Public Prosecutor *v* Chum Tat Suan
[2013] SGHC 221

Case Number : Criminal Case No 1 of 2012

Decision Date : 24 October 2013

Tribunal/Court : High Court

Coram : Choo Han Teck J

Counsel Name(s) : Mohamed Faizal and Qiu Huixiang (Attorney-General's Chambers) for Public Prosecutor; Nandwani Manoj Prakash and Eric Liew (Gabriel Law Corporation) for Accused.

Parties : Public Prosecutor — Chum Tat Suan

Criminal Law – Statutory offences – Misuse of Drugs Act – Discretion of court not to impose sentence of death

24 October 2013 Judgment reserved.

Choo Han Teck J:

1 The accused was charged with importing not less than 94.96g of diamorphine into Singapore, an offence under s 7 and punishable under s 33 of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) ("the Act"). On 5 August 2013, I convicted the accused and handed down a written judgment explaining my reasons for doing so (*Public Prosecutor v Chum Tat Suan* [2013] SGHC 150). Prior to 1 January 2013, when a number of legislative amendments came into effect, a sentence of death would have been mandatory upon such a conviction. However, the newly-enacted s 33B of the Act provides that, in certain circumstances, a sentence of death that would have been mandatory will no longer be so. Parties accordingly sought, and I granted, an adjournment to prepare submissions on sentence.

2 I should now briefly describe what the heading to s 33B of the Act calls the "[d]iscretion of court not to impose sentence of death". The Act's terminology in this regard is not entirely accurate, because in one of the two sets of circumstances defined by s 33B the court has no discretion but must sentence the convicted accused to imprisonment for life instead of imposing the death penalty. Nonetheless, the language captures the thrust of s 33B, which is that it defines two sets of circumstances in which a sentence of death that would have been mandatory before the legislative amendments came into effect may not or cannot be imposed. One set of circumstances, defined by s 33B(2) read with s 33B(1)(*a*), might perhaps be termed for convenience the "substantive assistance" situation, because it requires that the Public Prosecutor certify that the accused substantively assisted the Central Narcotics Bureau in disrupting drug trafficking activities in order for the court to have the discretion to impose a sentence of life imprisonment plus caning instead of the sentence of death. The other set of circumstances, defined by s 33B(3) read with s 33B(1)(*b*), might perhaps be termed for convenience the "mental abnormality" situation, because it requires that the accused person suffered from such abnormality of mind as substantially impaired his mental responsibility for his acts in order for the court not to impose the sentence of death.

3 Common to both sets of circumstances is that, in order to bring himself within their ambit and so to avail himself of reprieve from the death penalty, the accused must prove on a balance of probabilities that he was no more than a "courier", *ie*, he must prove that his involvement in

trafficking, importing or exporting drugs was restricted to the activities listed in s 33B(2)(*a*), which are identical to the activities listed in s 33B(3)(*a*). It should be noted that the word "courier" is nowhere to be found in the Act, but I employ it as convenient shorthand in the same way that members of Parliament did in the course of debates on the legislative amendments.

4 Parties returned before me on 30 September 2013. They informed me of their agreement on what ought to be the procedure to follow in sentencing the accused. According to that procedure, this hearing on 30 September would be confined to the question of whether the accused was no more than a "courier", and my answer to the question would determine what happens next. Should I find that the accused was not a "courier", the sentence of death would have to be imposed and proceedings would end there. But should I find that he was a "courier", the prosecution would take a further statement from the accused so as to give him an opportunity to furnish as much information as he can. That was what the learned DPP said. The prosecution would then make its decision on whether to certify that the accused had substantively assisted the authorities in disrupting drug trafficking activities. Should the prosecution so certify, I would possess the discretion to sentence the accused to life imprisonment and caning instead of imposing the sentence of death, and I would have to decide whether or not to exercise this discretion. However, in the event that the prosecution decline to certify that the accused had rendered substantive assistance, defence counsel indicated that they would seek to bring the accused within the "mental abnormality" situation. This would entail parties making submissions on the question of whether the accused was suffering from such abnormality of mind as substantially impaired his mental responsibility for importing drugs into Singapore.

