

Public Prosecutor v Koh Peng Kiat
[2015] SGCA 58

Case Number : Criminal Reference No 4 of 2014
Decision Date : 24 November 2015
Tribunal/Court : Court of Appeal
Coram : Chao Hick Tin JA; Andrew Phang Boon Leong JA; Tay Yong Kwang J
Counsel Name(s) : Francis Ng, Suhas Malhotra and Stacey Anne Fernandez (Attorney General's Chambers) for the applicant; The respondent in person; Elizabeth Ng Siew Kuan as amicus curiae.
Parties : PUBLIC PROSECUTOR — KOH PENG KIAT

Criminal law – Abetment

Criminal law – Elements of crime – Mens rea

Trade marks and trade names – Offences

[LawNet Editorial Note: The decision from which this appeal arose is reported at [\[2014\] 4 SLR 703.](#)]

24 November 2015

Judgment reserved.

Chao Hick Tin JA (delivering the judgment of the court):

Introduction

1 By this criminal reference, the Public Prosecutor (“the Applicant”) has referred the following three questions of law of public interest for determination by this court pursuant to s 397(2) of the Criminal Procedure Code (Cap 68, 2012 Rev Ed):

- (a) Are the statutory defences in s 49 of the Trade Marks Act (Cap 332, 2005 Rev Ed) (“TMA”) available to a person tried for abetting an offence under s 49(c) of the TMA (“Question 1”)?
- (b) Must a person seeking to rely on the statutory defence in s 49(i) of the TMA take all reasonable precautions before he can be said to have no reason to suspect the genuineness of the mark on goods to which a registered trade mark has been falsely applied (“Question 2”)?
- (c) Is an offence under s 16(1)(b) of the Health Products Act (Cap 122D, 2008 Rev Ed) (“HPA”) one of strict liability, such that the Prosecution does not have to prove that the person charged with such an offence has knowledge that the health product in question is a counterfeit (“Question 3”)?

2 After hearing the parties as well as the *amicus curiae*, Assoc Prof Elizabeth Ng Siew Kuan (“Prof Ng”), on 1 October 2015, we reserved judgment. We now give our opinion below.

Background facts

3 The questions referred to us arose from the High Court's decision in *Public Prosecutor v Koh Peng Kiat and another appeal* [2014] 4 SLR 703 ("the Judgment") to allow the appeal of Koh Peng Kiat ("the Respondent") against his convictions by the District Court. We should highlight at the outset that the Applicant has stated that, regardless of the answers given to the questions in this reference, they do not seek a re-opening of the acquittals of the Respondent in the High Court. It was therefore not necessary for us to consider whether the Judge's factual conclusions on the evidence before him were correct. Nevertheless, we shall set out the key facts of the case as an appreciation of the factual backdrop of the case is necessary to put the issues in this reference in their proper context.

4 The Respondent was an optometrist who owned an optical shop which sold spectacles and contact lenses. He had a partner named Neo Teck Soon ("Neo"), and another friend, Andy Wong ("Wong"), who was also in the contact lens trade. The Respondent came to know, in the course of his work, a Malaysian man known only as "Ah Seng". The Respondent was informed by Ah Seng that the latter could procure boxes of FRESHLOOK COLORBLEND contact lenses from Malaysia at a good price. FRESHLOOK COLORBLEND is a trade mark registered in Singapore owned by CIBA Vision Pte Ltd ("CIBA Vision").

5 Subsequently, the Respondent assisted Wong and Neo in purchasing the contact lenses from Ah Seng. In Wong's case, arrangements were made for Wong to pick up the boxes of FRESHLOOK COLORBLEND contact lenses from the Respondent's shop. Wong collected 30 boxes and paid \$8 per box for a total of \$240. As for Neo's case, the Respondent owed Neo some money and to help reduce the debt, the Respondent had suggested to Neo to buy contact lenses from Ah Seng at \$10 per box. The Respondent said he would absorb \$7.50 of that price to reduce the debt payable. The Respondent made arrangements with Ah Seng and Neo later collected 100 boxes of lenses from a person (purportedly Ah Seng) at a bus stop for \$250. As it turned out, the boxes of contact lenses purchased by Wong and Neo through the Respondent from Ah Seng, which Wong and Neo subsequently resold to others, were found to be counterfeit.

6 The Respondent faced 14 charges at trial:

(a) Two charges under s 49(c) of the TMA read with s 107(c) of the Penal Code (Cap 224, 2008 Rev Ed) for abetting by intentionally aiding persons to have in their possession for the purpose of trade, boxes of contact lenses to which the registered trade mark FRESHLOOK COLORBLEND had been falsely applied.

(a) 12 charges under s 16(1)(b) of the HPA for arranging to supply counterfeit contact lenses purporting to be FRESHLOOK COLORBLEND lenses.

The District Court decision

7 The Respondent was found to be guilty and convicted on all the charges by the District Court. In coming to its decision, the District Court made the following findings. First, the Respondent had played an active and crucial role in arranging the deals between Ah Seng and Wong, as well as Ah Seng and Neo. Secondly, it was found that the Respondent had reasons to suspect the genuineness of the contact lenses but did not take any reasonable precautions or exercise any due diligence for the following reasons:

(a) The Respondent did not ascertain from Ah Seng the provenance of the contact lenses and he had not checked with CIBA Vision on the authenticity of the contact lenses to be supplied by Ah Seng.

(b) The price offered by Ah Seng was much lower than the usual retail price and the Respondent would have known of that. The low prices should have aroused his suspicion regarding the authenticity of the products.

(c) The Respondent should have ascertained from Ah Seng whether Ah Seng had a valid importer or wholesaler's licence to import and distribute those contact lenses in Singapore, or alternatively, checked with CIBA Vision or the relevant authorities on the licences required.

8 The Respondent was sentenced to a total fine of \$38,000 (in default five months' and 18 weeks' imprisonment), being the sum total of the following:

(a) a \$20,000 fine (in default five months' imprisonment) for the first charge (for abetting the offence by intentionally aiding Neo to have in his possession for the purpose of trade 100 boxes of counterfeit contact lenses) under s 49(c) of the TMA read with s 107(c) of the Penal Code;

(b) a \$6,000 fine (in default six weeks' imprisonment) for the second charge (for abetting the offence by intentionally aiding Wong to have in his possession for the purpose of trade 30 boxes of counterfeit contact lenses) under s 49(c) of the TMA read with s 107(c) of the Penal Code; and

(c) a \$1,000 fine (in default one week's imprisonment) for each of the 12 charges under s 16(1)(b) of the HPA.

