Mahdi Bin Ibrahim Bamadhaj v Public Prosecutor
[2003] SGHC 95

Case Number : MA 2/2003

Decision Date : 16 April 2003

Tribunal/Court : High Court

Coram : Yong Pung How CJ

Counsel Name(s) : Syed Ahmad Alwee Alsree (Billy & Alsree) for the appellant; Amarjit Singh (Deputy Public Prosecutor) for the respondent

Parties : Mahdi Bin Ibrahim Bamadhaj — Public Prosecutor

Criminal Law – Controlled drugs – Trafficking – Whether Prosecution proved that drugs were in possession of accused – Whether accused rebutted presumption that drugs in his possession were for the purposes of trafficking

1 This was an appeal against the decision of district judge Teoh Ai Lin to convict the appellant Mahdi Bin Ibrahim Bamadhaj of nine drug related charges.

Facts

2 Mahdi bin Ibrahim Bamadhaj (the appellant) was arrested on the evening of 13 March 2002 at a party held at a Goodwood Park Service Apartment. Others at the party were also arrested. They included Julia Suzanne Bohl (PW9), Hamdan bin Mohd (PW10), and Sunaiza binte Hamzah (DW1). The CNB officers who raided the apartment found a packet of Ketamine at the balcony of the apartment. The raid was conducted at 8.15 pm.

3 At 9.15 pm on the same night the appellant, Julia and Hamdan were taken from the Goodwood Park Service Apartment to apartment #04-05 Balmoral Court (the Balmoral Apartment). This was done because the CNB officers had reports that the appellant and one 'Ben' were using the Balmoral Apartment to store drugs which they trafficked. Ben was Julia's boyfriend and it was not disputed that Ben stayed with Julia in the Balmoral Apartment. Julia was the tenant of this apartment. This was proved by the fact that she was named as tenant in the rental agreement. The appellant's name was included as an 'intended occupier' in the rental agreement. Ben was still at large at the time of the appeal.

4 The CNB officers tried the bunch of four keys seized from the appellant to open the front door of the Balmoral Apartment. One of the keys did in fact open the Balmoral Apartment's front door.

5 Drugs were found in the master bedroom, second bedroom (Room A) and living room. The CNB officers found an Umbro Haversack in Room A which contained a host of drugs, a weighing scale and a digital weighing scale.

6 The Balmoral Apartment was often used for 'drug parties' where ketamine and ecstasy were freely available. There was a steady stream of visitors who came for these parties. These party-goers included friends of Julia and Ben, and included the friends of the appellant and his girlfriend Sunaiza (DW1). Hamdan was often on the guest list at these parties.

7 After the apartment was searched, the appellant was taken in for a urine test and was tested positive for consumption of ketamine and methamphetamine.

8 On 15 March 2002 the investigating officer for the case, ASP Daniel Tan (PW8), conducted a second search of the Balmoral Apartment. Room A was searched in the presence of the appellant. ASP Tan found, inter alia, the following items in a cabinet drawer in Room A:

Item No.	Nature
1	An undated yellow application form from Comfort driving centre and a receipt dated 17 October 2001
2	An undated Hari Raya card addressed to the appellant
3	An undated birthday card addressed to the appellant
4	12 photocopied medical certificates of various dates from 20 April 2001 to 9 December 2001
5	Two certificates from the Director of Prisons stating when the appellant was in prison
6	A Bank of Singapore internet account user password with the name of the appellant
7	A photograph of a male Malay thought to be Ben

The contents found in the cabinet drawer in Room A pointed strongly to the conclusion that Room A was occupied by the appellant. The appellant denied that he occupied Room A in order to distance himself from the Umbro bag.

9 The appellant originally faced 17 charges, 16 of which related to possession, consumption and trafficking of drugs. At the hearing before district judge Teoh Ai Lin, the prosecution applied to withdraw three of the drug related charges and stood down the charge relating to the possession of a flip knife. The prosecution then proceeded on 13 of the drug related charges, and the appellant claimed trial to 11 of these. The two charges to which the appellant did not claim trial were the two drug consumption charges to which he pleaded guilty.

