Public Prosecutor *v* Chum Tat Suan
[2015] SGHC 151

Case Number : Criminal Case No 1 of 2012

Decision Date : 09 June 2015

Tribunal/Court : High Court

Coram : Choo Han Teck J

Counsel Name(s) : Tan Wen Hsien and Zhong Zewei (Attorney-General's Chambers) for prosecution. Nandwani Manoj Prakash, Eric Liew Hwee Tong and Krystle Kishinchand Primalani (Gabriel Law Corporation) for the accused.

Parties : Public Prosecutor — Chum Tat Suan

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

9 June 2015 Judgment reserved.

Choo Han Teck J:

1 The accused was arrested at the Woodlands Checkpoint on 15 January 2010 and charged for importing not less than 94.96g of diamorphine into Singapore. That is an offence under s 7 and punishable under s 33 of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) ("the Act"). The accused claimed trial. The trial commenced on 8 May 2013 and the evidence concluded on 20 June 2013. On 5 August 2013 I found the accused guilty as charged. Prior to 1 January 2013, the only sentence in such a case was death.

2 Parliament amended the Act on 14 November 2012 so that under certain circumstances the trial judge may impose a sentence of life imprisonment with caning instead of the mandatory death sentence. The amended provisions in ss 33B (1) and (2) are set out as follows:

> **33B.**—(1) Where a person commits or attempts to commit an offence under section 5(1) or 7, being an offence punishable with death under the sixth column of the Second Schedule, and he is convicted thereof, the court —
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> (a) may, if the person satisfies the requirements of subsection (2), instead of imposing the death penalty, sentence the person to imprisonment for life and, if the person is sentenced to life imprisonment, he shall also be sentenced to caning of not less than 15 strokes; or
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> (b) shall, if the person satisfies the requirements of subsection (3), instead of imposing the death penalty, sentence the person to imprisonment for life.
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> (2) The requirements referred to in subsection (1)(*a*) are as follows:
>
> (a) the person convicted proves, on a balance of probabilities, that his involvement in the offence under section 5(1) or 7 was restricted —
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> (i) to transporting, sending or delivering a controlled drug;

(ii) to offering to transport, send or deliver a controlled drug;

(iii) to doing or offering to do any act preparatory to or for the purpose of his transporting, sending or delivering a controlled drug; or

(iv) to any combination of activities in sub-paragraph (i), (ii) and (iii); and

(b) the Public Prosecutor certifies to any court that, in his determination, the person has substantively assisted the Central Narcotics Bureau in disrupting drug trafficking activities within or outside Singapore.

3 For the reasons in my judgment dated 24 October 2013, I held that the accused was no more than a "courier". The Public Prosecutor ("PP"), instead of filing an appeal against my finding, filed an application for questions of law of public interest for the determination of the Court of Appeal. The three questions referred to the Court of Appeal as set out in the judgment of Chao Hick Tin JA ("Chao JA") are, in essence, repeats of ss 33B(2)(*a*)(i) to (iv).

4 The answer to the first question is unequivocally set out in s 33B(2)(*a*) of the Act, namely, yes, the convicted person has to prove on a balance of probabilities that he was no more than a courier. The answer to the second question must be an obvious one, namely, yes. What was not asked was whether the court may permit an accused the opportunity of adducing further evidence after the trial. To this unasked question, Chao JA in his judgment was of the view that the convicted person ought to be granted leave to adduce further evidence. The majority decision by Woo Bih Li J and Tay Yong Kwang J, however, held that no further evidence ought to be allowed. In respect of the third question, the Court of Appeal held that the saving provisions apply to a convicted person only if the person satisfies the specific wording of s 33B(2)(*a*)(i) to (iv). "Selling" or having an intention to sell, clearly cannot mean "transporting, sending, or delivering". But this creates a separate issue concerning the burden of proof. The Act states that the accused bears the burden of proving, on a balance of probabilities, that his role was restricted to "transporting, sending, or delivering" and the like. But the Act clearly does not compel the accused on his own, without more, to prove a negative. If prosecution has adduced evidence to show that the accused had the intention to sell, that shifts the evidential burden to the accused to prove on a balance of probabilities that he had no such intention. Furthermore, evidence of the accused's intention to sell may also be given to the court through other persons such as co-accused persons and other witnesses.

5 The Court of Appeal was of the view that the questions were not questions that ought to have been referred to the Court of Appeal, but the Court of Appeal nonetheless proceeded to consider them. As a result, it held that the case be remitted to me to determine whether the accused was only a courier, that is to say, that he satisfied one of the limbs of s 33B(2)(*a*)(i) to (iv). That direction, together with the majority view that no fresh evidence should be permitted, and counsel's submission before me that no further evidence is necessary to determine the "courier" point, renders the remission of the case to me, a second opportunity to review the evidence. Having done so, I am of the view that the finding I made on 24 October 2013 has not been affected and I maintain my view that the accused was only a courier. I have, as counsel have done, referred to an accused who was only "transporting, sending, or delivering" as a "courier" for the purposes of the application of s 33B.

