

HONG KONG / JUDGMENT

HKSAR v. MANAN ABDUL**[2022] HKCA 479****COURT**

Court of Appeal

DECIDED

6 May 2022

CASE / FILE NUMBER

CACC64/2019

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AND CACC 64/2019 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF APPEAL CRIMINAL APPEAL NO 64 OF 2019 (ON APPEAL FROM HCCC NO 338 OF 2018)

HKSAR Respondent v MANAN ABDUL Appellant

(Heard together) Before: Hon Macrae VP, McWalters and Zervos JJA in Court Date of Hearing: 20 November 2020 Dates of Further Written Submissions: 12 and 14 April 2022 (in CACC 64/2019) Date of Judgment: 6 May 2022

J U D G M E N T

Hon Zervos JA (giving the Judgment of the Court): These two appeals have been heard together because they engage a common ground of appeal, namely the appropriateness of judicial comment in relation to fingerprint evidence when summing up to a jury. In this judgment, as a matter of convenience, we will refer to CACC 264/2018 as the 1st appeal and CACC 64/2019 as the 2nd appeal. When necessary we will refer to the appellant in each appeal by their family name. Hoang was convicted after trial before Deputy High Court Judge Alex Lee (as he then was) (Lee J) and a jury of one count of trafficking in a dangerous drug, namely 130.28 grammes of crystalline solid containing 123.67 grammes of methamphetamine hydrochloride (commonly known as Ice). He was sentenced to 12 years and 11 months imprisonment. Manan was convicted after trial before D Almada Remedios J (Remedios J) and a jury of two counts of trafficking in a dangerous

drug, namely 1.02 grammes of a solid containing 0.68 grammes of cocaine (Count 1); and 334 grammes of a solid containing 228 grammes of cocaine (Count 2). He was sentenced to 13 years and 6 months imprisonment. On 28 November 2019, leave was granted by a Single Judge to Hoang to appeal against his conviction on the sole ground as to whether the judge's directions to the jury concerning the lack of fingerprint or DNA evidence had sufficient evidential basis, and whether, in the context of the summing-up, this amounted to a material misdirection. On 8 November 2019, leave was granted by a Single Judge to Manan, who was then unrepresented, to appeal against his conviction on two grounds of appeal which concerned whether the judge misdirected the jury on fingerprint evidence (Ground 1); and whether the judge erred in failing to give Manan a good character direction for the sole reason that he was an illegal immigrant (Ground 2). Mr Simon Young, counsel for Manan, in his Amended Perfected Grounds of Appeal, advances an additional third ground of appeal without leave, which complains that there was a breach at trial of Manan's constitutional and common law right to interpreter assistance so as to constitute a material irregularity (Ground 3). In support of this third ground, Mr Young has filed a notice for leave to introduce fresh evidence pursuant to section 83V(1) of the Criminal Procedure Ordinance, Cap 221, consisting of two affirmations from Ms Amandeep-Kaur, a litigation clerk, employed by the firm of solicitors instructing Mr Young, and an affirmation from Manan.

The 1st appeal

The prosecution case

In the evening of 7 December 2016, a team of police officers, who were on patrol, went to a wooden hut in Sham Shui Po, Kowloon, and found Hoang sitting behind a table, on which there were 38 packets of Ice, a quantity of empty resealable plastic bags and an electronic scale. Hoang was the only person inside the hut at the time and he had in his possession \$19,100 cash. The estimated street value of the drugs at the time of the offence was \$43,514. The police officers on patrol were Sergeant 52253 (PW1), DPC 763 (PW2) and WDPC 13245 (PW3). PW2 testified that he and PW3 noticed that the door to a wooden hut off Block 3, Tung Chau street, was slightly open. He pushed at the door but found that it had, on its other side, a folded chair. He then entered the hut followed by PW3. He saw Hoang sitting alone behind a table in the living room. Hoang, upon seeing him seemed to withdraw his hands from the table and bend his body to the right, as if he was trying to get something from the floor. He saw what appeared to be a long object lying on the floor to the right hand side of the table where Hoang was sitting. This prompted him to shout Police. Don't move. He then showed his warrant card to Hoang who was only about 2 meters away from him. PW3 gave similar evidence to that of PW2 as to what had happened when they entered the hut. PW1 entered the hut shortly after PW2 and PW3. PW1 testified that when he entered the hut he saw Hoang sitting behind the table, on which were suspected dangerous drugs and an electronic scale. PW2 also gave similar evidence of seeing the items on the table, except he admitted in cross-examination he could not remember why, at the time, he knew that one of the items was an electronic scale as it had a cover over it. PW2 was the officer who arrested Hoang and administered a caution to him. He demanded, in Puntí, that Hoang produce some identification, however he soon realized Hoang did not understand him, and so he asked him in English for ID or paper. Hoang produced a Form 8 recognizance issued by the Immigration Department. PW2 then handcuffed Hoang and performed a body search, finding \$19,100 in cash on his person. PW3 said that she counted the dangerous drugs, which consisted of 28 packets of Ice (exhibits P1-P4), that were found in a paper

box wrapped in tin foil (exhibit P13) on the table. Also on the table was an electronic scale with a cover (exhibit P14), a mobile telephone (exhibit P15) and a paper box (exhibit P17), which contained empty plastic bags (exhibit P16). She said she handled the exhibits before the photographer arrived, but put them back on the table where she found them. It would appear there were two rooms (other than the living room) in the hut, which were referred to as Room A and Room B at trial. The adjoining room was Room A. It was the prosecution case that nothing of significance was found in either room, except that PW3 asked the photographer to take photographs of the location of the mirror in Room A because she was told by the fingerprint officer that he had found the impression of a fingerprint on the mirror in that room. The prosecution relied on the fact that Hoang was the only one in the room together with the drugs and related items, as well as the large amount of cash found on him, to establish that he was trafficking in the drugs. The defence case was that there were 7 or 8 other people in the hut, however, they had all fled just before the police arrived, leaving Hoang alone inside. The defence submitted that there was a concealed rear exit to the hut and that the other people must have escaped through this route. PW1 disagreed and said there was no back door, and this was supported by the evidence of PW2 and PW3. It was contended by the defence that the drugs were not found in the living room where Hoang was at the time, but in Room A which was locked. Hoang gave evidence that he had gone to the hut to buy drugs, and there were about 7 to 8 people present, who were taking drugs using tin foil. He said that he smoked some Ice and dozed off. The evidence of the police officers was that there were no bottles for smoking Ice or tin foil found in the hut. Hoang explained he had been going to the hut to buy Ice for about 3 months and he would do this on average 5 to 6 times a month. He elaborated that on the day of the offence, he had arrived there between about 9.00 to 9.15 pm and was let in by a Vietnamese man called Ah Fat . He said he paid \$100 to Ah Fat for a small packet of Ice. He then sat on the sofa and emptied the pack of Ice into an Ice bottle and smoked it. He said he was woken by the sound of banging on the door and shouts emanating from outside of Police, open the door . It was then that he realized he was alone in the hut. He said there was an exit on his left, which had previously been covered by a wooden board that had been opened, with the wooden board placed against the wall. He explained he had used this exit before. When Hoang opened the door to let the police officers into the hut, there was no Ice on the table. He said the police officers found the drugs in Room A, which was locked, and only after a police officer kicked the door in did they gain entry to the room. He claimed the \$19,100 in cash found on him was money from his family in Vietnam. He could not provide any details as to how he received the money in Hong Kong. He merely said that as a torture claimant he could not open a bank account. Hoang also described a series of beatings he suffered at the hands of initially PW1, and then by PW2 and another officer, PW4. The beatings caused him to soil himself twice, and on both occasions he was allowed to put on a different pair of trousers. Hoang participated in a video record of interview soon after his arrest. There was no challenge to the admissibility of the interview and he adopted what he said in the interview as part of his evidence in court. The defence did not allege that Hoang was forced to make admissions in the interview because of any improper conduct by the police officers. It was accepted that the interview was voluntary. The relevance of the alleged improper conduct by the police officers was to challenge their credibility. The lack of fingerprints and DNA

