Tay Kah Tiang v Public Prosecutor
[2001] SGCA 19

Case Number : Cr M 8/2001, Cr App 23/2000

Decision Date : 31 March 2001

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; L P Thean JA; Yong Pung How CJ

Counsel Name(s) : Christina Goh Siok Leng (Christina Goh & Co) and David Lee (Ang & Lee) for the appellant; Bala Reddy and Stephanie Wong (Deputy Public Prosecutors) for the respondent

Parties : Tay Kah Tiang — Public Prosecutor

Criminal Law – Offences – Trafficking in controlled drugs – Possession – Whether appellant in physical possession of drugs for purpose of trafficking – Whether appellant had knowledge of drugs – Whether presumption of possession for purpose of trafficking under s 17 of Misuse of Drugs Act (Cap 185, 1998 Ed) triggered-Whether appellant discharged burden of rebutting presumption – s 17 Misuse of Drugs Act (Cap 185, 1998 Ed)

Criminal Procedure and Sentencing – Appeal – Motion to adduce additional evidence – Principles governing motion to adduce additional evidence – Non-availability, relevance and credibility of additional evidence – Whether conditions for court's exercise of discretion to admit additional evidence fulfilled – s 55 Supreme Court of Judicature Act (Cap 322, 1999 Ed)

(delivering the grounds of judgment of the court): This was an appeal by the appellant against a conviction at the High Court of a capital charge of being in possession of 45 packets of substance containing not less than 24.12g of diamorphine for the purposes of trafficking. We heard the appeal on 2 March 2001 and dismissed it and now give our reasons.

The facts

The appellant, female, 36 years old, is a drug addict and was previously an inmate of the Drug Rehabilitation Centre. She is divorced with three children, but the children are in the custody of her ex-husband.

On 22 March 2000, at 4.20pm she was arrested by Central Narcotics Bureau (`CNB`) officers in room 507, Brendma East Park Hotel, Kitchener Road. With her in the room was a male friend, one Lai Gek Siew (`Lai`), 41 years old, unemployed, who is also a drug addict. Both had been staying at the hotel from 14 March 2000 until their arrest. The staff of the hotel told the court that they would only allow a Singaporean to register for a room if he or she produced his/her identity card. The room was registered in the name of Lai because the appellant did not have her identity card, having lost it more than a year ago.

Heroin in packets was found in the room. Three straws of heroin were on a chair. Three packets wrapped in newsprint and four straws were in a drawer of a dressing table. A black drawstring bag, with a total of 45 packets of heroin, was found hidden in the false ceiling above the bathroom. The drawstring bag was not sealed or locked. Inside the black drawstring bag were three plastic bags: a red, a blue and a black. In the red plastic bag were 20 packets of substance. In the blue plastic bag were two newsprint wrappings, each containing five packets of substance. In the black plastic bag there were three newsprint wrappers, each containing five packets of substance. The charge preferred against the appellant related only to the drugs found in the drawstring bag. The 45 packets had a net weight of 24.12g of diamorphine.

At the time, scissors, pincers (tweezers), paper foil, some 109 empty plastic sachets, a digital weighing scale and lighters were also found in the room. Evidence was adduced which showed that the appellant had purchased a digital weighing scale a few days before her arrest. The receipt for the purchase was found in her wallet. But no heroin stains were found on the weighing scale.

In the appellant`s statement recorded on 23 March 2000, under s 122(6) of the Criminal Procedure Code (Cap 68) (`CPC`), she said:

> *I did not intend to sell the drugs. A male Malaysian asked me to keep the drugs for him. My friend Lai Gek Siew has nothing to do with the drugs.*

In her second statement recorded on 29 March 2000, she admitted to the ownership of the drugs, stating that the 45 packets found in the black drawstring bag were given to her by one Hak Chai for safe-keeping and in return Hak Chai would forgo the $1,000 debt she owed him. In her third statement recorded on 5 April 2000, she gave an account of her dealings with Hak Chai. She also exonerated Lai from any knowledge of the drawstring bag. In her words, `I did not tell (Lai) about the black bag.`

