve parliamentary object.

28 [1996] 3 Sing. L.R. (R.) 390 at para. 34.

29 Statutory Interpretation in Singapore, *supra* note 25 at para. 13.

30 *Low Kok Heng*, *supra* note 27 at paras. 39–49. See also *Garreth Ho*, *supra* note 27 at paras. 55–57.

31 Statutory Interpretation in Singapore, *supra* note 25 at paras. 8, 18, and 33.

32 *Ibid*. at paras. 19–20 and 35. See also Francis Bennion, *Bennion on Statutory Interpretation*, 5th ed. (LexisNexis, 2008) at 947.

33 Statutory Interpretation in Singapore, *supra* note 25 at para. 36.

34 For instance, there appears to be no significant material at all that aids in the understanding of the literal meaning of the very crucial word "nature" in s 18(2). Indeed, as pointed out by the Court of Appeal in *ADP v. ADQ*, [2012] SGCA 6 at para. 29: "If the meaning of the statutory language is plain and clear, then the court ought to give effect to that meaning. What the court ought *not* to do is to *superimpose* what *it* feels *ought* to be the meaning of the statutory provision concerned" [emphasis in original]. Although the comments in *Tan Kiam Peng* regarding s. 18 were *obiter dicta*, the general thrust of those comments resembled the aforementioned prohibition against the judicial imposition of the meaning of statutory provisions.

general policy of the *MDA* (not to mention that the general policy was readily identified by the court, which is arguably an additional reason *not* to prioritise the literal and strict construction approaches above the purposive approach).[35] It would seem then that in effect, *Tan Kiam Peng* stands for the proposition that the literal approach and strict construction approach can *somehow be combined* to displace the purposive approach – a somewhat creative and sympathetic approach to improve the position of the accused, but possibly in contravention of the purposive approach.[36] Having said that, *Phuthita Somchit* disputed the relevance of considering whether the *MDA* was undermined or advanced in interpreting s. 18(2) purposively, and this leads to the third question, *viz*., how is purpose identified, and going one step further, what is the consequence of a provision being interpreted purposively?

Should it be said that the greater the desire for the social evil to be eliminated (as evinced in parliamentary speeches made by the relevant ministers for example), the more broadly a provision should be read in favour of the Prosecution – and hold the converse to be true? If so, what are the limits to this, to ensure that the right to the presumption of innocence of the accused is not eroded to the point of unacceptability? Or should it first be asked why a specific provision was enacted, followed by a consideration of whether the favoured interpretation comports with that reason? What about looking at the scheme and purpose of the entire statute and the situating paradigm and borderline scenarios within that scheme?[37] Fairly recently, *Public Prosecutor v. Mohammad Ashik bin Aris* held that the "underlying rationale of the purposive approach … is to have the courts construe statutory provisions, as far as it is reasonably possible to do so, in a manner that enables the statutory provision to work effectively having regard to its purpose."[38] However, with regard to *Tan Kiam Peng*, it appears that if the purposive approach leads to a potentially harsh result, it can be counterbalanced by the literal and/or strict construction approaches. What then constitutes a harsh result? Almost two decades after officially mandating the purposive approach as the prioritised canon of statutory interpretation in Singapore, it appears that much remains unclear as to how such an approach is actually applied concretely, and s. 18(2) exemplifies this problem.

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35 Statutory Interpretation in Singapore, *supra* note 25 at paras. 1–30.

36 Indeed, is it possible to come up with contrasting versions of what exactly the legislative purpose is? On the one hand, it cannot be the case that the Prosecution is allowed to succeed at all costs; on the other hand, it probably also cannot be the case that all presumptions of fact against the accused are forbidden as a matter of law. There is a balance to be struck, but it does not appear that any of the s. 18 line of cases provide assistance in this regard. Paradoxically, while the Court of Appeal in *Tan Kiam Peng* was prepared to displace the purposive approach out of fairness to the accused, it also said that "A purely theoretical discourse which tends to abstract itself from the realities and adopts a one-sided approach (which, at bottom, favours only the accused) tends to not only implode by its very abstraction but also ignores the fact that, in an imperfect and complex world, there is necessarily a whole compendium of rights, all of which must be balanced … the Legislature has put in place a structure that balances the rights of accused persons on the one hand and the rights of persons in the wider society on the other": *Tan Kiam Peng*, *supra* note 4 at para. 75.

