IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2017] SGHC 99

Criminal Case No. 14 of 2017

Public Prosecutor

v

Ng Peng Chong
Cheng Pueh Kuang

JUDGMENT

[Criminal Law] — [Statutory offences] — [Misuse of Drugs Act]

Public Prosecutor
v
Ng Peng Chong and another

[2017] SGHC 99

High Court — Criminal Case No 14 of 2017
Choo Han Teck J
7, 9-10, 14-15 and 21 February 2017

3 May 2017 Judgment reserved.

Choo Han Teck J:

1 The first accused is Ng Peng Chong ("Ng"), a 59 year-old male Singaporean. The second accused is Cheng Pueh Kuang ("Cheng"), a 58 year-old male Singaporean. Ng and Cheng have been ordering heroin and methamphetamine from a Malaysian drug supplier since 2013.

2 On 16 May 2014, at or around 4pm, Ng and Cheng drove to Woodlands to collect heroin that they had ordered from the supplier. Cheng was driving Ng in a car bearing registration number SGG 7410 J, which was owned by his (Cheng's) sister. Around 5.15pm, Cheng collected a plastic bag containing a black bundle from an Indian bus driver. He then drove the car back to Delight Court at Lorong 33 Geylang, a flat he shared with Ng. Officers from the Central Narcotics Bureau ("CNB") had arrived at Lorong 33 Geylang at 6.15pm and fifteen minutes later, as Ng and Cheng's car was parking at Lorong 33 Geylang, the CNB officers arrested both men.

3 When asked whether they had anything to surrender from the car, Ng and Cheng replied "peh hoon" (street name for diamorphine). CNB officers searched the car around 6.48pm and found the black plastic bag containing one bundle wrapped in black tape in the space between the driver and front passenger seats of the car. The CNB officers escorted Ng and Cheng to their rented room at Delight Court and searched the room. They found, among other things, packets containing brown granular, crystalline and other substances in yellow, blue and silver packets, slabs of tablets, aluminium foil, two lighters, two improvised bottles with glass pipes and straw attachments, three digital weighing scales with covers, and a plastic container with 14 packets of empty Ziploc plastic packets and empty yellow, blue and silver coloured packets.

4 The black bundle found in the car, which they had collected earlier that day, contained two packets of brownish granular substance weighing a total of 902.8g (approximately 2 pounds), and was analysed to contain 21.58g of diamorphine. Ng and Cheng were tried on one charge each, being that in furtherance of their common intention to traffic in drugs, on 16 May 2014, at or about 6.30pm, they were in joint possession of 21.58g of diamorphine for the purpose of trafficking, and had thereby committed an offence under s 5(1)(a) read with s 5(2) of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) ("the Act"), read with s 34 of the Penal Code (Cap 224, 2008 Rev Ed) ("the Penal Code"), and punishable under s 33(1) of the Act.

5 It is not disputed that Ng and Cheng had ordered heroin and knew that they were collecting it on 16 May 2014. The Prosecution's case is that Ng and Cheng had jointly ordered and collected two pounds of heroin for the purpose of trafficking. Counsel for Ng, Mr Cheong Aik Chye ("Mr Cheong"), and counsel for Cheng, Mr Peter Cuthbert Low ("Mr Low"), advanced alternative

defences on behalf of their clients. The first is that Ng and Cheng had only intended to order (in its gross form) one pound of heroin. Although they had physical possession of two pounds of heroin, they thought that they had only one and did not have the *mens rea* required for possession of two pounds of heroin. Alternatively, they intended to consume (in its pure form) at least 6.59g of heroin from the 21.58g they were found with, and accordingly only intended to traffic in not more than 14.99g of heroin.