evidence It was an admitted fact at trial that no fingerprint or DNA of Hoang was found by the police in the hut or on the exhibits seized in the hut. The prosecution called PC 4459 (PW5), an officer from the Fingerprint Division of the Hong Kong Police. He attended the scene to dust for fingerprints. He testified that he found a fingerprint on a mirror but nothing else of any significance. PW5 was given a briefing so that he knew what the case was about and where to focus his attention. He explained that inside the hut he examined a number of items. He dusted the wooden room door (Room A) for fingerprints but none were found. He examined the door rather than the frame. Inside the room he found the fingerprint on the mirror. He also examined a metal can, a beer can, a plastic box, a cabinet, a cigarette box, some plastic bottles and a clock. He did not enter the room near the main door (Room B), because after a quick look inside there was nothing there that needed examination. He explained the reason for not doing so was because s based on my experience in dusting fingerprints. I remember that the items in there were not suitable for examination When asked if he examined the door to the hut, PW5 answered that he did a visual inspection, but that the door was very coarse, and that according to his past experience no fingerprints would be found. He further explained that when he examined the beer can he found nothing on it and that as the paper box contained the drugs this would not be examined at the scene, but instead in the office. There was no reference to the lack of fingerprint or DNA evidence by either counsel in their closing speeches to the jury. The judge s impugned directions were contained in the following passage of his summing-up to the jury: As regards the Admitted Facts about the absence of the defendant s fingerprints or DNA in the hut or on the exhibits, it does not necessarily mean that the defendant had not come into contact with anything inside the hut. There is no issue, that means there is no dispute that the defendant was inside the hut. As regards fingerprints, you have heard evidence of PW5 that not all things are suitable for fingerprint examination, and the defence had not sought to challenge PW5 s evidence in this regard. Of course, whether or not to accept this part of PW5 s evidence is a matter entirely for you. You may consider, and it is a matter entirely for you, that the absence of the Defendant s fingerprints or DNA in the hut or on the exhibits may or may not assist either side. (The impugned directions are emphasised) Later in his summing-up, when summarising the evidence of PW5, the judge said: Apart from a fingerprint on the mirror in Room A, he found nothing of significance. PW5 said he decided what items he should examined for fingerprint and what not based on his experience. He said he took a look at Room B before going on to examine Room A. At the time the door of Room B was open and he took a look at the doorway and decided that there was nothing in the Room B suitable for fingerprint examination. As regards Room A, he could not remember whether he examined the room door first or the mirror first. Apart from the two rooms, PW5 also examined a number of items inside the hut, but the mirror was the only item on which he found the fingerprint. PW5 disagreed that he examined Room A because he had been asked by the WPC to do so. The ground of appeal The sole ground of appeal that Mr James Sherry, counsel for Hoang, advances reads as follows: Without any evidence from the fingerprint expert PW5 to support the trial judge s directions to the jury in relation to the absence of the Defendant s fingerprints or DNA in the hut or on the exhibits that it does not necessarily mean that the Defendant had not come into contact with anything inside the hut , the trial judge gave a material misdirection which invited the jury to speculate as to whether the Defendant had

come into contact with the plastic bags found to contain the Dangerous Drugs. The appellant's submissions Mr Sherry submitted that PW5 did not go as far as to say that it does not necessarily mean that the defendant had not come into contact with anything inside the hut, as stated by the judge. He emphasised that PW5 was not an expert witness, nor was any application made to treat him as one. He argued that the highest PW5's evidence could be taken was that in his experience some of the items found at the scene, such as the door frame, were not suitable for fingerprint examination. He stressed that PW5 did not say, nor give evidence to the effect, that the absence of the defendant's fingerprints in the hut or the exhibits found at the scene does not necessarily mean that the defendant had not come into contact with anything inside the hut, nor that not all things are suitable for fingerprint examination, both these statements having been made by the judge to the jury. He contended there was no evidential basis for these remarks, and there needed to be if the judge was to direct as he did. It was Mr Sherry's submission that a similar issue arose in *HKSAR v Silva Barba*, where the Court of Appeal held the trial judge's directions that there were many reasons why contact may not result in any trace of DNA or fingerprints, was without evidential foundation and therefore a material misdirection. The respondent's submissions Mr Ned Lai, with Mr Andrew Li, for the respondent, submitted that the absence of fingerprint and DNA evidence had no significance whatsoever in the present case. He noted that the judge directed the jury that in relation to the admitted facts they had to regard them as having been conclusively proven and could not be contradicted by other evidence. Having given this direction, the judge went on to specifically discuss the admitted fact in respect of the absence of fingerprint and DNA evidence. It was Mr Lai's submission that *Silva Barba* was not apposite and involved an entirely different set of circumstances where the judge's remarks about the fingerprint and DNA evidence had no evidential foundation, which was a material issue at trial. He referred to *HKSAR v Zhou Limei*, where the Court of Appeal noted the special facts in *Silva Barba* and said that the remark that if someone had touched an exhibit would not necessarily leave fingerprints or DNA was a matter of common sense. He also referred to *HKSAR v Henao Torres Oscar Oswaldo* and *HKSAR v Law Wing-hong* where the lack of fingerprint or DNA evidence had no significance in the case and proved nothing either way. He submitted that when the judge's directions were read as a whole, the safety of the conviction was not in issue. He argued that the lack of fingerprint and DNA evidence was a neutral factor. He also added that it was not true that the judge's directions were entirely without an evidential basis because PW5 did explain why not all the items were examined, and why other items were not suitable for an examination of this kind. Mr Lai also pointed out that the prosecution case did not turn on Hoang having physical possession of the drugs but whether they were within his control. This was apparent by the judge's response to a question from the jury for an explanation as to the meaning of possession, having discussed the matter with counsel for the parties, when he said: But here, in this case we are not talking about the defendant having the drugs in his hands. No, we are not talking about physical possession. However, we are talking about another kind of possession, which means the drugs was within his control. That means, he was keeping it and he knew where it is, or where it was, and he had the intention to exercise control or custody over it. So in the present case, if you accept the prosecution case, that the drugs were on the table and he was sitting behind the table, then obviously he knew the things were before him. The question is,

whether he was exercising any control over it whether he has the intention to exercise control over it. And in relation to these matters, whether he was exercising control over it and whether he had the intention to exercise control over it, is or are matters which you have to see whether you can infer those, from all the circumstances of that case. Discussion As this Court has said time and again, context is everything. It is important to consider the judge's impugned statements in the summing-up in the context in which they were given. It is not satisfactory to look at the judge's impugned statements in isolation without taking into consideration the relevant passage in which they were made, and any other passages to which they may relate, as well as the summing-up as a whole together with the issues and circumstances of the case. The circumstances of this case and what was in issue, is of particular relevance to the complaint in this ground. As has already been noted, it was an admitted fact that Hoang's fingerprints or DNA were not found in the hut or on the exhibits. PW5 testified that he only dusted certain items for fingerprints and only found one fingerprint on a mirror in Room A. The evidence of PW5 was not challenged by the defence. In fact, the evidence he gave about how he conducted the fingerprint examination at the hut was elicited by defence counsel in cross-examination. PW5 testified that some surfaces were not suitable for examination for fingerprints, and he mentioned various items. The complaint about the judge's comments in respect of the fingerprint evidence must be considered in the context of the appellant's own case that he was in the hut; he had been there many times to buy drugs; and he had fallen asleep there on that day after consuming drugs. Having referred to the admitted fact, and in the context of the evidence and issues at trial, the judge said, it does not necessarily mean that the defendant had not come into contact with anything inside the hut. He went on to note that there was no dispute that Hoang was present inside the hut. He then referred to the evidence of PW5 that not all things are suitable for fingerprint examination, which he explained had not been challenged by the defence. This concerned the evidence of PW5 as to what he had or had not dusted for fingerprints. The judge told the jury that it was a matter entirely for them as to whether or not to accept this part of PW5's evidence and added that they may consider that the absence of Hoang's fingerprints or DNA may or may not assist either side. The judge by these remarks was not preventing the jury from considering the evidence of the admitted fact but merely explaining its contextual relevance to them. There was the evidence of PW5 as to the selection process he went through in identifying items as a potential source of fingerprints and what items or surfaces were likely to leave fingerprints. This evidence was not contested by the defence. Nor was it the defence case that Hoang had no contact with anything inside the hut. It was accepted he had been in the hut many times, and particularly at the time the police gained entry to the hut finding the drugs inside. This was very different from Silva Barba, where the defendant's case was that the suitcase and handbag were not his luggage. The defendant's contact with the luggage was strongly contested at trial. Whereas here, the prosecution case was not whether Hoang was in physical possession of the drugs but whether they were under his control. The fact was that only one fingerprint had been found, and that was on the mirror, and there were no fingerprints on anything else that had been checked. It is understandable that in this context no issue was made about the lack of fingerprints in the defence closing speech to the jury. Lee J by his remarks was reflecting the evidence presented to the jury on this issue and was not asking the jury to ignore the evidence or

to speculate that Hoang had come into contact with the drugs. He explicitly tailored his remarks to accord with the defence not taking issue with the fingerprint evidence and the fact that Hoang was in the hut. In the context of the facts and circumstances of the case and what was in issue, the judge's remarks were both correct and appropriate. This ground of appeal fails. The 2nd appeal

