# IS SAFEKEEPING DRUG TRAFFICKING? THE SINGAPORE COURT OF APPEAL'S ATTEMPT TO DELINEATE ROLE AND CULPABILITY IN DRUG TRAFFICKING OFFENSES

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*Singapore is well known for its harsh stance against drug traffickers, with drug trafficking carrying some of the most severe penalties available in law. This includes the mandatory death penalty where the weight of the drug exceeds a statutory threshold. The act of trafficking is also broadly defined in the Misuse of Drugs Act 1973 and can encompass a wide range of activities. In a series of authoritative decisions since 1994, this has also included the act of safekeeping drugs for another.*

*However, the Singapore Court of Appeal revisited this definition in the recent decision of* Ramesh a/l Perumal v Public Prosecutor *[2019] 1 SLR 1003, finding that the act of safekeeping drugs does not fall under the definition of "trafficking." As this paper argues, this new definition is an attempt by the Court of Appeal to better delineate the varying roles and culpability of those involved in the drug trade, but will have future implications for drug prosecutions and enforcement.*

**Keywords:** *criminal law, drug offenses, drug trafficking, Singaporean law, safekeeping drugs*

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## INTRODUCTION

Drug trafficking is one of the most serious offenses in Singapore.[1] The definition of "trafficking" includes selling, giving, administering, transporting, sending, delivering or distributing, or offering to do any of these acts, giving Prosecutors a wide scope in prosecuting the offense. Mandatory minimum sentences, including the mandatory death penalty, also operate to restrict the court's discretion in the sentence it may impose.

However, recent decisions, including *Ramesh a/l Perumal v Public Prosecutor*,[2] have seen the Singapore Court of Appeal take a more liberal position from its traditional strict approach to crime control. In *Ramesh*,[3] the Court of Appeal redefined the meaning of "trafficking" by holding that a person who safekeeps drugs for a depositor to return them (or who actually returns them) is not guilty of drug trafficking. This is a marked departure from the previously established position on the issue and is perhaps an overly restrictive reading of the Misuse of Drugs Act's definition of the term to favor the accused. Although the Court of Appeal noted that a person who safekeeps drugs is part of the drug supply chain, he/she is less culpable than a *bona fide* trafficker who moves drugs toward the ultimate consumer.

*Ramesh* thus resulted in the accused's acquittal for the drug trafficking charge and a conviction for drug possession in the alternative. The less severe drug possession charge does not trigger mandatory sentencing provisions, thus allowing the appellate court to impose what might be considered a fairer sentence, considering the accused's role and culpability.

## I. MANDATORY MINIMUM SENTENCES IN DRUG TRAFFICKING OFFENSES

Drug trafficking offenses in Singapore carry some of the severest punishments, ranging from a five-year mandatory minimum term of imprisonment to the mandatory death penalty. The primary factor that determines an accused convicted of drug trafficking is the weight of the drugs that were trafficked. This is due to the mandatory minimum sentences set out in the

1. See Misuse of Drugs Act (Singapore, cap 185, 2008 rev. ed.), Second Schedule.
2. Ramesh a/l Perumal v Public Prosecutor and Another, Appeal [2019] 1 SLR 1003.
3. *Id.*

**Table 1. Mandatory minimum sentences for drug trafficking offenses.**

| *Tier* | *Mandatory Minimum Sentences* |
|---|---|
| 1 | Mandatory minimum of 5 years' imprisonment |
| 2 | Mandatory minimum of 20 years' imprisonment |
| 3 | Mandatory death penalty |

Misuse of Drugs Act (MDA), which defines punishment in four broad categories, depending on the type and weight of the drugs trafficked, and whether the accused met the exception set out in § 33B of the MDA (Table 1).[4]

The rationale for the imposition of mandatory minimum sentences was articulated by the then Minister for Home Affairs and Education, Chua Sian Ching, who said that "unless drug trafficking and drug addiction [are] checked, they [will] threaten our national security and viability. To do this, both punitive and preventive measures must be taken."[5] There was also a "fear" that judges would be too lenient toward such offenders if given discretion in such cases.[6]

The MDA was thus amended to provide enhanced penalties for traffickers, including the mandatory death penalty for drug trafficking and manufacturing. The Misuse of Drugs Act 1973 saw the introduction of mandatory minimum penalties for trafficking as well as the statutory presumption of trafficking when the amount of drugs found in the accused's possession exceeded a certain threshold.[7] The mandatory death penalty was included in the 1975 amendments for trafficking, specifically importing/

4. This allows the sentencing court to impose life imprisonment instead of the mandatory death penalty if:

(a) the accused's activities are restricted to that of a drug courier (as set out in § 33B(2)(a) of the MDA) and

(b) he provides substantial assistance to enforcement authorities; or

(c) is found to have an abnormality of mind.

5. *Singapore Parliamentary Debates*, *Official Report* (May 27, 1977), vol. 37 at col. 34 (Chua Sian Chin, Minister for Home Affairs).

6. *Singapore Parliamentary Debates, Official Report* (Jul. 26, 1984), vol. 44 at col. 1863–6 (Chua Sian Chin, Minister for Home Affairs), cited in Michael Hor, *Singapore's Innovations to Due Process*, 12 CRIM. L. F. 25 n.16 (2001).