However, there is an aspect of the evidnece which should be mentioned at this juncture. A fingerprint expert, ASP Lay Yeow Khoon, told the court that Lai`s fingerprints were found on the magazine paper used to wrap some of the drugs. Lai explained that he had been reading some of the magazines taken from the hotel front desk. The pages came from the 11-17 March 2000 issue of Singapore This Week, a tourist promotional magazine freely distributed at the hotel reception. The appellant did not make any comment regarding this aspect of Lai`s evidence. Lai also said that the heroin in the room belonged to the appellant, except as regards those in the drawstring bag found in the false ceiling, which he did not know existed. Neither did he know how the drawstring bag happened to be there. Lai was eventually not charged for drug-trafficking though he was arrested together with the appellant. Instead, he testified for the prosecution.

In the light of the foregoing evidence, the trial judge called upon the appellant to enter her defence. The appellant`s evidence was that on 12 March 2000, she received five packets of heroin from Hak Chai, a drug peddler, who had taken over from a previous peddler, `Ah Tee`. Those five packets of heroin were for her own consumption. They cost $1,000 and were not paid for. In return for waiving the debt, Hak Chai wanted the appellant to safe-keep something for him. So on 19 March 2000, Hak Chai asked the appellant to go to a rubbish bin near the Toa Payoh Post Office to pick up a plastic bag. She collected the plastic bag at around 8pm and returned to the hotel. She then called Hak Chai and was asked by the latter to help him keep it. She was informed that its contents were of a value of $9,000. He also informed the appellant that he would call her again later with regard to the return of the drawstring bag.

On opening the plastic bag, the appellant saw a black drawstring bag and a paper wrapper. Inside the paper wrapper, there were three packets of heroin. She took the three packets as they were meant for her personal consumption. She did not open the drawstring bag. She then hid the drawstring bag, with the substance therein, above the false ceiling of the bathroom. She did not touch it again. The next time she saw the drawstring bag was on the day of her arrest, when the CNB officers retrieved it from the false ceiling.

The appellant admitted that the three straws of heroin found on the chair and the three packets and four straws of heroin found in the drawer were hers, but they were for her own consumption. She also

stated that it was Hak Chai who had asked her to buy the digital weighing scale and the empty plastic sachets, although she did not know what purposes they were meant for.

It would be noted that the only inconsistency in her oral evidence, compared with the statements she gave earlier, was her denial of being the owner of the heroin, or that she suspected the black drawstring bag contained heroin. She admitted that Hak Chai had placed three packets of heroin in the plastic bag (together with the black drawstring bag), for her personal consumption. The trial judge drew the obvious inference that the 45 packets of heroin found in the black drawstring bag were not meant for the appellant`s own consumption but was for trafficking. He also held that the appellant would be guilty of trafficking even if the drug in the drawstring bag were meant to be returned to Hak Chai later.

Motion to adduce additional evidence

Before we proceed to examine the grounds raised by the appellant at the appeal, we ought to refer to a motion filed by the appellant to adduce additional evidence for this court`s consideration of the appeal.

In her affidavit filed in support of the motion, the appellant alleged that it was Lai who had bought the digital weighing scale and had also brought the black drawstring bag into the hotel room, without telling her about them. Furthermore, at the time the CNB officers raided the room, Lai had asked her to shoulder the blame and responsibility for the drugs found in the room. He repeated this request on two occasions later. She said that she did as was told by Lai because Lai had assured her that she would only serve a short sentence of between eight to ten years and he had also promised her that he would marry her after her imprisonment and would, while she was serving her imprisonment, look after her mother. As she loved him very much, she agreed to the suggestion. Furthermore, when she accepted blame, on behalf of Lai, she did not know that the black drawstring bag contained drugs. The appellant claimed that, for all these reasons, she concocted a story that she had collected the black drawstring bag from Hak Chai.