37 Aberrations in the Criminal Law, *supra* note 2 at 75–83.

38 [2011] 4 Sing. L.R. 34 at para. 191.

Remaining on the matter of statutory interpretation, perhaps another perspective can be added to those already offered thus far as to which interpretation should be the correct one, and it deals with interpreting the *MDA in conjunction* with and in the light of other penal statutes – this must surely be necessary, since the *MDA* does not operate in isolation to the exclusion of other such statutes and *vice versa*. When *Tan Ah Tee v. Public Prosecutor* (discussed in *Tan Kiam Peng*)[39] relied on an English case (*Warner v. Metropolitan Police Commissioner*,[40] also discussed in *Tan Kiam Peng*) to establish how the accused could rebut an allegation of drug possession, this was criticised because it was thought that a defence in the *Penal Code*[41] should have been applied instead.[42] Sections 76 and 79, commonly regarded as setting out the defence of mistake, state:[43]

> 76 Nothing is an offence which is done by a person who is, or who by reason of a mistake of fact and not by reason of a mistake of law in good faith believes himself to be, bound by law to do it.
>
> …
>
> 79 Nothing is an offence which is done by any person who is justified by law, or who by reason of a mistake of fact and not by reason of law in good faith believes himself to be justified by law, in doing it.

Notwithstanding the fact that *Tan Kiam Peng* has clarified the precise applicability of *Warner,*[44] the prevailing view is that s. 18 of the *MDA* effectively precludes an accused from even pleading the general exception of mistake:

> "[Section] 18(2) of the Misuse of Drugs Act, being narrower in scope, overrides s 79 of the Penal Code should the two provisions be inconsistent … a mistake between aspirins/heroin or sweets/heroin may not be considered a mistake as to "nature" under s 18(2) … and, hence, would not absolve the drug trafficker. If the defence of mistake under s 79 of the Penal Code were to apply, it would absolve an accused because a mistaken belief that heroin tablets are either aspirins or

39 [1979–1980] Sing. L.R. (R.) 311 [*Tan Ah Tee*].
40 [1969] 2 A.C. 256 [*Warner*].
41 Cap. 224, 2008 Rev. Ed. Sing. [*Penal Code*].
42 See Koh, Clarkson, and Morgan, *Criminal Law in Singapore and Malaysia* (Singapore: Malayan Law Journal, 1989) at 192 [*Criminal Law in Singapore and Malaysia*].
43 See also Yeo, Morgan, and Chan, *Criminal Law in Malaysia and Singapore* (LexisNexis, 2007) at 466 [*Criminal Law in Malaysia and Singapore*], which addresses the defence of accident (found in s. 80 of the *Penal Code*): "For example, under s 8(a) of the Singaporean Misuse of Drugs Act, it is an offence to be found in possession of a controlled drug. A person who had a drug planted on him or her could rely on the s 80 defence to show that he or she had come to have the drug by accident."
44 *Tan Kiam Peng*, *supra* note 4 at para. 137.

> sweets is a mistake of fact. They are different things. However … s 79 of the Penal Code is superseded by the express provision relating to mistake as to the "nature" of a drug under s 18(2) … *generalia specialibus non derogant* … should apply."[45]

Essentially, the argument being made here is that if the points regarding the strict construction rule and the presumption upon presumption (in s. 18) are considered legitimate factors in ascertaining the correct interpretation, it stands to reason that an accused deprived of an important defence tends towards an additional pillar of *support for the narrow interpretation*.[46] Moreover, the difficulties that an accused faces, however technical, do not stop here. There is also s. 108 of the *Evidence Act*, which states that "When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him."[47] There have, of course, been cases that clarified that s. 108 does not require the accused to prove the Prosecution's case – with the exception of facts that would be difficult for the Prosecution to prove but easy for the accused to prove.[48] Whether this has any meaningful impact on s. 18 of the *MDA* remains untested, although one may expect that a court would be unlikely to impose this additional burden on an accused facing an *MDA* charge.

