Cheng Siah Johnson v Public Prosecutor
[2002] SGHC 84

Case Number : MA 22/2002

Decision Date : 24 April 2002

Tribunal/Court : High Court

Coram : Yong Pung How CJ

Counsel Name(s) : SS Dhillon (Dhillon Dendroff & Partners) for the appellant; Jaswant Singh (Deputy Public Prosecutor) for the respondent

Parties : Cheng Siah Johnson — Public Prosecutor

Criminal Law – Statutory offences – Misuse of Drugs Act – Consumption of controlled drug – Urine tests – Appellant testing positive for controlled drug – Presumption of consumption – Defence of 'spiking' and unknowingly consuming drinks of others – Burden and standard of proof – Courts' approach to such defence – Whether evidence sufficient to rebut presumption – Whether practice of sharing drinks at nightclubs relevant – ss 8(b)(I) & 22 Misuse of Drugs Act (Cap 185, 1998 Ed)

Criminal Procedure and Sentencing – Trials – Rights of accused – Plea of guilt – Judge allowing retraction – Whether retraction affects accused's ability to discharge evidential burden – Whether casts doubt upon defence

Evidence – Admissibility of evidence – Statements to narcotic officers – Whether appellant's statements under ss 121 and 122(6) of Criminal Procedure Code (Cap 68) admissible – Whether statements confessions – s 24 Evidence Act (Cap 97, 1997 Ed)

Evidence – Weight of evidence – Withdrawal of charge against another – Defence witness sharing drink with appellant, testing positive for controlled drug and charged for consumption – Withdrawal of charge – Weight to be attached to fact

Evidence – Weight of evidence – Defence of spiking – Co-accused absconding – Appellant alleging spiking of drinks by co-accused – Whether linkage between appellant and co-accused exists – Whether sharing of drinks between appellant and co-accused – Burden of proof

Evidence – Weight of evidence – Evidence of defence witnesses – Whether adverse inference to be drawn from defence witnesses' failure to approach authorities before trial – Effect of discrepancies between evidence of defence witnesses and appellant

Criminal Procedure and Sentencing – Sentencing – Penalties – Consumption of controlled drug – Whether sentence of 18 months' imprisonment manifestly excessive – ss 8(b)(i) & 33 Misuse of Drugs Act (Cap 185, 1998 Ed)

Judgment

GROUNDS OF DECISION

Introduction

This was an appeal against conviction and sentence. The appellant, Cheng Siah Johnson ('Johnson') was convicted and sentenced to 18 months' imprisonment in the district courts on 29 January 2002 on the following charge:

> You, Cheng Siah Johnson Male/28 years NRIC: S7131170-H are charged that you, on or about the 25th day of May 2001 in Singapore, did consume a controlled drug as specified in Class B of the First

> Schedule of the Misuse of Drugs Act, Chapter 185, to wit, Ketamine without authorisation under the said Act or the Regulations made thereunder and you have thereby committed an offence under section 8(b)(i) and punishable under section 33 of the Misuse of Drugs Act.

I dismissed both appeals and now set out my reasons.

The facts

2 The agreed statement of facts tendered by the prosecution stated that, on 25 May 2001 at or about 1.45 am, Johnson was arrested with other persons in Velvet Underground Disco Pub ('Velvet') on suspicion of consuming drugs. At the Central Narcotics Bureau Headquarters two samples of urine were taken from him and were marked and sealed in his presence. These urine samples were subsequently found to contain traces of Ketamine.

3 Johnson was formally charged with consuming a controlled drug on 25 June 2001. He pleaded guilty to the charge on 13 November 2001 and sentencing was adjourned to 18 December 2001 for his then counsel to prepare a written mitigation before sentence. There was a further application for a postponement of sentencing on 18 December 2001, before the plea of guilt was retracted on 27 December 2001. The matter thereafter proceeded to trial and four witnesses, namely, Narcotics Officer Mohd Fazuri Bin Isnin ('DW2'), his fiance Eileen Tan ('DW3'), Chua Eng Hwee ('DW4') and Lim Siah Boon ('DW5') were called for the defence. The defence was twofold: the appellant did not consume Ketamine intentionally or knowingly because (1) his drink had been spiked; (2) he had drunk from glasses which did not belong to his party. The defence also attempted to draw a linkage to one "Lim Kee Ling" whom it claimed could be responsible for spiking Johnson's drinks.