The appellant thus wanted to adduce the following additional evidence. First, that Lai asked her to purchase the digital weighing scale. Secondly, that on 21 March 2000, Lai told her that a friend had left the black drawstring bag with him and told her not to ask so many questions about it. Lai then took the black drawstring bag to the bathroom and returned to the room without it. It was Lai who placed it above the false ceiling. Thirdly, Lai had, on several occasions, asked her to shoulder the blame for the drugs. She agreed to do so, because she loved him and thought that her own family (her three children) did not care for her.

Explaining why she decided to tell the true version of the events at this eleventh hour, she said that after the conviction at the High Court, her three children had visited her and showed much love and concern for her. She was moved. On the other hand, Lai had not kept his promise to take care of her mother. She realised she should live for the children and not die for Lai.

It is clear that this court, on hearing an appeal, has the power to admit additional evidence. This is provided for in s 55 of the Supreme Court of Judicature Act (Cap 322, 1999 Ed) (`SCJA`), which reads as follows:

> *(1) In dealing with any appeal, the Court of Appeal may, if it thinks additional evidence is necessary, either take such evidence itself or direct it to be taken by the trial court.*

(2) When such additional evidence is taken by the trial court, it shall certify such evidence, with a statement of its opinion on the case considered with regard to the additional evidence, to the Court of Appeal, and the Court of Appeal shall thereupon proceed to dispose of the appeal.

(3) The parties to the appeal shall be present when such additional evidence is taken.

(4) In dealing with any appeal, the Court of Appeal may also, if it thinks fit, call for and receive from the trial court a report of any matter connected with the trial.

The conditions to be fulfilled before the court exercises the power to admit additional evidence were enunciated by Lord Denning in **Ladd v Marshall** [1954] 3 All ER 745. In that case, the court laid down three conditions and they relate to non-availability of the fresh evidence, the relevance of the new evidence and the credibility of that evidence. This test involving the application of the three conditions was adopted and applied by this court in numerous cases, eg **Rajendra Prasad v PP** [1991] 2 MLJ 1 and **Van Damme Johannes v PP** [1994] 1 SLR 246 .

On the facts, there could not be any question that the first condition of non-availability was not satisfied. Counsel for the appellant, Ms Goh, had to concede as much. All the additional evidence sought to be adduced was available at the time of the trial and could have been adduced had the appellant been so minded to do. The appellant was also represented by Ms Goh at the trial.

On the second condition, despite Mr Reddy`s submission to the contrary, we thought that the additional evidence was clearly relevant. But, in our opinion, what the additional evidence which the appellant sought to adduce failed to satisfy related to the third condition on credibility.

The appellant said in her affidavit that on the day the CNB officers came into the hotel room, Lai, who was standing behind her, asked her to shoulder the blame for the drugs. If Lai had whispered anything to the appellant, the CNB officers would have noticed. What was more incredible was the assertion that she agreed to assume blame, expecting, as he told her, that it would only be a matter of imprisonment of some eight to ten years. But surely when the charge and consequent punishment were read and explained to her before the trial, the appellant would have known the serious nature of the charge. Ms Goh was already her counsel. She could not have failed to appreciate that the charge she faced carried the death penalty, and yet she went through the trial asserting that Lai had nothing to do with the drugs.

We would hasten to add that we recognised that the primary consideration of s 55(1) of the SCJA, in allowing fresh evidence, is the interest of justice. But it does not follow that each time a convicted accused changes his mind, justice would require that he be given an opportunity to adduce further evidence. The court has to assess each situation as it arises. In this regard, we had borne in mind what Lord Taylor CJ said in **Ahluwalia** [1992] 4 All ER 889:

Ordinarily, of course, any available defences should be advanced at trial ... It cannot be too strongly emphasised that this court would require much persuasion to allow such a defence to be raised for the first time here if the option had been exercised at the trial not to pursue it. Otherwise, as must be clear, defendants might be encouraged to run one defence at trial in the belief that if it fails, this court would allow a different defence to be raised and give

the defendant, in effect, two opportunities to run different defences. Nothing could be further from the truth.

...

We emphasise that the circumstances we have described and which have led us to this conclusion are wholly exceptional.