C. *Hong Kong Legislation and Decisions*

Finally, it is noteworthy that Hong Kong's *Dangerous Drugs Ordinance*[49] contains presumptions that are rather similar to s. 18 of the *MDA*.[50] These presumptions predate s. 18 of the *MDA*,[51] and suspicions that the drafters of the *MDA* had drawn some inspiration from the *DDO* would not be

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45 *Criminal Law in Singapore and Malaysia*, *supra* note 42 at 192. See also *Criminal Law in Malaysia and Singapore*, *supra* note 43 at 446. *Cf.* Aberrations in the Criminal Law, *supra* note 2 at 58–61.

46 Indeed, taking a step back away from the specifics of s. 18, one of the chief difficulties when interpreting the *MDA* is that key terms are not defined and the precise *mens rea* is simply not stated. See Chan, Wright, and Yeo, *Codification, Macaulay and the Indian Penal Code* (Ashgate, 2011) at 59–60: "[T]here has been excessive and confusing reference [in Singapore] to the common law doctrine of *mens rea*, often at the expense of the structure of the [*Penal Code*] itself … The real problem is that the maxim *actus non facit reum nisi mens sit rea* has been used to interpret the law, especially in the context of new offences outside the [*Penal Code*] where no fault element has been specified. As a result, there has been copious reference to common law cases on the question of whether a fault element should be 'read in' or whether the offence is to be construed as one of 'strict' or 'absolute' liability...".

47 Cap. 97, 1997 Rev. Ed. Sing. [*Evidence Act*].

48 See e.g., *Public Prosecutor v. Chee Cheong Hin Constance*, [2006] 2 Sing. L.R. (R.) 24 at para. 95.

49 Cap. 134 (originally Ord. No. 41 of 1968) [*DDO*].

50 Michael Hor, "Criminal Due Process in Hong Kong and Singapore: A Mutual Challenge" (2007) 37 Hong Kong L.J. 65 at 69 [Criminal Due Process].

51 See e.g., Hong Kong Legislative Council, *Official Report of Proceedings* (9 October 1968) 459.

unreasonable.[52] Section 47(1) of the *DDO* states in a similar manner to s. 18(1) of the *MDA* that "[a]ny person who is proved to have had in his physical possession… anything containing or supporting a dangerous drug… shall, until the contrary is proved, be presumed to have had such drug in his possession", and s. 47(2) states in a similar manner to s. 18(2) of the *MDA* that "[a]ny person who is proved or presumed to have had a dangerous drug in his possession shall, until the contrary is proved, be presumed to have known the nature of such drug."

In *R v. Tam Chun Fai*,[53] *R v. Ng Chiu Leung*,[54] and *H.K.S.A.R. v. Chan Ming Fai*,[55] the Hong Kong Court of Appeal indicated that s. 47(1) incorporates a *double presumption*. Applying that provision, a person who has in his physical possession anything containing a dangerous drug, is presumed to have legal possession of dangerous drugs *and is also* presumed to have knowledge of the presence of dangerous drugs. As for s. 47(2), it does not create a presumption of knowledge of the presence of dangerous drugs as that is covered by the second presumption created by s. 47(1); rather, it is meant for use where an accused is shown to have legal possession of a dangerous drug but argues that he thought that it was a drug other than what it actually is. In *Tam Chun Fai*, the court further elaborated that having regard to the wording of the offence of drug trafficking in the *DDO*, *viz*., that it is an offence to traffic in "a" dangerous drug, the exact type of dangerous drug that an accused traffics is nothing more than a *particular* of an offence, and not an ingredient of an offence.[56] The offence is one of trafficking in a dangerous drug, rather than trafficking in, say, salts of esters of morphine specifically. The fact that an accused thought that he was trafficking in a dangerous drug different from that which he was charged with would be irrelevant to the issue of guilt – it can, instead, only be relevant in sentencing.[57]