7. *Singapore Parliamentary Debates*, *Official Report* (Feb. 16, 1973), vol. 32 at col. 414 (Chua Sian Chin, Minister for Home Affairs).

exporting at least 30g of morphine or 15g of heroin.[8] This was later expanded to include other drug types, with the death penalty now prescribed for trafficking and importing/exporting six drugs: opium, morphine, diamorphine, cocaine, cannabis, cannabis mixture, cannabis resin, and methamphetamine.[9]

The use of mandatory minimum sentences has been criticized for usurping the role of the courts and curtailing the discretion of the sentencing judge.[10] This creates a displacement of sentencing discretion from the judiciary to the prosecution.[11] In relation to drug trafficking offenses, mandatory minimum sentencing means that the sentencing judge must impose a particular sentence, irrespective of the role or culpability of the drug trafficker. As illustrated by Chan Wing Cheong in a Privy Council appeal from Mauritius, a minimum sentence of 3 years' imprisonment for drug trafficking was held to be contrary to the principles of proportionality enshrined in § 7 of the Mauritius Constitution. The Privy Council noted that although the accused was convicted for drug trafficking, the amount he was dealing with was minute, and the minimum sentence of three years would be grossly disproportionate.[12]

Unlike Mauritius, Singapore's Constitution does not provide for any protection on the basis of proportionality in sentencing.[13] Challenges to the mandatory minimum sentencing regime, particularly in relation to the mandatory death penalty in Singapore, have not been successful.[14]

8. Misuse of Drugs (Amendment) Act 1975 (Singapore).

9. Misuse of Drugs Act (Singapore, cap 185, 2008 rev. ed.), Second Schedule.

10. Neil Morgan, *Capturing Crims or Capturing Votes? The Aims and Effects of Mandatories*, 22 U. N.S.W. L.J. 267 (1999); Declan Roche, *Mandatory Sentencing*, 138 Trends & Issues Crime & Crim. Just. 1 (1999).

11. Kumaralingam Amirthalingam, *The Public Prosecutor and Sentencing: Drug Trafficking and the Death Penalty in Singapore*, 18 Oxford U. Commonwealth L.J. 46, 62 (2018). Win Cheong Chan, *No Punishment without Fault: Kindling a Moral Discourse in Singapore Criminal Law* 25 Sing. Acad. L.J. 801, 816–17 (2013).

12. Aubeeluck v State [2011] 1 LRC 627 at [38]; Chan, *supra* note 11, at 801, 816–17, 818.

13. Chan, *supra* note 11, at 801, 816–17, 818; Public Prosecutor v Yong Vui Kong [2010] 3 SLR 489.

14. Ong Ah Chuan v Public Prosecutor [1980–81] SLR 48. See also the more recent *Yong Vui Kong* [2010] 3 SLR 489; Yvonne McDermott, *Yong Vui Kong v Public Prosecutor and the Mandatory Death Penalty for Drug Offences in Singapore: A Dead End for Constitutional Challenge?*, 1 Int'l J. Hum. Rts. & Drug Pol'y 35 (2010). See also Deaton v Attorney-General and the Revenue Commissioners [1963] IR 170 (Supreme Court of Ireland); Ellis v

Although this has been the accepted state of affairs for some time, recent developments have arguably shown a growing judicial sensitivity to the harshness of the mandatory minimum sentences.

As discussed below, from 2017 onward, the judiciary—the Court of Appeal in particular—has shown a willingness to interpret legal provisions in favor of the accused person. On the facts of the case upon which these were decided, these provided a just and fairer outcome, given the role and culpability of the accused. The courts are thus willing to engage in outcome-based reasoning to mitigate the effect of a disproportionate and unjust result. However, as illustrated below, although these may have achieved a fairer result in these particular cases, these decisions by Singapore's highest court will have far-reaching consequences for future drug prosecution and enforcement.

## II. "SAFEKEEPING" SCENARIOS: THE BAILEE-BAILOR DILEMMA

### A. Background

The current offense of trafficking is found in § 5(1) of the MDA, which states:

> Trafficking in controlled drugs
>
> 5. (1) Except as authorised by this Act, it shall be an offence for a person, on his own behalf or on behalf of any other person, whether or not that other person is in Singapore —
>
> (a) to traffic in a controlled drug;
> (b) to offer to traffic in a controlled drug; or
> (c) to do or offer to do any act preparatory to or for the purpose of trafficking in a controlled drug.
>
> (2) For the purposes of this Act, a person commits the offence of trafficking in a controlled drug if he has in his possession that drug for the purpose of trafficking.

The offense in § 5(1) of the MDA is worded broadly and can encompass trafficking, as well as offering to traffic or acts preparatory to or for

Minister for Justice and Equality [2016] IEHC 234 (Irish High Court); Amirthalingam, *supra* note 11, at 46, 64.

the purpose of trafficking. Further, § 5(2) of the MDA was inserted in 1993 to clarify that being in possession of drugs for the purpose of trafficking also amounts to an offense under § 5(1)(a) of the MDA.[15]

The definition of "traffic" is found in § 2 of the MDA and includes "to sell, give, administer, transport, send, deliver or distribute" or offer to do any of these acts, defined as follows:

- *Sell*—the exchange of the drug in return for payment.[16]
- *Give*—includes gratuitous sharing and contemplates a physical act without reference to ownership.[17] This would encompass situations where the accused gave drugs to another for consumption or safekeeping.[18]
- *Transport*—involves the moving of drugs from one place to another to promote the distribution of the drug.[19]
- *Deliver*—the transfer of possession from one person to another.[20] Significantly, as will be analyzed in greater detail below, this includes the act of returning the drugs to the owner after it has been entrusted to a custodian.[21]
- *Distribute*—refers to a physical act involving two or more persons and does not require any change of ownership in the drugs.[22]

As the courts have noted, the actions under § 2 of the MDA that constitute trafficking are capable of application in a wide range of situations and circumstances.[23]

One typical scenario in the drug trafficking ecosystem is the bailee-bailor deposit, where Person A gives drugs to Person B for the purpose of safekeeping the drugs, which are to be returned to Person A at some time in the future. This potentially gives rise to separate offenses under § 5(1) of the MDA.

The first offense involves Person A giving the drugs to Person B and could amount to trafficking under § 5(1)(a) of the MDA. The second offense involves Person B holding the drugs to be returned to Person

15. Misuse of Drugs (Amendment) Act 1993 (Singapore).
16. Ong Chin Keat Jeffrey v Public Prosecutor [2004] 4 SLR 483.
17. Muhammad Jeffry v Public Prosecutor [1997] 1 SLR 197 [122].
18. *Id.*
19. Ong Ah Chuan v Public Prosecutor [1981] 1 MLJ 64.
20. Public Prosecutor v Goh Hock Huat [1994] 3 SLR(R) 375.
21. *Id.*
22. *Muhammad Jeffry* [1997] 1 SLR 197.
23. Mohd Halmi bin Hamid and Another v Public Prosecutor [2006] 1 SLR(R) 548.

A, which could amount to possession for the purpose of trafficking under § 5(1)(a) read with § 5(2) of the MDA. Person B could potentially also be liable for trafficking under § 5(1)(a) of the MDA should the return of the drugs take place.

The first act of trafficking (from Person A to Person B) falls clearly within the term "give," which has been defined to include the physical act without the transfer of ownership,[24] or "deliver," which has been defined to include the transfer of physical possession.[25] The recent decision of *Ramesh* reaffirms this position with the Court of Appeal, stating that an individual in the position of a "bailor," who initiates a safekeeping arrangement by giving the drugs to a "bailee," should be liable for trafficking.[26]

Person B's liability is more controversial, and a question arises as to whether Person B should be liable, given that all he/she had done was *return* (or possess for the purpose of returning) the drugs to Person A. This question has been answered in the affirmative in several authoritative decisions from 1994 to 2001.[27] However, in *Ramesh*,[28] the Court of Appeal departed from these cases, which will have ramifications for the enforcement and prosecution of future drug trafficking cases.

### B. Pre-2000: Trafficking includes Return of Drugs from Custodian to Depositor

Prior to the decision in *Ramesh*, the position in Singapore was that the return of drugs from custodian to the depositor (i.e., from bailee to bailor) fell within the definition of trafficking and would constitute an offense under the MDA. The earliest authority for this is *Goh Hock Huat* in 1994, where the accused was found with diamorphine in his apartment and was charged with trafficking under § 5(a) read with § 17 of the MDA[29]—offering to sell, distribute, or deliver the drugs.

24. *Muhammad Jeffry* [1997] 1 SLR 197 [122].

25. *Goh Hock Huat* [1994] 3 SLR(R) 375.

26. *Ramesh a/l Perumal* [2019] 1 SLR 1003 at [122]–[125], [127].

27. See, e.g., *Goh Hock Huat* [1994] 3 SLR(R) 375; Tay Kah Tiang v Public Prosecutor [2001] 1 SLR(R) 577; Lee Yuan Kwang and others v Public Prosecutor [1995] 1 SLR(R) 778.

28. *Ramesh a/l Perumal* [2019] 1 SLR 1003 at [103]–[110].

29. *Goh Hock Huat* [1994] 3 SLR(R) 375 [1]. Note that at the time of the offense, § 5(2) of the MDA (possession for the purpose of trafficking) had not yet been inserted in the MDA.

The accused's defense, which was accepted by the trial judge, was that someone had passed him the drugs for safekeeping. The accused argued that drugs were to be returned to their owner, and this, therefore, did not constitute trafficking.[30] The trial judge agreed and took the view that the act of delivery does not include circumstances where prohibited drugs are returned to their owner after the drugs had been entrusted to the custodian.[31] Therefore, the trial judge acquitted the respondent of trafficking but convicted him of the lesser charge of possession.[32]

The Court of Appeal disagreed with the trial judge's decision. Section 5(2) of the MDA, which makes it an offense to be in possession of drugs for the purpose of trafficking, had not yet been inserted into the MDA. The Court of Appeal nonetheless substituted the accused's acquittal with a conviction under § 5(c) of the MDA for the accused's actions, which were "preparatory" to trafficking. Significantly, the Court of Appeal noted that if Goh had transported the drugs back to the owner, "there would clearly have been a delivery within the definition of trafficking under the Act."[33] The then Chief Justice Yong Pung How emphasized that "the requirement [for the offense] is merely the transfer of possession from one party to another."[34]