9 The Applicant appealed against the sentences while the Respondent appealed against the convictions.

The High Court decision

10 On appeal, the Judge held that s 49 of the TMA is a strict liability offence, but abetment requires knowledge or intention that the offence will be committed even if the primary offence itself does not require it. The Respondent was therefore not guilty of abetment by intentionally aiding Neo and Wong unless he knew that the contact lenses in question were counterfeit. However, there was no evidence to that effect. In addition, the Respondent had also raised a valid defence under s 49(i) of the TMA.

11 The Judge also found that it was unsafe to convict the Respondent for the 12 charges under s 16(1)(b) of the HPA and the Applicant's case was not adequately proved, although it is contended by the Applicant that there was some ambiguity as to whether the Judge had considered s 16(1)(b) of the HPA to be strict in liability when he came to this conclusion.

12 In the result, the Judge allowed the Respondent's appeal against the convictions and consequently dismissed the Applicant's appeal against the sentences.

Submissions before the court

The Applicant's written submissions

13 The Applicant's proposed answers to the three questions submitted for determination by this court are as follows:

(a) For Question 1, the statutory defences in s 49 of the TMA are *not* available to a person

tried for abetting an offence under s 49(c) of the TMA.

(b) For Question 2, a person seeking to rely on the statutory defence in s 49(i) of the TMA must take all reasonable precautions before he can be said to have no reason to suspect the genuineness of the mark on goods to which a registered trade mark has been falsely applied.

(c) For Question 3, an offence under s 16(1)(b) of the HPA is one of strict liability, such that the Prosecution does not have to prove that the person charged with such an offence had knowledge that the health product in question was a counterfeit.

The Amicus Curiae's written submissions

14 Prof Ng's proposed answers are as follows:

(a) For Question 1, on the assumption that the provisos to s 49 of the TMA are defences, they are not available to an abettor of the person charged with an offence under s 49(c) of the TMA.

(b) For Question 2, the elements in s 49(i) of the TMA are inextricably linked as part of a composite enquiry which mandates the court to subject the accused's assertion that he had no reason to suspect that the goods in question were falsely applied with a registered trade mark against an assessment of the reasonableness and adequacy of the precautions that were taken in the light of the relevant circumstances.

(c) For Question 3, s 16(1)(b) of the HPA may be construed as a strict liability offence in the sense that the Prosecution need not prove that the person charged with such an offence has knowledge that the health product in question is a counterfeit to secure a conviction.

The Respondent's written submissions

15 The Respondent, who did not have legal representation in this criminal reference, filed written submissions to the effect that he was not guilty of any offence. He had frankly stated in his written submissions that it might be difficult to make sense of his arguments as he was not legally trained. At the hearing, the Respondent also declined to speak as he was in no position to offer any considered views on the legal questions under reference.

Our decision

Analysis of Question 1

The mens rea requirement in s 49 of the TMA

16 For ease of reference, we set out again Question 1: Are the statutory defences in s 49 of the TMA available to a person tried for abetting an offence under s 49(c) of the TMA?

17 In answering Question 1, it is necessary to begin by considering the elements of the primary offence as well as the elements of the offence of abetment of the primary offence, for the reason that before one can see if the shoe fits, one must first measure the foot. We start with the elements of the primary offence under s 49(c) of the TMA. Section 49 of the TMA provides as follows:

Importing or selling, etc., goods with falsely applied trade mark

49. Any person who —

- (a) imports into Singapore for the purpose of trade or manufacture;
- (b) sells or offers or exposes for sale; or
- (c) has in his possession for the purpose of trade or manufacture,

any goods to which a registered trade mark is falsely applied shall, unless he proves that —

(i) having taken all reasonable precautions against committing an offence under this section, he had, at the time of the commission of the alleged offence, no reason to suspect the genuineness of the mark and on demand made by or on behalf of the prosecution, he gave all the information in his power with respect to the persons from whom he obtained the goods; or

(ii) he had acted innocently,

be guilty of an offence and shall be liable on conviction to a fine not exceeding \$10,000 for each goods or thing to which the trade mark is falsely applied (but not exceeding in the aggregate \$100,000) or to imprisonment for a term not exceeding 5 years or to both.

18 As there is no controversy over the *actus reus* of the offence, we are mainly concerned with the necessary *mens rea* for s 49(c) of the TMA, to which the provisos (i) and (ii) of s 49 would appear to relate. Both the Judge and the Applicant accepted the holding by Woo Bih Li J in *Cigar Affair v Pacific Cigar Co* [2005] 3 SLR(R) 633 ("*Cigar Affair*") that an offence under s 49 is "established without the *mens rea* and it is for the accused person to satisfy either of the provisos stated" (at [13]). However, Prof Ng suggested that it is possible for ss 49(i) and (ii) of the TMA to be construed as rebuttals rather than defences, in the sense that there is an implicit presumption of fact within s 49 of the TMA which effectively imputes or deems a certain culpable state of *mens rea*. Nevertheless, she does not think that it is necessary to address this issue in answering Question 1. We share that view.

19 In any event, even if the conceptual approach by which these conclusions ought to be reached is not exactly undisputed, the following propositions can be regarded as settled:

(a) In order to make out an offence under s 49 of the TMA, the Prosecution does *not* have the legal burden of proving that the accused person had knowledge that a registered trade mark has been falsely applied to the goods which are the subject matter of the offence.

(b) Notwithstanding this, the person accused of the primary offence can exonerate himself if he succeeds in proving, to the satisfaction of the court, the elements in proviso (i) or (ii) of s 49 of the TMA.

The mens rea under s 107(c) of the Penal Code

20 We now turn to the elements of abetment of an offence under s 49(c) of the TMA. For present purposes, the key statutory provisions governing the offence of abetment are ss 107 to 109 of the Penal Code, and the relevant parts of those provisions are as follows:

Abetment of the doing of a thing

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

...

(c) intentionally aids, by any act or illegal omission, the doing of that thing.

...

Abettor

108. A person abets an offence who abets either the commission of an offence, or the commission of an act which would be an offence, if committed by a person capable by law of committing an offence with the same intention or knowledge as that of the abettor.

...

Punishment of abetment if the act abetted is committed in consequence, and where no express provision is made for its punishment

109. Whoever abets any offence shall, if the act abetted is committed in consequence of the abetment, and no express provision is made by this Code for the punishment of such abetment, be punished with the punishment provided for the offence.

...

