Mohd Sharif bin Ibrahim v Public Prosecutor
[2002] SGCA 7

Case Number	: Cr App 18/2001
Decision Date	: 02 February 2002
Tribunal/Court	: Court of Appeal
Coram	: Chao Hick Tin JA; L P Thean JA; Yong Pung How CJ
Counsel Name(s)	: James Bahadur Masih and Gurcharanjit Singh (James Masih & Co) for the appellant; Han Ming Kuang (Public Prosecutor) for the respondent
Parties	: Mohd Sharif bin Ibrahim — Public Prosecutor

Judgment

GROUNDS OF DECISION

1. This was an appeal against a decision of the High Court convicting the appellant of a capital charge of having in his possession 98.71 grams of diamorphine for the purpose of trafficking. We heard the appeal on 19 November 2001 and dismissed it. We now give our reasons.

The facts

2. The evidence adduced by the prosecution established the following facts. On 11 October 2000, at about 6.10pm, the appellant and his girlfriend, one Siti Rohaza (Siti), were seen leaving the flat at 251 Tampines Street 21, #04-454 (the flat). The flat belonged to an uncle (Mohamed Salleh Bin Masaram) and aunt of the appellant. They walked through the Tampines MRT station and the Tampines Bus Interchange to reach a Singapore Turf Club booth located at Blk 512 Tampines Central. Having completed their business there, they walked to Tampines Mall (the Mall) where they met a Malay couple (established to be one Emran bin Tahir and his wife Suriani). At the Mall, the four of them then entered the "Americaya" shoe store where the appellant made a purchase. Thereafter the appellant and Siti parted company with the Malay couple and returned to Blk 251. It was then about 7.40pm.

3. While the appellant went up to the flat, carrying the shopping bag containing the pair of shoes, Siti remained downstairs at the playground. Two minutes later, the appellant came down from the flat. He walked across to the void deck of the adjacent Blk 250 where he met one Mohamed Idris Bin Sanip (Idris). After a short conversation where the appellant passed some heroin to Idris, the appellant returned to where Siti was. Both were then arrested by CNB officers. At about that time, Idris was also arrested in the vicinity of Blk 250.

4. A S$10 note and an envelope containing S$650 were found in the right pocket of the appellant's trousers. An aluminium foil containing loose heroin and another aluminium foil containing a straw of heroin were found in the left pocket of his trousers.

5. Later, at about 8.20pm, with the use of a key from the bunch seized from the appellant, the CNB officers entered the flat. In the presence of the appellant, a black briefcase, which was in the room occupied by the appellant, was forced open and found to contain the following items:-

(i) 2 packets and 8 sachets of what was later established to be 987.47 grams (gross weight) of heroin.

(ii) 3 empty brown envelopes with handwriting on 2 of them.

(iii) 2 digital scales, and

(iv) a marker pen.

In the wardrobe of the room, a sachet of heroin and some empty plastic sachets in a plastic container were also found.

6. The drugs found in the black briefcase, which was the subject of the charge against the appellant, were analysed to contain a net weight of not less than 98.71 grams of diamorphine.

7. Upon being questioned by Inspector Herman Bin Hamli (Insp Herman) as to whom the drugs found in the room belonged to, the appellant replied that they were his. The relevant questions and answers were as follows:-

"Insp Herman: The drugs in the room belong to who?

B1: Mine.

Insp Herman: What type of drugs?

B1: Heroin.

Insp Herman: What is the heroin for?

B1: All is for smoking.

Insp Herman: Whose weighing scale?

B1: Mine."

8. These questions and answers were recorded by Insp Herman in his pocket book. According to Insp Herman, the appellant declined to correct the answers recorded or sign on the pocket book.

9. At 1.00am on 12 October 2000, an instant urine test was also conducted on the appellant and Siti at the CNB headquarters. Both were tested positive for opiates.

10. Emran and his wife Suriani, together with Emran's nephew, one Ruziani Bin Ajis, were subsequently arrested. Siti was charged together with the appellant and the other three were charged shortly thereafter. However, Siti, Emran, Suriani and Ruziani were later given a discharge not amounting to an acquittal.