The prosecution case At 9:40 pm on 13 October 2017, Manan was seen quickly leaving 315 Nathan Road and heading in the direction of Tsim Sha Tsui. He returned shortly thereafter at 10:15 pm. At 10:36 pm, the exhibits officer, PC 15741 (PW2), who was waiting in the stairwell of the building between the 5th and 6th floors, informed PC 19218 (PW1) that Manan was coming back down to the ground floor via the staircase in the building. PW2 followed Manan from the 5th floor down to the ground floor. It was at 10:37 pm that Manan appeared on the ground floor, whereupon he was arrested by PW1 and PW2. PW1 said to Manan, m a police officer, here s my warrant card . The two police officers then searched Manan. They found a resealable plastic bag (exhibit P1a) containing 0.68 gramme of cocaine narcotic (exhibit P1) in his left trouser pocket and cash amounting to \$16,410 (exhibit P10) in his right trouser pocket. They also found keys and a mobile telephone. PW1 then handed the packet of drugs to PW2, however, PW1 left the cash, keys, and the mobile telephone in Manan's pocket. The officers then arrested and handcuffed Manan. The prosecution case was that Manan agreed to go for a house search. This was evidenced by the officer writing this down in his notebook (exhibit P28), which Manan signed. Manan was then escorted to Room 2 on the 5th floor of 315 Nathan Road (Room 2), where he lived, in order that his residence could be searched. Manan used his key to open the door to Room 2. When the police officers and Manan entered the room, PW1 noticed in the middle of the living room there was a mattress and an adjoining bedroom. He asked Manan, Where you sleep? , to which he replied, s me . PW1 then asked Manan, The things is you? , to which he replied, s me . Whilst pointing at the wardrobe in the bedroom, PW1 asked Manan, The clothes is you? and he replied, s me The prosecution submitted that the police officer used very simple English, coupled with hand gestures, to communicate with Manan and that Manan understood what was asked of him. We observe at this juncture that Remedios J cautioned the jury in emphatic terms not to use this evidence as an admission by Manan that the drugs and related items belonged to him because the question, The things is you? , and the answer, s me. , were so vague . She told them that they should ignore this evidence. The police officers did another search of Manan when they were up in the flat, but did not find anything else. There were two other Pakistani men already inside and sitting on the mattress in the living room. Their names were Ahmed Touqeer (Touqeer) and Safdar Muhammad (Muhammad). Inside a wardrobe in the bedroom the police officers found a resealable plastic bag (exhibit P2), containing 4 small plastic bags (exhibit P3a), containing a total of 228 grammes of cocaine narcotic (exhibit P3), an electronic scale (exhibit P4), a plastic bag (exhibit P5), containing 21 resealable small plastic bags (exhibit P5a), cash of \$42,250 (exhibit P6) and a tenancy agreement (exhibit P7). The exhibits officer testified that he saw white powder on the scales and that he forgot to tell the officer to take a photo of P1, the packet of drugs which was on the defendant's person The prosecution alleged Manan was the tenant of Room 2 and was the one who occupied the bedroom where the drugs were found. Manan was then taken back to Yau Ma Tei police station where they did another search, formally seizing the \$16,140 cash from him. The evidence from the arresting officer was that when they

initially apprehended Manan they did not seize this money but left it in his pocket. It was only when they were back at the police station that they seized and counted it. The prosecution case was that when Manan was leaving the building and arrested he was on his way to supply the drugs to another. The prosecution alleged that Manan was knowingly storing the drugs in the wardrobe for the purposes of supplying them to others; and that he was the occupier of the bedroom as a Form 8 loss memo was found under the pillow on the bed. It was submitted by the prosecution that the purity of the cocaine in both counts was nearly identical and all packets seized shared the same appearance and size. It was therefore alleged that the small bag found in Manan's trouser pocket had come from the bundle of small bags from the wardrobe. It was also submitted that the denominations of cash found on the appellant and in the flat were similar. Of the money (the \$16,140 found in Manan's pocket when he was arrested, and the \$42,250 found in the wardrobe), the prosecution submitted that this could only be explained on account of the fact he was dealing in drugs, as his only formal source of income was \$200 per month he received as a torture claimant. The defence case Manan gave evidence but did not call any witnesses. He testified that there were no drugs in his trouser pocket when he left the building, nor did he have on him \$16,140 cash. He said he was holding a \$500 note, his keys and a Form 8 loss report. It was submitted on his behalf at trial that the police officers were not truthful, in respect of the circumstances of his arrest and the police officers not mentioning finding the cash in his pocket until the third search of him, which happened back at the police station. At the time of the offence, Manan was 24 years of age and a national of Pakistan. He testified that he came to Hong Kong illegally in 2016 and made a torture claim. We note that when the judge mentioned that Manan came to Hong Kong illegally, she commented: Although, he came to Hong Kong illegally, members of the jury, you have heard from him he has never been convicted of any offences. It is correct, as you can see from the admitted facts he is a person of clear record. That means that he was never convicted of a criminal offence in Hong Kong. His evidence was that he and Touqeer were neighbours in Pakistan and they had coincidentally come to Hong Kong together. As for the other flatmate, Muhammad, he said he had moved in with them about a week before the offence. He said that Touqeer and Muhammad slept in the bedroom, while he slept in the living room. He indicated that the cigarette butts and bottles of whiskey in the bedroom belonged to Touqeer, which showed that it was Touqeer's bedroom. He did not know the wardrobe stored the drugs, the cash, the electronic scale and other items, although he shared the clothes inside the wardrobe with Touqeer. It was the defence case that the incriminating items in the wardrobe belonged to Touqeer. Manan said that on the night of the offence he had left his flat at 7:00 pm, not 9:40 pm as alleged by the police. After he returned to the flat he had a shower before cooking the evening meal at 9:30 pm. The three of them were at home. After he had showered, he asked Touqeer to give him pants to wear but Muhammad instead gave him the pants he was wearing when he was arrested. He said all three men shared their clothes, except their underpants. He did not go downstairs to sell drugs. He went out to buy some drinks for them to have with their meal, which he had just cooked. He did not have any money on him so Touqeer lent him \$500. He thought he left the room at around 10:15 He went from the 5th floor to the 2nd floor via the lift, and walked from the 2nd floor to the ground floor via the stairs. It was at that moment he was pushed back into the building by the police officers, who did not tell him they were police

officers, and he only realized they were when he was handcuffed. The prosecution claimed that when Manan was arrested, he gave the police officers his name, told them where he lived and agreed to a house search. However, Manan said he never gave them his name. If he had given his name to them, it would have been Abdul Manan, not Manan Abdul. He did not sign the notebook when arrested on the street but only when they were back at Yau Ma Tei police station. The defence submitted that there was a doubt on the prosecution evidence as there were photographs of all the drugs and other items found in the wardrobe, but there were none of the single pack of drugs found on Manan down on the street, nor of the money found in his right trouser pocket. As for this matter, the exhibits officer explained that he had forgotten to ask the Identification Bureau officer to photograph the pack of drugs whilst he was in Room 2. Manan denied having any knowledge of the drugs in the wardrobe, the electronic scale, the cash or the bundle of empty resealable plastic bags. Instead, he said that Touqeer was the drug trafficker and the cocaine in the wardrobe belonged to him. It was an admitted fact that Touqeer was charged with trafficking in a dangerous drug. The charge was withdrawn on 15 February 2018, upon legal advice on the ground of insufficient evidence. The defence contended that the alleged admissions of s me, were never made and that he did not speak English, nor understand the language. The defence invited the jury to consider that, on account of the admitted fact that the five plastic bags containing the drugs (exhibits P1a and P3a) were examined and no fingerprints were found, this indicated that Manan was not connected to the bags of drugs. The defence contended that Manan was not the only occupier of Room 2 and that Touqeer and Muhammad shared the bedroom, indicating it could well have been Touqeer or even Muhammad who were responsible for the drugs. However, defence counsel in his closing speech strongly submitted to the jury that the drugs and related items belonged to Touqeer. The fingerprint evidence The fingerprint evidence concerned the five plastic bags that contained the drugs; one bag containing the drugs allegedly found in Manan's pocket (exhibit P1a), and four bags containing the drugs found in the wardrobe (exhibit P3a). The fingerprint evidence was addressed in the admitted facts as follows:

16. One small plastic bag, Exhibit P(1a) and the 4 plastic bags Exhibit P(3a) were all submitted to police for fingerprint examination. There was no marks of value found on P(1a) and P(3a).
17. No attempt was made by police to examine the electronic scale Exhibit P(4) and the plastic bag Exhibit P(2) for the purpose of fingerprint lifting. There was later an amendment to paragraph 16 of the admitted facts, which read as follows:
 2. The last sentence of Paragraph 16 of the Admitted Facts (PA1) be substituted as follows: There were no fingerprints found on exhibit P(1a) and P(3a). Prosecuting counsel made no mention of fingerprints in her closing speech to the jury. While defence counsel in his closing speech emphasised the lack of fingerprints in support of the defence case that Manan had nothing to do with the drugs. He said: Four pieces of evidence which are missing, which you might expect and the obvious one of course is fingerprints. Now, it is obvious and I don't want to make bad points because I'm not obviously suggesting that for anything you touch leaves your fingerprint on it which could be wheeled out in court to prove your guilt. Of course not. But this packet of drugs we've been referring to as P1, this is