21 We pause to make a few points at this juncture. First, it is well established that an offence of abetment is not predicated on the primary offence being made out, as Explanation 2 to s 108 of the Penal Code clearly states: "To constitute the offence of abetment, it is not necessary that the act abetted should be committed, or that the effect requisite to constitute the offence should be caused." Secondly, it is also reasonably clear that, in the ordinary case (although statute can provide for otherwise), as the offence of abetment is different and distinct from the primary offence, an abettor who commits the offence of abetment cannot be said to have committed the substantive primary offence (see the High Court decision in *Choy Tuck Sum v Public Prosecutor* [2000] 3 SLR(R) 456 at [9]).

22 As for what the Prosecution must prove against a person charged with abetment by intentionally aiding, the elements were summarised by this court in *Bachoo Mohan Singh v Public Prosecutor and another matter* [2010] 4 SLR 137 as follows (at [111]):

In order to establish that abetment has taken place, the Prosecution must show that: (a) *the accused did something which facilitated the commission of offence (see Explanation 2 to s 107 (at [110] above)); and (b) the accused had knowledge of the circumstances of the offence (see Daw Aye Aye Mu v PP* [1998] 1 SLR(R) 175 at [41] and *Pritam Singh s/o Gurmukh Singh v Public Prosecutor* [2003] SGHC 160 at [33]). Nelsonian knowledge or wilful blindness may also suffice for the purposes of establishing abetment liability (see *Bala Murugan a/l Krishnan v PP* [2002] 2 SLR(R) 420 at [31]). In *Chiaw Wai Oon v PP* [1997] 2 SLR(R) 233, Yong CJ explained the difference between Nelsonian knowledge and lower standards of imputed knowledge in the following manner (at [45]):

[M]erely being put on inquiry or a mere suspicion is not to be equated automatically with knowledge. However, where the facts obviously point to one result, and the accused must

have appreciated it but shuts his eyes to the truth, then together with the other evidence adduced, this can form a very compelling part of the evidence to infer the requisite guilty knowledge.

[emphasis added]

23 It was held in *Daw Aye Aye Mu v Public Prosecutor* [1998] 1 SLR(R) 175 as follows (at [41]):

It is arguable that it is impossible to abet Ng without abetting San Lwin and, *vice versa*, it would be impossible to abet San Lwin without abetting Ng. This is since San Lwin's employment would necessarily involve Ng employing him. However, in my opinion, whom the appellant actually aided would depend on the appellant's "dominant intention" at the time she did the act which led to San Lwin's employment by Ng. It is clear that, before the appellant can be held to have abetted either one, *she must have had the necessary intention to commit an offence*, as s 107 states: to abet, one needs to "intentionally aid, by any act, the doing of that thing". Ajaib Singh J in *PP v Datuk Tan Cheng Swee* [1979] 1 MLJ 166 had said at 173:

Briefly to constitute the offence of aiding and abetting the prosecution must prove intention on the part of the abettor to aid and he must be shown to have known the circumstances constituting the crime at the time when he voluntarily does a positive act of assistance.

[emphasis added in underline]

24 In other words, the person who abets by intentionally aiding an offence under s 49(c) of the TMA must have done something which facilitated the commission of the offence, and he must also have done so intentionally and with knowledge of the circumstances constituting the crime.

25 But what does it mean to prove that the accused who is charged with abetment by intentionally aiding an offence under s 49(c) of the TMA "had knowledge of the circumstances of the offence"? The complication here is that, as we have stated, the Prosecution does not bear the burden of proving that the primary offender had knowledge that a registered trade mark had been falsely applied to the goods that are the subject matter of the charge. The Judge considered this issue (at [10] of the Judgment) and accepted the views of the Supreme Court of India in *Kartar Singh v State of Punjab* (1994) 3 SCC 569 and the commentary in Stanley Yeo, Neil Morgan and Chan Wing Cheong, *Criminal Law in Malaysia and Singapore* (LexisNexis, 2nd Ed, 2012) at para 34.23, that all cases of abetment require proof of an intention or knowledge on the part of the abettor that the offence will be committed *even if the main offence itself does not require it*.

26 The Applicant accepts the Judge's position, and, indeed, referred to case law from India, England and Australia to buttress the Judge's conclusion that the Prosecution would have to prove that the abettor has knowledge of all essential matters constituting the primary offence, even in cases where the primary offender need not have knowledge of all such matters to be criminally liable (see, eg, *Callow v Tillstone* (1900) 83 LT 411, *Johnson v Youden and others* [1950] 1 KB 544 and *Giorgianni v R* (1985) 156 CLR 473).

27 In our view, such a conclusion is well justified as a matter of both principle and policy. As Andrew Ashworth observed in his textbook, *Principles of Criminal Law* (Oxford University Press, 6th Ed, 2009) at pp 415–416, a higher degree of fault should be required of the accomplice than for the primary offender because, as the form of criminal liability moves further away from the actual infliction of harm, the grounds of liability should become narrower. Otherwise, the law would catch in its net all kinds of people who unknowingly helped others to commit crimes of strict liability. Similarly, David

Ormerod in *Smith and Hogan's Criminal Law* (Oxford University Press, 13th Ed, 2011) ("*Smith and Hogan*") at p 208 also argued that, for strict liability offences, the primary offender may, but an accessory may not, be convicted without *mens rea*.

Do the defences apply?

28 We have noted that the abetment offence and the primary offence are separate and distinct offences, with clearly different elements. One cannot simply assume that a defence available to the primary offender will also be available to the abettor. This can only be determined on a case-by-case basis.

29 Whether such a defence would apply depends greatly on the wording of the provision in question. Quite simply, the literal words of ss 49(i) and (ii) of the TMA do not fit an abettor. A rather strained reading would be required before one can apply them to someone charged with an abetment of s 49(c). For instance, the words "*he proves that*" [emphasis added], which precede ss 49(i) and (ii) of the TMA, can only make sense with reference to a person who actually does any of the acts specified in s 49(a)–(c) of the TMA, *ie*, a primary offender. The words "*he obtained the goods*" [emphasis added] in s 49(i) of the TMA also presuppose that the person who can rely on the defence is in either actual or constructive possession of the goods, as would be the case for a person who does any of the acts specified in s 49(a)–(c) of the TMA. This would be inconsistent with the fact that a person can abet an offence under s 49 of the TMA without ever obtaining the goods in question, which again indicates that the defences were drafted with only primary offenders in mind. That said, we would hesitate to conclude that, just because a defence specific to an offence might *literally* be applicable only to a primary offender, the alleged abettor would *ipso facto* be prohibited from relying on that defence. Certainly, in the absence of clear indications to the contrary, the court should be slow to hold that it was Parliament's intention to restrict the operation of any specific defences to primary offenders alone if it would lead to an absurd or manifestly unjust outcome.