The appellant's version of facts

4 Johnson testified that on 24 May 2001, he had arranged to meet DW3, DW4 and two other friends, Rudolf and Fabian, outside the entrance of Velvet at about 11.30 p.m. When the group was assembled, all five of them proceeded into Velvet which was described as being "packed shoulder to shoulder". They found space at a long rectangular table of about 15 feet long and stationed themselves there. Johnson remembered that there were about 10 to 15 jugs on the table with about 20 to 30 glasses "huddled together". He ordered a first round of drinks: two jugs of beer and a jug of bourbon coke and the group subsequently left for the dance floor.

5 Upon their return, Johnson claimed that there were a lot more drinks on the long table and the drinks "were in a mess and mixed up". He remembered one incident when he asked DW3 to identify their drinks and was told that their jug was at the left hand side of the long table, away from where they were standing. Subsequently, he claimed that he saw someone from a small round table, about three feet away, taking a drink from that jug. The people at this particular table had apparently placed some of their drinks on the left-hand side of the long table, about one foot away from Johnson's, because their table was too small to contain all their drink. At that time, Johnson stated that he had already taken a few sips or almost one-half of a mug of beer. He told DW3 of his mistake and asked for a new mug of beer. Johnson also testified that, throughout that night, about eight to ten friends had offered him drinks. He had accepted them because it felt it would be rude not to. In particular, one Lim Kee Ling and 'SB' ('DW5') whom he knew as "hi and bye friends", were seated at the small round table and had offered him a glass of beer and a bottle of Corona. He drank the entire glass of beer and about three quarters of the bottle of Corona.

The version of facts of the appellant's witnesses

6 DW2 was the investigation officer in charge of the case. He testified that 37 people were arrested on 25 May 2001. Seven of them were found to have controlled or prohibited drugs in their urine samples. Amongst them, Lim Kee Ling, DW5 and the appellant were charged with consuming Ketamine. Lim Kee Ling had absconded after being charged, one other was acquitted of the charge and a stern warning was given to him whilst another one and the appellant claimed trial.

7 DW3 testified that there were already "10 to 15 mugs" and about 15 glasses of beer on the long table when they arrived. She stated that, as the night went on, the table became very messy and Johnson had difficulty differentiating their drinks from the rest on the table, such that it became a "guessing game" at times. She stated that there were several occasions when she noticed Johnson "pick up a mug and put it back immediately, pick up another mug next to it, put it back immediately and pick up a third mug next to it, look around and in the end drink from it". She emphasised one particular incident when Johnson had asked her to identify their jug of beer. He then took the jug and poured some of the beer from the jug into a mug that he took from the table. Subsequently she had wanted to pour a drink for a friend from that same jug but was told by Johnson that it had been moved to the small round table. She further stated that she went over to the small round table and was told by someone that the jug belonged to them but had only been placed on the long table because there was no space on their table. This person was a friend of "Kee Ling" and DW5. DW3 testified that she was offered a full mug of beer but, as she disliked drinking beer, she passed it to DW5 instead. Kee Ling then picked up another mug of beer and these two mugs were then shared between Kee Ling, DW5 and Johnson.

8 DW3 also stated that the occupants of the small round table had placed jugs of beer, about six or seven mugs and a few Coronas on the long table. These drinks were grouped together with their drinks on the long table and, except for the Coronas, the drinks were otherwise indistinguishable from each other.

9 DW4 testified that Johnson had ordered Vodka with Ribena for the first round of drinks. Many jugs of drinks and glasses had been left on the long table by people who were dancing, standing and sitting. However these did not include the drinks of the people around the small round table which remained on their table. According to DW4, as the night progressed, they were unable to differentiate which were their drinks. He and Johnson simply grabbed whatever drinks were by their side without knowing exactly what they were drinking. DW4 also testified that more than four or five people from the small round table, both men and women, had offered Johnson drinks.