supposed to have been found in his pocket and if it was in his pocket he must have put it there - I mean it's common sense - that means he must have handled it. It is surprising that there are no fingerprints on it. It's an obvious point and I've got to make it with some point - with some force, I think. Point 4 - bullet point 4, as I understand the position, the scales, the big GLAD bag, and I think -- leave it at that. At least those two items were not fingerprinted. Goodness knows why not. They're obviously involved in this case. Well, of course they might have had the defendant's fingerprints on it, but what they might have had is that they might have had Toukir's fingerprints on it. And obviously the scales would have been used for the weighing of the drugs. If Toukir's were on it, that would put a different complexion on the case. The whole case would be different, would it not? Miss Cheung has been suggesting that it's this defendant, this young man, who is running the show. Now, we don't have, they haven't been fingerprinted, so I can't take that point any further. But all I say about that, it's not good enough. It's not good enough, this is a relatively simple case, I know, but it's a very, very serious case and it's not good enough to deal with important exhibits in this way and just to check some of them for fingerprints and not bother with others. Remedios J directed the jury in relation to the fingerprint evidence in the following terms: Fingerprint evidence or lack of. At paragraph 16 of the first Admitted Facts and paragraph 2 of the second Admitted Facts, you will see the five plastic bags, that is P1a and P3a, the bags that contained the drugs, were examined but no fingerprints were found. It is correct what Mr Whitehouse is saying to you. There is no fingerprint evidence connecting the defendant to the plastic bags. Members of the jury, the absence of the fingerprints proves nothing one way or the other. At the time, Mr Frederick Whitehouse, who was representing Manan at trial, objected to this direction and the following exchange took place between he and the judge in the absence of the jury: MR WHITEHOUSE: Yes, just two matters, my Lady. I appreciate we are in your Ladyship's hands on this. But, first, the first thing is your direction on the lack of fingerprints, in my submission, it was really rather too strong. You used just three words and not -- well, It does not prove anything, and I'd say was added with some emphasis by you. In my submission, that was almost a judicial direction and it was really a little too strong. The absence of fingerprints, in my submission, should also be considered by the jury in all fairness. The other thing... COURT: I don't understand what you're saying. MR WHITEHOUSE: Yes, it's -- well, the... COURT: But that is the usual direction. MR WHITEHOUSE: Well, the lack of fingerprints might raise an inference that the defendant didn't handle any of the exhibits. COURT: No, but... MR WHITEHOUSE: As I said... COURT: Perhaps, you could -- you could -- the law is not -- does not state it that way. MR WHITEHOUSE: Well, I mean, I have set it out in your Ladyship's hands. COURT: But as to the fingerprint, I will not be adding anything further. The lack of fingerprints on the plastic bags in which the drugs were contained was an important primary fact for the defence. It would have been particularly relevant to the credibility of Manan's testimony that the prosecution case in respect of the packet allegedly found in his trousers pocket was a fabrication. Similarly, it would have had relevance to the drugs found in the wardrobe as the prosecution case was that the bag of drugs allegedly recovered from Manan's pocket came from the same batch of drugs in the wardrobe so it could be expected that Manan would also

have handled those bags of drugs. The grounds of appeal Mr Young raised three grounds of appeal, which read as follows: Ground 1 Misdirection on Fingerprint Evidence

1. In relation to the admitted fact that the Appellant's fingerprints were not detected on the small plastic bags containing the dangerous drugs (exhibits P(1a) and P3(a)). It was an error for the trial judge to direct the jury that the absence of the fingerprints proves nothing one way or the other, because such a direction:
 - a. effectively prevented the jury from having any regard to a critical defence argument (i.e. the plastic bags did not have the Appellant's fingerprints because the Appellant never handled them and hence did not possess or know of the drugs in them) to the prejudice of the Appellant;
 - b. did not have a proper evidential basis because there was no evidence the admitted fact was logically incapable of supporting an inference favourable to the Appellant;
 - c. usurped the function of the jury in its fact-finding role; and
 - d. is at variance with the basic principle that reasonable doubt can be founded on both the presence and absence of evidence.
- Ground 2 Failure to Give a Good Character Direction
2. In deciding to give a good character direction to the jury for the sole reason the Appellant was an illegal immigrant, notwithstanding he had a clear criminal record and had testified in his own defence, the trial judge erred in her exercise of discretion because:
 - a. as the Appellant had not been convicted of any immigration offence and enjoyed a presumption of innocence, any allegation of being an illegal immigrant could not rationally disparage an otherwise good character;
 - b. the trial judge's decision implied a view the Appellant was guilty of an immigration offence thereby infringing the Appellant's constitutional guarantee of the presumption of innocence;
 - c. as a non-refoulement protection claimant, whose claim was still pending, it is even more precarious to label the Appellant an illegal immigrant because if his protection claim is substantiated, any immigration offences related to illegal entry or stay will be withdrawn in accordance with prosecution policy;
 - d. where a person of clear record, such as the Appellant, has testified in his own defence and credibility is a central issue in the case, for the court to deprive such a person the credibility limb of the good character direction requires the court be appraised of clear evidence of the person's bad or discreditable character, none of which was present in relation to the Appellant; and
 - e. the overall effect of not giving any good character direction in the circumstances of this case was to render the summing up unbalanced and unfair.
- Ground 3 Failure in the Provision of Interpreter Assistance

3. It was a material irregularity and a breach of the Applicant's constitutional right to interpreter assistance for the Urdu interpreter to stop interpreting on multiple occasions when the trial judge interjected, had detailed exchanges with prosecuting counsel (and sometimes defence counsel), and gave directions to the jury, during the Applicant's cross-examination and re-examination and whilst his vital interests were involved. Ground 1 - Fingerprint Evidence The appellant's submission Mr Young submitted Remedios J was wrong to have directed the jury on the fingerprint evidence as she did, arguing that the effect on the jury of the direction undermined the exculpatory effect of the absence of fingerprints and ultimately amounted to a usurpation of the jury's fact finding role. He contended that the fingerprint evidence weakened the prosecution case and strengthened the defence case in terms of showing that Manan did not handle the drugs and supporting Manan's credibility as a witness. He added that this was of particular significance because the prosecution case was that Manan was actively trafficking in the drugs found in the wardrobe and that the bag of drugs allegedly found in his pocket had come from this source. Mr Young argued that by directing that the absence proves nothing one way or another this would have confused the jury as to why Manan would need to prove anything. He submitted the defence was entitled to argue that the absence of fingerprints raised a reasonable doubt that Manan possessed the drugs. He further submitted that, as the prosecution was entitled to call evidence to explain away the absence of fingerprint evidence (for example, that an accused may have worn gloves when handling the drugs), this meant the defence could call or elicit evidence which demonstrated the significance of the absence of any fingerprints. Mr Young contended that a judge, in addressing the absence of any fingerprints, should simply approach the task in the way that he or she normally would when dealing with any other evidence, that is to summarise the respective cases of both the prosecution and the defence in a fair and balanced way. He submitted the present case was on all fours with *Silva Barba*, in which the Court of Appeal held the judge was wrong to have given a direction without any evidential basis. He also submitted that the judge erred in regarding her remarks as the usual direction as comments of this kind in respect of fingerprint evidence would very much depend upon the particular circumstances of the case. The respondent's submissions Mr Lai suggested that the impugned direction by the judge owed its origin to what was said in *Law Wing Hong* that where there is no fingerprint evidence, it proves nothing either way Mr Lai submitted that the absence of such evidence merely meant there was no positive evidence to prove contact between the accused and the exhibit being examined, but it does not mean such contact is disproved. However, he did concede that it would be preferable for a judge to expressly direct a jury to the effect that they should take into account a lack of fingerprint evidence linking an accused to the drugs. Mr Lai contended that when the summing-up was considered as a whole, it was fair and balanced and the jury was in reality not prevented from having due regard to the lack of fingerprint evidence. Discussion It is not uncommon in drug trafficking cases, where it is alleged as an element of the offence that a defendant was in possession of a dangerous drug for the purposes of trafficking, that an issue arises in relation to fingerprint or DNA evidence or the absence of it. The presence of fingerprint or DNA evidence on a material item of the offence,