11. A number of statements were recorded from the appellant. Four long statements (exhibits 32, 33, 34 and 35), recorded over three days, were admitted into evidence after he confirmed that they were voluntarily made. The statements incriminated the appellant directly and substantially. We cite below portions of exhibit P32 to show the sort of admission he made:-

On 11 October 2000 at about 5.00pm, plus I met a male Chinese known to me as Ah Chai at the void deck of Blk 240 plus, Tampines Street 21. This Blk is near an overhead bridge. I collected from him a plastic bag containing a shoe box. Inside this shoe box there were two plastic packets of heroin. After collecting the plastic bag, I proceeded to the ground floor lift landing and

removed the two plastic packets from the shoe box and transferred them into a black briefcase.

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I left the place and walked back to my uncle's house at Blk 251, Tampines Street 21.

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I arrived at my uncle's house before 6.00pm. It was only a few minutes walk. When I arrived, the house was locked. Using the house key which was in my possession, I opened the iron gate and then the main door. I looked around and there was no one in the house. I know that at this hour, my uncle and auntie would be at work. I entered the first room and placed the black briefcase near a big bag in front of the bed.

The eight sachets of heroin inside a brown envelope in my briefcase was the balance of 9 sachets of heroin which I had earlier placed inside the briefcase. I placed the other sachet of heroin inside a plastic container on a shelf of my wardrobe in the bedroom.

The two weighing scales that was found inside my black briefcase was given to me by Ah Chai on 11 October when I collected the two plastic packets of heroin from him. I had asked him to give me these weighing scales because I need them to weigh the heroin before converting into sachets. That was how it came to be inside my briefcase.

Defence

12. In essence, what the appellant asserted at the trial was that the facts set out in the four long statements were not true. He claimed that he fabricated those things to protect his uncle and aunt who owned the flat. While the appellant did not deny occupying the room where the briefcase was found, he claimed that the briefcase was only given to him by Emran on the morning of the day of the arrest. Emran wanted to leave it with him for safekeeping as he was under surveillance by the Police. He denied knowledge that the briefcase contained drugs as he was told by Emran that the briefcase contained pornographic VCDs. The appellant also said that Emran gave him a sum of $650 for his expenses, as Emran knew the appellant was unemployed.

13. The trial judge, having carefully weighed the evidence tendered by the prosecution and the defence raised by the appellant, concluded that the appellant was guilty of the charge. The facts alluded to in the four long statements (which voluntariness was not in issue), as well as the oral statement recorded by Insp Herman in this pocket book, showed quite clearly that the appellant was a heroin trafficker as well as a heroin addict. He had, on the day of his arrest, even delivered heroin to Idris.

14. The trial judge also found that even if the appellant's defence, that the briefcase belonged to Emran, was to be believed, given the circumstances and his relationship with Emran, the appellant could not reasonably say that he did not know and had no reason to suspect that the briefcase contained drugs; all the more so when the appellant said that Emran left the briefcase with him for safekeeping as Emran was under police surveillance. The trial judge also noted that the appellant had

failed to call Emran to substantiate his assertion.

Grounds of appeal

15. There was, in the main, only one ground upon which the appellant sought to have the verdict of the court below overturned, and this was very much the same ground he canvassed before the judge below. He said that although he had physical possession of the briefcase, he did not know that the briefcase contained drugs as the briefcase belonged to Emran who only left it with him for safekeeping on the day of his arrest. He did not open the briefcase as it was locked by a combination lock and he did not know the number combination. In this regard, he said that the trial judge failed to give sufficient consideration to his evidence that what was set out in the four long statements was a fabrication. He further contended that the trial judge also erred in accepting Insp Herman's evidence that he gave the oral statement which was recorded by Insp Herman in his pocket book, and in failing to draw an adverse inference against the prosecution for not calling Emran to testify.

Presumption

16. In the present case, to prove the charge against the appellant the prosecution had relied upon the presumption in s 17 of the Misuse of Drugs Act (MDA) which provides that a person who "is proved to have had in his possession more than … 2 grammes of diamorphine … shall be presumed to have had that drug in possession for the purpose of trafficking." In order that this presumption could be invoked, the prosecution must prove that the appellant was in possession of the drugs: *Low Kok Wai v PP* [1994] 1 SLR 676.

17. However, it is settled law that physical control per se is not sufficient to prove "possession" within the meaning of the Act: e.g., *Tan Ah Tee v PP* [1978-1979] SLR 211 and *Sim Teck Ho v PP* [2000] 4 SLR 39. There must be *mens rea*, namely, knowledge on the part of the accused of the thing itself, namely, the drugs, though not the name nor the nature of the drugs. Only where possession of the drugs is so proved would the presumption in s 17 be triggered: *Low Kok Wai v PP (supra)* and *Sharom bin Ahmad v PP* [2000] 3 SLR 565.