30 Notwithstanding the analysis above, the issue of absurdity does not arise here. Under s 49 of the TMA, by its express wording, the legal burden of proving a lack of fault is placed on the primary offender. However, there is nothing in this provision or the provisions in the Penal Code (see [20] above) which similarly shift the burden of proof as far as an alleged abettor is concerned. The burden of proving the accused *did* have the requisite guilty knowledge remains throughout on the Prosecution.

31 The result, as the Applicant rightly concedes, is that even if as a matter of conceptual purity, the provisos in s 49 of the TMA do not strictly apply to the alleged abettor, he may nonetheless seek to prove the same facts in order to raise a reasonable doubt as to the Prosecution's case. For example, if it is established that the alleged abettor had taken all reasonable precautions and had no reason to suspect the genuineness of the mark that has been falsely applied to the goods, the Prosecution would have failed to prove beyond a reasonable doubt that the abettor had knowledge or was wilfully blind to the fact that the goods were counterfeit. There can be no logic to bar an accused abettor from doing so. This is common sense. Indeed, such facts, if adduced by an accused abettor, will undoubtedly help the court in determining whether the Prosecution has proven that the abettor had the requisite *mens rea*. Accordingly, the Judge is not only entitled to, but also obliged to consider the evidence adduced to determine whether the accused abettor (*ie*, the Respondent in the present case) has shown that he has satisfied the requirements prescribed in s 49(i) of the TMA, even though it was not obligatory for the accused abettor to do so.

Conclusion

32 In conclusion, our answer to Question 1 is as follows: ss 49(i) and (ii) of the TMA are, strictly speaking, not applicable to a person tried for abetting an offence under s 49(c) of the TMA. However, as the onus is on the Prosecution to prove beyond a reasonable doubt in relation to an abetment charge of an offence under s 49 that the abettor had the knowledge of or was wilfully blind to the fact that the goods in question had a registered trade mark falsely applied to them, the abettor is always at liberty to adduce facts to raise doubts as to the Prosecution's case against him and thus exonerate himself.

Analysis of Question 2

33 Question 2 is as follows: Must a person seeking to rely on the statutory defence in s 49(i) of the TMA take all reasonable precautions before he can be said to have no reason to suspect the genuineness of the mark on goods to which a registered trade mark has been falsely applied?

34 We would preface that the question as stated is not a novel one. Indeed, the issue would seem to have been settled in Singapore for a long time, although the pronouncements on the interpretation of s 49(i) have come only from the High Court. They are the decisions of Yong Pung How CJ in *Trade Facilities Pte Ltd and others v Public Prosecutor* [1995] 2 SLR(R) 7 ("*Trade Facilities*") and *Public Prosecutor v Tan Lay Heong and another* [1996] 1 SLR(R) 504 ("*Tan Lay Heong*"). In both cases, one of the issues concerned the correct interpretation of s 73 of the Trade Marks Act (Cap 332, 1992 Rev Ed) ("TMA 1992"), which was the precursor to, and, despite some changes in the drafting, was *in pari materia* with, s 49 of the TMA. In fact, the Judge had considered and applied both of the aforementioned decisions at [11]–[14] of the Judgment.

35 Section 73(a) of the TMA 1992 stated:

Any person who imports, sells or exposes or has in his possession for sale or for any purpose of trade or manufacture, any goods or thing to which a counterfeit trade mark is applied or to which a registered trade mark is falsely applied, shall, unless he proves that —

(a) having taken all reasonable precautions against committing an offence under this section, he had, at the time of the commission of the alleged offence, no reason to suspect the genuineness of the mark and on demand made by or on behalf of the prosecution, he gave all the information in his power with respect to the persons from whom he obtained the goods or things; or

...

be guilty of an offence ...

36 In *Trade Facilities*, Yong CJ considered s 73(a) of the TMA 1992 and held that there were three elements in the defence (at [59]):

The s 73(a) defence is relatively straightforward. There are three elements in this defence, all of which must be satisfied. Thus, in order to avail himself of this defence, it is quite clear from the plain language of s 73(a) that the accused must prove: (a) that he took all reasonable precautions against committing an offence under s 73; (b) that at the time of the alleged offence he had no reason to suspect the genuineness of the mark; and (c) that on demand by or on behalf of the Prosecution, he gave all the information in his power with respect to the persons from whom he obtained the goods or things.

37 Question 2 is concerned with the first two elements alluded to by Yong CJ, which might, at first blush, appear to be entirely independent of each other. Any such misunderstanding was subsequently dispelled in *Tan Lay Heong*, where after a careful consideration of the case law from England, India and the Straits Settlements as well as their equivalent legislation, Yong CJ concluded that the first two elements in s 73(a) of the TMA 1992 were in fact interdependent and ought to be applied in a holistic and interactional manner. He had stated (at [66]–[69] of *Tan Lay Heong*) as follows:

66 As for the first two elements of the s 73(a) defence, in *Allard v Selfridge and Company Limited* [1925] 1 KB 129, Lord Hewart CJ said at 134 in a case involving the UK Merchandise Marks Act 1887 s 2, which contained a defence similar to s 73(a):

The subsection, as I understand it, means that if a defendant seeks to excuse himself upon the ground that he had no reason to suspect the genuineness of the trade description he must lay the foundation of that defence by establishing that he has taken all reasonable precautions; in other words, the section in effect says that it is no excuse for the defendant to say that he had no reason to suspect the genuineness of the trade description unless he shows that he has taken all reasonable precautions.

67 *This may give the impression that the two elements are separate and distinct. However, the two are actually inextricably tied together. It can be said that this is really one element of having no reason to doubt the genuineness of the mark after having taken all reasonable precautions.* In *R v Ewe Kai Cheah* [1926] SSLR 158, which was a case on false trade descriptions, Murison CJ said at 160:

In the first place it must, I think, be understood that the section imposes upon the merchants a duty (which without the section would not exist) to take some trouble to find out that trade descriptions are not false. How far the enquiry is to go is a question of fact in each case and in that connection the further question arises as to what circumstances there are, in the selling of an article, that should put the seller upon enquiry.

68 Whether a person has taken all reasonable precautions depends on the circumstances of the case. Similarly, the same circumstances will determine whether there is any suspicion that the mark is not genuine; *and suspicion sits on a sliding scale*. This means that these two elements cannot be separated. *Thus, if there is initially reason to suspect the genuineness of the mark, more precautions will be required, so much so that after the necessary precautions have been taken, there must no longer be any reason to suspect its genuineness.* In *Shantilal Uttamram Mehta v Dhanji Kanji Shah* ([49] *supra*) Bom LR 69, the following observation was made at 72:

The words 'having taken all reasonable precautions' must be read in conjunction with the concluding words of that clause, namely, 'had no reason to suspect the genuineness of the mark.' That means that the precautions, which the accused is expected to take, have relation to the examination of the mark and his coming to the conclusion that after having taken all reasonable precautions, he had no reason to suspect that the mark was a false or counterfeit mark.