10 When I first looked at this case I was of the view that it was odd that the appellant, who was just an 'occupier' of Room A, was charged with offences more serious than those for which Julia Bohl, who was the actual tenant of the Balmoral Apartment, was convicted. It is for this reason that I requested from the Registry the notes of evidence and the oral grounds for the sentence in the Julia Bohl case. Having read through these documents, I found that there was no unfairness towards the appellant as regards the charges made out against him by the prosecution. This was so for two reasons. First, it was clear that Julia was not living in the Balmoral Apartment one month prior (though not immediately prior) to the arrests on 13 March 2002. Julia moved out of the Balmoral Apartment in order to study for her exams. She moved into an apartment at Cairnhill Circle for one month, and only returned to the Balmoral Apartment to do her laundry. I found that this fact distanced her from the drugs found in Room A. Secondly, Julia assisted in the prosecution of the appellant. This second reason raised the issue of whether Julia was indeed an independent witness since she had an interest in distancing herself from the bag in Room A, which was after all in her apartment. The alleged non-

independence of Julia made up one of the grounds of the appeal. I addressed this point in the appeal.

The law

11 As regards the charges for trafficking in cannabis, cannabis mixture and methamphetamine (first, third and fifth charges) found in the Umbro bag in Room A, the prosecution relied on the presumption of trafficking found in s 17 of the Misuse of Drugs Act (MDA) Cap 185 – ie that the appellant had these drugs in his possession for the purposes of trafficking. The amount of cannabis, cannabis mixture and methamphetamine in the Umbro bag crossed the respective threshold limits set out in s 17 of the MDA such that the presumption of trafficking applied.

12 The Court of Appeal held in *Low Kok Wai v PP* [1994] 1 SLR 676 that the presumption of trafficking in s 17 only applied when the fact of possession was proved independently. Thus, possession should not be presumed solely by virtue of s 18 of the MDA. The prosecution must have proved beyond reasonable doubt that the drugs were in the possession of the appellant. Once this was proved, the presumption of having the drugs in his possession for the purpose of trafficking applied and the burden shifted to the appellant to rebut this presumption.

13 As regards the rest of the drugs (comprising 26 sachets of ketamine and 37 ecstasy and mixed drug tablets) found in the Umbro bag, the weight of these drugs did not cross the threshold limits set out in s 17 of the MDA. Thus, the appellant was only charged with possession of these drugs. Since these drugs were found together in the Umbro bag, the prosecution did not rely on the s 18 MDA presumption of possession. Instead they sought to prove the fact of possession independently. This was logical.

14 The Court of Appeal in *Fun Seong Cheng v PP* [1997] 3 SLR 523 laid down the rule as to what constituted 'possession.' The Honourable Karthigesu JA held that the prosecution needed to prove two things in order to prove possession. First, it needed to prove that the accused had physical control over the drugs. It was a matter of fact whether someone had physical control over an item. Second, the requisite mens rea, on the part of the accused, must be proved. This mens rea included 'knowledge only of the existence of the thing itself and not its qualities.'

Decision in the trail below

15 District Judge Teoh Ai Lin was satisfied that the prosecution had met the two-limb test as laid down in *Fun Seong Cheng*. Therefore, the burden of proving that the drugs in his possession were not meant for the purposes of trafficking shifted to the appellant. The appellant's defence at trial to all the 11 charges was one of denial. The district judge found the appellant's defence to nine of the eleven charges unsatisfactory. Her grounds of decision which went into 96 pages, were thorough and complete. She addressed each of the accused's arguments and dealt with them in a detailed fashion. She acquitted the accused of the 11th and 12th charges pertaining to drugs and paraphernalia found in the living room of the Balmoral Apartment. In particular, she was extremely fair to the accused when she pointed out that there was insufficient evidence to establish beyond reasonable doubt that the cannabis mixture in the wooden box, and the silver pipe and other drug paraphernalia found in the display cabinet in the living room were in the possession of the accused pursuant to a common intention between the accused, Julia and Ben. However, she did convict the appellant on the nine remaining charges. The sentences were as follows:

Charge No.	Nature	Minimum & Maximum Sentence	Sentence Given
1	Possession of 281.6 g of cannabis for the purpose of trafficking	5 yrs* + 5 strokes^ to 20 yrs + 15 strokes	15 yrs and 10 strokes
3	Possession of 382.2 g of cannabis mixture for the purpose of trafficking	5 yrs + 5 strokes to 20 yrs + 15 strokes	10 yrs and 7 strokes
5	Possession of 25.12 g of methamphetamine for the purpose of trafficking	5 yrs + 5 strokes to 20 yrs + 15 strokes	5 yrs and 5 strokes
6	Possession of 26 sachets of substance containing ketamine	10 yrs or $20,000 fine or both No minimum	3 yrs
7,8,9	Possession of a total of 37 ecstasy and mixed drug tablets	10 yrs or $20,000 fine or both No minimum	3 yrs per charge
10	Possession of drug paraphernalia inside the Umbro bag	3 yrs or $10,000 fine No minimum	3 months jail
All charges above relate to drugs and paraphernalia found in Umbro bag in Room A			
4	Possession of 0.16 g of ketamine at Goodwood Park Service Apartment's balcony	10 yrs or $20,000 fine or both No minimum	2 yrs
2, 13	Consumption of ketamine and methamphetamine	3 yrs to 10 yrs or $20,000 fine or both	3 yrs per charge

* years imprisonment ^ strokes of the cane

16 The district judge ordered the sentences on the 1st charge, the 2nd charge and the 4th charge to run consecutively, and the rest of the sentences to run concurrently with that on the 1st charge. This made a total of 20 years and 22 strokes of the cane.

The appeal

17 The appellant appealed against conviction (on all the charges except the two to which he pleaded guilty) and against the sentences on all the charges.

18 The appellant contended that he did not have physical control of the drugs in the Umbro bag. To this end, he maintained that he did not stay in Room A on a regular basis. The gist of his argument was that, because Room A was seldom locked when he visited the Balmoral Apartment and because so many visitors went to the apartment for parties, it was unfair to find that he alone had physical control over Room A. Thus, he argued that the district judge erred in fact when she found him to be in physical control of the drugs in Room A. He advanced a second argument. He contended that the district judge erred in law when she drew parallels between the case of *Gulam Bin Notan Mohd Shariff Jamalddin & Anor v PP* [1999] 2 SLR 181, the *Fun Seong Cheng* case and the case at hand. The district judge used both these cases as authority for the assertion that one can be found to be in physical control of drugs found inside the premises to which one does not have exclusive possession.

19 As regards the first contention, I found the district judge was spot on in finding him to be in physical control of Room A. I found five reasons why Room A was indeed his room. First, his name was on the rental agreement as an occupier of the Balmoral Apartment. To this end, the district judge found in the course of the proceedings that he paid rent for this room. She found that there was an agreement between Julia and him that the total rent for the apartment should be shared, though not equally, between them. He denied this, but I found the weight of evidence, which included the objective fact that his name was written into the rental agreement, worked to his great disadvantage. Secondly, it was another objective fact that one of the keys seized from his person by Sgt Tony Ng (PW3) during the raid on the Goodwood Park Service Apartment opened the front door to the Balmoral Apartment. The district judge was correct to draw the logical conclusion that he had free access to and from the Balmoral Apartment. Thirdly, many personal documents belonging to him were found in a cabinet drawer in Room A when the investigation officer returned to the Balmoral Apartment to conduct a second and more thorough search on 15 March 2002. I tabulated these personal documents at para 8. Fourthly, Sunaiza (DW1), who was his girlfriend, stated that she had stayed in the Balmoral Apartment with him for five days in the days before her arrest. Fifthly, in the course of the investigation, clothes were recovered from Room A. These clothes were identified to be his. These reasons indicated that the trial judge was correct to find that he was the occupier of Room A and that he stayed there regularly. In fact, his base was the Balmoral Apartment.

