Iwuchukwu Amara Tochi and Another v Public Prosecutor
[2006] SGCA 10

Case Number : Cr App 9/2005

Decision Date : 16 March 2006

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; Choo Han Teck J; Yong Pung How CJ

Counsel Name(s) : Chandra Mohan s/o K Nair (Tan Rajah & Cheah) and Patrick Tan Tse Chia (Patrick Tan & Associates) for the first appellant; N K Rajarh (N K Rajarh) and Thrumurgan s/o Ramapiram (Allister Lim & Thrumurgan) for the second appellant; Han Ming Kwang and Jason Chan (Deputy Public Prosecutor) for the respondent

Parties : Iwuchukwu Amara Tochi; Okeke Nelson Malachy — Public Prosecutor

Criminal Law – Statutory offences – Misuse of Drugs Act – Appeal against conviction on charge of conspiracy to import controlled drugs into Singapore under s 7 read with s 12 Misuse of Drugs Act – Whether appellant intended recipient of drugs – Sections 7, 12 Misuse of Drugs Act (Cap 185, 2001 Rev Ed)

Criminal Law – Statutory offences – Misuse of Drugs Act – Appeal against conviction on charge of importing controlled drugs into Singapore – Whether appellant knowing he was importing drugs into Singapore – Sections 7, 18 Misuse of Drugs Act (Cap 185, 2001 Rev Ed)

Words and Phrases – "Abet" – Whether "abet" under s 12 Misuse of Drugs Act to be given same meaning as "abet" under s 107 Penal Code – Section 12 Misuse of Drugs Act (Cap 185, 2001 Rev Ed), s 107 Penal Code (Cap 224, 1985 Rev Ed)

16 March 2006

Choo Han Teck J (delivering the judgment of the court):

1 Three persons appeared to be involved in a plan to import 727.02g of diamorphine into Singapore on 27 November 2004. All that was known of the first man, who was subsequently charged and convicted, and appeared before us as the first appellant, were from the findings of the trial judge. The factual findings, inferences aside, were that the first appellant was 18 years old and came from Nigeria. He left school at the age of 14 and played football for a living in Nigeria and Senegal. After Senegal, he planned to go to Dubai from Pakistan, but found himself stranded in Karachi, Pakistan. There, he befriended the third person in the conspiracy, a man known only as Smith; and it appeared that Smith helped the first appellant out of Pakistan through Kabul in Afghanistan and it was intended that he enter Dubai from Kabul. However, he was unable to enter Dubai. It also appeared that the first appellant had told the court that he was planning to come to Singapore to play football. No further personal account of the first appellant was noted, although the trial judge found that "a considerable amount of time was spent on many matters, for example, the bag from which the capsules were recovered from, and the [first appellant's] travels after leaving Nigeria up to his arrival in Singapore" (see *PP v Iwuchukwu Amara Tochi* [2005] SGHC 233 at [37]). Hence, it was not known which football clubs he played for in Nigeria and Senegal, and which he hoped to play for in Singapore (however, he had testified that he had not made any arrangements with any club in Singapore but had hoped to approach the football federation for assistance). At one point after his arrest, the first appellant appeared to have said that his football manager was Smith. These would not be information that directly connected the first appellant to the offence of importing diamorphine into Singapore but would serve as corroborative evidence of the facts he supplied in his defence. It is not apparent from the judgment below where the first appellant came from and when he landed at Changi Airport although the court found that he was due to return to Dubai on 30 November.

2 The second person involved in the plan to import diamorphine into Singapore was the second appellant, a 33-year-old Nigerian who was named in the charge as "Okeke Nelson Malachy". Part of his defence lay in rejecting the Prosecution's case that he was known to the first appellant and also to Smith as "Marshal". His account of himself was that he had come to Singapore to buy a used car to be shipped to South Africa for his use. No other details of this part were known or deemed relevant by the trial judge. The second appellant maintained that he did not know the first appellant and Smith. Smith, it transpired, was known only as a voice speaking through the mobile telephones of the first and second appellants. The account of the arrests of the appellants as found by the trial judge was as follows.