6 In maintaining my views, I have considered some of the incriminating statements made by the accused, but I do not think that they add any weight to the fact that at the time he was arrested at Woodlands Checkpoint on 15 January 2010, he was only transporting the drug into Singapore. Further, the accused's statements, on their own, are not unequivocal in shedding light on whether the accused intended to sell the drugs for profit, or was merely transporting and delivering the drugs to

identified parties. There are parts of his statements which seem to suggest one way, whilst other parts suggest otherwise. However, the question as to whether he had the intention to sell the drugs he imported was not an issue at the trial. As this issue was not properly argued at trial, and the statements are not unambiguous in regard to the accused's intention, on the balance of probabilities, I find that the balance tilts in favour of the accused and I thus hold that he was only a courier.

7 When this matter came back to me on 21 May 2015, Ms Tan Wen Hsien, the Deputy Public Prosecutor ("DPP"), and Mr Nandwani Manoj Prakash, the defence counsel, appear to take the view that this court must proceed to first make a finding that the accused was or was not a courier. If I found, as I have, that the accused was a courier, then, in the words of the DPP and Chao JA, "the prosecution would take a further statement from [the accused] for the purposes of determining whether he meets the requirements of s 33B(2)(*b*), that is, whether [he] has substantively assisted the CNB such that the s 33B certificate is deemed by the public prosecutor to be justified" (*Public Prosecutor v Chum Tat Suan and another* [2015] 1 SLR 834 at [8]). Sections 33B(3) and (4) provide as follows:

> (3) The requirements referred to in subsection (1)(*b*) are that the person convicted proves, on a balance of probabilities, that —
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> (a) his involvement in the offence under section 5(1) or 7 was restricted —
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> (i) to transporting, sending or delivering a controlled drug;
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> (ii) to offering to transport, send or deliver a controlled drug;
>
> (iii) to doing or offering to do any act preparatory to or for the purpose of his transporting, sending or delivering a controlled drug; or
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> (iv) to any combination of activities in sub-paragraphs (i), (ii) and (iii); and
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> (b) he was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts and omissions in relation to the offence under section 5(1) or 7.
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> (4) The determination of whether or not any person has substantively assisted the Central Narcotics Bureau in disrupting drug trafficking activities shall be at the sole discretion of the Public Prosecutor and no action or proceeding shall lie against the Public Prosecutor in relation to any such determination unless it is proved to the court that the determination was done in bad faith or with malice.

8 I am of the view that the procedure suggested by counsel is not desirable. In the first place, in enacting the new s 33B, Parliament did not specify that the findings required under ss 33B(2)(*a*) and (*b*) or ss 33B(3)(*a*) and (*b*) are to be carried out one after the other. On a plain reading, it appears that nothing suggests that they should be so. If the Central Narcotics Bureau ("CNB") is to record a further statement only after the finding of this court as to whether the accused was only a courier, the judicial proceedings will be prolonged unnecessarily. How may the CNB decide whether the further statement qualifies as substantively assisting it unless the matters deposed in the new statement are verified? When may that be concluded? In some cases, the time needed might be shorter and some longer than others. The sentencing may not take place for a long time to come. The accused committed the offence in this case in 2010 and the case will not even end here more than five years

later. Counsel informed me that only after the courier point is determined and the PP certifies that the accused has substantively assisted the CNB can the sentencing take place. But if the certificate is not issued, the parties will then proceed to argue whether the accused suffered from an abnormality of mind such as to enable him to be spared the death penalty.

9 This process requires the accused to go through a series of hearings after he has been convicted of an offence that carries the possibility of a death penalty. At every stage, his fate is uncertain. Even if the accused person has been adjudged to merit the death penalty (whether in law or by law) he should be spared the agony of having his hopes rise and dashed so many times. It is true that when hope is abandoned all may be lost, but when the law sets out a procedure for a capital case, it allows hope and mercy a fair and even chance to co-exist. Only then, when the law takes its course, will it be as humane as possible. Further, this procedure may, on the other hand, give the impression that accused persons have several opportunities to save themselves from the gallows, thus diminishing the deterrent effect that Parliament seeks to maintain in the 2012 amendments.

10 The legislative amendments cannot have been enacted to create a staggered trial. There must be only one trial to dispose of all issues, and after that, an appeal to the Court of Appeal if a party wishes. The accused is not prejudiced by the amendments because the original procedure remains should he elect for it. That is, he is still at liberty to challenge the charge on the ground that he did not traffick the drugs. If he succeeds he will be acquitted. If he fails he will be sentenced with the mandatory death penalty. The legislative enactments now provide an accused the right to claim that although he trafficked in the drugs, he did so only as a courier. Should he succeed and the PP certifies that he has rendered substantive assistance to the CNB, he may not suffer death. The second option open to him is that he may elect to claim that although he committed the offence he did so when he was labouring under an abnormality of mind. If he succeeds, he will also be spared the death penalty. In all the circumstances stated above, the accused has to elect which his case is at the outset. He might make two final submissions together, namely, that he did not traffick but in the event that the court finds that he did, his role was merely that of a courier. But he cannot try out one defence after the other. Even an accused in a murder case has to elect from the start if he wishes to plead diminished responsibility. By the same token, the PP must indicate at the outset as well whether it will or will not be granting the certificate of substantive assistance. This will enable the accused to consider his defence carefully and make his election. It seems, therefore, that the legislative amendments did not alter the circumstances to the prejudice of the accused. In fact, they provide two opportunities, in limited circumstances, for the accused to save himself from the gallows with the aim of enhancing the overall operational effectiveness of our regime against drug trafficking.

11 In the present case, for the reasons that I had stated in my judgment of 24 October 2013 and as stated above, I find that the accused was acting only as a courier. I have reviewed the case and find no reason to change my mind.