Some seven years later, in *Tay Kah Tiang*, the issue of the return of drugs from custodian to depositor was raised again when the accused claimed on appeal that she was merely safekeeping the drugs for another. The Court of Appeal noted that the offense would still have been committed as long as the accused had intended to deliver the drugs to a third party.[35] The act of holding on to drugs in anticipation for their return to the depositor would thus constitute an offense of possession for the purpose of trafficking:

> The fact that the appellant was holding the drugs as a safe-keeper and would be passing them on (either back to Hak Chai or to a third person indicated by Hak Chai) would not render the possession any less than it was for the purpose of trafficking . . . It must be borne in mind that "traffic" is defined in the MDA to mean, inter alia, "give", "transport" or "deliver". Indeed, the fact that the appellant would be delivering the drugs either back to Hak Chai

30. *Goh Hock Huat* [1994] SGHC 107 [40].
31. *Id.* at [45].
32. *Id.*
33. *Goh Hock Huat* [1994] 3 SLR(R) 375 [20].
34. *Id.*
35. *Tay Kah Tiang* [2001] 1 SLR(R) 577 [35].

> or to a third person reinforces the point that she was in possession for the purpose of trafficking.[36]

The argument that the offense of trafficking should be charged only if there is some distribution of drugs toward the end-user had previously rejected by the Court of Appeal in *Lee Yuan Kwang*. One of the accused in *Lee Yuan Kwang* argued that the intent of the MDA was to punish drug traffickers, meaning "persons who intend to purvey the drug to end-users."[37] The act of safekeeping drugs with the intent to return them to the depositor thus should not constitute an offense of trafficking.

The Court of Appeal rejected this argument and held that:

> *The Act itself makes no reference to "end-users" or promotion or distribution of drugs, apart from the fact that 'distribute' comes within one of the seven definitions of "traffic" in s 2.* There is no requirement that the person found in possession must be shown to be a "dealer" or "supplier" in order for the presumption of trafficking in s 17 to operate. There is also no requirement in the Act for any directly proximate connection between any particular end-user and an accused who is found in possession of a quantity of drugs which attracts the presumption of trafficking in s 17.[38]

Based on the decisions in *Goh Hock Huat*, *Tay Kah Tiang*, and *Lee Yuan Kwang*, the established position is that the return (or the possession for the purpose of returning) of drugs from custodian to depositor would constitute trafficking under § 5(1)(a) of the MDA. Arguments that the accused was merely safekeeping the drugs with no intention of purveying them to drug users also held no water with the Court of Appeal.

### C. The Court of Appeal's Decision in *Ramesh a/l Perumal*

The Court of Appeal chose to revisit the bailee-bailor issue in 2020 in its decision in *Ramesh a/l Perumal*.[39] The outcome of this has fundamentally reshaped the law in relation to trafficking. The case involved two accused persons, Ramesh and Chander.[40] Ramesh faced a single charge for being in possession of 29.96g of diamorphine for the purpose of trafficking under

36. *Id.*
37. *Lee Yuan Kwang* [1995] 1 SLR(R) 778 [58].
38. *Id.* (emphasis added).
39. *Ramesh a/l Perumal* [2019] 1 SLR 1003.
40. *Id.*

§ 5(1)(a) read with § 5(2) of the MDA. Chander was charged with trafficking 29.96g of diamorphine to Ramesh under § 5(1)(a) of the MDA, along with two other trafficking charges.

The Prosecution's case was that Ramesh had received the bundle of drugs from Chander and was to pass it to a third party later that day. Ramesh did not deny receiving the bundle but claimed that he thought they were merely documents which he was holding for Chander, to be passed back to him. The trial judge rejected Ramesh's arguments that he was unaware that the bundle contained drugs.[41] Further, the trial judge noted that regardless of whether Ramesh intended to deliver the drugs to a third party or return the drugs to Chander, possession for the purpose of trafficking would constitute "traffic" is defined under § 2 of the MDA to include the *acts of giving* and *delivering*, as well as *offering to do either*.[42] Both Chander and Ramesh were convicted at trial for drug trafficking and sentenced to life imprisonment.

The Court of Appeal agreed with the trial judge that Ramesh was unable to rebut the presumption that he had knowledge of the drugs, but found the Prosecution's case lacking as to what Ramesh intended to do with the drugs.[43] There was insufficient evidence to show that Ramesh had intended to deliver the drugs to a third party, and the Court of Appeal thus accepted Ramesh's account that he was merely safekeeping the drugs, which were to be returned to Chander later that day.[44] The main question, therefore, was whether this constituted possession for the purpose of trafficking. The Court of Appeal revisited the previous decisions on the issue, including *Goh Hock Huat* and *Lee Yuan Kwang*, and elected to depart from these cases.[45]

In arriving at this conclusion, the Court of Appeal considered that although "traffic" in § 2 of the MDA included the act of selling, administering, giving, transferring, transporting, sending, or delivering, it did not include the act of *returning*.[46] The Court of Appeal thus held that a person who returns drugs to the person who originally deposited those

41. *Id.* at [36]–[63].
42. *Id.* at [62].
43. *Id.* at [86].
44. *Id.* at [82]–[86].
45. *Id.* at [101].
46. *Id.* at [103]

drugs with him would not ordinarily come within the definition of "trafficking."[47]

Of interest is the Court of Appeal's analysis of the Western Australian decision of *Manisco*, where Pidgeon J noted that:

> An owner delivering a product to a defendant so that the defendant is an agent or factor of the owner to arrange its further sale for distribution could well amount to a supply by the owner. The fact that the defendant received the drug for further distribution would mean that he is in possession of it with the necessary intent. However, I do not consider [that] the re-delivery to the owner pursuant to a bailment comes within this category. *The legislature has used the word "supply" as distinct from the word "deliver."*[48]

The Court of Appeal reasoned that whereas Pidgeon J's remarks might mean that the act of returning would fall within the term "deliver," if used in the Misuse of Drugs Act 1981 (WA), it "is also possible that the word 'deliver' may have been used by Parliament without an intention to include the act of returning."[49] The Court of Appeal thus concluded that it was "unclear" whether in using the term "deliver," Parliament had intended to include the act of returning.[50] Turning to examine the legislative intent of the MDA, the Court of Appeal held that Parliament's objective was to address the movement of drugs toward end-users and, as such, the return of drugs from custodian to depositor should not be liable given it is not "part of the process of supply or distribution of drugs."[51]

It should be noted that the Court of Appeal had no difficulty in finding that Chander was guilty of trafficking when he passed the drugs to Ramesh to be returned later. In the Court of Appeal's judgment, the act of giving drugs to a bailee with a view to taking them back "is unambiguously within the ordinary meaning of terms such as 'giving' and 'delivering,' which are found in the definition of 'traffic' in § 2 of the MDA."[52] The Court further reasoned that the bailor who *initiates* a deposit/safekeeping arrangement of drugs is more culpable than a bailee who merely *accepts and returns* the deposit of drugs, as the latter does not move the drugs to a third

47. *Id.* at [103]–[110].
48. *Manisco v The Queen* (1995) 14 WAR 303, at 306 (emphasis added).
49. *Id.* at [104].
50. *Id.* at [105].
51. *Id.* at [114].
52. *Id.* at [123].

party and does not advance the trafficking of drugs along the supply chain toward the ultimate consumer.[53]

The Court of Appeal thus acquitted Ramesh on his drug trafficking charge and instead convicted him on the alternative charge of possession of drugs under § 8(a) of the MDA. He was sentenced to 10 years' imprisonment, the maximum term permitted for a drug possession charge. Considering Ramesh's reduced role and culpability compared to Chander, it is suggested that the Court of Appeal took an outcome-based approach to ensure proportionality in sentencing, resulting in a fairer outcome for Ramesh.

### D. Difficulty with the Reasoning in *Ramesh*

However, there are several difficulties with the Court of Appeal's reasoning. These deficits in logic lend weight to the argument that the Court of Appeal has engaged in outcome-based reasoning to achieve an intended result. First, the Court of Appeal's remarks on Ramesh's culpability as a custodian of the drugs is puzzling. On the one hand, in examining Parliament's intention in respect of the trafficking offense in the MDA, the Court of Appeal found that it was to address the mischief of *supply and distribution, and the movement of drugs along the supply chain toward end-users*.[54] The Court of Appeal specifically noted that a bailee, in returning the drugs, does not move the drugs to a third party *and cannot be said to contribute to the movement along the supply chain toward the ultimate consumer*.[55]

With respect, this reasoning is flawed and directly contradicts prior Court of Appeal decisions on the issue. As the Court of Appeal previously stated in *Lee Yuan Kwang*, there is no requirement that the drugs be moved *toward* the ultimate consumer for a trafficking offense to be constituted. The reasoning in *Ramesh* also overlooks the operational realities of drug trafficking. Given their value, parting with illicit drugs, even for a brief period, poses a high degree of risk for a drug trafficker. A person who deposits drugs with a custodian would only do so if there were some benefit to this, either as a means to store or to conceal the drugs. Whereas such

53. *Id.* at [124].
54. *Id.* at [108], [109].
55. *Id.* at [124].

storage or concealment does not strictly contribute to the *movement along the supply chain toward the ultimate consumer*, it is certainly *part of* the supply chain and offers benefits to the depositor personally and the illicit drug trade generally. Indeed, on the facts of *Ramesh*, the Court of Appeal acknowledged that Ramesh "must have known that he was committing some act that was connected to the illicit circulation of drugs."[56] It is thus difficult to see how custodians of drugs who intend to return the drugs to the depositors/owners do not fall within the mischief envisioned by Parliament.

Second, aside from the obvious and abrupt departure from the previously established local authorities on the issue, it is curious that the Court of Appeal did not embark on a more thorough examination of the authorities in other jurisdictions. This supports the proposition that the Court of Appeal is attempting to engage in outcome-based reasoning, with a selective endorsement of foreign authorities to support their intended outcome.

The Court of Appeal noted Pidgeon J's remarks in *Manisco* for the suggestion that the term "deliver," if included in Western Australia's legislation, would encompass the return of drugs, but in the same breath, dismissed it as possible legislative oversight. With respect, *Manisco* is an inappropriate starting point given the use of the term "supply" in the Misuse of Drugs Act 1981 (WA) as opposed to "traffic" in the MDA, as previously discussed. Further, the Western Australian legislature has since remedied the issue with the definition of supply to include the act of returning.[57]

The Court of Appeal also failed to consider any Canadian authorities on the matter, which is odd given the similarity between Canada's drug legislation and the MDA. The Singapore Court of Appeal had previously drawn on Canadian authorities to determine the definition of "give" in the MDA.[58] In answering this question in the affirmative, the Singapore Court of Appeal analyzed the Canadian cases of *R v Nittolo*, *R v Lauze*, and *R v Verge*, and endorsed Nolan JA's remarks that "once it is established that an accused 'gave' a narcotic to another person, irrespective of his reason for doing so, he is guilty of trafficking."[59] If the Court of Appeal had analyzed these exact same cases in *Ramesh*, it would have found support for the

56. *Id.* at [118].
57. Misuse of Drugs Act 1981 (WA) § 6(1).
58. *Muhammad Jeffry* [1997] 1 SLR 197 [123].
59. *Id.* at [121].

proposition that the mere act of giving—regardless of whether it is from bailee to bailor—would amount to trafficking.

