

Public Prosecutor v Zulfikar bin Mustaffah
[2000] SGHC 224

Case Number : CC 64/2000
Decision Date : 06 November 2000
Tribunal/Court : High Court
Coram : Choo Han Teck JC
Counsel Name(s) : David Khoo and Mohamed Nasser Ismail [Attorney-General's Chambers] for the prosecution; S S Dhillon [Dhillon Dendroff & Partners] (briefed) with Zero Nalpon [Nalpon & Company] (assigned) for the accused
Parties : Public Prosecutor — Zulfikar bin Mustaffah

JUDGMENT:

Grounds of Decision

1. The accused is an unemployed man aged 31. He was charged with possession of 72.58g (nett) of diamorphine for the purposes of trafficking. The arrest took place at 6.45pm on 4 April 2000 at the 9th floor of Blk 701, Yishun Avenue 5. The four arresting officers were ASP Soh Thiam Loon, Sgt Ace Yap Choon Boon, Cpl Matthew Tan Chun Kiat and Cpl Jasper Teo Chee Hock.
2. The officers had been lying in wait on the 12th floor. At 6.45pm they received instructions to proceed to the 9th floor and arrest the suspect there. Cpl Matthew Tan was the first to reach the 9th floor followed by ASP Soh, Sgt Yap and then Cpl Teo. They were one behind the other, walking down the staircase. Cpl Matthew Tan was the first officer to see the accused who was facing the wall with his back to the staircase and the approaching officers. He was pre-occupied in conversation through his handphone. He was holding a plastic bag (P22) with his other hand.
3. Cpl Matthew Tan announced the arrival of the officers by shouting "CNB". He testified that the accused, who had been talking on the handphone, and looking in all directions as if looking for someone, dropped the plastic bag and the handphone and attempted to run. He was quickly caught and pinned to the ground. The arresting officers all testified that the accused put up a struggle and refused to be handcuffed. Mr Dhillon, counsel for the accused made an issue of the word "violent". He disputed the evidence that the accused was caught after running and thereafter put up a violent struggle.
4. It was, however, not disputed that the accused was not shown the contents of P22 from the arrest until 9.10pm when the seized plastic bag (P22) and its contents (the diamorphine) were photographed at the CNB headquarters. The defence case was that the diamorphine were wrapped in newspapers and further covered by another layer of plastics so that the accused did not know what it was that he was carrying.
5. The accused was charged, and the caution under s 122(6) of the Criminal Procedure Code read to him at 11.30pm. He responded by stating that "I have nothing to say". A series of further statements were recorded from him three days later. None of the statements were challenged and, in fact, admitted by the defence as defence exhibits.
6. No submission was made at the close of the prosecution case. On the evidence that the accused was caught holding the drugs, and the presumption of trafficking under the Misuse of Drugs Act, the accused was called upon to make his defence. He elected to give evidence.
7. The accused testified that on 3 April 2000, the eve of his arrest, he went alone to the "Europa" pub for a drink or two. There a Chinese man called out his name and introduced himself as "Ah Boy". The accused thought that he had met "Ah Boy" before but cannot recall where they had met. "Ah Boy" and the accused chatted and "Ah Boy" offered to find the accused a job, but the accused never thought that it was a serious offer. "Ah Boy" asked for the accused's telephone number which he gave.

8. The accused drank till he was drunk and found himself at a nearby beach the next morning. It was about 10am. He received a call from "Ah Boy" shortly after that who said that he had a job for the accused. He gave the accused a telephone number (93547663) and told him to go to Sengkang. He instructed the accused to meet at the Rivervale Primary School at 3.30pm. The accused went there by taxi and waited in front of the school at the appointed time. A Chinese man approached him and mentioned "Ah Boy's" name, but the accused had never seen this man before. The man handed him a plastic bag, saying that it was "Ah Boy's" bag. The man left after saying that "Ah Boy" will call the accused later. The accused looked into the plastic bag and saw some bundles. He put his hand into the bag and counted five bundles. Five minutes later the accused received a call from "Ah Boy" instructing him to call the telephone number given to him earlier on. The accused called but it was engaged. The accused then walked towards a nearby block of flats and waited. At 5pm "Ah Boy" telephoned him and asked if he had carried out his earlier instructions. When the accused reported his unsuccessful attempts to do so, "Ah Boy" gave him another number. The accused called the said second number but a male voice answered saying it was a wrong number and hung up. This call was repeated with the same result.

9. The accused then decided to try his luck with the first number. This time he got through and a male voice answered, and instructed him to go to Block 701, Yishun Avenue 5. The accused went to Yishun by taxi. While in the taxi he called the second telephone number a couple of times and each time he was told it was the wrong number. Then "Ah Boy" telephoned the accused just as he arrived at Yishun. "Ah Boy" instructed the accused to put the plastic bag into a dustbin and call the first telephone number.

10. The accused testified that he saw only one dustbin and so he placed the bag in that one. Then he called the first telephone number and asked the man to collect the bag. He refused. The accused said that he would call back, and then walked to the block opposite block 701, and waited for "Ah Boy" to call but he did not. About five or ten minutes later the accused called the first telephone number again. He said that he wanted the man to collect the plastic bag because it was getting late (about 6pm) and he wanted to meet his girl friend. The man refused and instead, instructed the accused to send the plastic bag to the 9th floor. The accused retrieved the bag from the dust bin and went up to the 9th floor (of block 701) where he was arrested.