Whether Ng and Cheng were in possession of two pounds of heroin

6 It is not disputed that Ng and Cheng were in physical possession of two pounds of heroin. The question is whether they knew that they had two pounds of heroin in their possession, or just one pound as they contend. Ng and Cheng claim that they had only ordered one pound of heroin to be collected on 16 May 2014. Hence, up to the point they were arrested and shown the two pounds, they had thought that they had only one pound of heroin. In Ng's contemporaneous statement, when he was shown the plastic bag containing the bundle and asked what it was, he replied "one pound of heroin". Ng and Cheng have maintained this position in their 21 and 20 May 2014 statements respectively, and also in their oral testimonies. They also rely on records of text messages in Cheng's Sony Ericsson phone (marked "PK-HP2"), seized by the CNB officers on the day of their arrest. The records show text messages sent from a Malaysian number between 7 March and 14 May 2014. Ng testified that these were text messages from their Malaysian supplier indicating orders and payments made for drugs. These messages were bare mathematical equations, *eg*, an incoming message dated 16 March 2014 read "7640+2800=10440-3500=6940". In his oral testimony, Ng explained that the added sums (*ie*, 7640 and 2800) referred to outstanding amounts to be paid for

orders for drugs, whereas the subtracted sums (*ie*, 3500) were for payments already made. $2,800 was the price for half a pound of heroin and $5,600 was the price for one pound of heroin.

7 The text messages are relevant to Ng and Cheng's defence in two ways. First, Mr Low submits that the 16 May 2014 collection was for an order placed by Ng and Cheng on 14 May 2014 for one pound of heroin. The text message sent by the supplier on 14 May 2014 reads "5050+5600=10650+3600=(14250)-300=(12950)". "5600" refers to the price of, and thus reflects the order for, one pound of heroin. In Cheng's long statement dated 20 March 2014, he stated that "Ah Chong" (*ie*, Ng) had made the order for the heroin on 14 May 2014, although he "did not hear the exact conversation" and "did not know how much [Ng] ordered". Ng then told him that the heroin would arrive on 16 May 2014. This was consistent with his oral testimony, where he maintained that they "[ordered] on the 14th of May, then on the 16th, the supplier call we all [*sic*]… to give us the exact location and time".

8 Cheng's version of events was challenged by the Prosecution during cross-examination, where Deputy Public Prosecutor Mr Isaac Tan ("Mr Tan") pointed out that there were no calls from or to the Number on 14 May 2016 on Ng's iPhone. In contrast, there was an incoming call from the supplier at 5.52am on 16 May 2016 on his Sony Ericsson phone. Cheng then agreed that the order was placed from his Sony Ericsson phone but that it was placed on 14 May 2014, and pointed to an incoming call from the supplier at 1.52am. Cheng's testimony is also inconsistent with Ng's, who had stated in his 21 May 2014 statement that at about 6am on 16 May 2014, the Malaysian supplier had called him to ask if he wanted to order more drugs, and "on that

day [16 May 2014], [he] also ordered one pound of 'sio zui'", "sio zui" being "[his] meaning for heroin". The call was received on his iPhone. On the stand, Ng appeared to change his position by testifying that he had "heard from [Cheng] that the order was placed on the 14th… and to collect it on the 16th May". Mr Tan submits that this was an "equivocal and half-hearted retraction of what he had said to [Inspector Tan]".

9 Second, Mr Low submits that even if the order was not made on or otherwise not reflected by the 14 May 2014 message, Cheng and Ng had "established a particular *modus operandi* where they consistently ordered either one pound or half a pound of diamorphine at each given time". In the 34 messages from the supplier, there were eight records of "5600" and four records of "2800" (one pound and half a pound of heroin respectively) but no evidence of any transaction of two pounds of heroin, which would have been reflected as "11,200" or "5,600 + 5,600". It would have been out of character for Ng and Cheng to suddenly order two pounds of heroin, and it was far more likely that Ng and Cheng had ordered one pound of heroin as they claimed.