such as the packaging containing the drugs or related items and paraphernalia, may be relied upon by the prosecution to connect the defendant to the item where the fingerprint or DNA evidence is attributable to him; or by the defence to show the converse to be the case, where the fingerprint or DNA evidence is not attributable to the defendant. The absence of fingerprint or DNA evidence on a material item of the offence poses more of a problem as to its relevance or significance because it will depend upon the particular circumstances of the case. The absence of such evidence may be due to a wide variety of reasons, including the fact that no forensic examination was conducted for fingerprints or DNA; that a forensic examination was conducted but insufficient data was obtained to make a positive finding for fingerprints or DNA; or that there was a scientific or other explanation why no fingerprints or DNA would be present. Depending upon the circumstances, a defendant may still rely on the absence of fingerprint or DNA evidence to show that he was not connected to a material item of the offence. The question arises as to what are the permissible bounds within which a party can rely on fingerprint or DNA evidence or the absence of it. It seems clear to us that where there is no fingerprint or DNA evidence at all, it proves nothing either way. This principle was stated by the Court of Appeal in *Law Wing Hong* as follows: the applicant complains that there was no evidence of fingerprints on the knife. It is true that there was not, but lack of fingerprint evidence is a neutral factor. Of course if fingerprint evidence is given and either implicates an accused or exonerates him by establishing that the fingerprints are those of some other person, then it can be evidence of very substantial importance. Where, however, there is no fingerprint evidence at all, it proves nothing either way. In the present case, a key aspect of the defence case was the lack of fingerprints on the plastic bag allegedly in Manan's pocket. It was argued that this was not consistent with him having handled the bag of drugs. This argument also applied to the four plastic bags found in the wardrobe because the prosecution case was that the bag of drugs in Manan's pocket came from his cache of drugs in the wardrobe. It was further argued that neither the GLAD bag (exhibit P(2)) nor the scales (exhibit P(4)) had been tested for fingerprints, and should have been as they may have had Touqeer's fingerprints on them, whom the defence claimed was responsible for the drugs and related items. The essential issue engaged in this ground is whether the judge usurped the fact finding role of the jury when directing that the absence of fingerprints proves nothing one way or the other. The respondent submitted that when the direction is considered in context, the judge did not usurp the jury's role. There were directions given by the judge that the jurors were the sole judges of the facts and that no one else could decide the facts of the case. The judge then directed: in the course of my summing up, if I appear to express my views concerning the facts or I emphasize a particular part of the evidence, do not adopt those views unless you agree with them. Consider all the evidence before you decide what is important and what is not. Take into account what counsel have urged upon you. But remember it is your sole responsibility to decide the facts of this case. You must decide the facts from the evidence presented to you during this trial. It was argued that the judge was making it known that her view was that the fingerprints did not prove anything. She was not directing them to ignore the evidence. It was contended her directions did not go that far. We do not agree. The fundamental

principle that governs the admissibility of evidence is relevance. It is the judge's role to determine if evidence is relevant and, therefore, prima facie admissible. Once the judge makes that determination and admits material or testimony into evidence then it is for the jury to assess the credibility, reliability and weight of the evidence. In this particular case, the absence of the fingerprints was relevant to the issue of the truth or falsity of the allegation that Manan was in physical possession of the drugs in his pocket and in the wardrobe, which he denied. In the circumstances of this case, the judge's direction to the jury that the absence of fingerprints proves nothing one way or the other was not a personal observation which the jury was free to ignore. It was expressed as a statement of fact that carried with it the full authority of the judge and effectively removed from the jury's consideration a critical piece of evidence that may have weakened the prosecution case and strengthened the defence case. A direction to the jury must have a foundation either in law or on the evidence. Turning to this case, there was evidence that the police carried out fingerprint examination on the five bags containing the drugs and no fingerprints were found. Of particular relevance was the fact that a bag of drugs was allegedly found in the pocket of Manan but no fingerprint was found, without any further explanation as to why this may have been the case. The defence case was that the bag of drugs was not in Manan's pocket and he had nothing to do with the drugs either in his pocket or in the wardrobe. It therefore may have had a bearing on whether Manan had come into contact with the drugs and was in physical possession of them as alleged, and it also went to Manan's credibility as a witness as he had testified that the drugs were not found on him and he had nothing to do with the drugs in the wardrobe. The defence case relied heavily on the absence of the fingerprints and this was emphasised in defence counsel's closing speech to the jury. Defence counsel also complained to the judge about her direction to the jury at time, explaining that the lack of fingerprints might raise an inference that Manan did not handle any of the drugs. The absence of a fingerprint was relevant evidence to a fact in issue that the jury was entitled to consider and did not ineluctably prove nothing one way or the other. It is axiomatic that one of the quintessential functions of the jury is to independently consider the evidence and attach relative weight to each piece of evidence. The judge may comment on the evidence but that comment must be based on the evidence and must not be expressed in a way that may cause the jury to think that it is a direction that they must follow. The judge's remark that the absence of fingerprints proves nothing one way or the other in the circumstances of this case was erroneous because it was contrary to the evidence before the court and was expressed in such strong and unequivocal terms as to give it the appearance of a direction and no judge can ever direct a jury to ignore evidence which is properly before it. In doing so the judge usurped the function of the jury. She dissuaded the jury from considering the evidence and effectively neutralised the defence's reliance on it. A similar issue arose in *HKSAR v Au Yeung Fu*, where the applicant was charged with drug trafficking offences who alleged the drugs were planted on him. The trial judge directed the jury that the absence of the applicant's fingerprints in the flat or traces of drugs in his closing or fingernails was neutral and did not prove anything one way or another. In allowing the appeal on this and other grounds, the Court of Appeal said: it was

for the jury to decide if they attach any significance to the negative findings in relation to traces of drugs on the applicant or his clothing. It was not for the judge on this important matter of fact to direct them that it proved nothing. It may have proved nothing, but that was a matter for the jury to consider in the light of the evidence as a whole, especially after the defence had laid so much emphasis on the point. It is a fundamental principle that it is for the jury to assess the credibility, reliability and weight of a particular piece of evidence by having regard to the whole of the evidence in the light of the issues at trial. In the present case the judge, by her statement as to the probative value of the lack of fingerprint evidence, went beyond legitimate judicial comment and encroached onto the jury's area of responsibility of determining whether to accept, and assessing the weight to be given to a particular piece of evidence. We are satisfied that this ground of appeal is established. We would add that there is a wide variety of circumstances in which this issue may arise and therefore there is no usual direction that will generally apply. Judges should be careful not to use a formula as a usual direction derived from a case where the circumstances are different but tailor a direction to the facts and circumstances of the case.

Ground 2 Good Character Direction

The appellant's submission The basis upon which leave was granted was whether Manan's illegal immigrant status was sufficient to deprive him of the benefit of a good character direction. The position contended by Mr Young was that under human rights law an admission of illegally entering Hong Kong by a non-refoulement claimant, should not be treated as a discreditable matter. He submitted the judge wrongly exercised her discretion when not giving Manan the benefit of a good character direction and should have given him at least the credibility limb of the direction. Mr Young argued that the judge, in assessing whether there were discreditable matters failed to take into account that, whilst the appellant may have entered into Hong Kong illegally, he may have done so in an effort to escape torture or persecution in his home country. He further supported his argument by relying on international law. He placed emphasis on Article 31 of the Convention Relating to the Status of Refugees (1951 and 1967) (CRSR 31) which provides that states should not impose penalties for illegal entry to refugees who come directly from a territory where their life or freedom is threatened. He also made reference to several leading human rights cases, to argue that fleeing from persecution bears no rational connection to propensity to commit a criminal offence. Mr Young referred to *R v Uxbridge Magistrates Court, Ex Parte Adimi*. In that case, the applicants had entered the United Kingdom illegally and were seeking to claim asylum. However, they all entered using false documents and were prosecuted. This caused them to judicially review the decision to prosecute them. It was argued the prosecutions were in breach of CRSR 31 requiring states party to the convention not to impose penalties on those seeking asylum. Brown LJ giving the judgment of the Court of Appeal, construed CRSR 31 broadly as providing immunity for genuine refugees whose quest for asylum reasonably involved them breaching domestic law. In *Sakthevel Prabakar v Secretary for Security*, the Court of Appeal, in allowing an appeal to quash a decision to issue a deportation order, considered *Uxbridge Magistrates Court, ex p Adimi*, and made the obiter comments that the distinction between a refugee using a forged passport to gain entry to a country of refuge and a person using a passport to obtain a pecuniary advantage by

deception was very marked. The latter act might well mark its perpetrator as someone whom it would be undesirable to admit to a country even as a refugee. In contrast, the former circumstance could be regarded as something which was entirely excusable, at least in countries adhering to CRSR, which did not apply to Hong Kong. It was submitted that in principle this approach has been followed in Hong Kong, and has been reflected in the Department of Justice's prosecution policy not to prosecute a non-refoulement claimant for an immigration offence relating to a pending asylum claim. The central thrust therefore of Mr Young's argument, was that this policy not to prosecute, has so broad an application to extend even into the realm of good character directions. The basis for his submission was that this policy is routed in the high standards of fairness expected of both criminal and non-refoulement proceedings. Hence, to treat the making of a non-refoulement claim, by a defendant who has made an admission of illegally entering Hong Kong, as something that is a discreditable matter, could ultimately amount to a discriminatory and unfair practice being adopted against defendants who are non-refoulement claimants. The respondent's submissions Mr Lai submitted the judge correctly exercised her discretion not to give Manan a good character direction as there was evidence that he had entered Hong Kong illegally. He noted that the court's discretion on this issue was wide. He also argued that what really mattered was whether or not the summing-up, when read as a whole, was fair and balanced. Mr Lai submitted the judge was fully aware Manan had come to Hong Kong in June 2016 indicating that he had been in Hong Kong for about 16 months prior to his arrest on 13 October 2017. This was a short period of time and so the judge had sound reason to refuse to give a good character direction. He referred to the cautionary note struck by the Court of Appeal in *HKSAR v Mohammed Saleem (No 2)*: 26. Certainly in *Tang* the court acknowledged that a bare lack of convictions, absent any positive evidence of good character, did not justify, necessarily, a character direction.