69 This, however, does not answer the question in what circumstance it can be said that the accused has taken all reasonable precaution and has no reason to suspect the genuineness of the mark. *This, in my view, is a question of fact to be decided having regard to all the circumstances of the case.*

[emphasis added]

38 *Tan Lay Heong* concerned the private prosecution of two respondents by the representatives of the registered proprietor ("HWI") of the trade mark HUNTING WORLD. The second respondent ("Lim") had taken over some products bearing that mark from a large Japanese retail chain department store, Sogo, after he was assured by one of Sogo's managers ("Maniam") that the products were genuine. Lim sold the products under the trading name of the first respondent. After the stock was depleted, Lim approached Maniam who referred him to Sogo's supplier, who in turn referred him to another supplier (the latter of which assured him that he was an authorised distributor). Unfortunately, the products Lim ultimately obtained turned out to be counterfeit.

39 In a judgment notable for its nuanced appreciation of the pragmatic sensibilities of commercial life, Yong CJ took into account a number of factors that remain as true today as it was in 1996. First, Yong CJ considered that genuine goods can always come from alternative sources regardless of the trade mark owner's attempts to restrict redistribution, and indeed, he said that "there are more parallel sources of legitimate branded goods in the global market than one can imagine" (at [72]). He also considered that it was not unreasonable and indeed often necessary for a trader to take into consideration the reputation of its business partners, and it was relevant that Sogo was a reputable concern to the extent that "a prudent businessman might rely on its assurances and its recommendations" (at [52]).

40 Yong CJ acknowledged that there were a number of indications on the facts which might have appeared suspicious with the benefit of hindsight and expert submissions. Nevertheless, he pointed out that commercial activity does not take place within the arid confines of a courtroom but in the hustle and bustle of the real world, and therefore "the facts must be viewed from the point of view of a reasonably prudent businessman at the time the transaction was entered into" – the court should also take into account the background of the transactions, as well as simple commercial sense (at [76]).

41 Yong CJ placed significant emphasis on the need to strike a reasonable balance "between the rights of the trade mark owner and the practical commercial reality that a retailer or distributor faces" (at [77]). As he said, in everyday commerce, reasonable businessmen rely on the assurances of their trading counterparts. It was unrealistic to expect that a businessman should make inquiries of the trade mark owner or authorised dealer every time he is offered a supply of goods, even from a reputable source, especially when it is not always easy to discern who is an authorised distributor in the first place. Moreover, if the distributor is a parallel importer, it would not be in the authorised distributor's interest to assist his competitor, and, in this regard, Yong CJ referred to past cases of a trade mark owner being untruthful about the genuineness of the goods when confronted with parallel imports, which Parliament has expressly legalised. Accordingly, "all reasonable precautions" should not be equated to inquiries with the trade mark owner.

42 Yong CJ summed up the point at [88]–[89] of *Tan Lay Heong* as follows:

88 For this reason, I was of the view that the s 73(a) defence could, in law, still be made out even if the second respondent had not made any inquiries from HWI in the USA. "All reasonable precautions" does not mean that the defence fails merely because the complainant can think of some precaution which, on hindsight, would avoid infringing the owner's trade mark. *It means all precautions which an honest and prudent businessman would consider to be reasonable to guard against infringing the trade mark at the time the act of selling was done.* Reasonable traders seek assurances from their trading counterparts. They do not necessarily make inquiries from the trade mark owner.

89 This is not to say that mere assurance from one's counterpart will always be sufficient. Nor

is it to say that it will necessarily be a good defence if that counterpart is reputable. Similarly, it does not follow that under no circumstance will it ever be the case that only an inquiry with the trade mark owner suffices. In certain circumstances, if the goods were of such obvious discrepant quality and the price was so low that any reasonable person would immediately become suspicious, it may well be the case that nothing short of inquiry with the trade mark owner suffices. The defence may not be made out in such a case even if the accused had bought the goods from an authorised distributor, for there is no rule that says that an authorised distributor may not sell counterfeit goods. In other cases, it may well be apparent that the goods come from a dubious source. In yet other cases, the price may be so low that any businessman would become suspicious and would want to know why the goods are sold so cheaply. In these cases, it may be that inquiries short of asking the trade mark owner suffice, depending on the result of such inquiries. *Much depends on the facts of each case.* Referring again to *Trade Facilities* ([42] *supra*), there is obviously a wide gulf between relying on the reputation of a well-established retail chain with outlets worldwide and relying on the reputation of someone met in a nightclub. The same applies to persons they recommend as sources of goods.

[emphasis added]

43 Prof Ng endorses the position set out by Yong CJ that the first two elements in s 73(a) of the TMA 1992 should *not* be read disjunctively, and that his reasoning is just as applicable to s 49(i) of the TMA. What initially appears to be two distinct elements of “having taken all reasonable precautions” and “no reason to suspect the genuineness of the mark” are in substance clauses of a composite enquiry. The core issue lies in ascertaining whether the accused had any reason to suspect that the goods in question were falsely applied with a registered trade mark. This in turn necessitates an objective assessment of the reasonableness and adequacy of the precautions that were taken by the accused.

44 In other words, one cannot treat the first two elements of s 49(i) of the TMA as embodying a rigid two-step test in which the issue of whether the accused person has taken all reasonable precautions is assessed in a vacuum without reference to the suspiciousness of the circumstances, which relates to the second element. As Prof Ng had submitted, any attempt to ascribe a conditional or chronological relationship between them would invariably be unproductive, if not circular. We also share her view that it would go against commercial sense to require honest traders to undertake each and every possible check to verify the authenticity of the goods they deal in on a basis that they are potentially fake. It is therefore our conclusion that s 49 of the TMA does not impose such an onerous burden. We should, nevertheless, caution that the accused’s *subjective* views of whether he had taken all reasonable precautions is not determinative; rather, Yong CJ had espoused an *objective* test, assessed from the perspective of a reasonably prudent businessman at the time the transaction was entered into.

