# Mohd Halmi bin Hamid and Another v Public Prosecutor
# [2005] SGCA 56

**Case Number** : Cr App 5/2005

**Decision Date** : 09 December 2005

**Tribunal/Court** : Court of Appeal

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

**Counsel Name(s)** : Aqbal Singh (Unilegal LLC) and R Gupta (A Zamzam and Co) for the first appellant; Ismail Hamid (Ismail Hamid and Co) and Zaminder Singh Gill (Hilborne and Company) for the second appellant; Cheng Howe Ming and Deborah Tan (Deputy Public Prosecutors) for the respondent

**Parties** : Mohd Halmi bin Hamid; Mohamad bin Ahmad — Public Prosecutor

*Criminal Law – Statutory offences – Misuse of Drugs Act – Trafficking in controlled drugs – Whether offence made out – Whether knowledge of identity of intended recipient of drugs essential requirement of offence – Whether presumption of trafficking under s 17 of Act may be used in conjunction with presumptions of possession under s 18 of Act – Sections 17, 18(1), 18(2) Misuse of Drugs Act (Cap 185, 2001 Rev Ed)*

9 December 2005

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

1 This case began with the joint trial of three persons accused of trafficking in 75.56g of diamorphine. The charges against the first and third accused were for abetment of trafficking by the second accused. At the end of the trial the court convicted the first and second accused, now the first and second appellants respectively, but acquitted the third. The convicted persons appealed against their convictions but before us, Mr Aqbal Singh, counsel for the first appellant, informed us that he was instructed to make no submissions on behalf of his client. We proceeded to hear Mr Ismail Hamid, counsel for the second appellant, and not being persuaded, we dismissed the appeal of the second appellant. There being no submissions on behalf of the first appellant, and we were satisfied from the record that there were no merits in the appeal, we also dismissed the appeal of the first appellant. We now set out the grounds of our decision in respect of our dismissal of the second appellant's appeal.

2 The facts as found by the trial judge were as follows. The second appellant was under surveillance by the Central Narcotics Bureau ("CNB") on 7 January 2004. He drove to Yishun Ring Road at about 11.30am and parked near Block 108. He left the car and entered the lift at Block 108 empty-handed, but emerged a few minutes later with a white plastic bag. He returned to his car and drove away. He was arrested at the junction of Yishun Ring Road and Yishun Avenue 2. The white plastic bag was recovered from the rear floorboard behind the front passenger seat. Another party of CNB officers arrested the first appellant at 11.40am at Block 106 Yishun Ring Road. The third accused was arrested at 2.20pm along Serangoon North Avenue 1.

3 The Prosecution's case against the three accused were founded on the statements given by them to the CNB officers. The key evidence was that of the second appellant who stated that he collected the drugs from the first appellant on the instructions given to him by the third accused. The first appellant admitted in his statements that he had given the drugs to the second appellant at Block 108. The sequence of events was elaborated in the statements of the second appellant as follows. He stated that at 10.00am of 7 January 2004, the third accused telephoned him and told him to collect something from the first appellant at Yishun. About half an hour later, the second appellant received another call on his handphone but he did not know who the caller was. He spoke in Malay

and told the second appellant to go to Block 108 at Yishun and to wait at the carpark near the lift. When the second appellant arrived at the carpark, he received another call from the man and was instructed to wait ten minutes before taking the lift to the fifth floor. At the fifth floor, the first appellant entered the lift and gave the second appellant a white plastic bag. No words were exchanged between them. The first appellant got off on the fourth floor and the second appellant returned to his car where he telephoned the third accused and asked him who the bag was for. He was told to wait for the third accused's call. But the second appellant was arrested before any further contact could be made. On these straightforward facts the trial judge convicted the first and second appellant, but acquitted the third accused on the ground that the only evidence against him was the unreliable evidence of the second appellant.