Most curious of all is the absence of any inclusion of the United Kingdom's developments on the bailee-bailor scenario, which the UK has discussed at length in *Delgado*,[60] *Dempsey*,[61] and *Maginnis*.[62] Although the UK's legislative framework is different from Singapore's, these authorities have analyzed the exact same issues at length, with the majority in *Maginnis* offering a well-reasoned reconciliation of the English authorities.

The absence of any detailed analysis of the bailee-bailor issue in Australia, Canada, and the UK is a serious weakness in the Court of Appeal's reasoning in *Ramesh*. These jurisdictions have all previously dealt with the bailee-bailor issue, and although they have approached it in different ways, their experience offers a useful basis of comparison, of which the Court of Appeal has deprived itself.

### E. Cross-Jurisdictional Comparison

To determine the cogency of the Court of Appeal's reasoning in *Ramesh*, an analysis of the position in overseas common-law jurisdictions is useful for examining how the bailee-bailor situation is dealt with internationally.

#### 1. The UK

A useful starting point is to analyze the developments on the bailee-bailor issue in the UK, which has seen a range of judicial opinions. The first known reported decision is that of *Delgado*, which involved the *return* of the drugs from custodian to depositor.[63] The accused was arrested with 6.31kg of cannabis, which he was returning to the depositor, who had given him the drugs for safekeeping. Examining § 5(3) of the Misuse of Drugs Act 1971 (UK), which prohibited possession of drugs with the intent to supply them, the English Court of Appeal considered that the intention for a *physical transfer* was all that was required to constitute "supply" and thus upheld the accused's conviction.[64]

60. R v Delgado [1984] 1 All E.R. 449.
61. R v Dempsey [1986] Crim. L.R. 171.
62. R v Maginnis [1987] 1 All E.R. 907.
63. *Delgado* [1984] 1 All E.R. 449.
64. *Id.* at 452.

However, in the subsequent case of *Dempsey*,[65] which concerned whether an accused who *deposits* drugs to a custodian for safekeeping can be liable for an offense under § 4(1)(b) of the Misuse of Drugs Act 1971 (UK), which prohibits the "supply" of controlled drugs, a different approach was adopted. Although this scenario concerns the *deposit* (and not *return*) of the drugs, it is illustrative in understanding the development of judicial reasoning on the issues. In the absence of a statutory definition of the term "supply," the English Court of Appeal endorsed the definition as it appeared in the Shorter Oxford English Dictionary, with the emphasis that it is the *fulfilment, satisfaction, or furnishing of something wanted by the recipient*—an *act designed to benefit the recipient*.[66] Applying this, Lord Lane CJ drew the analogy that it could scarcely be said that the person handing over a coat "supplies" it to the cloakroom attendant. *Dempsey* thus stood for the proposition that *depositing* drugs with a custodian for safekeeping did not amount to "supply" for the purpose of the Misuse of Drugs Act 1971 (UK).

These two conflicting authorities were examined in *Maginnis*,[67] where the accused was charged with possession of a controlled drug, with intent to supply them to another. The accused claimed that the drugs were left with him by a friend, who was expected to collect them later. The trial judge ruled that this was sufficient to constitute "supply" for the purpose of § 5(3) of the Misuse of Drugs Act 1971 (UK) and convicted the accused. On appeal, the English Court of Appeal preferred the reasoning and definition set out in *Dempsey* over that in *Delgado*.[68]

That, however, was not the end of the matter, with the Prosecution raising the issue on a point of law of public importance to the House of Lords. The majority of the House of Lords agreed that the term "supply" should be given its ordinary meaning and convey the idea of furnishing or providing something that is wanted.[69] It connotes *more than the mere physical transfer* from one person to another and enables the recipient to apply the thing handed over for his/her purpose.[70] The House of Lords thus reasoned as follows:[71]

65. *Dempsey* [1986] Crim. L.R. 171.
66. *Id.*
67. *Id.*
68. *Maginnis* [1986] 2 All E.R. 110, 113.
69. *Id.* at 907, 909.
70. *Id.*
71. *Id.* at 907, 909–12.

- *A gives drugs to B for safekeeping* (such as the situation in *Dempsey*)—no offense was disclosed, as the handing over of drugs to the custodian is not "supply" in the sense that it does not provide or furnish something the custodian wants. This transfer was a mere placement in temporary custody with no intention of enabling the custodian to use the drugs for his/her purpose.
- *B intends to return the drugs to A* (such as the situation in *Delgado*)—the offence under § 5(3) or § 4(1)(b) of the Misuse of Drugs Act 1971 (UK), as the custodian was handing back the drugs to the depositor, which enabled him/her to utilize it to his/her purpose. In adopting this position, emphasis must also be given to public policy considerations, which obliges the custodian to hand the drugs over to the authorities rather than back to the depositor, which would enable its further circulation.