10 In response, the Prosecution argues that it was always open to Ng and Cheng to order more than one pound of heroin. Ng and Cheng were the ones who decided the type and quantity of drug to order. Their supplier had told them that the quality of heroin was high then, giving them an incentive to order more heroin. A text message sent by the supplier on 8 May 2014, which read "4150 + 2800 = 6950 + 5600 = (12550)", indicated that around a week before they were arrested, they had ordered more than one pound of heroin, which was inconsistent with their purported "modus operandi". The Prosecution also points out the implausibility of the supplier arranging for

them to collect an additional pound of heroin (its sale value being $5,600) if they had not ordered it.

11 It is usually sufficient for the purposes of proving possession that the accused persons had personally collected the bundle. They could not claim to not have knowledge of the existence of the thing they had handled and placed in their sight. In this case, I find it likely that Ng and Cheng had ordered one pound of heroin to be collected on 16 May 2014. It may be improbable for their supplier to have (mistakenly or otherwise) oversupplied them, but Ng and Cheng's evidence has been credible and consistent throughout. Despite the lack of clarity about when the heroin was ordered, they have consistently maintained that they had only ordered one pound of heroin, from the point of their arrest (Ng's contemporaneous statement), to the recording of their long statements, and to their oral testimonies at trial. Their version of events is corroborated by their text message history, which reflects a general pattern of ordering only one or half a pound of heroin. The Prosecution has not contested Ng and Cheng's evidence that their orders for heroin were reflected accurately in the text messages. It has also not disputed Ng and Cheng's pattern of ordering one or half a pound of heroin at any given point in time, save for pointing out one text message (on 8 May 2014) recording their order for one and a half pounds. This is in contrast to the other nine instances of orders of heroin between 7 March and 14 May 2014 where they had not deviated from their purported pattern. I thus find that Ng and Cheng expected to collect one pound of heroin on 16 May 2014. Even after collecting the bundle, Ng and Cheng may have truly and reasonably believed that the bundle contained only one pound of heroin and no more, and had no knowledge of the existence of the additional pound. Thus, I find that the Prosecution has not proven beyond

a reasonable doubt that Ng and Cheng had knowledge of the existence of the additional pound of heroin.

12 The Prosecution may still rely on the presumption of possession in s 18(1) of the Act. In this regard, they point to Ng and Cheng's behaviour after collecting the heroin. Cheng gave evidence that after collecting the plastic bag, he brought it back to the car and drove back to Delight Court. Ng remarked to him that the "bundle was bigger than what [they] usually ordered, because usually [they] ordered one pound and the bundle [they] collected seemed to be bigger and heavier". They did not think to confirm the amount there and then as they did not want to do it in the car, but return to Delight Court first. Ng's evidence was that he had "noticed that the black bundle was bigger than [its] usual size", but Cheng had confirmed that it was one pound of heroin and hence Ng "did not think too much about it". He orally testified that Cheng had told him that since they had collected it, they had "no choice but to accept it". The Prosecution submits that Ng and Cheng wilfully did not wish to know the quantity of heroin inside the black bundle. Although they were worried that the bundle could have contained an amount of heroin that would cross the death penalty threshold, they did not open up the bundle to verify its contents. Their defence seems especially weak because they cannot claim ignorance when they had been communicating with the supplier after picking up the black bundle. Cheng's phone records showed that there were four incoming calls from the supplier at 5.13pm, 5.27pm, 5.29pm, and 5.37pm on 16 May 2014. The time of collection (in the Agreed Statement of Facts) was 5.15pm and Ng and Cheng admitted that there was at least one call from the supplier after the collection. If they had been so worried, the Prosecution submits that it would have been easy for them to immediately clarify the amount delivered with their supplier.

13 I find that Ng and Cheng have rebutted the presumption on the balance of probabilities. Although Ng and Cheng are experienced in ordering and handling one-pound and half-pound bundles of heroin, and in fact noticed that the bundle was larger than usual, their state of knowledge was a mere suspicion at best. The circumstances did not point to there being clearly more heroin than what they had ordered.