5 In my view, this procedure gives rise to a significant difficulty. I have already convicted the accused on the basis of findings of fact that I have made. But now I have to make new findings on at least one question of fact for the purposes of sentencing, which is whether the accused was no more than a "courier". If I allow parties to introduce new evidence on this question of fact, there is the possibility of evidence emerging that might undermine the findings of facts that I had earlier made in convicting the accused. There is even the possibility of evidence emerging that casts doubt on the guilt of the accused. On the other hand, if I do not allow the introduction of any new evidence, and premise my decision on sentencing exclusively on the findings of fact that I have already made and the evidence that had been adduced at trial, there is a possibility of prejudice to the accused, in that he might have conducted his defence in such manner as to furnish no occasion for evidence of his being no more than a "courier" to emerge at trial. This would make it difficult or impossible for him now to prove, without introducing further evidence on the question, that he was no more than a "courier". I think that this difficulty is not confined to the present case but is one which may afflict all cases in which the accused faces a capital charge under the Act. If evidence relevant to the questions of whether the accused was a "courier" and whether the accused suffered such mental abnormality as substantially impaired his mental responsibility is only introduced after the accused has been convicted, there is the possibility of that evidence interfering with the findings of fact already made by the court in convicting the accused.

6 The alternative is to make it a rule that evidence relevant to those questions must be adduced at trial, so that the court decides the issues of conviction and sentence together, or, if the court hands down a conviction before hearing submissions on sentence, the submissions may be based only on the evidence adduced at trial. But this alternative puts the accused in a bind. This is because, in order to make the claim that he was no more than a "courier", the accused must first admit that he was trafficking or importing or exporting drugs. Choosing not to admit this might subsequently preclude him from arguing that he was no more than a "courier" should the court convict him nonetheless. For instance, if the accused elects to remain silent because he is of the opinion that the prosecution has not made out a case against him, and the court convicts him anyway, he would not

have had the opportunity to give evidence for the purposes of proving that he was no more than a "courier". If his case was that he did not know that he had drugs in his possession, or that he had them in his possession for his own personal consumption, the evidence he gives and adduces at trial would be directed towards proving that case rather than that he was no more than a "courier". Consequently, should the court disbelieve his defence and convict him, it would be difficult or impossible for him to argue that he was no more than a "courier". One response might be that the accused must take a position and stick with it. But the onus is not on the accused to take positions. Since the prosecution seeks to invoke the court's authority to punish the accused, the onus is on the prosecution to prove its case as to why the accused should be so punished. This must especially be so when the punishment sought to be visited on the accused is the sentence of death.

7 In the present case, the parties have proceeded on the basis that no new evidence will be introduced on the question of whether the accused was no more than a "courier". This is just as well, for I am not inclined to call for new evidence, lest that evidence undermine the findings of fact that I have already made. The remaining course for me to take, it would seem, is to scrutinise the evidence that was adduced at trial and determine on the basis of that evidence whether the accused was no more than a "courier". However, this may be an unsafe course to take, for there is the possibility that, but for the manner in which the accused conducted his defence, he would have been able to give and adduce evidence tending to show that he was no more than a "courier". In the first place, the evidence that has been adduced on this point is not unequivocal, and in addition, what makes such a course especially unsafe to take is that this is a matter of life and death. Therefore, I give the benefit of the doubt to the accused, and hold that he was no more than a "courier". I think that this new requirement in law needs to be settled before we impose the burden of proving that aspect on the accused at the level of proof on a balance of probabilities. That is to say, I hold that the accused's involvement in his offence under s 7 of the Act was restricted to the activities listed in s 33B(2)(*a*) and duplicated in s 33B(3)(*a*).

8 Speaking more generally, I should think that this would be the prudent solution in capital cases under the Act in which the accused seeks to bring himself within the ambit of s 33B, unless and until there is legislative or judicial guidance to the contrary. Finally, it seems to me that it would be preferable not to extend the anxiety of a man facing a capital charge by breaking the ultimate decision into three separate phases – the trial phase, the finding of "courier" phase, and the certificate of substantive assistance phase.