45 Further, Prof Ng also submitted it is possible – at least in theory – that there may be situations where the circumstances are so objectively unsuspecting to a reasonably prudent businessman that it was reasonable for no precautions to have been taken at all, although such instances are likely to be rare. Counsel for the Applicant did not quarrel with the learned *amicus curiae*’s analysis, except that he submitted before us that an accused person in such circumstances should be vindicated under the s 49(ii) defence of innocence rather than s 49(i). This criminal reference is, however, not concerned with the exact dividing line between the two provisions. The issue was examined in comprehensive detail in *Trade Facilities* and we do not intend, in the absence of detailed submissions on the point, to come to a decision one way or another. In any event, the end result would likely be the same.

46 In our view, Question 2 has already been answered nearly 20 years ago by *Tan Lay Heong*, a

judgment which, in our view, has not lost any of its vitality with age. We would therefore take this opportunity to affirm in whole Yong CJ's conclusions. Indeed, as we had noted, the Judge had followed *Tan Lay Heong* and applied the principles set out therein to the facts before him. To the extent that the Judge was merely saying that it was *not necessary* for the Respondent to have checked with the registered proprietor, this was perfectly consistent with *Tan Lay Heong*. The only difficulty we had with the Judgment was that the Judge did not clearly say *what*, exactly, were the reasonable precautions that the Respondent should have taken, and did take; and if it was reasonable that *no* precautions were taken, why that was the case. Since the Respondent's acquittal is not being challenged, we do not propose to deal with this point as it falls outside the ambit of the criminal reference.

47 Accordingly, our answer to Question 2 is as follows: the first two elements of "having taken all reasonable precautions" and "no reason to suspect the genuineness of the mark" in s 49(i) of the TMA are not independent requirements to be applied in a rigidly chronological or conditional order. Instead, they are inextricably linked as part of a single composite enquiry in which the accused's assertion that he had no reason to suspect that the goods were falsely applied with a registered trade mark is considered against an objective assessment of the reasonableness and adequacy of the precautions that were taken by the accused from the perspective of a reasonably prudent businessman in similar circumstances.

Analysis of Question 3

48 Question 3 is as follows: Is an offence under s 16(1)(b) of the HPA one of strict liability, such that the Prosecution does not have to prove that the person charged with such an offence has knowledge that the health product in question is a counterfeit?

49 Section 16 of the HPA states:

Prohibition against supply of health products that are adulterated, counterfeits, etc.

16.—(1) No person shall supply, or procure or arrange for the supply of, any health product which is —

- (a) an adulterated health product;
- (b) a counterfeit health product;
- (c) a health product that has been tampered with; or
- (d) an unwholesome health product.

(2) Any person who contravenes subsection (1) shall be guilty of an offence and shall be liable on conviction —

- (a) in the case of an offence under subsection (1)(d), to a fine not exceeding \$50,000 or to imprisonment for a term not exceeding 2 years or to both; and
- (b) in the case of an offence under subsection (1)(a), (b) or (c), to a fine not exceeding \$100,000 or to imprisonment for a term not exceeding 3 years or to both.

(3) In any proceedings for an offence under subsection (1), it shall be a defence for the accused to prove that —

(a) he —

(i) did not know;

(ii) had no reason to believe; and

(iii) could not, with reasonable diligence, have ascertained,

that the health product was in contravention of that subsection; and

(b) he had taken all such precautions and exercised all such due diligence as could reasonably be expected of him in the circumstances to ensure that the health product did not contravene that subsection.

50 The Applicant said that they had raised Question 3 because the Judge was unclear about whether s 16(1)(b) is strict in liability. The relevant passage in the Judgment is at [15]–[17] which we set out below:

15 I now consider the 12 charges under s 16(1)(b) of the HPA. Unlike s 49 of the TMA, there are no cases on point for s 16(1)(b) of the HPA. An offence under s 16(1)(b) of the HPA is also strict in liability. The wording of s 16(1)(b) of the HPA does not provide for *mens rea* as an element of an offence under s 16(1)(b) of the HPA. The accused has to avail himself of either of the defences provided under s 16(3) of the HPA. I do not accept the Prosecution's submission that Parliament intended s 16(1)(b) of the HPA to be strict in liability. The Prosecution relies on the following statements made by the Minister for Health, Mr Khaw Boon Wan, to contend that Parliament intended an offence under s 16(1)(b) of the HPA to be strict in liability. ...

16 These statements only go as far as to state that the HPA seeks to establish a regulatory framework for the regulation of health products to safeguard public health and safety. They do not demonstrate a legislative intent in making an offence under s 16(1)(b) of the HPA strict in liability.

17 I find that it is unsafe to convict Koh for the 12 charges under s 16(1)(b) of the HPA. This is because the District Judge convicted Koh after rejecting his defence for the same reasons he did for the first two charges of abetment by intentional aiding. Those reasons, as I have explained, do not adequately prove the Prosecution's case.

51 There are sentences in the above quote which appear at first blush to be inconsistent. At [15], the Judge said an "offence under s 16(1)(b) of the HPA is also strict in liability". A couple of sentences later, the judge stated, "I do not accept the Prosecution's submission that Parliament intended s 16(1)(b) of the HPA to be strict in liability." At [16], the Judge, after referring to the Ministerial statements made in Parliament, concluded that those statements did not demonstrate "a legislative intent in making an offence under s 16(1)(b) of the HPA strict in liability". While we do find some difficulty on that account, we think the true view which the Judge had was that he did not think that s 16(1)(b) created a strict liability offence.

52 We will now turn to allude briefly to the difficulties inherent in the concept of "strict liability". Books have been written on it. The first part of Question 3 itself asks whether s 16(1)(b) is an offence of strict liability. But what exactly does that phrase mean? As Prof Ng observed, its meaning is somewhat indeterminate, because different degrees of "strictness" may exist. At one end of the

scale, there are offences for which the Prosecution must prove that a *mens rea* attaches to all elements of the *actus reus* of the offence (examples of such offences include theft and assault). At the other end, there may be offences (at least in theory) where criminal liability automatically follows once the Prosecution proves all the physical elements of the offence, and that, not only is the accused's lack of guilty knowledge or intention irrelevant, he may even be precluded from relying on the defences of due diligence or reasonable mistake of fact or any of the other general defences that are found in the Penal Code. To that end, such offences are truly "absolute" in nature.

53 Between these extremes exists a wide variety of possibilities. For example, a provision may not require that the Prosecution prove the *mens rea* for a specific aspect of an offence, but instead require the accused to prove an absence of intention, knowledge, negligence, or the like. While it cannot be said that no *mens rea* attaches to an offence, the offence is still "strict" in that the Prosecution can succeed even if it has led no evidence as to the accused's state of mind. The manner by which this result is accomplished is a question of statutory drafting, and there may be different nuances in each individual case. For example, Parliament is free to determine whether it is a shift of the *legal* burden, or merely the *evidential* burden, and it is the task of the court to determine which is the position in each case.