27. In many cases in Hong Kong a good character direction is meaningless, because the defendant is not a Hong Kong resident, or has resided in Hong Kong for a short time only, or is here illegally, or is in transit. In such cases it is arguable that a defendant should not be entitled to a character direction, either as to credibility or propensity, beyond a simple statement to the effect that there is no criminal record which exists in Hong Kong.
28. A jury must be puzzled and confused when listening to a judge give a good character direction for a defendant whose only link to Hong Kong is an intention or desire to come here to commit offences; who may be in Hong Kong for the first time; where no reliable material establishes a clear record in the country of origin and where no character witnesses are called. To require a judge to give a full and unqualified character direction in such circumstances runs the risk of being an affront to common sense. Discussion At trial, Mr Whitehouse on behalf of Manan accepted it was not appropriate for Manan to receive a good character direction. The issue of Manan's background and character first arose early in the proceedings, when counsel discussed with the judge the Admitted Facts. In the original Admitted Facts there was reference to Manan being a suspected illegal immigrant. It had been confirmed that Manan had entered Hong Kong illegally although no further details

were provided. The judge considered this fact was not relevant and could be prejudicial to Manan if included in the Admitted Facts. It was therefore deleted. However, the judge stressed that the jury should have a proper understanding of what was a non-refoulement claimant, and asked it be addressed in the Admitted Facts. The judge also referred to the admitted fact that Manan had a clear record in Hong Kong. She indicated that as Manan was an illegal immigrant she would not be intending to give him a good character direction on both limbs. She asked counsel to comment, and Mr Whitehouse said, Yes, I accept a clear -- a good character direction is not appropriate in your summing-up. The judge took the opportunity to confirm that the admitted fact that Manan had a clear record concerned him having no convictions in Hong Kong, which she said should remain in the Admitted Facts. Later in the proceedings, when discussing the directions to be included in her summing-up, the judge referred to the evidence that Manan was an illegal immigrant and said she would not be giving a good character direction on both limbs. She invited comment from counsel, and Mr Whitehouse said, I agree on that point. As already noted, the judge in her summing-up emphasised to the jury that whilst Manan had come to Hong Kong illegally, he had submitted an application as a torture claimant and had never been convicted of any offences. It is clear that the judge went to great lengths to ensure that the background and character of Manan was fairly and appropriately dealt with. Whilst we accept that a defendant's illegal immigrant status alone may not necessarily deprive him of the benefit of a good character direction, the question of whether he should be given the benefit of such a direction will very much depend upon the particular circumstances of the case and common sense. This was specifically addressed in *Mohammed Saleem (No 2)*, to which we have already referred, and by the Court of Final Appeal in *Tang Siu Man (No 2)* as follows: A jury is invariably told by the trial judge - as was the jury in this case - that in viewing the evidence they must use common sense. Implicit in this statement is the proposition that in weighing up credibility the jury must have regard, as best they can, to the character of the person standing in the witness-box; and, in determining guilt or innocence, the disposition of the defendant, in so far as there is material bearing upon such disposition. But, so high is the concern of the common law for a fair trial that, in fact, trial judges normally do more than to simply enjoin the jury to use common sense: judges would, where appropriate, direct the jury regarding the relevance of good character to credibility and propensity: that is, tipping the scales slightly in favour of believing the defendant's story and questioning whether he (or she) might be the sort of person who would commit the offence charged. This, in effect, is nothing more than common sense writ large. And where judges have failed to do that, such failure might render the summing-up unbalanced and unfair, causing appellate courts to intervene. So judges, exercising prudence, often would give the full Vye direction when the defendant is a person with a clear record. This flexible regime has worked reasonably well in Hong Kong and, as counsel for the appellant Mr McLanachan candidly told the court at the hearing, it has not resulted in a spate of appeals. This regime is based on humanity and common sense, not on the application of a rigid set of rules. Having noted that good character was an elusive concept, the Court in *Tang Siu Man (No 2)* said: It is illusory to think that in the artificial environment of a court of law, focused upon evidence

relating to the criminal charges and not on collateral issues, the character of a witness or of the defendant can be revealed in a truly meaningful way. The Court also observed that the Vye principles, applied in practice, might be highly artificial and amount to no more than the incantation of a well-worn formula. The Court added that the need to heavily qualify the direction, to avoid an affront to common sense, might make the words virtually meaningless and also confuse the jury. The principles in *Tang Siu Man (No 2)* were reiterated in *Mohammed Saleem (No 2)*, where this Court said that even where there was evidence of good character, it was not always necessary to give a full good character direction. The mere absence of any previous convictions, absent any positive evidence of good character, did not justify, necessarily, a good character direction. However, where positive evidence of good character had been adduced and nothing suggesting discreditable conduct had emerged, a failure to give a full good character direction might render a summing-up unbalanced or unfair. The Court observed that in many cases in Hong Kong, a good character direction was meaningless, because the defendant was not a Hong Kong resident, or had resided here for a short time only, or was here illegally, or in transit. The Court considered that in such cases it was arguable that a defendant should not be entitled to a good character direction, either as to credibility or propensity, beyond a simple statement to the effect that there was no criminal record which exists in Hong Kong. The test of a good character direction is whether what is said is fair and balanced. As to this aspect of the case, the jury were told not to speculate and not base their findings on emotional or moral judgment; to use their own experience of life and common sense when assessing the witnesses credibility; and although Manan had entered Hong Kong illegally, he was a torture claimant with a clear record in Hong Kong. Manan testified that he entered Hong Kong illegally and had only been here for a period of 16 months before his arrest for this offence. He claimed as part of his case that the drugs and related items, including the substantial sums of cash, belonged to Touqeer, who was actively trafficking in the drugs. He said Touqeer was his neighbour in Pakistan and that coincidentally they came to Hong Kong together. They took out a lease together for a room on 23 July 2016 and moved to Room 2 on 3 August 2017 because of a leakage problem with the other room. On his own case, he was living with Touqeer for the entire time that he was in Hong Kong, while Touqeer was actively dealing in drugs out of a small room, with whom he shared clothes and the wardrobe in which the drugs and related items were found. It was also of significance that Mr Whitehouse agreed with the judge that Manan not be given a good character direction and this would have been based on his instructions and knowledge of the case. Whilst the judge said that she would not give Manan a good character direction because he was an illegal immigrant, it was a general description by her, obviously taking into account the relevant principles and observations in the various authorities together with the facts and circumstances of the case. We do not find any merit in this ground of appeal. Ground 3 Interpreter Assistance The appellant's submission As we have already mentioned, an additional ground of appeal was filed which complained of a failure in the provision of interpreter assistance to Manan. Mr Young relied on *HKSAR v Moala Alipate*, to argue that the alleged lapses in interpretation during the course of the proceedings when Manan's vital interests were involved was a material irregularity. In

Alipate, the Canadian Supreme Court decision of *R v Tran* was discussed as to this issue. In a recent judgment, this Court in *HKSAR v Gutierrez* dealt comprehensively with complaints of this very nature, and declined to follow the approach in *Tran* preferring the more practical and less theoretical jurisprudence in *Lee v HM Advocate* and *Abdula v R*. The Court in *Gutierrez* also emphasised the highly unique circumstances in the case of Alipate given the translator in that case was in fact a professional rugby player working part-time as a translator, who readily admitted his inability to translate large parts of the case. The complaint under this ground concerns some 30 occasions that Manan's legal representatives have identified in which they say the Urdu interpreter stopped interpreting. Leave has been sought to file three affirmations in support of this ground, the first dated the 12 August 2018 is from Manan, and there are two affirmations from Ms Amandeep Kaur dated 14 August and 20 October 2020. Mr Young submitted these interruptions occurred when Manan's credibility was in question, and that elementary justice and the appearance of fairness required that a non-English speaking accused be provided with the means and assistance to understand what was being said. He argued that in the circumstances of this case there had been a miscarriage of justice. The respondent's submissions Mr Lai submitted that the subject-matter of this complaint all took place during cross-examination and re-examination of Manan, after the prosecution had closed its case and when Manan would have well understood the case against him. He argued that the instances of non-interpretation were mainly exchanges between the bench and counsel over how the examination of Manan was to proceed, and therefore it was unrealistic to submit that Manan could have clarified his evidence if these exchanges had been translated. Mr Lai also pointed out that no complaint was made at the time, nor at any time prior to when this ground was added to the Amended Perfected Grounds of Appeal on 23 January 2020. Discussion When considering an issue concerning interpretation, it is important to bear in mind the observations of this Court in *Gutierrez*, that occasionally mistakes are made, but we are not prepared to presume any deficiency in interpretation unless it is properly established, and unless it can be demonstrated that the fairness of the trial has been thereby compromised. The instances highlighted by Manan in the transcript of proceedings of 30 January 2019, nearly all relate to dialogue between counsel and the judge. All of this took place when Manan was giving evidence, after the prosecution had closed its case. Mr Lai was right to have stressed that Manan would no doubt have been advised by his counsel (who was an experienced criminal law advocate), whether or not to give evidence. A decision which would have required him to have an understanding of the case against him. Further, it was not enough for Manan to show there was a lapse in interpretation, rather he needed to demonstrate that this materially impacted on his understanding of the case or on the conduct of his defence. The first area which would appear not to have been translated was when the prosecutor was attempting to put the prosecution case to Manan, prompting the judge to give to the jury a direction about what the prosecutor was trying to do by putting the prosecution case to a defence witness. The prosecution then put to Manan, what the judge remarked herself was a somewhat strange question, namely, that Manan had decided to take the stairs instead of the lift in his building as he knew he was carrying drugs. This then culminated with the

