IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2016] SGHC 101

Criminal Case No 23 of 2016

Between

Public Prosecutor

And

(1) Azahari bin Ahmad
(2) Wasis bin Kalyubi

GROUNDS OF DECISION

[Criminal Law] — [Statutory offences] — [Misuse of Drugs Act]

Public Prosecutor
v
Azahari bin Ahmad and another

[2016] SGHC 101

High Court — Criminal Case No 23 of 2016
Hoo Sheau Peng JC
20–21, 26–28 April; 3–4 May 2016

23 May 2016

Hoo Sheau Peng JC:

Introduction

1 The first accused, Azahari bin Ahmad ("the First Accused"), a 46 year-old Singaporean, claimed trial to the following charge:

> First Charge
>
> That you, AZAHARI BIN AHMAN, on 1 November 2011, at about 4.45 pm inside a taxi (bearing registration number SHB 1220 U) at the carpark between Block 299A and 2998 Tampines Street 22, Singapore, did traffic in a Class "A" controlled drug listed in the First Schedule to the Misuse of Drugs Act (Cap. 185, 2008 Rev. Ed.), to wit by transporting two bundles of granular substance weighing a total of 911.7 grams which was analysed and found to contain not less than 31.52 grams of Diamorphine to the aforesaid place without any authorisation under the said Act or the Regulations made thereunder and you have thereby committed an offence under section 5(1)(a) and punishable under section 33(1) of the said Act, and further upon your conviction, you may alternatively be liable to be punished under section 33B of the said Act.

2 Jointly tried in the same trial was the second accused, Wasis bin Kalyubi ("the Second Accused"), a 61 year old Singaporean, who claimed trial to the following charge:

> First Charge
>
> That you, WASIS BIN KALYUBI, on 1 November 2011 at or about 4.15 pm inside a taxi (bearing registration number SHB 1220 U), along Woodlands Road near Kranji MRT station Singapore did traffic in a Class "A" controlled drug listed in the First Schedule to the Misuse of Drugs Act (Cap. 185, 2008 Rev. Ed.), to wit, by giving two packet of granular/powdery substance weighing a total of 911.7 grams which was analysed and found to contain not less than 31.52 grams of Diamorphine, to [the First Accused], without any authorisation under the said Act or the Regulation made thereunder and you have thereby committed an offence under section 5(1)(a) and punishable under section 33(1) of the said Act, and further upon your conviction, you may alternatively be liable to be punished under section 33B of the said Act.

3 There was also a second charge against the First Accused, which was that of the consumption of methamphetamine under s 8(*b*)(ii) of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) ("MDA"), and punishable under s 33(1) of the same. As for the Second Accused, there were two other charges against him. The second charge was that of trafficking by having in his possession 426.3 g of granular/powdery substance containing not less than 17.14 g of diamorphine under s 5(1)(*a*) read with s 5(2) of the MDA, and punishable under s 33(1) of the same. The third charge was that of consumption of monoacetylmorphine under s 8(*b*)(ii) of the MDA, and punishable under s 33A(1) of the same. The Prosecution did not proceed with these charges at the trial, and proceeded only with the first charge faced by each of the accused persons.

4 At the conclusion of the trial, I convicted both the accused persons of their first charge. Further, I found that each of them had satisfied the

requirements under s 33B(2) of the MDA. Instead of the death penalty, which was provided for under s 33(1), pursuant to s 33B(1)(*a*), I imposed a sentence of life imprisonment on each of them and backdated the sentence to 1 November 2011 for the First Accused and to 16 November 2011 for the Second Accused. In addition, I imposed the mandatory minimum of 15 strokes of the cane on the First Accused. As the Second Accused was 61 years old, pursuant to s 325 of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) ("CPC"), he was not liable for caning. As such, no caning was imposed.

5 The First Accused has appealed against the sentence imposed on him on the ground that it is manifestly excessive. I now furnish my reasons for the case.

The Prosecution's case

6 For the purpose of the trial, the Prosecution tendered an agreed bundle of documents ("ABOD"), comprising statements of 46 witnesses prepared in accordance with s 264 of the CPC, and the accompanying exhibits. Separately, the Prosecution also tendered two additional statements for two further witnesses prepared in accordance with s 264 of the CPC, along with the accompanying exhibits. I shall refer to the statements of the 48 witnesses as "the conditioned statements".