3 The first appellant was charged with the offence of importing a controlled drug into Singapore under s 7 of the Misuse of Drugs Act (Cap 185, 2001 Rev Ed) ("the Act"). The offence was stated to be committed on 27 November 2004. No time was specified. The trial judge found that the first appellant had arrived in Singapore at 1.45pm. The first appellant made enquiries for a room in the hotel at the transit area of the airport the following day. The time he made the enquiry was not noted in the judgment below. However, the court found that the supervisor at the booking station noted that the first appellant had been in the transit area for more than 24 hours and that she (the supervisor) duly notified the police in accordance with security procedures at the airport. The first appellant was then told that the police would arrive shortly to talk to him. He was found elsewhere in the transit area about 20 minutes later when the police arrived, and was taken back to the hotel. The first appellant was searched there. One of the items carried by him was a dark blue sling bag bearing the brand name "Converse". The bag contained a red container bearing the brand name "Maltesers", a pair of gloves, and a pair of shoes. 100 capsules were found inside the sling bag, as well as the Maltesers container, the gloves, and the shoes. Each of the 100 capsules containing diamorphine was found wrapped in layers of aluminium foil, plastic, and adhesive tape. When questioned by the police, the first appellant at first said that the capsules were chocolate, but when the question was repeated he said that they were African herbs that tasted like chocolate. He said that such herbs "gave strength" when eaten. He then swallowed a capsule, but that was subsequently retrieved from the first appellant at the hospital. The police suspected the content to be drugs when they cut open one of the capsules. The Central Narcotics Bureau ("CNB") was then alerted and it took over the investigation.

4 The first appellant told the CNB officers that Smith had made arrangements for him (the first appellant) to bring the capsules into Singapore where he was to deliver them to a person named "Marshal". In return, Marshal would hand him US$2,000. On the instructions of the CNB officers, the first appellant contacted Smith three times that evening by telephone. It was established at the trial that Smith's number was registered as a telephone number in Pakistan. A trap for the second appellant was set and sprung after Smith told the first appellant that the second appellant was at the Coffee Bean café near the hotel in the transit area. Marshal was described as a dark man of big build, and when the second appellant who fit the description was spotted, he was arrested and brought to the hotel where the first appellant was asked if that was Marshal. The trial judge recorded that the first appellant "nodded in affirmation". Several items were seized from the second appellant, among them a mobile telephone with the number 98657833. The Subscriber Identity Module card, popularly known as the "SIM card", from that telephone was found to contain two identical messages sent from the same telephone number at which the first appellant had called Smith earlier on, namely 923335216217. The message read: "I have been expecting your call since what happen". Two incoming calls, with an outgoing call in-between, to the second appellant's telephone from the telephone bearing Smith's telephone number were also traced to have been made at 10:58:43pm, 11:14:19pm and 11:17:37pm. A separate SIM card taken from the second appellant was found to contain an abbreviated dialling name, "Dogo", which the first appellant said meant "tall" and was a reference to Smith. A small telephone book also taken from the second appellant had the entries

"M.N." and "012585312" next to the words, "Name" and "Tel:" respectively. Finally, a laundry receipt dated 10 September 2004 from a laundry in Bangkok, Thailand, was also taken from the second appellant. And on the receipt was written "Marshal" and "012585312" next to the words, "Name" and "Tel:" respectively. The second appellant was charged with an offence under s 7 read with s 12 of the Act in engaging with the first appellant and Smith in a conspiracy to import 100 capsules of diamorphine into Singapore. Section 12 provides that any person involved in the abetment of any offence under the Act shall be guilty of that offence and be liable on conviction to the punishment provided for that offence.