Lord Goff dissented with the majority's reasoning on B's return of the drugs to A, stating that this scenario involved a mere return or re-delivery of goods, and B cannot be said to have "supplied" to A.[72] Lord Goff emphasized that the supply offense was directed at those who were "pushing" controlled drugs, and B, who was simply safekeeping or returning A's drugs to him/her, cannot be said to have been "pushing" these drugs.[73]

Crucially, *Maginnis* differentiated the act of *depositing* and the act of *returning*, reasoning that the latter was the more culpable act, given that custodian of the drugs could have—and should have—surrendered them to the authorities rather than returned them to the depositor.[74] Regardless of the legislative framework or the difference between "supply" and "traffic," this reasoning should apply to the Singapore context with equal force.

### 2. Australia

Although the UK decision in *Maginnis* offers a well-reasoned determination on the bailor-bailee situation, not all have chosen to adopt it. In New South Wales, the Court of Criminal Appeal also had occasion to consider the bailor-bailee situation in *R v Carey*[75] but expressly rejected the approach in *Maginnis*.

72. *Id.* at 907, 913.
73. *Id.* at 907, 914.
74. *Id.* at 907, 909–12.
75. R v Carey (1990) 20 NSWLR 292.

The accused in *Carey* informed the authorities that the drugs found on her belonged to her sister, who was to collect them the next day. Her defense thus centered around the fact that her intention of returning the drugs to her sister did not amount to "supply" under § 3(1) of the Drugs Misuse and Trafficking Act 1885 (NSW), the definition of which reads as follows:

> supply includes sell and distribute, and also includes agreeing to supply, or offering to supply, or keeping or having in possession for supply, or sending, forwarding, delivering or receiving for supply, or authorising, directing, causing, suffering, permitting or attempting any of those acts or things.

The New South Wales Court of Criminal Appeal disagreed with the majority's reasoning in *Maginnis* and found that none of the various limbs in the definition of "supply" included the mere return of drugs.[76] Hunt J, delivering the judgment of the Court, described the decision in *Maginnis* as "surprising" and emphasized that the ordinary meaning of "supply" was to *furnish* or *provide* something wanted.[77] The act of *returning* the drugs to their owner fell outside this ordinary definition and thus would not constitute an offense under § 3(1) of the Drugs Misuse and Trafficking Act 1885 (NSW). This position is now well accepted in Australia and has been followed in numerous other decisions.[78]

As the Singapore Court of Appeal noted in *Ramesh*, the bailee-bailor scenario was addressed by the Western Australian Court of Appeal in *Manisco*, where Pidgeon J held that the return of drugs from custodian to owner did not constitute the offense of "supplying drugs" under the Misuse of Drugs Act 1981 (WA). However, it should be noted that the decision was before the amendments in 1998, when the term "supply" was not defined in the Misuse of Drugs Act 1981 (WA). Dissatisfied with the outcome in *Manisco*, the Western Australian legislature overcame this by way of the Misuse of Drugs Amendment Bill 1998, which now defines "to supply" to include:

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76. *Id.* at 292, 295.

77. *Id.*

78. *Liberty* (1995) 55 A. Crim. R. 120; *Tuckey* (1991) 57 A. Crim. R. 468; *Fong* (unreported, NSWCCA 29 Nov 1996).

**Table 2. The definition of "traffic" in the Control of Narcotics Act (Canada) and the Misuse of Drugs Act (Singapore).**

| *Control of Narcotics Act (Canada)* | *Misuse of Drugs Act (Singapore)* |
|---|---|
| "*traffic*" means<br>(i) to manufacture, sell, give, administer, transport, send, deliver or distribute, or<br>(ii) to offer to do anything mentioned in paragraph (i)<br>otherwise than under the authority of this Act or the regulations. | "traffic" means –<br>(a) to sell, give, administer, transport, send, deliver or distribute, or<br>(b) to offer to do anything mentioned in paragraph (a),<br>otherwise than under the authority of this Act, and "trafficking" has a corresponding meaning. |

> *deliver, dispense, distribute, forward, furnish, make available, provide, return or send*, and it does not matter that something is supplied on behalf of another or on whose behalf it is supplied.[79]

This amendment was a result of the Select Committee into the Misuse of Drugs Act 1981's concern that the decision in *Manisco* would allow drug offenders to avoid conviction by simply alleging that the drugs found on them were held in custody, to be returned to their owner later.[80] As is obvious from the clear wording of the definition, the return of drugs to their owners now falls well within the act of "supply" for the purpose of the Misuse of Drugs Act 1981 (WA).

### 3. Canada

Canada offers a valuable perspective, given the similarity between its definition of "traffic" in its drug legislation and Singapore's. These are set out in Table 2.

The Singapore Court of Appeal has also previously relied on Canadian decisions in the interpretation of clauses in the MDA. This was seen in *Muhammad Jeffry*, where the Court of Appeal examined the definition of "give" in the MDA to determine if the accused was liable for trafficking in drugs by leaving drugs out for another to partake in them.[81] In answering

79. Misuse of Drugs Amendment Bill 1998 (WA) (emphasis added).

80. *Select Committee Into the Misuse of Drugs Act 1981, Taking the Profit Out of Drug Trafficking: An Agenda for Legal and Administrative Reforms in Western Australia to Protect the Community from Illicit Drugs* 37 (1997).