7 In respect of 23 of the 48 witnesses, parties agreed to dispense with their attendance in court, and to admit into evidence their conditioned statements and the accompanying exhibits. Accordingly, I admitted these into evidence without the witnesses taking the stand.

8 Thereafter, 19 witnesses testified for the Prosecution. 16 were duly cross-examined by counsel for the First Accused, Mr Tito Isaac ("Mr Isaac").

Counsel for the Second Accused, Mr John Abraham ("Mr Abraham"), sought minor clarifications from two of the witnesses. In fact, from the outset, the Second Accused's position was that he would not challenge the Prosecution's case. Thus, Mr Abraham had indicated that he would not substantively cross-examine any of the Prosecution witnesses. Essentially, the Second Accused claimed trial because the offence was one punishable with death, and the Prosecution would therefore be required to prove its case in any event.

9 With six witnesses remaining to be called by the Prosecution, Mr Isaac indicated that the First Accused would no longer dispute the Prosecution's case. Accordingly, on 4 May 2016, all parties agreed on the material facts to be placed before the court. The Prosecution tendered a statement of agreed facts which was admitted into evidence pursuant to s 267 of the CPC ("SOF"). As for the six remaining witnesses, their conditioned statements, the accompanying exhibits, and the physical exhibits referred therein, were admitted by consent into evidence without requiring their attendance in court. With the admission of the SOF, the remaining portions of the ABOD and all the exhibits, the Prosecution closed its case.

The Statement of Agreed Facts (SOF)

10 At this juncture, I substantially reproduce the material facts in the SOF.

Facts pertaining to the operations at Kranji MRT Station

11 On 1 November 2011 at about 12.20 pm, a party of Central Narcotics Bureau ("CNB") officers arrived in the vicinity of Kranji MRT station for an operation. At about 4.15 pm, a white Mercedes Taxi bearing licence plate number SHB1220U ("the Taxi") arrived at the taxi stand in front of Kranji MRT station. Senior Station Inspector Ng Tze Chiang Tony ("SSI Tony Ng")

saw a male malay, later ascertained to be the Second Accused, board the Taxi. He was holding what appeared to be a white paper bag. After the Second Accused boarded the Taxi, it moved off.

12 SSI Tony Ng then boarded a CNB operation vehicle which was parked nearby, and followed the Taxi. A short distance away from Kranji MRT station, the Taxi stopped and the Second Accused alighted without the paper bag. SSI Tony Ng then followed the Second Accused on foot. The Second Accused entered a staff room in Kranji MRT station, and SSI Tony Ng stopped following him.

Facts pertaining to the First Accused's arrest at Tampines Street 22

13 Meanwhile, at about 4.15 pm, a separate team of CNB officers learned that a male Malay believed to be in possession of controlled drugs was travelling along Woodlands Road in the Taxi. They were directed to follow the Taxi in their respective vehicles and to arrest the male Malay at an opportune time. The CNB officers then followed the Taxi, which eventually stopped at the carpark between Blocks 299A and 299B at Tampines Street 22.

14 A male Malay, later ascertained to be the First Accused, was then seen alighting from the Taxi, and moving a few metres away from the Taxi. The CNB officers then approached the Taxi. The First Accused then hastily opened the rear passenger door of the Taxi, and boarded it again. Immediately, the Taxi started to make a "three-point" turn. Before the Taxi completed the turn, a few CNB officers comprising Station Inspector David Ng ("SI David Ng"), Staff Sergeant Sunny Chien Lik Seong ("SSgt Sunny Chien") and Sergeant Muhammad Fardlie bin Ramlie moved in to arrest the First Accused. During the arrest, the First Accused put up a struggle. Necessary force was used to arrest him.

15 At about 4.52 pm, a CNB officer, Senior Staff Sergeant Wong Kah Hung Alwin ("SSSgt Alwin"), conducted a search on the First Accused while he was being escorted by SI David Ng. During this process, SSSgt Alwin was wearing a pair of gloves. One "Gardenia" bread plastic bag was found in each of the pockets of First Accused's trousers, one on the left and another on the right. These "Gardenia" plastic bags were suspected to contain controlled drugs ("the suspected drug exhibits").