In **R v Stafford** [1968] 3 All ER 752, Edmund Davies LJ also sounded a similar note of caution of the possible mischief if the court should regularly receive fresh evidence when there was no adequate explanation for the failure to adduce it at trial:

public mischief would ensue and legal process could become indefinitely prolonged were it the case that evidence produced at any time will generally be admitted by this court when verdicts are being reviewed.

While recognising the overriding consideration of justice, Yong Pung How CJ in **Juma`at bin Samad v PP** [1993] 3 SLR 338 at 347G put the whole matter in perspective as follows:

It is true that there are situations where the court would allow additional evidence to be called even though it could not be strictly said that the evidence was not available at the time of the trial, if it can be shown that a miscarriage of justice has resulted. The core principle in s 257 of the CPC [pari materia with s 55(1) of the SCJA] after all, is that additional evidence may be taken if it is necessary, which must mean necessary in the interests of justice. That said, it must be emphasised in no uncertain terms that such a situation will arise only in the most extraordinary circumstances.

Reverting to the present case, we did not see any extraordinary circumstances warranting the exercise of our discretion in admitting the additional evidence. The appellant ran a line of defence at the trial. That was rejected. Now at the appeal stage she took a defence which was completely at variance with the defence taken at the trial. There was nothing to suggest that what she now sought to say at this late stage was likely to be more credible than what she said at the trial. Furthermore, even if we believed what she alleged in the motion to be true, that the drugs were, in fact, brought back by Lai, and belonged to Lai, the evidence (including her evidence that she bought the weighing scale on behalf of Lai) suggested quite clearly that she was very much involved in Lai`s drug activities. She was not an innocent bystander. She abetted in what he did.

The question of possession

The main contention of the appellant at the trial was that she did not know there were drugs in the drawstring bag. Contrary to the statements she gave, she denied having admitted that she was the owner of the drugs in that bag.

Before us, counsel for the appellant submitted that the prosecution had not proven beyond a reasonable doubt that the appellant had possession of the drawstring bag and its contents. It was

pointed out that whenever the appellant was out of the room, the room key would be left with Lai or the hotel reception counter. The appellant and Lai seldom went out of the hotel room together. There were occasions when the appellant went out, and Lai was still in the room, and she would leave the room key with Lai. If, however, at the time, Lai had already gone out, the appellant would leave the room key with the hotel reception. On her return, when she approached the hotel reception counter for the room key, the receptionist would give the key to her without asking for identification. Furthermore, when she was out of the room, she would not know if Lai had brought anyone else into the room. The thrust of all these contentions was to show that between 19 March and 22 March 2000, the contents of the drawstring bag could have been tampered with by a third party.

Another argument of the appellant was that she did not know what was in the drawstring bag or that they were drugs. She did not check the contents of the bag as she had no reason to and had no permission from Hak Chai to do so.

Our determination

The evidence did not bear out the assertion of the appellant that the drawstring bag placed above the bathroom ceiling could have been tampered with by a third party. There was no evidence that Lai had allowed any third party to enter the hotel room. Lai was not even asked about this when he was in the witness box. Neither could the appellant say that there were any occasion on which Lai had brought anyone to the room. In this connection, we must point out that according to the appellant, Lai had no knowledge of the drawstring bag. Neither was there any evidence that a stranger could have entered the hotel room using the room key because the hotel reception counter staff did not ask for identification before handing over the room key. The defence did not cross-examine the hotel management staff along this line. It could very well be that the reception counter staff recognised who the appellant was and thus did not ask for identification before handing the room key over to her.

This entire assertion was highly speculative and conjectural. The fact of the matter was that the drawstring bag was hidden by the appellant above the false ceiling of the bathroom. It was not within view. Her intention was obviously to prevent anyone from seeing it or discovering it by chance.

The appellant admitted getting the drawstring bag from Hak Chai, her drug peddler. The understanding was that she would safe-keep the drawstring bag and its contents for Hak Chai and in return Hak Chai would not demand the payment of the $1,000 debt, which the appellant owed Hak Chai in respect of a previous supply of heroin. In her cautioned statement recorded on 23 March 2000, she admitted that Lai, though occupying the same room with her, had nothing to do with the drug. She repeated that in a later statement. Therefore, there was ample evidence for the trial judge to have concluded that the appellant had physical possession of the drawstring bag and the contents therein.