10 DW5 was the friend of Chan Choon Chye. On the night of 24 May 2001, at around midnight, he went alone to Velvet. He had a glass of whisky with friends at the small round table before moving to the long table where he saw Chan Choon Chye. At the long table, a friend of DW3 formally introduced him to Johnson for the first time. DW5 testified that Johnson had offered him a drink from the glasses that were already on the long table. Both of them then drank from the same glass. Other than this glass of beer, he remembered drinking from a common jug using straws with other friends. Although DW5 tested positive for Ketamine, charges were dropped against him and he was discharged after a stern warning.

The decision of the court below

11 The district judge was unable to find that the defence had succeeded in rebutting the presumption

in s 22 of the Misuse of Drugs Act (Cap 185) on a balance of probabilities. He did not believe that Johnson, as a 30 year old businessman who had been frequenting pubs since he was 20, had never realised the dangers of taking other people's drinks. From the numerous shifts in position from his evidence-in-chief and the hesitant way in which he explained why drugs were found in his urine samples, vacillating between alleging that he had drunk from a glass that he had been offered to admitting that he could have drunk from a glass that he had picked up from the table, the district judge concluded that his testimony was not to be believed. Neither did Johnson offer any such explanation in his s 122(6) cautioned statement taken one month after the incident on 25 June 2001.

12 The district judge also noted several material inconsistencies between the testimonies of Johnson, DW3, DW4 and DW5. In his view, the attempt by the defence to draw a "linkage" between Johnson and Lim Kee Ling failed as Johnson's evidence that both DW5 and Lim Kee Ling had offered him drinks was debunked by DW5 who had testified that it was Johnson who had offered him a drink. There was also no credible reason why Lim Kee Ling would have wanted to spike Johnson's drinks.

The appeal

13 Before me, counsel for the appellant argued that the district judge had erred in the following respects:

> (1) Failing to give any or sufficient weight to the s 122(6) statement and to the s 121 statement of the appellant
>
> (2) Failing to attach any weight to the fact that DW5 who had shared a drink with the appellant and was tested positive for Ketamine had his charge withdrawn
>
> (3) Failing to consider all the circumstances of the case including the fact that it was common practice for patrons of nightclubs to share drinks
>
> (4) Failing to consider the contention that Lim Kee Ling could have spiked the appellant's drinks
>
> (5) Concluding that DW3's, DW4's and DW5's testimonies in support of the appellant were less likely to be believed because they had failed to offer themselves as witnesses to the authorities prior to the trial.

The statutory presumption in s 22 of Misuse of Drugs Act

14 Before turning to each ground of appeal proper, I shall make some preliminary observations about s 22 of the Misuse of Drugs Act. The provision is in the following terms:

> Presumption relating to urine test
> s 22 – If any controlled drug is found in the urine of a person as a result of both urine tests conducted under section 31, he shall be presumed, until the contrary is proved, to have consumed that controlled drug in contravention of section 8(b).

15 I had previously in *Vadugaiah Mahendran v PP* [1996] 1 SLR 289 held that the statutory

presumption in s 22 was two-fold in that proof of the primary fact by the prosecution i.e. a controlled drug was found in the urine as a result of both urine tests in s 31, triggered the actus reus of consumption and the mens rea required for the offence. The burden of proof hence fell upon the defence who would have to disprove either element on a balance of probabilities. It was insufficient if the appellant merely raised a reasonable doubt. It may be that, in most circumstances (when s 31 is read together with s 16), the defence would find it virtually impossible to rebut the presumption of consumption and would have to rely solely upon evidence to disprove intention or knowledge of consumption. Therein lies the reason why the defence of 'spiking' and unknowingly consuming the drinks of strangers are so commonly utilised in cases of this kind. These are allegations that are extremely easy to make but which are almost impossible to debunk. Although it is not the law that a commonly used defence will not be accepted, a judge may be obliged to approach such a defence with greater caution and circumspection than usual in the absence of any other credible evidence: *PP v Hla Win* [1995] 2 SLR 424. In this way, importing a statutory presumption into s 22 may well have the effect of imposing a minimum degree of care upon patrons of nightclubs to be wary of sharing drinks with others.