14 First, there at all times remained the fact that they had only ordered one pound of heroin. The Prosecution's submission that it is implausible for the supplier to mistakenly deliver one additional pound of heroin (the sale value of which was $5,600) if Ng and Cheng had only ordered one pound of heroin cuts both ways. Ng and Cheng would also have been less likely to believe that the supplier had given them more than what they had ordered, and thus to check the bundle expeditiously on the way home. There is no evidence that such mistakes had been made on previous occasions. Second, no money changed hands during the collection. Ng and Cheng gave evidence that the supplier would send men to collect the money for the drugs separately. If they had paid for the heroin upfront, it would have been clear that the amount paid was insufficient for two pounds of heroin. In this case, they were merely there to collect a bundle which they reasonably assumed would contain their order for one pound of heroin. Third, Ng and Cheng both gave evidence that they did not handle the bundle after collection and did not check its contents before they were arrested. Neither Ng nor Cheng's DNA was found on the plastic bag or the bundle, corroborating their evidence that they did not handle the bundle after collection and thus did not gain knowledge of the additional pound. The difference in size between one and two pounds of heroin (approximately 450g), especially if packed compactly in a bundle, is not as significant as one might think.

15 The Prosecution submits that Ng and Cheng's failure to check is evidence that they wilfully refused to examine the bundles because they already knew its contents (Ng testified that he "[dared] not touch" it). I accept that Ng and Cheng wanted to open up the bundle only after they had returned to the safety of Delight Court, rather than in broad daylight in Cheng's sister's car. The Prosecution also argues that Ng and Cheng could have clarified the amount of heroin in the plastic bag with the supplier, who had called them at least once after collection, but these calls were made soon after the collection and Ng and Cheng would have been more concerned with leaving Woodlands and returning home at that point. Given that they were clearly in frequent communication with their supplier, it would have been easy for them to call the supplier after they had returned home and opened the bundle.

16 In these circumstances, their omission to check the bundle and clarify with the supplier cannot be said to an active choice not to inquire into something they already knew. As far as they were concerned, although the bundle seemed larger than usual, they had only ordered one pound of heroin, and expected to collect the same. This is not a case where they were on their way to deliver the heroin to someone else, and would not have had a chance to check the bundle once it was delivered. They were on their way home and it was reasonable to choose to return to Delight Court first, where they felt safer and where their weighing equipment was, than to stop the car in the middle of their journey. It would be artificial and harsh to find that they had, within the span of an hour, became aware of the additional pound of heroin during the drive home.

17 I thus find that Ng and Cheng were not in possession of the additional pound of heroin, but were only in joint possession of one pound of heroin. As

they have admitted to ordering and expecting to collect one pound of heroin on 16 May 2014, it is beyond doubt that they were in full possession of this pound, knowing that it was heroin. I give them the benefit of the doubt by treating them to be in possession of the packet containing the smaller amount of (pure) heroin (marked A1A1), *ie*, 10.17g of (pure) heroin.

18 For completeness, even if I were to find that the presumption of possession (and that of knowledge in s 18(2) of the Act) had not been rebutted, I would still have found that the Prosecution failed to make out its charge. It has not proven beyond a reasonable doubt that the additional pound of heroin was in Ng and Cheng's possession for the purpose of trafficking. It is clear from Ng and Cheng's statements that they were taken by surprise at the additional weight and were undecided as to what to do with it. Cheng had testified that he was "worried and scared" and all he wanted to do was to "go back [to Delight Court] and open [the bundle]". Ng stated that he "did not think too much about" the fact that the bundle was bigger than usual. In the circumstances, there is reasonable doubt as to whether they had formed any intention regarding the heroin during the drive home (other than to return home to open the bundle), let alone a common intention to traffic it.

Whether the one pound of heroin in Ng and Cheng's possession was for the purpose of trafficking

19 I turn now to the question of whether the one pound of heroin in Ng and Cheng's possession was for the purpose of trafficking. Given the presumption of trafficking in s 17(1) of the Act, Ng and Cheng have to show that, on a balance of probabilities, such possession was not for the purpose of trafficking.