18. Here, the appellant did not deny that he was in physical control of the briefcase which contained the drugs. On the element of *mens rea*, the prosecution relied largely on the four long statements of the appellant and the statement recorded by Insp Herman in his pocket book. In 11 above, we have cited passages from P32. The passages clearly showed that he knew the briefcase contained heroin and that he intended to traffic in them.

Fabrications

19. We now turn to examine the appellant's main ground for this appeal, namely, that what were set out in his four long statements were fabrications, created by him in order to protect his uncle and aunt, in whose flat he was staying. He was afraid that he might place their flat in jeopardy if he did not admit to the charge.

20. We must first point out that there was no suggestion that any threat or promise was made to induce the appellant to make the four statements. Upon being asked, in cross-examination, to mark out the parts in the four statements which were true and those which were fabricated, he eventually told the court that P32, P33 and P34 were entirely fabricated and in respect of P35, about 60% was

fabricated. It would appear that the position taken by the appellant was that anything which was incriminating of the appellant was fabricated. This claim of fabrication was not accepted by the trial judge who found that:-

> "the incontrovertible facts based on evidence of the prosecution as well as the evidence in chief of the accused are that the accused was a heroin trafficker having delivered heroin to Mohd Idris shortly before his (appellant's) arrest on 11 October 2000. He also had heroin in his possession, on his person as well as in his cupboard."

21. We reviewed the evidence relating to this aspect of the matter. We noted that the interpreter, Ms Sofia bte Sufri (Sofia), who was present at the recording of all four statements, told the court under cross-examination that the appellant was very forthcoming with his answers and did not require any prompting. It was as though he was relating a story. She also testified that he did not show signs of being frightened whilst giving the statements and that no one had pressurised him or induced him into making the same. As we saw it, the evidence of Sofia was significant. More likely than not, anyone who was making up a story out of fear, would have moments of hesitation as he went about creating it.

22. If it were true that the appellant fabricated the statements to protect his uncle and aunt, why then did he not even once mention in any of the four statements that his uncle and aunt had nothing to do with the drugs? He was concerned of the uncle and aunt being charged for drugs and of the risk of the lease of the flat being forfeited by HDB. His explanation that he did not do so because what was "paramount on his mind" was saving his uncle and aunt, was, to say the least, puzzling. It was beyond belief for the appellant to say that his uncle and aunt were "paramount" in his mind, and yet he did not even once say that the drugs had nothing to do with them. It did not make sense. Again, in none of the statements did the appellant mention Emran or the role the latter played. If protecting his uncle and aunt was foremost in his mind, then surely the most natural thing to do would have been to place the blame squarely on the true culprit. Why should the appellant take the blame for a capital charge? What he had done was completely ridiculous. In our judgment, his omission to mention his uncle and aunt, and the role which Emran played, underscored all the more that his evidence in court was a "fabrication", an afterthought, and that what he stated in the four statements was the truth. We could not agree more with the trial judge on this.

23. It is settled law that the retraction of an accused's confession will only go towards the weight to be accorded to the confession and it does not prevent the confession from being relied upon to convict the accused: see *Ismail bin UK Abdul Rahman* [1974] 2 MLJ 180 and *Panya Marimontree v PP* [1995] 2 SLR 341. In the light of our views above concerning the alleged 'fabrication', we did not see how it could be argued that the weight to be accorded to his four statements should in any way be diminished.

The statement given to Insp Herman

24. The appellant denied he made the statement to Insp Herman which was recorded in the form of questions and answers. On these answers, the appellant said that when he read what was recorded, he found that the contents were different from what he had uttered. That was the reason he did not sign on the pocket book. While the appellant could not recall what he said to Insp Herman, this much he could: he remembered having told Insp Herman that only the drugs found in the cupboard belonged to him. As regards the other drugs, he remembered telling him that "the rest of the drugs don't belong to me."

25. In view of the fact that the appellant did not sign against the answers recorded in the pocket book, and had at the trial denied he gave those answers (other than the answer relating to the drugs found in the wardrobe), it then became a question of fact whether he was asked and did give the answers which was attributed to him. The trial judge, having heard the evidence, came to the following conclusion:-

> "The incontrovertible evidence is that an interview did take place in which Insp Herman questioned the accused. I have not been persuaded by the accused that Insp Herman's account was wrong or inaccurate."