5 The evidence that the first appellant was in possession of a bag containing drugs was not disputed. The evidence showed in detail the possession of the bag by the first appellant until the CNB officers took it from him after the police had detained him. Under s 18(1) of the Act, the first appellant was presumed to have the drugs in his possession. Under s 18(2) of the Act, the first appellant was presumed to know the nature of the drugs in his possession. The burden thus shifted to him to persuade the court on a balance of probabilities that he did not know that he was carrying drugs or that what he was carrying were drugs. The first appellant's defence was that he did not know that the capsules contained drugs. His explanation was that in his meeting with Smith, a person he described as not a wealthy man, he was asked by him to deliver the capsules to the second appellant who would then pay him US$2,000 for the delivery. It was apparent to us that the trial judge did not accept that the first appellant had rebutted the presumption of possession against him. We saw no reason to interfere with that decision. The court could have chosen to believe the first appellant but the inferential evidence supported the judge's rejection of the first appellant's story. In one instance, the first appellant had said that he was carrying chocolate but amended his answer, when the question was repeated, to say that he was carrying an African herb that tasted like chocolate. Furthermore, while we did not have the opportunity to assess the credibility of the first appellant, the trial judge had. The court below was better placed to determine whether the accused before it was one who could have believed that the 100 capsules of chocolate cost US$2,000 – that worked out mathematically to US$20 a capsule of "chocolate". The trial judge apparently did not, and we had no reason to disagree with that conclusion. Finally, the first appellant gave differing statements to the CNB after his arrest. It is not necessary to recite all the discrepancies and contradictions here as the trial judge had set them out in his grounds of decision. One would suffice. In the first statement, he had claimed that the drugs were not in his possession but were in a white plastic bag brought in by the police and were not in the white plastic bag that the police found in his possession. In his third statement, the first appellant stated that Smith had given him a plastic bag containing chocolates and sweets.

6 The presumption of knowledge was therefore not rebutted, and all that remained was to determine whether the act of importing the drugs was proved. However, a statement in the trial judge's grounds requires clarification. At para 48, the trial judge stated, in what appeared to us as an emphasis to his rejection of the first appellant's evidence:

> I found he had wilfully turned a blind eye on the contents of the capsules because he was tempted by the US$2000, which was a large sum to him. … Consequently, even if he may not have actual knowledge that he was carrying diamorphine, *his ignorance did not exculpate him* … [emphasis added].

That passage creates an impression that there is a legal duty not to "turn a blind eye". It would thus create a wrong assumption that there was some sort of positive legal duty, meaning that the first appellant was bound in law to inspect and determine what he was carrying, and that consequentially, if he did not do so, he would be found liable *on account of that failure or omission*. The Act does not prescribe any such duty. All that the Act does (under s 18), is to provide the presumptions of

possession and knowledge, and thus the duty of rebutting the presumptions lay with the accused. There could be various reasons why a court might not believe the accused person, or find that he had not rebutted the presumptions. The fact that he made no attempt to check what he was carrying could be one such reason. Whether the court would believe a denial of knowledge of the articles in the accused person's possession (made with or without explanation or reasons) would depend on the circumstances of the individual case. The trial judge then referred to *Yeo Choon Huat v PP* [1998] 1 SLR 217 at [22]:

> [I]gnorance is a defence only when there is no reason for suspicion and no right and opportunity of examination …

The above passage, however, was from the judgment in *Ubaka v PP* [1995] 1 SLR 267 and cited with approval by both the minority judgment in *PP v Hla Win* [1995] 2 SLR 424, as well as in the unanimous judgment in *Yeo Choon Huat v PP*. It is also pertinent that the same coram sat in both cases (*Yeo Choon Huat v PP* and *PP v Hla Win*). It will be gleaned from these cases that the true principle is that, ultimately, a failure to inspect may strongly disincline a court from believing an "absence of knowledge" defence. Therefore, to say, as in this case, that the first appellant thought it was chocolates was another way of saying he did not know that he was carrying drugs. Given the evidence, including the evidence that the first appellant did not inspect the articles when he could have done so (the turning of the blind eye), the court was entitled to find that the presumption had not been rebutted.