16 SSgt Sunny Chien assisted SSSgt Alwin by opening up individual polymer bags so that the latter could put the suspected drug exhibits into them. However, SSgt Sunny Chien did not wear gloves while assisting SSSgt Alwin. After the drugs exhibits were seized, they were handed over to SI David Ng, who kept them in his custody. A sum of $1,500 and a white "UNIQLO" paper bag was also recovered from the passenger seat of the taxi by Senior Staff Sergeant Jason Tay Cher Yeen ("SSSgt Jason Tay"), who had searched the Taxi in the presence of the First Accused and the taxi driver. Later, these items were handed over to SI David Ng.

Facts pertaining to the Second Accused's arrest at Woodlands Checkpoint

17 On 16 November 2011 at about 9.25 am, the Second Accused was arrested at Woodlands Checkpoint when he tried to enter Singapore for work.

Facts pertaining to drug and DNA analysis

18 After the First Accused was escorted to CNB headquarters on 1 November 2011, the suspected drug exhibits were handed over by SI David Ng to the Investigating Officer, Assistant Superintendent Mohaideen Abdul Kadir ("IO Mohaideen"). The suspected drug exhibits were then unwrapped,

marked and photographed in the First Accused's presence. DNA swabs were also taken.

19 Subsequently, the suspected drug exhibits were sent to the Health Sciences Authority ("HSA") for drug and DNA analysis. Tan Ying Ying, an analyst with the Illicit Drugs Laboratory, HSA, conducted the drug analysis while June Tang Sheau Wei, an analyst with the Biology Division, HSA, conducted the DNA analysis. The HSA reports have been duly admitted into court, and the results of their analyses are set out below:

Location of exhibit	**Description**	**Marking**	**Analysis results**
Right pocket of the First Accused's cargo pants	One "Gardenia Original Classic Jumbo" plastic bag with one tape	A	The Second Accused's DNA was found on the exterior of the plastic bag and on the tape
	One newspaper wrapped bundle	A1	N.A.
	One bundle wrapped in brown fabric plaster and newspapers	A1A	The Second Accused's DNA was found on a swab taken from this bundle
	Clear plastic packet containing brown granular substance, subsequently confirmed to be diamorphine	A1A1	455.8 g of granular powdery substance found to contain not less than 15.95 g of diamorphine
Left pocket of the First Accused's cargo pants	One "Gardenia Raisin Oatmeal" plastic bag with one tape	B	N.A.
	One newspaper	B1	N.A.

	wrapped bundle		
	One bundle wrapped in brown fabric plaster and newspapers	B1A	N.A.
	Clear plastic packet containing brown granular substance, subsequently confirmed to be diamorphine	B1A1	455.9 g of granular powdery substance found to contain not less than 15.57 g of diamorphine

20 In total, 31.52 g of diamorphine was found in the First Accused's possession.

Background facts in relation to the offences on 1 November 2011

21 It transpired that the Second Accused first came to know the First Accused in or about September 2011 through a friend known to the Second Accused as "Along" or "Abang", and who was also known to the First Accused as "Boy Samad". The person is referred to as "Abang" in the remaining parts of the SOF. "Abang" asked the Second Accused if he could find people to bring diamorphine from Johor to Singapore. However, the Second Accused could not find anyone to do it.

22 On 30 October 2011, as arranged by "Abang", the Second Accused agreed to safe-keep two pounds (or "two batu") of diamorphine, which were to be handed to him by the First Accused. The Second Accused agreed to this arrangement in return for a payment of $400 per pound of diamorphine as he needed money to pay his rent. On that day, the First Accused came to Kranji MRT Station and passed two bundles to the Second Accused. Both the accused persons knew that the two bundles contained two pounds of

diamorphine. These are the suspected drug exhibits referred to at [15], contained in the two "Gardenia" plastic bags.

23 After receiving the bundles from the First Accused, the Second Accused kept them in his locker. On 1 November 2011 at about 4.15 pm, the Second Accused gave the two bundles back to the First Accused in the Taxi as set out in [11]. The Second Accused's act of giving the two bundles of diamorphine to the First Accused was not authorised under the MDA or the Regulations made thereunder.

24 After receiving the two bundles of diamorphine from the Second Accused, the First Accused was supposed to hand them over to "Abang" in Tampines. For this purpose, he travelled to the carpark between Blocks 299A and 299B, Tampines Street 22, in the Taxi. By his action, the First Accused had transported the two bundles of diamorphine, which act was not authorised under the MDA or the Regulations made thereunder.