26. Quite clearly, the trial judge accepted the evidence of Insp Herman, that the questions were asked and the answers were given by the appellant, and that the recording was accurate. There was no basis for us, an appellate tribunal, to disturb this finding of fact, based as it were on oral evidence given by witnesses in court.

Was the defence obliged to call Emran as its witness

27. The final argument raised by the defence counsel was that the trial judge erred in law and in fact when he ruled, upon the defence being called, that the appellant ought to have called Emran to support his defence and that this failure on the part of the appellant should be taken against the appellant. The appellant further submitted that if any adverse inference were to be drawn, it should have been drawn against the prosecution because the latter ought to have called Emran to rebut the appellant's assertion.

28. At this juncture it would be helpful to see what precisely the trial judge said on this aspect –

> "Emran was offered to the defence but was not called. The question is, was the defence obliged to call Emran to corroborate the accused, or, was the prosecution obliged to call Emran as a rebuttal witness? I accept that there is no obligation on either party to call Emran, but the failure of the defence to do so in the present circumstances reduces the value of the claims made by the accused, especially those that attributed the briefcase and drugs to Emran. It is true that on the face of it, an assertion by the accused invariably invites rebuttal, but it is not an invitation that must be taken up. At this stage of the trial, the burden is on the accused to raise a reasonable doubt. If there is any adverse inference to be drawn, on the facts and circumstances of this case, it would have to be drawn against the failure by the defence to call Emran as a witness. It would be wrong to draw an adverse inference against the prosecution as Emran's testimony was never part of its case. It is obvious that the approach most favourable to the accused is to draw no inference whatsoever, but there is no sound or rational basis for that in this case. The obvious inference that I must draw is that Emran was unlikely to corroborate the accused, but is not difficult to appreciate why – if he saves the accused he condemns himself. In these circumstances, I regard the drawing of the said inference to be of much lower value than it otherwise might have, and hence, I have merely taken the failure of the accused to call Emran as another point to be weighed in the pot of evidence against him."

29. In our opinion, the trial judge was correct in the approach he took. The law is well settled that a court will not draw an adverse inference against the prosecution for not having called a witness, where the prosecution has sufficiently proven its case by other independent evidence. All it needs to prove are the elements of the charge: see *Chua Keem Long v PP* [1996] 1 SLR 510 and *Satli bin Masot v PP* [1999] 1 SLR 663. The prosecution has a discretion whether or not to call a particular witness, provided the discretion is exercised in good faith and the witness whom the prosecution does not

propose to call (if available) is offered to the defence: *Lim Young Sien v PP* [1994] 2 SLR 257. In the present case, Emran (who was brought to court) was offered to the defence at the close of the prosecution's case. Thus, no adverse inference could conceivably be drawn against the prosecution for not calling him.

30. Indeed, it was the appellant who claimed in his testimony in court that Emran passed him the briefcase, with the contents, on the morning of the day of his arrest. This was a bare assertion. The court was certainly entitled, in its deliberation, to take this fact into account to determine if the appellant had raised a reasonable doubt in the prosecution's case. That was what the court did.

Conclusion

31. At the end of the day, the central issue was whether the appellant knew what was in the black briefcase. On this, the finding of the trial judge was explicit:-

> "In this regard, I do not accept the evidence of the accused that he did not know what was in the black briefcase. On his own evidence, the briefcase was handed to him by his friend Emran together with a seemingly gratuitous largesse of $650 on the morning of the day he (the accused) was directed by Emran to deliver heroin to Mohd Idris. And even on his own account, the briefcase contained illegal material. His girlfriend Siti and himself were also heroin consumers. In these circumstances, I do not believe the accused that he did not know what was in the briefcase."

32. In the light of this finding, which was amply justified, the conviction of the appellant on the charge must follow as both the elements of *actus reus*, "physical act of control" of the drugs, and *mens rea,* knowledge of what was in the briefcase, had been proven. Accordingly, the presumption in s 17 of the MDA applied. The appellant had not rebutted the presumption by showing that his possession of the drugs was not for the purpose of trafficking. He could not even answer how much drugs he consumed.

33. In the premises, we upheld the conviction recorded by the court below.

Sgd:

YONG PUNG HOW
CHIEF JUSTICE

Sgd:

L P THEAN
JUDGE OF APPEAL

Sgd:

CHAO HICK TIN
JUDGE OF APPEAL