4 On appeal before us, Mr Ismail Hamid, counsel for the second appellant, submitted that the evidence did not indicate that the second appellant had any intention to part with the drugs because he had not yet received any clear indication as to who he was going to hand the drugs to. Moreover, he contended that the second appellant had no knowledge that he was carrying prohibited drugs. On the latter point, the evidence upon which the trial judge acted on included the second appellant's own evidence that he had suspected that he was carrying drugs and had the opportunity to examine the contents of the bag. He merely opened the bag and looked at it without examining the contents. The clear finding of fact by the trial judge that convicted the appellant is encapsulated in this passage from his Grounds of Decision ([2005] 4 SLR 200 at [37]):

> By his own evidence, the second [appellant] was transporting the drugs for delivery on the instructions of the third accused or Zali. The drugs were not his and were not intended for his own consumption. When he transported the drugs, he was trafficking them.

We see no reason to disturb the findings of fact by the trial judge nor his conclusion that the second appellant was guilty of trafficking. Since the amount of diamorphine involved was more than 15g, the mandatory death penalty applied and was so pronounced by the trial judge. For these reasons, we dismissed the appeal of the second appellant. However, in the course of delivering his grounds the trial judge referred to the statutory presumptions under ss 17 and 18 of the Misuse of Drugs Act (Cap 185, 2001 Rev Ed) ("the Act") which we must address. We are mindful that neither party addressed that point before us (it was unnecessary for either side). However, as it is an important point and since the court below had expressed a definite opinion upon which our comment is necessary, we would proceed to do so.

5 The two principal offences under the Act are possession (under s 8) and trafficking (under s 5) in controlled drugs. Section 5(1) creates the offence of trafficking while s 5(2) expands the definition of trafficking to include the situation in which a person is in possession of controlled drugs "for the purpose of trafficking". Possession in such circumstances amounts to trafficking. As in any crime, the Prosecution is obliged to prove its case, and that includes every aspect of the elements that constitute the offence, beyond reasonable doubt. Conventionally, therefore, the Prosecution has to prove the fact of possession for the purposes of trafficking if it wishes to secure a conviction of trafficking under s 5(2). In this regard, Parliament has legislated, under s 17 of the Act, a presumption in favour of the Prosecution to the effect that:

> Any person who is proved to have had in his possession more than 2 grammes of diamorphine [the controlled drug involved in this case] … shall be presumed to have had that drug in possession for the purpose of trafficking unless it is proved that his possession of that drug was not for that purpose.

This presumption under s 17 is thus a presumption of trafficking incorporating both the mental element

as well as the physical act constituting the crime of trafficking in a controlled drug – see *Lee Ngin Kiat v PP* [1993] 2 SLR 511 at 517, [22] where Yong Pung How CJ held that "it presumes both actus reus and mens rea to be present once possession is proved". Section 18 provides two different presumptions, both of which are in relation to possession. They are not presumptions in respect of trafficking. Section 18(1)(*a*) states that:

> Any person who is proved to have had in his possession or custody or under his control anything containing a controlled drug [a white plastic bag in this case] shall, until the contrary is proved, be presumed to have had that drug in his possession.

It is not necessary to refer to ss 18(1)(*b*) to 18(1)(*d*) because they refer to other situations to be covered, but the principles concerning s 18(1)(*a*) will apply to them similarly. Section 18(2) provides that:

> Any person who is proved or presumed to have had a controlled drug in his possession shall, until the contrary is proved, be presumed to have known the nature of that drug.

Section 18 was clearly intended to cover the situation in which a person is found in possession of anything, say, a bag or container, in which controlled drugs were kept but were not visible to the eye. The interlocking provisions in ss 18(1) and 18(2) presume not only that that person was in possession of the controlled drugs in the bag or container, but also that he knew the nature of that controlled drug or drugs. These two presumptions shift the burden of proving that the person concerned either was not in possession of the controlled drugs or that he did not know that they were controlled drugs, to that person who had been proved to be in possession of the thing that contained the controlled drugs.