prosecution putting its case that in his trousers Manan had a packet of dangerous drugs in his pocket, which he denied. Other instances of non-interpretation include counsel objecting with what he termed a technical objection to a question put to Manan; or the judge calling for a break because one of the jurors seemed to be falling asleep; both the interpreter and counsel clarifying aspects of a question before it was eventually put to Manan; and the proper basis for questions arising from re-examination. It appears little if any qualitative assessment had been made of the non-interpretations before this ground was embarked upon as being reasonably arguable. In our view, it is difficult to see how any of this could have possibly compromised Manan's right to a fair trial, or, moreover, how he could have changed the conduct of this case had he understood what the judge and prosecutor were discussing. In light of these matters it is difficult to understand how he was disadvantaged in any way, and also bearing in mind the defence he was advancing at trial. The prosecution case was very straightforward. It centered on whether Manan knew about the drugs in his pocket and was intending to traffic them, they having allegedly come from a wardrobe in his bedroom where there were more drugs he was also allegedly trafficking. The appellant never complained at the time, and was represented by counsel, who of course had charge of the case. He also had the added benefit of an interpreter assigned by the Director of Legal Aid, in addition to the Court interpreter at trial. We are of the view that this ground of appeal to be devoid of merit and leave is therefore refused.

Conclusion

For the reasons given, we are not persuaded that the ground of appeal advanced by Hoang has merit and his appeal is dismissed. We were satisfied that the first ground of appeal advanced by Manan was established while the second and third grounds were not sustainable. We allow Manan's appeal against conviction. We quash his conviction and set aside his sentence. We refuse to invoke the proviso as we do not consider that a reasonable jury, properly instructed, would inevitably come to the same conclusion where the credibility of the witnesses was a key factor based on the fingerprint evidence. Mr Young submits that the interests of justice do not require an order for retrial because of the following main reasons. First, the appellant has served the sentence on Count 1. Secondly, the prosecution case on Count 2 is not strong. Thirdly, the judge's erroneous direction deprived the appellant of a chance of an acquittal. Fourthly, a retrial would give the prosecution a second bite of the cherry and an unfair opportunity to strengthen its case. Fifthly, the appellant has served about 4 years and 6 months of his original sentence of 13 years and 6 months imprisonment. Sixthly, the need for finality of the case, bearing in mind the lapse of time that has been occasioned in this case and the risk of further institutional delays due to the coronavirus pandemic. Mr Lai, on the other hand, submits that the interests of justice dictate a retrial on both counts. He argues that the two offences concern serious crime and the prosecution case is strong where the factual issues are fairly straightforward and the only crucial question is the credibility of the witnesses called by the prosecution and the defence. He disagrees that the lapse of time since the offences took place in October 2017 or the time served by the appellant of the original sentence provides justification against an order for a retrial. He

notes that a retrial can be expedited. We consider the countervailing factors raised by Mr Young are not convincing, bearing in mind the offences are serious and the matters in issue at trial were of narrow compass. We have already set out the evidence against Manan and it cannot be said that the prosecution case is a weak one. We do not consider in the circumstances of this case that a retrial will afford the prosecution an unfair advantage of supplementing a defective case, or presenting a substantially different case to that presented to the jury in the previous trial. Nor do we find the lapse of time to be an impediment to an order for a retrial. As the facts and circumstances of Count 1 form an integral part of the prosecution case on Count 2, which is a very serious offence, we do not consider the fact that Manan has served his sentence on Count 1 to militate against an order of retrial on both counts. Having considered the submissions on retrial from the parties, we have come to the conclusion that it is in the interests of justice that Manan be retried on a fresh indictment in respect of Counts 1 and 2 before another judge, and remand him in custody pending determination of the retrial, which we direct should be expedited. (Andrew Macrae) (Ian McWalters) (Kevin Zervos) Vice President Justice of Appeal Justice of Appeal CACC 264/2018 Mr Ned Lai, DDPP and Mr Andrew Li, ADPP (Ag), (Ms Ho May-yu Lily, SPP, signed the Respondent s Written Submission) of the Department of Justice, for the respondent Mr James Sherry, instructed by Cheung & Liu, assigned by the Director of Legal Aid, for the appellant CACC 64/2019 Mr Ned Lai, DDPP and Mr Andrew Li, ADPP (Ag) of the Department of Justice, for the respondent Mr Simon Young, instructed by Choy Yung & Co, assigned by the Director of Legal Aid, for the appellant HKSAR v Hoang Gia-huan [2019] HKCA 1324 per Zervos JA. HKSAR v Manan Abdul [2019] HKCA 1276 per McWalters JA. Appeal Bundle, page 30S. Appeal Bundle, page 32M-N. Appeal Bundle, page 33N-Q. Appeal Bundle, page 40A-H. Appeal Bundle, page 35L-N. Appeal Bundle, page 42M. Appeal Bundle, page 43A-U. Appeal Bundle, page 46E-J. Appeal Bundle, page 8, Admitted Facts 2, at [2]. Appeal Bundle, pages 82K-83B. Appeal Bundle, pages 83K-89F. Appeal Bundle, page 88S. Appeal Bundle, pages 92R-93K. Appeal Bundle, pages 94-112. Appeal Bundle, page 18C-J. Appeal Bundle, pages 36L-37D. HKSAR v Silva Barba [2017] 1 HKLRD 29, at [79]-[81]. Appeal Bundle, page 17H-K. HKSAR v Zhou Limei [2020] 1 HKLRD 234, at [49]-[52]. HKSAR v Henao Torres Oscar Oswaldo, unrep., CACC 428/2012, 14 June 2013, at [56]-[58]. HKSAR v Law Wing-hong, unrep., CACC 169/1998, 11 November 1998, 8, at [(4)]. Appeal Bundle, page 56C-J. Other than at Appeal Bundle, page 104P, but this is in a different context. Appeal Bundle, page 36P-T. Appeal Bundle, page 38M-O. Appeal Bundle, page 37A-D. Appeal Bundle, page 37L-N. Appeal Bundle, page 23F-K. Appeal Bundle, page 24D-G. Appeal Bundle, pages 24H-M and 37O-R. Appeal Bundle, pages 11 and 12, Admitted Facts, at [11], [13], [18] and [19]. Both were arrested but not prosecuted. Appeal Bundle, page 16Q-U. Manan and Touqeer entered into a tenancy agreement on 23 July 2016 for Room 6 on the 4th floor of 202 Nathan Road, but because of water leakage problem in the room, they moved to Room 2 on 3 August 2017. See Appeal Bundle, page 10, Admitted Facts, at [6]-[8]. Appeal Bundle, page 39C-F. Appeal Bundle, pages 31N-Q and 38A-B. Appeal Bundle, page 38G-M. Appeal Bundle, pages 31N-32E. The prosecution called Dr Wong Tze Tat, the government chemist, and relied on his expert report (exhibit P25) to prove that the purity of the cocaine in exhibit P1 was 66% and that the purity of the cocaine in the other packets was 68%, meaning, in his opinion the purity of the drugs was almost the same. Appeal Bundle, page 32P-R. Appeal Bundle, page 35M-R. Appeal