7 The next issue was whether an act of importing the drugs within the meaning of s 7 of the Act had been proved. There is no special definition of the words in s 7 which are clear and obvious: "Except as authorised by this Act, it shall be an offence for a person to import into or export from Singapore a controlled drug." The evidence that was not disputed, and in our view, adequately proved, was that the first appellant had entered Singapore at the Changi International Airport with the sling bag and had not left the transit area of the airport from the time he arrived until he was arrested. There was no dispute that bringing the bag (and thus the drugs) into Singapore was an act of importing the drugs within the meaning of s 7. The first appellant proceeded with his defence on the basis that he came into Singapore with the bag containing the drugs. The trial judge thus had no difficulty finding that the act of importing the drugs was proved beyond reasonable doubt and accordingly, found the first appellant guilty as charged and convicted him.

8 The Prosecution's case against the second appellant was based on s 12 of the Act which creates the offence of abetment. Unlike the abetment provision in s 107 of the Penal Code (Cap 224, 1985 Rev Ed), s 12 of the Act does not provide any specific definition of abetment. It merely states that:

> Any person who abets the commission of or who attempts to commit or does any act preparatory to, or in furtherance of, the commission of any offence under this Act shall be guilty of that offence and shall be liable on conviction to the punishment provided for that offence.

Abetment under the Penal Code is defined to include instigation, conspiracy, and aiding in the following terms:

> A person abets the doing of a thing who —
>
> (*a*) instigates any person to do that thing;
>
> (*b*) engages with one or more person or persons in any conspiracy for the doing of that

thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or

(*c*) intentionally aids, by any act or illegal omission, the doing of that thing.

However, the word "abetment" in its ordinary sense and usage includes instigation, conspiracy, and aiding. Thus, we are of the view that the penal provision in the Act must be given the same meaning as that in the Penal Code. It would be more precise if the word "conspiracy" in the charge against the second appellant was replaced by "abetment" in conformity with the word used in s 12 of the Act. In the event, it made no material difference to the defence. The trial judge had not only found sufficient evidence connecting the second appellant to Smith and the first appellant, he had also found that the second appellant was connected with the name "Marshal". He disbelieved the second appellant's evidence that the initials "M.N." written on the telephone book in his possession stood for "Malachy Nelson", his name; or that the "Marshal" written on his laundry receipt referred to one "Joseph Marshal". The court was satisfied "beyond a reasonable doubt that there was an arrangement between Smith and the two [appellants] for the second [appellant] to come to Singapore to collect the capsules from the first [appellant]" (at [61]). Accordingly, the second appellant was also convicted as charged. We were satisfied that on the evidence as found by the trial judge, including his rejection of the second appellant's explanations, the court was entitled to find that there was no reasonable doubt that the second appellant was engaged in a conspiracy with the first appellant and Smith as charged.

9 The appeals before us were entirely against findings of fact. The law presumes that a person caught in possession of prohibited drugs knows that he is in possession of such drugs, with the burden of rebutting that presumption on the person charged – what Lord Pearce would describe as "an improvement of a difficult position": see *Warner v Metropolitan Police Commissioner* [1969] 2 AC 256 at 307. Rebutting the statutory presumption is a matter of fact, and is no different from any other fact-finding exercise save that the law requires that a person rebutting a statutory presumption does so on a balance of probabilities. It is not sufficient for him merely to raise a reasonable doubt. In the present instance, the first appellant testified that he thought that he was carrying chocolates, later correcting his evidence to African herbs (that tasted like chocolate). This brought his case within the kind discussed in *Shan Kai Weng v PP* [2004] 1 SLR 57, *Tan Ah Tee v PP* [1978–1979] SLR 211, and the statement from *Ubaka v PP* cited in all the cases above as well as by the trial judge in the present case: "[I]gnorance is a defence only when there is no reason for suspicion and no right and opportunity of examination …". It was sufficiently clear to us, from the trial judge's grounds of decision, that the court did not believe the explanation of the first appellant, and was thus not persuaded that he had rebutted the statutory presumption. It was a finding that the court was entitled to make on the totality of the evidence before it. The trial judge did not need to refer to thinly speculative evidence so long as it appeared clear that he had taken all the relevant and material evidence into account in making his finding.

10 For the reasons above, we dismissed both appeals.