54 Another difficulty – and danger – in placing a criminal provision in a box titled "strict liability" is that the physical and mental elements of a crime may overlap. Some verbs, for example, may imply a mental element, and it has been suggested that "courts generally give verbs their natural meaning, including any mental element they imply, unless they consider that social policy requires them to decide otherwise" (*Smith and Hogan* at para 7.3.1.1). In the present case it is not disputed that the Prosecution must prove the accused did "supply, or procure or arrange for the supply of" the health product that is the subject of the offence. It may well be argued that a person can only "procure or arrange for the supply" of something if he has a certain state of mind. He must at least know that he was procuring, or arranging the supply of that something. We say no more as to what else may need to be proved. Our purpose in mentioning this point is simply to illustrate the perils of describing an offence as one of strict liability or not.

55 Therefore, rather than engage in an unhelpful and possibly hazardous exercise of determining whether or not to attach the convenient but unsettled and potentially ambiguous label of "strict liability" to s 16(1) of the HPA, we shall instead focus on the second part of Question 3, which is really about whether the Prosecution has the *legal* burden of proving that a person charged with an offence under s 16(1)(b) of the HPA has knowledge that the health products in question are counterfeit.

56 The construction of criminal statutes was summarised in the following terms by V K Rajah JA in the High Court decision of *Public Prosecutor v Low Kok Heng* [2007] 4 SLR(R) 183 (at [57]) (cited with approval by this court in *Yan Jun v Attorney-General* [2015] 1 SLR 752 (at [58])) as follows:

To summarise, s 9A of the Interpretation Act mandates that a purposive approach be adopted in the construction of all statutory provisions, and allows extrinsic material to be referred to, even where, on a plain reading, the words of a statute are clear and unambiguous. The purposive approach takes precedence over all other common law principles of interpretation. However, construction of a statutory provision pursuant to the purposive approach stipulated by s 9A is constrained by the parameters set by the literal text of the provision. The courts should confine themselves to interpreting statutory provisions purposively with the aid of extrinsic material within such boundaries and assiduously guard against inadvertently re-writing legislation. Counsel should also avoid prolonging proceedings unnecessarily by citing irrelevant extrinsic material to support various constructions of a statutory provision; this would be tantamount to an abuse of the wide

and permissive s 9A(2) of the Interpretation Act. The general position in Singapore with respect to the construction of written law should be the same whether the provision is a penal or civil one. Purposive interpretation in accordance with s 9A(1) of the Interpretation Act is the paramount principle of interpretation even with respect to penal statutes; it is only in cases where penal provisions remaining ambiguous *notwithstanding* all attempts at purposive interpretation that the common law strict construction rule may be invoked.

57 In the present case, the Respondent had been charged with 12 counts of arranging the supply of counterfeit contact lenses under s 16(1)(b) of the HPA, which is punishable under s 16(2)(b) of the HPA. Under the plain and clear words of s 16(1)(b), the offence is made out if it is shown that the accused has arranged for the supply of any counterfeit health product. Under s 2(2)(b) of the HPA, a health product is counterfeit if:

- (a) it is presented in such a manner as to resemble or pass off as a registered health product when in fact it is not; or
- (b) it is presented with any false information as to its manufacturer or origin.

58 There is no express requirement in s 16(1)(b) of the HPA for the Prosecution to prove that the accused had knowledge that the health product in question was in fact a counterfeit health product. The fact that the statute is silent as to a *mens rea* is not the end of the matter, for there is a common law presumption that *mens rea* is an essential ingredient of the offence (see, for example, *Leu Xing-Long v Public Prosecutor* [2014] 4 SLR 1024 (at [6]), citing with approval *M V Balakrishnan v Public Prosecutor* [1998] SGHC 169 (at [8])). This presumption may be displaced expressly or by necessary implication: see *Public Prosecutor v Phua Keng Tong and another* [1985–1986] SLR(R) 545 adopting the approach of the Privy Council in *Lim Chin Aik v Regina* [1963] MLJ 50 and the House of Lords in *Sweet v Parsley* [1970] AC 132 (“Sweet”).

59 This common law presumption is perfectly consistent with the purposive approach because a court should not lightly infer that Parliament intended, without good reason, to punish people without a guilty mind, or that such a result would suit the statute’s purpose. In *Tan Chong Koay and another v Monetary Authority of Singapore* [2011] 4 SLR 348, this court (at [50]) quoted with approval the High Court of Australia’s decision in *He Kaw Teh v R* (1985) 157 CLR 523 (“*He Kaw Teh*”) at 567–568. In that passage, Brennan J expressed the point that “[t]he requirement of *mens rea* is at once a reflection of the purpose of the statute and a humane protection for persons who unwittingly engage in prohibited conduct”. As a person cannot be deterred from doing something he never intended to do or did not know or would lead to results he could not foresee, the presumption is that a statute would not impose criminal liability on that person without *mens rea* unless it is shown that “the purpose of the statute is ... to compel [the accused] to take preventive measures to avoid the possibility that, without deliberate conduct on his part, the external elements of the offence might occur” (at [50]).

60 So the question is – is there anything in s 16 of the HPA which suggests that Parliament intended that the ordinary presumption of *mens rea* ought not to apply? In this regard, s 16(3), which is germane, provides that it is a defence for a person being charged with an offence under s 16(1) to first prove that he did not know, had no reason to believe, and could not, with reasonable diligence, have ascertained that the health product was in contravention of s 16(1), and secondly, prove that he had taken all such precautions and exercised all such due diligence as could reasonably be expected of him in the circumstances to ensure that the health product did not contravene that subsection. By this provision, it is clear beyond peradventure that Parliament intended to *not merely* deter the accused from engaging in the prohibited conduct, but *also* compel him to take sufficient care to avoid the occurrence of the external elements of the offence. In this scheme of things, to

also require the Prosecution to establish that the accused knew that the health product was counterfeit in relation to an offence under s 16(1)(b) would render the defence in s 16(3) otiose, as well as fly in the face of the overt purpose of the statute.

61 We would also add that the language of s 16(3) of the HPA falls plainly within the general scope of s 107 of the Evidence Act (Cap 97, 1997 Rev Ed), which states as follows:

Burden of proving that case of accused comes within exceptions

107. When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the general exceptions in the Penal Code (Cap. 224), or *within any special exception or proviso* contained in any other part of the Penal Code, or *in any law defining the offence*, is upon him, and the court shall presume the absence of such circumstances.

Illustrations

(a) A accused of murder alleges that by reason of unsoundness of mind he did not know the nature of the act.