81. *Muhammad Jeffry* [1997] 1 SLR 197 [123].

this question in the affirmative, the Singapore Court of Appeal adopted the reasoning of several Canadian cases, given the similarities in their statutory phrasing.[82]

Both Singapore and Canada include within their definitions of "traffic" the acts of selling, administering, giving, transferring, transporting, sending, or delivering. This clearer definition arguably avoids the issue with the term "supply," which as demonstrated in the Australian and UK decisions, some courts have taken to require the provision of something that is wanted. An examination of the authorities in Canada shows that the act of returning drugs from custodian to depositor falls within the definition of "give" under the Control of Narcotics Act (Canada).

In *R v Verge*,[83] the accused handed over a pipe of cannabis to an undercover police officer for the latter's consumption and was arrested. The British Columbia Court of Appeal held that it was clear that the accused did "give" or "deliver" a narcotic to the officer and was thus guilty of trafficking under the Narcotic Control Act (Canada).[84] Maclean JA drew on *Murray's New English Dictionary* to find that the word "give" has several meanings, but the one most appropriate in the present context is "to deliver, hand over without reference to change of ownership."[85] Using this plain definition, the return of drugs from custodian to depositor should fall squarely within the definition of "give."

In *R v Nittolo*,[86] the accused was charged with trafficking in narcotics when he gave narcotics to a woman with whom he shared a residence for safekeeping while he went out. The accused was originally acquitted, as the trial judge found that the term "give" requires the intention to depart with possession of the item. Given that the accused had only handed over the drugs for safekeeping, he had not "given" the drugs and thus had not "trafficked" in them. On appeal, the appellate court disagreed and held that the terms "give" and "deliver" can operate without reference to any changes in ownership of the object given or delivered.[87] Further, the Court of Appeal drew upon the Legislature's intent with regard to the Narcotic

82. *Id.* at [121].

83. R v Verge (1971) 3 CCC (2d) 398.

84. *Id.* at [10].

85. *Id.* at [9].

86. R v Nittolo [1978] CA 146, 44 CCC (2d) 56.

87. *Id.* at [24]–[29], endorsing the reasoning of R v Taylor (1974) 17 CCC. (2d) 36; *Verge*, 3 CCC (2d) 398.

Control Act (Canada), which was to prohibit the trafficking of narcotics in all forms.[88] As such, the interpretation of "give" without any references to a change in ownership better promotes the intent of the Act and should be preferred.[89] The accused was therefore convicted on appeal.

In the subsequent decision of *R v Lauze*,[90] the accused had purchased a quantity of marijuana and had given it to his companion for safekeeping in case of a search by the police. His act of handing it over to his companion was held to be within the meaning of "give" and therefore amounted to trafficking as defined in § 2 of the Narcotics Control Act (Canada).[91] Nolan JA emphasized that once it is established that a person "gave" narcotic to another person, irrespective of his reason for doing so, he is guilty of trafficking.[92]

While the known decisions in Canada have centered on the act of depositing drugs with a custodian, the judicial reasoning is clear in that the term "traffic," as defined in the Narcotics Control Act (Canada), should be interpreted broadly. Significantly, the terms "give" and "deliver" refer simply to the physical transfer of an object without references to a change of ownership—markedly different from the House of Lords' decision in *Maginnis*, in which they held that "supply" requires "more than a mere physical transfer."[93] Applying this reasoning to the custodian of drugs who intends to return the drugs to the depositor should be relatively straightforward. The act of this physical transfer should fall squarely within the term "give" or "deliver" and thus constitutes "trafficking" for the purposes of the Narcotics Control Act (Canada).

## CONCLUSION

*Ramesh* stands as an example of the Court of Appeal's engagement in outcome-based reasoning to achieve a result that would otherwise have been unjust. The departure from the traditional established position of the definition of "safekeeping" was arguably intended to take Ramesh outside

88. *Id.* at [20].
89. *Id.* at [22].
90. R v Lauze (1981) 60 CCC (2d) 469 [22].
91. *Id.*
92. *Id.*
93. *Maginnis* [1987] 1 All E.R. 907.

of the act of trafficking. Although the Court of Appeal has gone to great lengths to justify its decision, its reasoning contains several flaws, as outlined above. This includes the failure to consider the wording of the MDA, as well as the Canadian authorities in the similarly worded Narcotics Control Act (Canada). The Court of Appeal has also made no reference to the seminal decision of *Maginnis*, which offers a thorough analysis of the safekeeping issue in the UK.

From this, it is arguable that whereas the Court of Appeal was of the view that Ramesh was involved in the drug trafficking trade, his culpability and role did not warrant a life sentence, which would be mandatory had he been convicted of trafficking. Instead, the Court of Appeal acquitted Ramesh of his trafficking charge and convicted him in the alternative for drug possession. This then allowed the Court of Appeal the discretion to impose 10 years' imprisonment on Ramesh. On balance, although this may have resulted in a fairer outcome on the facts of *Ramesh*, the Court of Appeal's decision will have implications for future cases, which may result in difficulty securing trafficking convictions against *bona fide* drug traffickers.