The weight to be given to the s 122(6) and s 121 statements of the appellant

16 Counsel for the appellant argued that the district judge failed to give any or sufficient weight to the fact that the appellant had in his s 122(6) statement declared that he was innocent of consuming any form of drugs. The district judge was also wrong in faulting the appellant for not making any specific mention of his defence that he did not consume the drugs knowingly because of a mix-up of glasses or jugs of beer. He relied upon *Teo Keng Pong v PP* [1996] 3 SLR 329 for the proposition that a submission that a prima facie case could not be answered by a bare denial could not be accepted. The prosecution replied that the appellant's bare denials in his statements had to be viewed in the context that the appellant never once mentioned the defences raised later at the trial and that he had pleaded guilty earlier. Both factors raised doubts as to the genuineness of his defences. I shall deal with both arguments briefly.

17 *Teo Keng Pong* supra. was a case that was very different from the one at hand. It was one when the usual burden of proving beyond reasonable doubt at the end rested upon the prosecution. Conversely, when the burden was on the defendant to rebut the statutory presumption, a bare denial (or a declaration of innocence) without any explanation or mention of his defence would be manifestly inadequate in rebutting the presumption and consequently little weight would be accorded to it. I agreed with the prosecution that a failure to mention any part of the defence in the s 122(6) statement ordinarily entitles a court to draw adverse inferences via s 123 Criminal Procedure Code or s 116 of the Evidence Act. However, I disagreed with the suggestion that a retraction of a plea of guilt necessarily cast doubts upon the validity of a defence. It is trite law that the trial judge has the discretionary power to allow an accused person to change his plea at any time before sentence or before the court is *functus officio*, and if there is a reasonable doubt as to the validity or unequivocality of the plea of guilty, the trial judge will have to allow the accused person to retract his plea of guilty and order a re-trial (see *Lee Weng Tuck v PP* [1989] 2 MLJ 143, *Ganesun s/o Kannan v PP* [1996] 3 SLR 560). The trial must provide the accused person with a fresh opportunity to answer the charges against him and the prior retraction of a plea of guilt should rightly not affect his ability to discharge his evidential burden at the criminal trial of the offences charged. On the facts of this case, the judge had allowed the appellant to retract his plea of guilty on 27 December 2001 prior to sentencing. The judge would obviously not have permitted the appellant merely at whim to change his plea, but must have been satisfied that there were valid and sufficient grounds for allowing him to do so. I was hence of the view that it would be wrong in the circumstances and in the absence of any other reason to infer from the outset that his defence could not be believed.

18 These arguments aside, one fundamental aspect of the statements seemed to be ignored by the parties. It was this: both the s 122(6) and s 121 statements were recorded by narcotics officers. It had been established in cases such as *Chai Chien Wei Kelvin v PP* [1999] 1 SLR 25, *Sim Ah Cheoh v PP* [1991] SLR 150 and *Tan Siew Chay v PP* [1993] 2 SLR 14 that s 122(5) CPC is not applicable to narcotics officers. Rather, the admissibility of the appellant's statements fall to be tested by s 24 of the Evidence Act (Cap 97). That section makes it clear that in order for such statements to be admissible as evidence, they had to be (1) confessions and (2) not made under any inducement, threat, or promise, which in the opinion of the court would have led the maker of the statement to believe that he would gain some advantage or avoid some evil of a temporal nature in reference to the proceeding against him. I was unable to read the s 121 and s 122(6) statements here as amounting to confessions. In his s 121 statement, the appellant merely described how the urine samples were obtained from him whereas his s 122(6) statement had the following sentence: "I'm really innocent of consuming any form of drugs. I'll try my best to prove myself…" Admissibility of a statement is a precursor to a court's determination of its probative value and the s 121 and s 122(6) statements of the appellant were not admissible via s 24 of the Evidence Act. Therefore the parties erred in admitting the statements as evidence and the district judge ought not to have considered them in coming to his decision.