20 As regards the second contention, I looked at the facts of the *Gulam Bin Notan* case and the *Fun Seong Cheng* case. In the latter case, the accused was arrested in Upper Bukit Timah and escorted back to his office in an Army camp. Also arrested at Upper Bukit Timah were Tan Peng Swa (Tan) and Kua Teck Meng (Kua). The accused's office was shared with his colleague, Sgt Soh Sin Sie (Sgt Soh). Both had keys to a storeroom inside the office in which was kept SAF sports equipment. On the day of the arrest, Sgt Soh was on leave and the accused was alone in the office and had access to the storeroom throughout that day. In the storeroom the CNB officers found seven packets and six sachets of substance containing not less than 251.70 g of diamorphine. The Court of Appeal held that the storeroom was meant for the accused and Sgt Soh. Only the accused and Sgt Soh were given the keys to the storeroom. The Court of Appeal held that the fact that Sgt Soh was able to gain access to the storeroom did not mean that the accused did not have physical control over the drugs.

The Court was satisfied that the accused did in fact have physical control of the drugs. The Court further held:

> Counsel for the appellant submitted that Tan and Kua may have known where the appellant kept the key to the storeroom and that the appellant was used to leaving open the window to his office. If it were the appellant's case that Tan and Kua may have planted the drugs in the storeroom, then the mental element of possession would not be satisfied, but this will not affect our view as to whether the appellant had physical control over the drugs.

I drew two principles from the Court of Appeal's decision. First, it was clear that exclusive possession of the room or office in which the drugs were found was *not* a pre-requisite to find that an accused had actual physical control of the drugs. The second principle was that any allegation by an accused that the drugs were not his (that they were planted by others who might have had access to the area in which the drugs were found) went to the mental element of the offence. Therefore, to have raised this allegation in the hope that it negated 'physical control' was fruitless. I found that both these principles pointed to the conclusion that he had physical control of the drugs found in the Umbro bag.

21 He also advanced a unique argument in order to distinguish the facts of *Fun Seong Cheng* from the case at hand. He argued that, whilst the drugs in *Fun Seong Cheng* were found in one location, drugs were found in three distinct areas in the Balmoral Apartment – ie Room A, Ben and Julia's room (the master bedroom) and the living room. I was of the view that the fact that drugs were found in three locations rather than just in one provided insufficient reason for this Court to distinguish the current case from *Fun Seong Cheng*. There had been a very fair apportionment of responsibility for the drugs in the Balmoral Apartment; he was found to be responsible only for the drugs in his room, Room A.

22 I disagreed with one minor aspect of the district judge's interpretation of the *Gulam Bin Notan* case. I disagreed that this case should be used as an authority for the assertion that 'physical control of drugs is possible even though the accused did not have exclusive possession of the area in which the drugs were found.' In *Gulam Bin Notan*, there were two appellants who had been convicted of furthering a common intention to possess drugs for the purposes of trafficking. Of importance was the fact that the Court of Appeal found that the two appellants had free access to the area in which the drugs were found. Because: (a) they were being charged *for furthering a common intention* to traffic drugs and (b) it could be argued that *both the appellants, together, had exclusive possession* of the area in which the drugs were found, it was my view that it was safer not to use the *Gulam Bin Notan* case as an authority for the assertion that 'physical control of drugs is possible even though the accused did not have exclusive possession of the area in which the drugs were found.' For the sake of clarity, this assertion should be found in cases such as *Fun Seong Cheng* where (a) a single appellant was trying to advance the argument that some other people had access to the room in which the drugs were found and (b) there was no issue of common intention. Importantly, there was no co-appellant in *Fun Seong Cheng* with whom the Court could say the appellant shared exclusive possession of the area. In these circumstances, the Court of Appeal held that exclusive possession of the area in which the drugs were found was not a pre-requisite to having physical control of the drugs for the purposes of s 17 of the MDA. Nevertheless, in light of the *Fun Seong Cheng* case, the district judge was correct in finding that he had physical control of the drugs in the Umbro bag.