20 In support of its case, the Prosecution relies first on Ng and Cheng's confessions in their recorded statements. In Cheng's first long statement, dated 20 May 2014, he admitted that "the 'peh hoon' that was recovered in my sister's car… was meant for stocking up so that we can pack and sell to friends…" He also provided their reason for selling drugs, namely to "feed [their] heavy addiction and to pay [their] rent for the room and daily expenses". Ng similarly confessed in his 21 May 2014 statement that "the 'sio zui' that we ordered [on 16 May 2014] was also meant to be packed and sold to clients". During their oral testimonies, Ng and Cheng testified that the heroin found in the car (and all the drugs in their room) were for their own consumption. They would invite friends over to share and consume the drugs and these friends would make voluntary monetary contributions, but only if they wished to. The Prosecution submits that this is no more than a euphemism for "selling", although it does not make the submission that such sharing falls within trafficking as defined in s 2 of the Act. Second, the Prosecution points to the large amounts of weighing scales, empty coloured packets, and other drug-trafficking paraphernalia found in Ng and Cheng's room in Delight Court as circumstantial evidence that the heroin was for the purpose of trafficking. Third, the Prosecution submits that Ng and Cheng did not have the financial capability to order such large amounts of drugs just for their own use and consumption. The text message history shows that they had ordered 10 pounds of heroin worth $56,000 over a period just shy of two months (16 March to 14 May 2014), not to mention sums payable for orders of other drugs amounting to $28,200. Cheng was unemployed at the time of his arrest. Ng testified that he was working as a pimp. Cheng testified that he had around $30,000 to $40,000 in savings from working as a taxi driver previously, and from loans by his sister, but even this could not sustain their frequent orders absent another regular source of income.

21 Ng and Cheng rely on the defence of consumption. In their contemporaneous statements, Ng stated that he "[intended] to consume the drug" and Cheng stated that he and Ng would "share [the collected bundle] to smoke". Mr Cheong and Mr Low do not contend that the entire amount of heroin that Ng and Cheng had collected was earmarked for consumption. Their defence, as put forth in their closing submissions, is a limited one: if the court finds that Ng and Cheng are in possession of 21.58g of heroin, they argue that Ng and Cheng had intended to consume at least 6.59g of (pure) heroin. Having found that Ng and Cheng are only in possession of 10.17g of heroin, there is no strict need to examine this defence. Given the possibility that it may further exonerate Ng and Cheng with regard to the 10.17g of heroin in their possession, I will proceed to evaluate their defence of consumption.

22 With a defence of consumption, the relevant factors include the rate of drug consumption, the frequency of supply, whether the accused had the financial means to purchase the drugs for himself, and whether he had made a contrary admission in any of his statements that the whole quantity of drugs was for sale. It is agreed between the Prosecution and the Defence that there is no correlation between the amount of heroin one consumes and the withdrawal symptoms one experiences after its consumption. This is an established point as the scientific evidence currently stands, so I have not considered the severity of Ng and Cheng's withdrawal symptoms as assessed by Dr Ung and Dr Guo, the Prosecution's and Defence's experts respectively.

23 I find that Ng and Cheng have not shown, on the balance of probabilities, that at least 6.59g of pure heroin was intended for their own consumption. They have also not provided me with a basis to make any other

form of apportionment. First, Ng and Cheng have given contradictory evidence on their rates of consumption. Ng claimed in his 21 May 2014 statement that they would each consume one packet of heroin weighing 7.5g (in its gross form) daily. At trial, he testified that he did not smoke any "fixed amount" but that it was "at least one packet or more than one packet" a day, depending on the quality of the heroin. This was also recorded by Dr Ung in Ng's medical report. Cheng claimed that they each smoked two packets a day. He then stated at trial that he meant that only he smoked two packets a day. Apart from the fact that a consumption rate of two packets a day far exceeds the usual amount for a heroin addict, and has never been heard of by the Prosecution's expert witness, Dr Guo, the evidence from Ng and Cheng is inconsistent and cannot provide any reliable basis upon which to examine their defence.