The weight to be attached to fact that DW5 had his charge withdrawn

19 The defence took issue with the fact that DW5, who testified to having unknowingly consumed Ketamine in largely similar circumstances as the appellant, had his charge withdrawn against him and was let off with a stern warning. I was unable to see the relevance of this. First, while DW5 testified that he had shared a drink with the accused, this was not the only drink which he had consumed throughout the night. The drug could have been found in some other drink. DW5 also admitted that he could not be sure if it was that drink which he had shared with the appellant that was tainted. Even accepting that it was possible that that drink had been spiked, I noted that it was actually Johnson who had offered the mug of beer to DW5. This gave rise to the possibility that Johnson could in fact have been the one who had 'spiked' the drinks. There was a further discrepancy: DW5 had testified that the mug of beer was from Johnson's side of the long table whereas Johnson's case was that the drinks actually belonged to the small round table. Secondly, I agreed with the district judge when he held that in any criminal prosecution, each case had to be adjudged on the basis of the evidence adduced at the trial. It is not the role of the courts to engage upon idle speculation as to what should or might have been. Thirdly, it is axiomatic that the courts will not interfere in matters concerning the exercise of prosecutorial discretion: *Arjan Singh v PP* [1993] 2 SLR 271. The power to institute, conduct or discontinue any proceedings for any offence is vested in the Attorney-General by the Constitution of the Republic of Singapore, see Article 35(8) of the Constitution and s 336 CPC. This is an absolute discretion and one which I believe is carefully exercised. It is widely acknowledged that the prosecution has no interest in prosecuting innocent or unmeritorious claims. In fact, the reality often is that the prosecution only prosecutes when it is satisfied that there is more than a reasonable prospect of success. Therefore, I was of the view that, in the absence of credible evidence, the defence could draw no assistance from the fact that a charge against DW5 had been withdrawn in establishing the innocence of the appellant.

The contention that Lim Kee Ling could have spiked the drinks

20 I moved on to consider the appellant's contention that he had drawn a "linkage" to one Lim Kee Ling whom he claimed was responsible for spiking his drinks. His reasoning was this: Lim Kee Ling and the appellant had shared the same drinks and the former was on the run after his urine was tested

positive for Ketamine and, if he had been produced, his evidence in court might have corroborated the appellant's evidence.

21 I was unable to see any such "linkage" between the appellant and Lim Kee Ling. The appellant admitted that he and Lim Kee Ling were friends. DW3 confirmed this when she testified that Lim Kee Ling and the appellant were acquaintances in the disco scene and had known each other for a few months prior to the incident. All the witnesses also agreed that the appellant was very friendly and well-liked by everyone. In fact on the material night, DW4 had teased him about the number of people who had offered him drinks and the widening of his circle of friends. There were no arguments or unhappiness between the appellant and Lim Kee Ling or anyone else. As such, I could find no discernible motive as to why anyone, much less Lim Kee Ling, would have wanted to implicate the appellant by spiking his drinks. More importantly, the evidence that Lim Kee Ling had shared drinks with the appellant and DW5 was pro-offered by only the appellant and DW3. DW5 contradicted this when he testified that he shared a drink with the appellant and not with both of them. No evidence was also led as to whether DW5 knew Lim Kee Ling. There were also discrepancies between the testimonies of the appellant and DW3. He had stated that Lim Kee Ling and DW5 were seated at a small round table having a birthday celebration and they offered him a glass of beer and a bottle of Corona. Conversely, DW3 testified that when she went to the small round table to inquire about the jug, she was offered a glass of beer but passed it to DW5 instead (who together with the appellant and Lim Kee Ling were standing near her). Lim Kee Ling also took another glass of beer and both glasses of beer were then shared between the three of them. The defence failed to adduce other additional evidence or call further witnesses to establish that the appellant had indeed shared drinks with Lim Kee Ling. In addition, the burden was on the appellant to find Lim Kee Ling and, in his absence, it would be highly speculative to assert that his evidence would have corroborated the appellant's evidence.

The evidence of DW3, DW4 and DW5

22 The trial judge had noted that both DW3 who was the appellant's fiance and DW4 who had known the appellant for about eight to ten years did not go to the authorities to give any statements on behalf of the accused before the trial date. He felt that their failure to approach the authorities before the trial coupled with their close relationship with the appellant meant that their evidence was suspect. I doubt that such an adverse inference could be drawn against them. It was undisputed that none of them were ever approached by the police or the narcotics officers to provide statements. The situation would be different if they had been asked for statements prior to the trial but had refused to give them or having given them then refused to testify at the trial: s 116(g) Evidence Act.