The burden of proof is on A.

(b) A accused of murder alleges that by grave and sudden provocation he was deprived of the power of self-control.

The burden of proof is on A.

(c) Section 325 of the Penal Code provides that whoever, except in the case provided for by section 335, voluntarily causes grievous hurt shall be subject to certain punishments.

A is charged with voluntarily causing grievous hurt under section 325.

The burden of proving the circumstances, bringing the case under section 335, lies on A.

[emphasis added]

62 We ought to mention that English case law shows that language similar to that used in s 16(3) – “it shall be a defence for the accused to prove” – has frequently been read to be indicative of Parliamentary intention to transfer the *legal* burden of proof (see *eg*, *Regina v Bezzina* [1994] 1 WLR 1057 at 1062; *Pharmaceutical Society of Great Britain v Storkwain Ltd* [1986] 1 WLR 903 at 909; *Regina v Johnstone* [2003] 1 WLR 1736 at [46]). Similarly, it is also well-established that the burden of proof referred to in s 107 of the Evidence Act is the *persuasive or legal burden* (see *Rajapakse Pathurange Don Jayasena v The Queen* [1970] 1 AC 618 as well as *Tan Khee Wan Iris v Public Prosecutor* [1995] 1 SLR(R) 723). Accordingly, we hold that s 16(3) irretrievably demonstrates that to establish a case of an offence under s 16(1)(b), it does not lie on the Prosecution to prove that the accused knew that the health product was a counterfeit. By s 16(3)(a)(i), the burden of proving that he did not know is placed on the accused.

63 Our conclusion regarding Question 3 is further strengthened when the object of the HPA is considered as a whole. The Judge had come to the conclusion (at [15]–[16] of the Judgment) that the HPA was enacted to “establish a regulatory framework for the regulation of health products to

safeguard public health and safety” based on the following statements of the Minister for Health, Mr Khaw Boon Wan, during the Second Reading of the Health Products Bill (Bill No 3 of 2007) (*Singapore Parliamentary Debates, Official Report* (12 February 2007) vol 82 at cols 1262–1296 as follows:

There is a need to regulate some of these new [health] products to protect public safety. First, we need to prohibit such products from containing harmful substances, at the very least. Second, we need to evaluate the more complicated health products for their quality and effectiveness. Third, we need an effective post-marketing surveillance programme to detect any problems early. But we need to regulate them in a practical manner given the wide diversity and different risk profile.

...

... Items like counterfeit medicines, which might not contain the essential life-saving drugs they are supposed to contain, or traditional medicines that have been adulterated with potent drugs, are especially dangerous. They threaten public health, and we have singled them out to make clear that we take such offences seriously.

64 While the Judge considered that these statements do not, *ipso facto*, demonstrate a legislative intent in making an offence under s 16(1)(b) of the HPA strict in liability, it does go some way towards explaining *why* Parliament found it prudent to displace the usual requirement that the Prosecution proves the *mens rea* of the offender. As stated in *Sweet* at 163, *per* Lord Diplock, as follows:

... where the subject-matter of a statute is the regulation of a particular activity involving potential danger to public health, safety or morals in which citizens have a choice as to whether they participate or not, the court may feel driven to infer an intention of Parliament to impose by penal sanctions a higher duty of care on those who choose to participate and to place upon them an obligation to take whatever measures may be necessary to prevent the prohibited act, without regard to those considerations of cost or business practicability which play a part in the determination of what would be required of them in order to fulfil the ordinary common law duty of care. But such an inference is not lightly to be drawn, nor is there any room for it unless there is something that the person on whom the obligation is imposed can do directly or indirectly, by supervision or inspection, by improvement of his business methods or by exhorting those whom he may be expected to influence or control, which will promote the observance of the obligation ...

65 Prof Ng and the Applicant are of the same view that s 16 of the HPA was enacted to address the mischief that may be caused by activities, absent proper regulatory safeguards and control, that are likely to create social concerns and endanger public safety. We agree with them and we also take the view that the reversal of the legal burden of proof in s 16 is justified, for the primary reason that the persons who are best placed to ensure that health products circulated in Singapore are safe and fit for consumption are those who are in the supply chain. They can do so by implementing a system of appropriate checks and dealing with reputable suppliers upstream. Consumers are unlikely to be able to take any real precautions in identifying counterfeits. Traders can also prove that they have discharged that duty by keeping good records of their transactions, which should, in any case, be encouraged. Furthermore, the suppliers of counterfeit products are unlikely to be cooperative and requiring the Prosecution to prove knowledge would lead to fewer prosecutions, to the detriment of society, given how easy it is for any one trader to deny his state of knowledge.

66 For the above reasons, our answer to Question 3 is as follows: For an offence under s 16(1)(b) of the HPA, the Prosecution does not bear the legal burden of proving that the person charged with

such an offence has knowledge that the health product in question is a counterfeit, but the accused shall be able to exonerate himself if he is able to discharge the legal burden of proving the elements in s 16(3) of the HPA.

Conclusion

67 To recapitulate, our answers to the questions in this criminal reference are as follows:

(a) Question 1: Sections 49(i) and (ii) of the TMA are, strictly speaking, not applicable to a person tried for abetting an offence under s 49(c) of the TMA. However, as the onus is on the Prosecution to prove beyond a reasonable doubt in relation to an abetment charge of an offence under s 49(c) that the abettor had the knowledge of or was wilfully blind to the fact that the goods in question had a registered trade mark falsely applied to them, the abettor is always at liberty to adduce facts to raise doubts as to the case of the Prosecution against him and thus exonerate himself.

(b) Question 2: The first two elements of “having taken all reasonable precautions” and “no reason to suspect the genuineness of the mark” in s 49(i) of the TMA are not independent requirements to be applied in a rigidly chronological or conditional order. Instead, they are inextricably linked as part of a single composite enquiry in which the accused’s assertion that he had no reason to suspect that the goods were falsely applied with a registered trade mark is considered against an objective assessment of the reasonableness and adequacy of the precautions that had been taken by him, viewed from the perspective of a reasonably prudent businessman in similar circumstances.

(c) Question 3: For an offence under s 16(1)(b) of the HPA, the Prosecution does not bear the legal burden of proving that the person charged with such an offence has knowledge that the health product in question is a counterfeit, but the accused shall be able to exonerate himself if he is able to discharge the legal burden of proving the elements in s 16(3) of the HPA.

68 It remains for us to thank Prof Ng for her comprehensive and well-reasoned submissions, which we found to be very helpful, and also the Applicant for taking a fair and reasonable stance throughout the course of this criminal reference.

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