11. The defence of the accused was that he did not know what was in the plastic bag and had no opportunity to inspect its contents. He relied on the fact that no other drugs were found on him or his home, and no drug trafficking or consumption paraphernalia were seized from him. He had two bundles of money, namely S\$2,240 in ten-dollar notes, and S\$2,650 in fifty-dollar notes. He explained that he won about S\$3,000 in a lottery. He gave the winning number to the investigating officer who verified that that was indeed a second prize winner. The accused said that after that he used S\$350 from the winnings to bet, this time with illegal bookies, and won another S\$1,000. Mr Dhillon submitted that this explained the presence of the large sums of money found on the accused. Mr Khoo urged me to find that the moneys were proceeds from drug trafficking activities. On this point, I am prepared to give the accused the benefit of doubt even though I am not entirely satisfied with his account of how he came into such large sums of money given his financial and job records. Mr Dhillon also submitted that the testimony of the accused in court was the same as his four statements given to the investigating officer, and ought, therefore, to be accepted as being consistent. The accused also explained that when he said "I have nothing to say" in his s 122(6) statement, he meant that he had no connection whatsoever with the drugs and did not know what happened. It is fair to say that the statements of the accused have been consistent with each other and with his testimony in court, but it is a long way from saying that they have sufficiently rebutted the presumption. Consistency is a pre-requisite not the synonym for reliability.

12. The thrust of the defence was that it is unsafe to convict a man on a capital charge of trafficking in drugs when the only evidence of the prosecution consists only of the fact that the accused was arrested with the drugs in his physical possession. Counsel submitted that there is no evidence to rebut the accused's testimony that he had no knowledge that the plastic bag he carried contained drugs.

13. The law applicable to this case is straightforward. S 5(2) of the Misuse of Drugs Act, Cap 185 defines the offence of trafficking to include a person who "has in his possession that drug for the purposes of trafficking". Once a person is proved to have more than 2g of diamorphine in his possession, he is presumed by s 17 of the Act, to be in possession for the purposes of trafficking. Once the presumption applies, the onus shifts to the accused to persuade the court on a balance of probabilities that

the drugs were not meant for trafficking. The initial burden lies with the prosecution in proving possession. In this case, Mr Dhillon submitted that possession was not proved because there was no evidence to contradict his client's assertion that he did not know that the contents of the plastic bag he carried were diamorphine.

14. "Possession" in s 5 implies possession with knowledge. Thus, for example, if a person purchases a box of candy but was given a box of diamorphine by mistake it cannot be said that he is in possession of the diamorphine within the meaning of s 5(1). What happens after that is a question of fact. If he had a reasonable opportunity to examine the box but did not do so, his continued physical possession may be found to be possession within the meaning of s 5(1). He can, of course, adduce evidence to show that although he had the opportunity to examine it (because, say, the box was kept by him for a week), he did not do so because he kept it in his refrigerator immediately upon reaching home and had forgotten about it. It is purely factual and whether he succeeds depends on whether his evidence is accepted.

15. In the present case, Mr Dhillon urged me to consider that the accused was in possession of the plastic bag for only three hours. Time is only time. The more relevant question is, what was he doing with the plastic bag over the three hours? The accused gained possession of the drugs in the bag, not by a purchase of what he thought to be something innocuous; not by an innocent or chance finding in circumstances that do not give rise to suspicion; but from a person he hardly knew, and for no clearly defined purpose other than mere delivery. The unusual and suspicious nature of the way the bag was given to him and the instructions which he had to follow are not in doubt. The accused himself admitted that at some point he felt "something amiss" about it all. He had seen that the bag contained packed bundles which he counted to be five in total. He obeyed the instructions of a virtual stranger and carried the bag from Sengkang to Yishun. By the same token, it is inexplicable that "Ah Boy" would entrust the large consignment of drugs to a person he hardly knew. He deposited the bag in a public waste bin, and then retrieved it to bring it to the 9th floor of a block of flats. Not only do I find the instructions of his contact person to be suspicious, but his own very conduct itself was suspicious. In such circumstances, the accused cannot say that he had neither opportunity nor reason to find out what he was carrying. If he was unable to find out, his only recourse was to abandon the bag. The accused claimed that although he spoke to "Ah Boy" a couple of times over the handphone he could not ask what the bag contained because "Ah Boy" kept hanging up on him. I find this unacceptable. Only a person with an extremely simple mind would have been led around in the way described by the accused. Any reasonable person would have enquired from "Ah Boy" what it was that he was asked to carry, and what remuneration was in store for that service. No evidence whatsoever in this regard was adduced and the accused did not appear to me as a simple-minded person. I am satisfied that the prosecution had proved that the accused was in possession of a bag of drugs within the meaning of s 5(2).

16. The burden thus shifted to the accused to persuade me that he had no intention to traffick. The evidence that the accused relied on to rebut the presumption was essentially the same evidence he used to refute knowledge. He asserted that his only intention was to hand the bag to the mysterious caller from handphone number 93547663. But, by this assertion, he only affirms the act of trafficking. Thus, having failed to persuade me that he had no reason or opportunity to check the contents of the plastic bag, his defence failed entirely.

17. Assessing the story and the story-teller, I form the view that the presumption of trafficking has not been rebutted. I am, therefore, satisfied that the prosecution had proved its case beyond reasonable doubt and the accused was accordingly convicted as charged.

Choo Han Teck

Judicial Commissioner