25 All communications between the First Accused and the Second Accused at all material times, and their roles, were solely in relation to the delivering and transporting of the bundles of diamorphine.

The Agreed Bundle of Documents

26 The SOF was meant to be read in conjunction with the ABOD, to which I now turn. Essentially, the SOF had already captured the key aspects of the evidence contained in the conditioned statements, and the accompanying exhibits. In my view, the contents of the ABOD are consistent with and support the material facts within the SOF. Thus, there is no need to go into the ABOD in any detail. However, when I deal with sentencing in due course at

[40], I will return to some additional evidence in the ABOD concerning the second charge of trafficking against the Second Accused (see [3]).

Close of Prosecution's case

27 At the close of the Prosecution's case, I found that the Prosecution's evidence was not inherently incredible, and satisfied every element of the charges against the accused persons. Therefore, I called on them to provide their defences.

The Defences

28 Given that their positions were that they would not be challenging the Prosecution's case, the First Accused and the Second Accused elected to remain silent. Also, they did not call any other evidence in their defence. No closing submissions were made by either Mr Tito or Mr Abraham to dispute the guilt of the accused persons.

Convictions

29 For an offence of trafficking under s 5(1)(*a*) of the MDA, the ingredients to be established are the act of trafficking in a controlled drug without any authorisation, and knowledge of the nature of the controlled drug. By s 2, "traffic" is defined to include the acts of transporting and giving of a controlled drug.

30 In relation to the First Accused, it was not disputed that the two bundles containing 31.52 g of diamorphine were handed to him by the Second Accused while they were in the Taxi. After the Second Accused alighted from the Taxi, the First Accused continued his journey from the vicinity of Kranji MRT station to the carpark at Tampines Street 22 in order to hand the

diamorphine to "Abang". Therefore, I found that he had trafficked by *transporting* the diamorphine. In addition, the First Accused admitted that he knew that the two bundles contained diamorphine.

31 Turning to the Second Accused, it was not disputed that on 1 November 2011, he gave the diamorphine to the First Accused while in the Taxi. Therefore, I found that he had trafficked by *giving* the diamorphine to the First Accused. Again, the Second Accused admitted that he knew that the two bundles contained diamorphine.

32 Accordingly, I found that the Prosecution had proved beyond a reasonable doubt the respective charge against the First Accused and the Second Accused. I found them guilty and convicted them of the respective charge against each of them.

Sentences

33 By s 33(1) of the MDA read with its Second Schedule, the punishment prescribed for trafficking in more than 15 g of diamorphine under s 5(1) is death. However, pursuant to s 33B, the court has the discretion not to impose the death penalty. Under s 33B(1)(*a*), the court may order life imprisonment and caning of *at least* 15 strokes if the two requirements within s 33B(2) are satisfied. First, the person convicted must prove, on a balance of probabilities, that his involvement in the offence under s 5(1) is restricted to that of a mere courier, as set out in s 33B(2)(*a*)(i) – (iv). Second, the Public Prosecutor must certify that the person convicted has substantively assisted the CNB in disrupting drug trafficking activities within or outside Singapore.

34 On the first requirement, in *PP v Chum Tat Suan and another* [2015] 1 SLR 834 at [63] ("*Chum Tat Suan*"), the Court of Appeal endorsed the

position, expressed by the High Court in *PP v Abdul Haleem bin Abdul Karim and another* [2013] 3 SLR 734 ("*Abdul Haleem*") at [51], that the definition of a courier in s 33B(2)(a) is a narrow one. In *Abdul Haleem*, the High Court concluded that a courier is one whose involvement is limited to delivering or conveying drugs from point A to point B. However, at [67] of *Chum Tat Suan*, the Court of Appeal clarified that if it is clear that the accused person's involvement was truly that of a courier, "the mere incidental act of storage or safe-keeping by the accused person in the course of transporting, sending or delivering the drugs, should not take him outside of the definition of a courier." This was noted in *Abdul Haleem* at [55].

35 Returning to the present case, the First Accused and the Second Accused admitted to their previous antecedents, comprising mainly of drug related offences.