24 Second, even if I accept the unlikely proposition that Ng and Cheng consumed a total of three packets a day, no evidence was led from Ng and Cheng as to how long this particular order was intended to last them, which is key to calculating how much heroin was to be set aside for consumption. Without such evidence, any attempt at apportionment can only be guesswork. Mr Low submits that I should rely on Ng and Cheng's text message history, which shows that one pound of heroin was generally ordered for Ng and Cheng's consumption for seven to eight days. Even if I were to do so, there is no correlation between the amount of heroin ordered and the date of the next order. An order for half a pound of heroin would be followed by an order for another half a pound of heroin after six days (19 and 25 May 2014), but an order for a pound of heroin would be followed by an order for another pound in just three days (1 and 4 May 2014). Further, in the three weeks prior to their 14 May 2014 order, Ng and Cheng had ordered three pounds of heroin. Taken

together with the heroin already found in their room, and their easy and frequent access to its supply, I find it unlikely that they had intended to set aside an amount of heroin in the 16 May 2014 bundle that was sufficient to last them for more than a week. There is no other basis upon which I can make a meaningful apportionment of the heroin for consumption and accordingly I do not do so.

25 I thus find that Ng and Cheng have not been able to rebut the presumption of trafficking, and were in joint possession of 10.17g of pure heroin for the purpose of trafficking. Taking into account their financial situation and frequent drug orders, their claim that they merely intended to share the heroin with friends without expecting any monetary payment in return is difficult to believe. The amount of drugs and drug-trafficking paraphernalia found in their rented room also indicates that they were involved in more than just a casual arrangement. Although it is not disputed that they were also addicts, their defence of consumption of all the drugs in their possession lacks internal and external consistency and misses key details, and cannot be used to meaningfully apportion the drugs as between consumption and trafficking.

26 The original charge faced by Ng and Cheng was that they were in joint possession of 21.58g of diamorphine for the purpose of trafficking, in furtherance of their common intention to traffic in drugs. For the reasons given above, I amend the charge to joint possession of 10.17g of diamorphine for the purpose of trafficking, thereby committing an offence under s 5(1)(a) read with s 5(2) of the Act, and convict both Ng and Cheng on this amended charge.

27 As a final point, I note that the Prosecution had originally charged Ng and Cheng with being in possession of heroin for the purpose of trafficking in furtherance of their common intention to traffic in drugs. Constructive liability under s 34 of the Penal Code is usually only required when two people play different roles in an offence, with only one person carrying out the act that constitutes the offence despite both having the intention to commit said offence. In this case, Ng and Cheng were individually in possession of the offending drugs, knew the nature of such drugs, and intended to traffic in them. They would both be guilty under s 5(1)(a) read with s 5(2) of the Act without any need to rely on s 34 of the Penal Code. Nevertheless, it is clear from all the evidence that Ng and Cheng worked in tandem, from ordering the heroin to traveling to Woodlands to collect it, and either one would have been constructively liable for the trafficking offence committed by the other.

28 I therefore convict the first and second accused on the amended charge of possession of 10.17g of diamorphine for the purpose of trafficking.

- Sgd -
Choo Han Teck
Judge

Isaac Tan, Rachel Ng and Muhammad Zulhafini Bin Haji Zulkeflee (Attorney-General's Chambers) for prosecution;
Cheong Aik Chye (A C Cheong & Co.) and Tan Jeh Yaw (Lim Swee Tee & Co.) for first accused;
Peter Cuthbert Low, Elaine Low, Priscilla Chan (Peter Low LLC) and Wong Seow Pin (S P Wong & Co.) for second accused.