23 He also contended that he did not possess the requisite mens rea**.** He quoted the following passage in the district judge's grounds and argued that she erred in coming to the findings therein. The passage read:

> Aside from the fact that the accused occupied Room A, he had shown from his oral replies to St Sgt David Ng's questions that he knew the nature of the different drugs found inside the Umbro bag. When shown the various drugs he had correctly identified the vegetable block as ganja, and the other substances as Ketamine and Ice. He had even gone as far as to tell St Sgt David Ng the weight of the vegetable block was 400 plus grams. The accused's responses satisfied the mens rea element to found possession.

With this passage in mind, he advanced three arguments. First, he argued that St Sgt David Ng did not ask him any questions and neither did he reply to these fictitious questions. He maintained that he was only questioned by St Sgt Ngo Hing Wong and that the responses to these questions were found in the conditioned statement of St Sgt Ngo. I found that this argument was correctly dealt with in the court below. The district judge said:

> I rejected the accused's account that there was no conversation between the other officers and him and that St Sgt Ngo was the only one who spoke to him inside Room A. On this he was directly contradicted by St Sgt David Ng and Sgt Tony Ng. The accused's account as to what took place inside Room A was also shifting. In P27 his CNB statement he had even claimed that he did not even know where the officers had found the haversack, and that a few officers had questioned him about his background while he was inside Room A.

There was nothing at the appellate stage that prompted me to question these findings of the district judge. Indeed, an appellate court should be slow to overturn the trial judge's assessment of the credibility and veracity of witnesses unless the assessment was plainly wrong or against the weight of evidence; *Lim Ah Poh v PP* [1992] 1 SLR 713; *Shamsul Bin Abdullah v PP* [2002] 4 SLR 176.

24 Secondly, he contended that the district judge was incorrect to make the finding that he had made a statement as to how heavy he thought the vegetable matter was. I found that the district judge adequately addressed this argument. She said:

> I accepted St Sgt David Ng's evidence that upon casual questioning the accused had told him that the vegetable matter block was ganja, that the crystalline substance was Ice, and the powdery substance ketamine. I also accepted his evidence that when he asked the accused the weight of the vegetable matter block after everything was laid out, the accused told him it was 400 plus grams. As for counsel's challenge as to why this was not included in his conditioned statement, I also accepted St Sgt David Ng's explanation that he had not paid much notice to what the accused said at the time because he knew that the block would be sent for analysis, and he had only brought up the matter in court as he was being questioned by the DPP about what the accused said.

I found that the district judge correctly addressed the evidence before her. There was nothing at the appellate stage which prompted me to interfere with her finding.

25 Thirdly and in the alternative, he contended that the district judge was not correct in her finding that he had the requisite mens rea since he only identified the drugs after the CNB officer had unwrapped them.. The district judge treated such prompt identification as a sign that he knew from the onset that the Umbro bag contained drugs. I was of the view that this finding was further bolstered by the fact that he offered an estimation of how much the vegetable matter block (which turned out later to be cannabis mixture) weighed. Furthermore, the district judge relied on the corroborative value of his cumulative lies to find that he was in possession of the drugs inside the Umbro bag. To this end, the district judge used the principle laid down by the Court of Appeal in *PP v Yeo Choon Poh* [1994] 2 SLR 867 – that the lies of the accused have corroborative value if they indicate a consciousness of guilt.

26 The appellant contended that the fact that Julia and Ben had free access to the apartment and that Room A was seldom locked sufficiently distanced him from the drugs found in Room A. It was well established however that Room A was occupied by him and that he had physical control of the drugs found therein.

27 Counsel contended that the fact that the television and hi-fi sets went missing between 13 March 2002 (the night of the arrest) and 15 March 2002 (when the investigation officer did a second search of Room A) proved the ease with which people moved in and out of the Balmoral Apartment which in turn provided a reasonable explanation as to how party-going visitors gained access to the flat and left the drug-filled Umbro bag in Room A. I found this argument speculative. Furthermore, there was evidence that Sunaiza returned to the Balmoral Apartment on 14 March 2002, and there was no telling if Sunaiza herself took the television and hi-fi sets in order to help her boyfriend, the appellant, concoct a story as to how easy it was to gain entry to the apartment. I found that this concoction should not distance him from the drugs in Room A.