36 For the purpose of sentencing, the Prosecution tendered a Certificate of the Public Prosecutor under s 33B(2)(*b*) of the MDA for the First Accused and the Second Accused each. The Prosecution did not dispute that each accused person's involvement was restricted to that of a courier within s 33B(2)(*a*). The Prosecution left sentencing to the Court.

37 In mitigation, Mr Tito tendered a written plea, which covered the personal and family circumstances of the First Accused. Essentially, Mr Tito submitted that the First Accused was merely a courier in that his role in the offence was restricted to transporting the diamorphine under the direction of Abang. Mr Tito submitted that the death penalty should not be imposed.

38 Similarly, Mr Abraham submitted that the Second Accused was a courier, who only delivered the diamorphine, and urged the court to exercise its discretion under s 33B(1)(*a*) of the MDA.

39 In respect of the First Accused, given my findings at [30], I was satisfied that he had proved on a balance of probabilities that his role was restricted to that of transporting the diamorphine within s 33B(2)(*a*) of the MDA. As for the Second Accused, apart from delivering the diamorphine on 1 November 2011 as found at [31], he kept the diamorphine from 30 October 2011 to 1 November 2011. However, I was of the view that such safekeeping was merely incidental to the act of delivering the diamorphine, and did not expand his role beyond that of a courier as defined in s 33B(2)(*a*) of the MDA.

40 For completeness, I set out some additional evidence in the ABOD. Specifically, there were 10 statements given voluntarily by the Second Accused to CNB officers. In them, the Second Accused explained that he was living in Johor at the material time, and would travel to Singapore to work. Then, in two of the statements recorded under s 22 of the CPC, the Second Accused described the circumstances surrounding the second charge of trafficking against him. The first was recorded by Inspector Michelle Sim on 26 November 2011, at 3.05 pm, and the second was recorded by IO Mohaideen on 5 July 2012 at 11.12 am.

41 In gist, the Second Accused recounted how he came to be in possession of the bundle of diamorphine which formed the subject matter of the second charge ("the third bundle of diamorphine"). The Second Accused stated that the First Accused informed him to pick up the third bundle of diamorphine which has been placed outside his home in Johor, and to bring it to Singapore. Thereafter, the Second Accused brought it into Singapore from

Johor, and kept it in his locker at Kranji MRT station. The third bundle of diamorphine was also meant to be delivered to the First Accused. However, the Second Accused was arrested and the third bundle of diamorphine was recovered from his locker at the point of arrest. The Second Accused claimed that it was the only time he had brought drugs from Johor to Singapore.

42 In my view, the Second Accused's involvement with the third bundle of diamorphine, of bringing it into Singapore and safekeeping it before delivery, indicated that generally, he was but a mere courier. As for the First Accused, I observed that the evidence showed that he contacted the Second Accused in relation to the transportation of the third bundle of diamorphine, and was meant to take delivery of it. However, there was no evidence on what the First Accused would have done with this third bundle of diamorphine. More importantly, there was nothing to suggest that he would go beyond delivering and transporting it. In other words, the circumstances of this transaction did not point to the First Accused acting other than as a courier in respect of the third bundle of diamorphine which might in turn impact my consideration of his role for the purpose of sentencing. In my view, the evidence did not detract from my finding that the First Accused was but a mere courier.

43 Accordingly, I found that the accused persons had satisfied the requirements of section 33B(2) of the MDA. In the exercise of my discretion within s 33B(1)(*a*), instead of imposing the death penalty, I imposed the sentence of imprisonment for life on the First Accused and the Second Accused, backdated to 1 November 2011 and 16 November 2011 respectively. I also imposed the mandatory minimum caning of 15 strokes. No caning was imposed on the Second Accused, as he was not liable for caning under s 325 of the CPC.

44 As set out at [5], the First Accused has appealed against the sentence imposed on the ground that it is manifestly excessive. However, I have already imposed the mandatory minimum punishment provided by law.

Conclusion

45 Finally, I should add that pursuant to s 147(1) of the CPC, the Prosecution applied to withdraw the remaining charges against the accused persons. Consent was granted to do so.

Hoo Sheau Peng
Judicial Commissioner

John Lu Zhuoren and Nicholas Wuan Kin Lek (Attorney-General's Chambers) for the prosecution;
Tito Isaac and Jonathan Wong (Tito Isaac & Co LLP) for the first accused;
John Abraham (Crossborders LLC) and Lam Wai Seng (Lam WS & Co) for the second accused.