Finally, we would refer briefly to the point that the appellant did not have exclusive access to the room. However, that fact does not necessarily suggest that she could not have possession of the drugs: see **Fun Seong Cheng v PP** [1997] 3 SLR 523 and **Chia Song Heng v PP** [1999] 4 SLR 705 . It would depend on the circumstances of the case. Here, the appellant said she placed the drawstring bag with its contents above the false ceiling of the bathroom. According to her, Lai did not know about the bag. Lai also told the court that he did not know of the existence of the bag until the CNB officers discovered it. There was no evidence that anyone had tampered with the bag or was likely to have tampered with the bag.

The appellant`s knowledge of the drug

It is settled law that to prove possession, apart from mere physical possession, knowledge is required: see eg **Low Kok Wai v PP** [1994] 1 SLR 676 , **Lim Lye Huat Benny v PP** [1996] 1 SLR 253 and **Lim Beng Soon v PP** [2000] 4 SLR 589 .

In the statement recorded on 5 April 2000, the appellant said that although she did not ask Hak Chai about the contents in the drawstring bag, she suspected the stuff inside to be heroin. She also stated that `a male Malaysian asked me to keep the drugs for him`. Upon her return to the hotel room, she opened the plastic bag and saw a black drawstring bag and a newspaper wrapping containing three packets of heroin which were for her own consumption.

By its very nature, in a case of this kind, knowledge is a matter that has to be inferred in the light of all the circumstances. In our judgment, the appellant knew that there were illegal drugs in the bag. First, Hak Chai was a drug peddler and had previously supplied drugs to her. Second, the very secretive and suspicious manner in which Hak Chai chose to pass the drawstring bag to the appellant (leaving it at a public dustbin). Third, there were three packets of heroin in the plastic bag which were meant for the appellant. Fourth, the appellant was told that the stuff in the bag were of a value of $9,000. Fifth, for the favour of safe-keeping the drawstring bag (and the stuff therein), Hak Chai would write off the debt of $1,000 which the appellant owed him. Sixth, she hid the drawstring bag, with its contents, above the false ceiling of the bathroom. All these pointed irresistibly to the fact that the appellant knew the nature of the stuff in the drawstring bag. This was further confirmed by what she said in her statements. It was not just an instance of wilful blindness. She was fully aware of the contents. Thus, we entirely agreed with the trial judge that possession of the drugs by the appellant had been proven beyond a reasonable doubt. The presumption laid down in s 17 of the Misuse of Drugs Act (Cap 185, 1998 Ed) (`MDA`) that she was in possession of the drugs for the purposes of trafficking was accordingly triggered.

Future return to owners

There is one last point we need to mention in passing. According to the appellant, she was to keep the drawstring bag (with the contents) for Hak Chai, and that Hak Chai would later contact her to tell her how to dispose of the drugs. The fact that the appellant was holding the drugs as a safe-keeper and would be passing them on (either back to Hak Chai or to a third person indicated by Hak Chai) would not render the possession any less that it was for the purpose of trafficking: see **Sze Siew Luan v PP** [1997] 2 SLR 522 , **PP v Goh Hock Huat** [1995] 1 SLR 274 and **Lee Yuan Kwang v PP** [1995] 2 SLR 349 . It must be borne in mind that `traffic` is defined in the MDA to mean, inter alia, `give`, `transport` or `deliver`. Indeed, the fact that the appellant would be delivering the drugs either back to Hak Chai or to a third person reinforces the point that she was in possession for the purpose of trafficking.

Judgment

For the reasons given above, possession by the appellant of at least 24.12g (nett) of diamorphine was proven beyond a reasonable doubt. The presumption under s 17 of the MDA was triggered. She failed to discharge on a balance of probabilities the burden of rebutting the presumption raised against her. Thus, the conviction recorded against the appellant was not impugned. In the premises, we dismissed the appeal.

Outcome:

Motion and appeal dismissed.