28 He also contended that Julia and Hamdan were not independent witnesses. Julia (PW9) and Hamdan (PW10) had an interest in his conviction for the drugs found in Room A. This was because the two had also been charged with the same offences relating to the drugs in the Umbro bag in Room A. Although the two had been given discharges not amounting to acquittals, these charges were 'resurrectable' at any time. Nonetheless, I found that the district judge approached the evidence of these two with utmost caution. As regards Julia, the district judge stated:

> I therefore exercised extreme caution as regards the uncorroborated aspects of Julia's testimony, particularly as regards those matters which might have the effect of directly or indirectly implicating her in the drug activities in the apartment. However despite the foregoing, I was satisfied that Julia had in fact been truthful in many areas of her testimony. Many details in her evidence were corroborated by the other witnesses.

I found that the district judge applied the same level of caution to Hamdan's evidence.

Sentence

29 In the alternative, he argued that the sentence of 20 years and 22 strokes was manifestly excessive. I found this not to be the case.

30 As regards the 281.6 g of cannabis (the 1st charge), the district judge was correct to point out that this was well above the 15 g threshold that attracted the trafficking presumption under s 17(d) of the MDA. An amount of 330 g to 500 g would have attracted a minimum sentence of 20 years and 15 strokes. 281.6 g was only 50 g short of the 330 g lower limit. Thus 15 years and 10 strokes of the cane was not manifestly excessive. As regards the 382.2 g of cannabis mixture (the 3rd charge), this was far above the 30 g threshold that attracts the trafficking presumption in s 17(e) of the MDA. An amount between 660 g to 1000 g of cannabis mixture would have attracted a minimum sentence of 20 years and 15 strokes. 382.2 g was more than half the 660 g lower limit. Thus, 10 years and 7 strokes of the cane was not manifestly excessive. Furthermore, these sentences were in line with the sentences passed for similar offences involving drugs of roughly similar amounts, as seen in the cases of *Loo Pei Xiang v PP* (MA 205/97/01-02) and *K D Chandran v PP* (MA 207/98/01). Unlike the accused persons in these two cases, he did not plead guilty. As regards the 25.12 g of methamphetamine (the 5th charge) he was in fact given the minimum sentence – 5 years and 5 strokes.

31 As regards the drug consumption charges (2nd and 13th charges), the district judge took into

consideration his previous consumption conviction in June 1999. In this 1999 conviction, three charges of drug possession were also taken into consideration. With this background in mind I found that the three years imprisonment given for each of the two consumption charges was not manifestly excessive.

32 As regards the drug possession charges for drugs found in the Umbro bag (6th to 9th charges), the district judge took into consideration the substantial quantity of drugs found – 37 tablets containing ecstasy and a mixture of drugs, and 26 sachets of crystalline substances containing ketamine. Three years imprisonment for each of these possession charges was not manifestly excessive. As regards the sachet of ketamine found next to him on the balcony of the Goodwood Park Service Apartment (4th Charge), the district judge paid heed to the fact that it contained much less ketamine than did the packets in the Umbro bag. To this end, I found that the two years imprisonment given for this offence was not manifestly excessive.

33 Lastly, as regards the drug paraphernalia found in the Umbro bag (10th Charge), the three months jail given for this offence was not manifestly excessive due to: (a) the fact that the appellant could have received a maximum of three years and (b) the fact that he had a previous conviction on a drug related offence.

34 The district judge ordered the sentence in the 1st charge, the 2nd charge and the 4th charge to run consecutively, and the rest of the prison sentences to run concurrently with that on the 1st charge. This made a total of 20 years and 22 strokes of the cane.

Conclusion

35 In light of the above reasons, I decided that the appeal against conviction and sentence be dismissed.

Appeal dismissed.