6 A person who is presumed by virtue of s 18 to be in possession of controlled drugs would be guilty of an offence of possession of controlled drugs (unless he can prove otherwise). That person may be guilty of an offence of trafficking in those drugs if the Prosecution proves any act of trafficking as defined in s 2 of the Act. This was precisely the case before us. The evidence showed that the second appellant took delivery of a bag containing diamorphine, a controlled drug, and by virtue of s 18 he was presumed to be in possession of that drug, and that he knew the nature of that drug. He took delivery with the intention of delivering them to another party, and by that act he was trafficking within the meaning of s 2 of the Act which defines "traffic" and "trafficking" in drugs to mean –

(*a*) to sell, give, administer, transport, send, deliver or distribute; or

(*b*) to offer to do anything mentioned in para (*a*).

There was no necessity or basis for applying the presumption in s 17 in this case. If the capital charge of trafficking is not strictly proved either with the aid of s 17 or directly by proving trafficking within the meaning of s 2 of a quantity of controlled drugs within the capital range set out in the Second Schedule of the Act, then the person concerned would only be guilty of possession if s 18 applies. Mr Ismail argued before us that there was no specific or named recipient because the second appellant was waiting for instructions as to who he should deliver the drugs to. The actions under s 2 that constitute trafficking are capable of application in a very wide range of situations and circumstances. In the case of delivery, all that is envisaged is that there was an intention to hand the drugs to another person, but there is no requirement that the recipient must be known or identified. In other circumstances, an act otherwise falling within the meaning of trafficking may not constitute trafficking under s 2, such as that envisaged by Lord Diplock in *Ong Ah Chuan v PP* [1980–

1981] SLR 48 at 58, [12], if, say, that person was transporting drugs from one place to another intending to use the drugs for his own consumption.

7 In his Grounds of Decision ([4] *supra* at [34]), the trial judge expressed the view that "the presumption under s 18(2) can apply together with a presumption under s 17". He seemed to be of the view that if a person is proved to be in possession of a controlled drug, then, by virtue of s 18(2) he is presumed to know the nature of the drugs, and then, by applying the presumption in s 17, he is presumed to be in possession for the purposes of trafficking. The presumption under s 17, as the Act itself provides in the heading to that section, is a presumption in respect of trafficking; whereas, the presumptions under s 18, as the Act provides in the heading to s 18, are presumptions in respect of possession. We agree with the observation of Lord Reid in *Director of Public Prosecutions v Schildkamp* (1969) 3 All ER 1640 at 1641 that "it would be more realistic to accept the Act as printed as being the product of the whole legislative process, and to give due weight to everything found in the printed Act". This view has since been expressed in s 9A(3) of our Interpretation Act (Cap 1, 2002 Rev Ed). For convenience, we set out ss 9A(2) and 9A(3):

> (2) Subject to subsection (4), in the interpretation of a provision of a written law, if any material not forming part of the written law is capable of assisting in the ascertainment of the meaning of the provision, consideration may be given to that material —
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> > (*a*) to confirm that the meaning of the provision is the ordinary meaning conveyed by the text of the provision taking into account its context in the written law and the purpose or object underlying the written law; or
> >
> > (*b*) to ascertain the meaning of the provision when —
> >
> > > (i) the provision is ambiguous or obscure; or
> > >
> > > (ii) the ordinary meaning conveyed by the text of the provision taking into account its context in the written law and the purpose or object underlying the written law leads to a result that is manifestly absurd or unreasonable.
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> (3) Without limiting the generality of subsection (2), the material that may be considered in accordance with that subsection in the interpretation of a written law shall include —
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> > (*a*) all matters not forming part of the written law that are set out in the document containing the text of the written law as printed by the Government Printer; …

8 The presumption in s 17 applies only in situations where a person is, in the words of this court in *Lim Lye Huat Benny v PP* [1996] 1 SLR 253, "proved" to be in possession of controlled drugs, but apart from mere possession, had not done any of the acts constituting trafficking as set out in s 2. It is contrary to the principles of statutory interpretation, and even more so, the interpretation of a criminal statute, especially one in which the death penalty is involved, to combine presumptions from two sections in an Act each serving a different function – in this case, shifting the burden of proof in one with regard to possession and the other, in regard to trafficking. Possession and trafficking are distinct offences under the Act, although possession may lead to the more serious charge of trafficking, while, trafficking itself might conceivably be committed without actual possession. The danger of mixing the s 17 and s 18 presumptions was anticipated by this court in some of its previous decisions which were not brought to the attention of the trial judge below because this was not an issue before him. The decision of this court in *Lim Lye Huat Benny v PP* expressed the view that for the s 17 presumption to apply, it must first be proved that the accused

knew that he was in possession of the drugs. L P Thean JA held at 260, [17]–[18]:

> It is settled law that the presumption under s 17 only arises where possession of the drugs (not mere physical possession) has been proved: see *Low Kok Wai v PP* [1994] 1 SLR 676 and *PP v Wan Yue Kong & Ors* [1995] 1 SLR 417.
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> But, in this case, it is not necessary to invoke the presumption under s 17 *and hence there is no need for the prosecution to prove possession of the drugs in the sense that the appellant knew that what he was carrying were drugs*. The material facts were that at the material time he was carrying a white plastic bag and was bringing it from the car park to the void deck with a view to delivering it to the male Chinese, and that bag contained drugs, the subject matter of the charge. On these facts, the presumptions under s 18(1) and (2) arise.
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> [emphasis added]

The accused in *Lim Lye Huat Benny v PP* failed to persuade the trial judge that he was carrying counterfeit money in the white plastic bag and was convicted. The conviction was upheld by this court which also held that the application of s 17 was inappropriate where the presumptions under s 18 and an act constituting trafficking under s 2 had been proved, as was the case there.

9 This court also referred to the application of s 17 in *Low Kok Wai v PP*, but was there considering the effect of the amendment to s 17 whereby the words "or presumed" were deleted after the February 1990 statutory amendment. Chao Hick Tin J (as he then was) held at 683, [37]:

> Parliament must have intended that the presumption of trafficking in s 17 was only to apply where a person was proved to be in possession of a controlled drug and not merely presumed to be in possession of a controlled drug.

Chao J continued by holding that:

> In our judgment, Parliament, by deleting the words 'or presumed' had shown abundantly that it did not intend to create a situation of triple presumption, namely, by linking ss 18(1), 18(2) and 17.

The court stopped there, but for reasons set out above, we now extend and hold that it could not have been the Legislature's intention to have a crossover application of the presumptions under ss 17 and 18(2). Section 18(2) was a logical and direct complement to s 18(1); it is not an auxiliary provision to s 17. The phrase "proved or presumed to have had a controlled drug in his possession" in s 18(2) has a perfectly logical sense in the structure of the Act and in its proper place within s 18. That section provides the statutory presumptions of possession and knowledge of the nature of the controlled drugs found in any container where the drugs were not obvious to view. It clearly needed to apply to situations where the drugs were found in the possession of a person and were not obvious to view, in which event, it would be open to the trial judge to find as a fact that those drugs have been proven to be in the physical possession of that person. Hence, the phrase "proved or presumed to have had a controlled drug in his possession" in s 18(2) shifts the burden of proof to that person to show that he did not know the nature of the drugs and it may, therefore, not be sufficient for him to say merely, that he did not know that the drugs found in his room were in fact drugs. He will have to persuade the judge that he truly did not know. If he fails to rebut the s 18 presumptions he would be liable to a conviction for possession, unless an act of trafficking, as defined in s 2, is proved against him, in which event, he would be liable to a conviction for trafficking. If, a person is proved to know (as opposed to presumed to know) the nature of the drugs in his possession, then the presumption

under s 17 applies and he would be liable to a conviction for trafficking even though he did not commit any act constituting the act of trafficking defined in s 2.

10 The statutory presumption under s 17 being a presumption in respect of trafficking with the possibility that the death penalty might be imposed, must be read strictly. It is a provision to facilitate the application of s 5(2), whereas s 18 concerned presumptions in respect of the possession of controlled drugs, which (possession) is another principal (though not capital) offence under the Act. The Legislature would have made it clear had it wanted s 5(2) to be further reinforced by means of s 18(2). In the absence of such an express intention, we think it best to keep the presumptions under s 18 separate from that in s 17, as has always been the case. A person who is to be condemned to death under this Act must at least be proven to know that he had controlled drugs in his possession. For the reasons above, the appeals were dismissed.