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52 See generally G.L. Peiris, "Some Constitutional, Substantive and Evidentiary Aspects of Drug Control Legislation: A Comparative Study of the Law of Singapore, Hong Kong and Canada" (1982) 24 Mal. L. Rev. 119. Justice V K Rajah's view seems to be different. In *Public Prosecutor v. Tan Kiam Peng*, [2007] 1 Sing. L.R. (R.) 522, he stated (at para. 15): "It also bears mention that s 18(2) of the MDA appears to have been directly inspired by certain observations and musings by Lord Reid and Lord Pearce in *Warner*." In *Warner*, Lord Reid had observed (at 280): "In a case like this Parliament, if consulted, might think it right to transfer the onus of proof so that an accused would have to prove that he neither knew nor had any reason to suspect that he had a prohibited drug in his possession." Lord Pearce added (at 307): "It would, I think, be an improvement of a difficult position if Parliament were to enact that when a person has ownership or physical possession of drugs he shall be guilty unless he proves on a balance of probabilities that he was unaware of their nature or had reasonable excuse for the possession."

53 [1994] 2 H.K.C. 397 [*Tam Chun Fai*] .

54 [1996] 1 H.K.C. 181 [*Ng Chiu Leung*].

55 [2001] 4 H.K.C. 511 [*Chan Ming Fai*].

56 *Tam Chun Fai*, *supra* note 53 at para. 22. Interestingly, s. 5 of the *MDA*, which sets out the offence of drug trafficking, in similar fashion refers to trafficking in "a" controlled drug.

57 *Ibid*. at para. 25.

However, *Tam Chun Fai*, *Ng Chiu Leung*, and *Chan Ming Fai* represent an earlier raft of cases that have to be reconsidered in light of the Court of Final Appeal's 2006 decision in *H.K.S.A.R. v. Hung Chan Wa*.[58] In the main judgment by Sir Anthony Mason NPJ, it was held that s. 47(1) has to be understood in light of the common law conceptualisation of possession.[59] Lord Pearce's *dicta* in *Warner* that "the term 'possession' is satisfied by a knowledge only of the existence of the thing itself and not its qualities, and that ignorance or mistake as to its qualities is not an excuse" was cited.[60] Based on the common law conceptualisation of possession, it would be unnecessary for the implied presumption of knowledge in s. 47(1) "to extend to knowledge of the nature of the drug or knowledge that it was a dangerous drug, in order to constitute legal possession at common law."[61] Absent legislative intention to the contrary, there "is no reason at all why the presumption as to knowledge of the presence of the thing itself should be extended to knowledge of its nature or qualities."[62] The presumption as to knowledge of nature or qualities of a dangerous drug would, instead, be covered by s. 47(2), the interpretation of which was analysed as follows:[63]

> "[T]he presumption under s.47(2) of knowledge of the presence of a dangerous drug in a container is relevantly linked to the possession-based offences created by ss 4 and 8 of the Ordinance.
>
> The explanation of the relationship between s.47(1) and (2) and the seemingly infelicitous language of sub-section (2) is to be found, as the Court of Appeal held, in attributing to it the purpose of responding to the expectation that the courts would, in accordance with established principle, read into the offence provisions, a requirement of knowledge of the presence of a dangerous drug… The case for adopting this approach is a very strong one. The offences created by ss 4 and 8 are serious offences; the former (trafficking) very serious, being punishable with a sentence of life imprisonment.
>
> So understood, s.47(2) sheds most of the difficulties which have been thought to surround it. It is directed at an additional element of the offences which stands outside the common law concept of legal possession dealt with by s.47(1). In the

58 [2006] 3 H.K.L.R.D. 841 [*Hung Chan Wa*].
59 *Ibid*. at para. 65.
60 *Warner*, *supra* note 40 at 305.
61 *Hung Chan Wa, supra* note 58 at para. 67.
62 *Ibid*.
63 *Ibid*. at paras. 69–71.