23 However, there were numerous material discrepancies between the evidence of the appellant, DW3, DW4 and DW5. In particular, I noted that DW4 had initially testified that the appellant had ordered jugs of Vodka with Ribena when they first arrived at Velvet, whereas both the appellant and DW3 claimed that they had ordered jugs of beer and bourbon coke. When told by defence counsel of the earlier evidence of the appellant and DW3, DW4 became evasive and said that he could not remember. This cast doubt on the types of drinks that were ordered that night, which was relevant towards the issue of whether there was actually a mix-up of drinks and glasses as alleged by the appellant. DW4 also stated that all the drinks of the other group were placed on the small round table. This was contrary to the evidence of the appellant and DW3 who stated that the appellant could have drunk from the glasses and jugs belonging to the small round table which were placed on their side of the long table.

24 Similarly, DW5's evidence was irreconcilable with that of the appellant and DW3. He had stated

that he was at the long table with Chan Choon Chye whereas both the appellant and DW3 claimed that he was with Lim Kee Ling at the small round table. He further stated that it was the appellant who had offered him a drink rather than the other way round. This was also contrary to DW3's evidence that it was she who had given DW5 a mug of beer. I also found the testimonies of the appellant and DW3 with respect to the 'incident' to be questionable. First of all, their testimonies suggested that this 'incident' occurred in entirely different circumstances. DW3 said that it was she who had asked the appellant where their jug of beer was when she wanted to pour a drink from it for one of her friends. On the other hand, the appellant said that he told DW3 of the mix up when he saw someone from the small table pouring the drinks into his own glass. Secondly, the appellant was silent on the entire sequence of events about DW3 going to the small round table and inquiring about the 'missing' jug. He said that he had asked the waitress for a new mug of beer instead, whereas DW3 said that he did no such thing. These inconsistencies cumulatively raised doubts as to the appellant's defence that there was a mix-up of drinks at the long table causing him to drink from someone else's glass or that he had been offered a 'spiked' drink. On these grounds, I found no reason to interfere with the judge's finding that the appellant was not a credible witness.

25 I have stated the reasons why the defence failed to draw a "linkage" with Lim Kee Ling and why it was irrelevant that DW5 had his charge withdrawn. I was hence of the view that the appellant had not furnished any evidence to show that the drinks were spiked. In addition, I also found it telling that, of the entire party of five (the appellant, DW3, DW4, Rudolf and Fabian) only the appellant had tested positive for Ketamine. This was despite the evidence of the appellant, DW3 and DW4 that all four of them, save for DW3, had difficulty in distinguishing their drinks and had simply grabbed whatever drinks were at their side. The material inconsistencies between the evidence of the appellant and his witnesses also raised suspicions as to the validity of his defences. With respect to the point that the judge had failed to consider the fact that it was common for patrons of night clubs to share drinks, the sole issue was whether the appellant had provided sufficient evidence to rebut the presumption in s 22 of the Act on a balance of probabilities. This was regardless of what the practice at nightclubs was. Considering all the evidence that had been adduced on behalf of the appellant (excepting the s 121 and s 122(6) statements), I found that he had failed to disprove the presumption of consumption on a balance of probabilities.

The appropriate sentence

26 Consumption of Ketamine is viewed as a serious offence because of its harmful effects on the minds, bodies and lives of those who consume it. What is particularly worrying is that, despite the continued efforts of the authorities, the use of such 'designer' or 'club' drugs remains on the rise amongst youths. The profile of the typical drug abuser is also changing, more of them are young and more of them are also female. It has also been brought to my attention that the number of first-time drug abusers caught for using Ketamine almost doubled last year. This is a social problem that can escalate to uncontrollable proportions if left unchecked.

27 It is the responsibility of the courts to send a strong message to the public that such drug offences are taken very seriously: *Chua Poh Kiat v PP* [1998] 2 SLR 713. Bearing in mind the gravity of the offence and the maximum limits of punishment as prescribed by s 33 of the Act, I did not consider that the sentence of 18 months' imprisonment was so manifestly excessive as to justify it being reduced. In the premises, both appeals against conviction and sentence were dismissed and the appellant was ordered to commence his term of imprisonment immediately.

Appeal dismissed

Sgd:

YONG PUNG HOW
Chief Justice