Bundle, pages 118F-119B. Appeal Bundle, page 40M-P. This is also consistent with his evidence that apart from entering Hong Kong illegally he had not committed any other offences. See Appeal Bundle, page 104M-N. Appeal Bundle, page 40N-Q. Appeal Bundle, page 39R-S. Appeal Bundle, page 42E-H. Appeal Bundle, pages 74P-75L. Appeal Bundle, page 41D-J. Appeal Bundle, page 110E. Appeal Bundle, page 41N-R. Appeal Bundle, page 36K-M. Manan's Form 8 records his name as Manan Abdul . This was also the name that appeared in the indictment, see Appeal Bundle, page 40H-I. Appeal Bundle, pages 21K-22F. Appeal Bundle, page 12, Admitted Facts, at [19]. Appeal Bundle, page 33C-H. Appeal Bundle, pages 74R-75L. Appeal Bundle, page 12, Admitted Facts, at [16] and [17]. Appeal Bundle, page 14, 2nd Admitted Facts, at [2]. Appeal Bundle, pages 76S-77D and 79G-O. Appeal Bundle, page 24P-U. Appeal Bundle, pages 47D-48P. Appeal Bundle, pages 151C-K and 155C-K (Cross-examination of Manan); pages 64L-S and 65G-66B (Prosecution closing speech); and pages 40G, 69T-70B and 71H-L (Summing-up). HKSAR v Law Wing Hong, unrep., CACC 169/1998, 11 November 1998, 8, at [(4)]. HKSAR v Law Wing Hong, 8, at [(4)]. Appeal Bundle, pages 76S-77D. Appeal Bundle, page 18P-Q. Appeal Bundle, page 19A-F. Appeal Bundle, page 47D-O. HKSAR v Au Yeung Fu [1998] 2 HKC 81. Ibid., 86C-D. HKSAR v Vu Thang Duong [2015] 2 HKLRD 502, at [6]; Sakthevel Prabakar v Secretary for Security [2002] 4 HKC 552, at [26]. R v Uxbridge Magistrates Court, Ex Parte Adimi [2001] QB 667. Sakthevel Prabakar v Secretary for Security [2002] 4 HKC 552. HKSAR v Tang Siu Man (No 2) (1997-98) 1 HKCFAR 107. HKSAR v Mohammed Saleem (No 2) [2009] 5 HKLRD 478. Ibid., at [26]-[28]. Appeal Bundle, page 92A-B. Appeal Bundle, pages 87I-90Q. Appeal Bundle, page 91D-T. Appeal Bundle, page 92A-B. Appeal Bundle, page 92E-I. Appeal Bundle, pages 97Q-98A. Appeal Bundle, page 40L-P. Tang Siu Man (No 2), 124G-125B. Ibid., 121H-I. R v Vye [1993] 1 WLR 471; and R v Aziz [1996] AC 41. Tang Siu Man (No 2), 130B-D. Mohammed Saleem (No 2), at [14]-[21]. Ibid., at [26]-[28]. Ibid., at [30]. Appeal Bundle, page 19F-Q. Appeal Bundle, pages 20Q-21C. HKSAR v Moala Alipate [2019] 3 HKLRD 20. R v Tran [1994] 2 SCR 951. HKSAR v Gutierrez [2020] 2 HKLRD 720. Lee v HM Advocate [2016] HCJAC 39. Abdula v R [2012] 1 NZLR 534. Manan affirmed that there were many discussions between counsel and the judge which were not translated to him. He said on one occasion the judge said, in front of the jury, his evidence was not clear, this was not translated and if it had been then he could have rectified it by speaking more clearly. Manan then complained about how his lawyer was yelled at by the judge, prompting the judge to issue a direction which was not interpreted to him. He said that if he had known about these problems at trial he would have been able to address them. Ms Kaur deposed that, in her capacity as a native speaker of Hindi, Punjabi and English, she had listened to the audio recording of proceedings that took place on 30 January 2019. She highlighted on the typed up transcript where she heard words that were not translated. She said, in total, there were 18 segments which amounted to approximately 45 minutes of proceedings (that is, specifically, when Manan was in the witness box and his counsel and the judge were speaking to each other). At [63]. See Gutierrez, at [34]. Appeal Bundle, pages 129-138. Appeal Bundle, page 139. Appeal Bundle, page 141A-P. Appeal Bundle, page 150. Appeal Bundle, pages 155S-156A-G. Appeal Bundle, pages 166-167. See Gutierrez at [76]: The decision in Titchener also reinforces the point that it is incumbent on the defence to raise these matters at trial, so that steps can be taken to remedy them, there and then. It is plainly unsatisfactory and unfair to the interpreter, as well as the legal representatives at trial, to raise the matter for the

first time at an appeal, sometimes years after conviction, when memories of what happened and what was said at trial will have faded or disappeared. If there is a valid complaint, it should be raised as soon as possible so that it can be addressed. Apelete (No 2), for example, the trial judge had, on being informed of purported difficulties in understanding between the defendant and the court-appointed Ewe interpreter, arranged for two interpreters to be present at the next hearing, and for there to be interaction between them and the defendant before trial so that he could decide which of the two he was more comfortable with PAGE

- 51 - A B C D E F G H I J K L M N O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V A B C D E F sbsbXs h];1 hL)o hL)o hL)o h];1 gd%J gd];1 gdl< gd];1 gdn gd*F ucScF6 hL)o hL)o hD33 hD33 hD33 gdvq gdl< gdvq qmieimaimYmY hD33 h^3N hs]! gdL- gd%D% gdvq ho8G haN0 haN0 haN0 hGGF h,Dt ho8G ho8G haN0 haN0 ho8G ho8G hGGF ho8G haN0 hGGF gd0~ gdDJ gd'37 gd0h gd!w= ho8G h8M5 hZ0! hZ0! haN0 hGNs ho8G ho8G hrMx hV~? haN0 ho8G hV~? ho8G hV~? ho8G h6*K haN0 hV~? ho8G h}Va ho8G h}Va ho8G heeI h|< ho8G hRzD heeI h&0M gd3f gdx"I gd^Iq h&0M ho8G h&0M h:n! qiq^Vi ho8G h&0M h:li ho8G heeI ho8G ld\d\d ho8G h#w{ hM<> gd;~ hx j heeI heeI h#w{ ho8G h?7! ho8G h/<- xmxmb hZ0! ho8G hjDR hZ0! hSo+ ho8G hQ<) ho8G gd!w= gde7g hK f ho8G hQ<) ho8G ho8G hsdS ho8G hsdS h^uT ho8G hzF h/]N ho8G hSli hzF h/]N ho8G hDL% hjbW ho8G gdkd gdkd gdME gdME gdkd gde7g hNT` h{>l h{>l hDL% h\te hvl h1[- h{>l hNT` h^uT gd}k h^uT h:3s gd4V gde7g h{<w h^uT ho8G gd04\ gde7g gd'37 hsdS he7g ho8G ho8G ho8G hsdS ho8G h20J he7g hsdS ho8G gde7g gd\ gd04\ gd'37 wowg_gw h20J ho8G he7g h4!i h>UP h20J h20J hjD0 h6Iz |q|f he7g ho8G ho8G h20J h4!i h4!i he7g ho8G h4!i ho8G ho8G he7g gd!C gde7g h6g, ho8G he7g he7g hKz~ hl0` ho8G h6g, ho8G hl0` xpxpxpxpxpx hmk7 hbf= hbf= hR0D hZ#Z ph!!! gde7g gd!C h4!i hbf= zrzzrzm hmk7 h4!i ho8G |q` q ho8G he7g huO! he7g hsdS ho8G he7g ho8G hFzY hsdS ho8G he7g he7g ho8G h:3p hn/< he7g ho8G gd@5U gdgJ gde7g ho8G hsdS ho8G he7g h@5U hj@z gdU. gd@5U vlcYO h91\$ h91\$ hxqi h91\$ } uiuiu^ }uUiu hka2 gd0~ gdDJ hZ0! h>-9 hZ0! h04\ gd0^ hs]! hjbW h{>l ~uiaZ h{<w h{<w h{<w h{<w h4!i h4!i hl0` tmi`X h4!i pjfMBf hqvz hqvz h@5U r p# gdqvz r p# > G H I J K L M N O P Q R S T U V 09&P phf3f [Content\_Types].xml \_rels/.rels theme/theme/themeManager.xml K Y, sQ}# theme/theme/theme1.xml \$O} Xp90 +PHI| PP yu 9xu5 fs+W VF7H q=. 8}d- qyI@ j! Q\_ jyV` |PZ+ T ""p < 4V O&x\$ A8>v ;EUC n 8r ~*P(5 .}x E /EE\} theme/theme/_rels/ themeManager.xml.rels 5 6?\$Q K(M&\$R(.1 [Content_Types].xmlPK _rels/.relsPK theme/ theme/themeManager.xmlPK theme/theme/theme1.xmlPK theme/theme/_rels/ themeManager.xml.relsPK <?xml version="1.0" encoding="UTF-8" standalone="yes"?> <a:clrMap xmlns:a="http://schemas.openxmlformats.org/drawingml/2006/main" bg1="lt1" tx1="dk1" bg2="lt2" tx2="dk2" accent1="accent1" accent2="accent2" accent3="accent3" accent4="accent4" accent5="accent5" accent6="accent6" hlink="hlink" folHlink="folHlink"/> 0B(\$ 0B(\$ C|i, ,\$~\ Uu\$ |) (d] EGe) dDw*~\$ C|i, ci0,\$~\ 0@[x= QGR1 *)o1g2 "Nz5V mih6 7J|0T 8v/T ?G.: 3&<d] @[x=-m =qNRR (;>= AhlS 6'YAg2 N"Fp BhFM\ J1P[r .8hJ ^iN,\$~\ N +fb qNRRp J|0T5 "V^u ,,\$~\?G.: +)@]v? a!^1P[r `*)o1 +fb jdqe%4 f1P[r J]Hh 1P[rp &xr?G.: t +fb 5Dny Setup Normal.dotm Windows User Microsoft Office Word Judiciary Hong Kong Title <?xml version="1.0" encoding="UTF-8" standalone="no"?><b:Sources SelectedStyle="\APA.XSL"

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Prepared on 27 October 2026 · Esheria