> expectation that the two presumptions carrying the prosecution case based on physical possession forward to legal possession will not be enough to establish the mental element – knowledge of the nature of the drug – on which the courts would insist, a further presumption is provided by s.47(2). Once this is acknowledged, the relationship between s.47(1) and (2) is comprehensible and the opening words of sub-section (2) serve the purpose of indicating that, after proof or presumption of legal possession, there is introduced another presumption, namely of knowledge of the nature of the drug. The explanation provides an important role for s.47(2) …"

Although the foregoing would appear to indicate that the Hong Kong cases cannot shed much direct light on the question of whether the narrow or broad interpretation should apply, the latter part of the main judgment in *Hung Chan Wa*, nevertheless, is interesting as it raises a possible approach to ameliorating any severity of the law arising out of s. 18(2) – this being to read the presumptions in s. 18 as imposing mere *evidential burdens* (as opposed to legal burdens) on the accused.[64] This was the course adopted by the court in *Hung Chan Wa vis-à-vis* s. 47 of the *DDO*, after it had regard to the presumption of innocence provision – which incidentally, is expressed in rather robust terms – in the Hong Kong Bill of Rights Ordinance.[65] However, insofar as the right to presumption of innocence is not expressed in similar fashion in Singapore's *Constitution*[66] and also the *Evidence Act* for that matter (indeed the *Evidence Act* may even be said to qualify the right), this forms a significant and fundamental impediment to Singapore's courts following *Hung Chan Wa*.[67] Moreover, insofar as the Privy Council decision of *Jayasena v. R.*[68] remains good law in Singapore – in that case, it was decided that all references to burdens in the *Evidence Act* pertain to legal, as opposed to evidential burdens – this forms another fundamental impediment to adopting the latest Hong Kong approach, if one assumes and extrapolates that any reference to burdens in the *MDA* is to legal, rather than evidential, burdens.

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64 See also Jeffrey Pinsler, SC, *Evidence and the Litigation Process* (LexisNexis, 2010) at 402–05.

65 Cap. 383 (originally Ord. No. 59 of 1991). See also Criminal Due Process, *supra* note 50 at 69–71.

66 1999 Rev. Ed. Sing. [*Constitution*].

67 For a discussion on how the *Constitution* and *Evidence Act* actually erode the right to presumption of innocence in Singapore, see Michael Hor, "The Presumption of Innocence – A Constitutional Discourse for Singapore" [1995] Sing. J.L.S. 365. See also Albert Buchman, "The Misapplication of *Leung Kwok Hung* in Hong Kong: Authorising the Rationality Requirement for Textually Absolute Rights" (2010) 19 Pac. Rim L. & Pol'y J. 565.

68 [1970] A.C. 618. See also *PP v. Yuvaraj*, [1969] 2 M.L.J. 89.

III. CONCLUSION

It is intriguing how a simple set of words in s. 18 of the *MDA* can generate so much jurisprudential and academic thought.[69] As this piece has attempted to demonstrate, there are various intertwined issues in s. 18 which arise just from a consideration of whether the narrow or broad interpretation is correct. Given the severe penalties at stake, they ought to be examined more thoroughly. Ideally, for a statute as important as the *MDA* (in terms of the possible harsh penalties), legislative amendment is the most effective way to inject clarity, but expecting that may be hoping for too much. It is thus incumbent on our courts to ensure that the legal reasoning underlying its provisions is as robust and exhaustive as possible.

69 See also Koh T.T.B., "Drug Abuse and Community Response in Singapore" (1974) 2 Intl. J. Crim. & Pen. 51.