Kwek Seow Hock *v* Public Prosecutor
[2011] SGCA 12

Case Number : Criminal Appeal No 19 of 2009

Decision Date : 07 April 2011

Tribunal/Court : Court of Appeal

Coram : Chan Sek Keong CJ; Andrew Phang Boon Leong JA; V K Rajah JA

Counsel Name(s) : Eugene Thuraisingam and Mervyn Cheong (Stamford Law Corporation) and Raymond Lim (Raymond Lim & Co) for the appellant; Eugene Lee and Gordon Oh (Attorney-General's Chambers) for the respondent.

Parties : Kwek Seow Hock — Public Prosecutor

Criminal Law

Evidence

[LawNet Editorial Note: This was an appeal from the decision of the High Court in [2009] SGHC 202.]

7 April 2011

Chan Sek Keong CJ (delivering the grounds of decision of the court):

1 The appellant in this appeal, Kwek Seow Hock ("the Appellant"), appealed against the judgment of the High Court judge ("the Judge") in Criminal Case No 8 of 2008. The Judge convicted the Appellant on a charge of trafficking in not less than 25.91g of diamorphine (more commonly known as heroin) without any authorisation – a capital offence that is punishable pursuant to s 5(1)(*a*) read with s 33 of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) ("the Act") (see *Public Prosecutor v Kwek Seow Hock* [2009] SGHC 202 ("the GD")).

2 After hearing the submissions of the Appellant and the Prosecution, we dismissed this appeal. We now give our reasons.

Background facts

3 The Appellant had worked for one "Ah Long", an unauthorised supplier of controlled drugs, in making drug deliveries to persons as instructed by Ah Long. On 20 July 2007, the Appellant was instructed to receive drugs from one "Ah Seng". [note: 1] After meeting Ah Seng, he was on his way to hand over S$6,650.00 in cash to one "Jackie" [note: 2] when, at around 11.15pm, he was arrested by officers from the Central Narcotic Bureau ("the CNB") at the vicinity of the car park of Block 23 Hougang Avenue 3. [note: 3] When he was arrested, the Appellant had in his possession a black "Hugo Boss" paper bag. [note: 4] An "Ever Rich" paper bag was found inside the "Hugo Boss" paper bag. The paper bags contained, *inter alia*, S$6,650 in cash, one red packet that contained one sachet and one straw of white granular substance, one red packet that contained 6½ dormicum tablets, and 46 packets of white granular substance [note: 5] ("the Packets"), which were subsequently established by scientific analysis to contain 25.91g of diamorphine. [note: 6] The Appellant was also found to have S$2,409.15 in cash in his wallet and pockets. [note: 7]

4 Pursuant to s 17 of the Act, there was a presumption that the Appellant had the Packets (which contained 25.91g of diamorphine) in his possession for the purposes of trafficking. On 25 July 2007, a long statement (*ie*, a statement recorded pursuant to s 121 of the Criminal Procedure Code (Cap 68, 1985 Rev Ed) ("the CPC")) was recorded, in which the Appellant made the following admission: [note: 8]

> All the drugs found in the black bag are for selling. Only the one packet of heroin, 1 straw of heroin and 6 ½ [d]ormicum tablets [*ie*, the drugs found in the red packets] are for my consumption, the rest are for selling.

The Appellant, in addition, did not dispute the fact that he knew that the Packets contained diamorphine.

5 However, during the trial, the Appellant claimed that he had intended to retain 23 of the Packets (*ie*, half of the Packets) for his own consumption (this will be referred to as "the defence of consumption" where appropriate). If the Judge had accepted the defence of consumption, the Appellant would have, *inter alia*, successfully established that the quantity of diamorphine that he had trafficked in was not above the 15g threshold for his offence to attract capital punishment.

The findings of the Judge

6 At the conclusion of the trial, the Judge rejected the defence of consumption and held that the Appellant had failed, on a balance of probabilities, to rebut the presumption under s 17 of the Act. Accordingly, the Prosecution was held to have established its case beyond reasonable doubt (see [78] of the GD). The main reasons for rejecting the defence of consumption could be said to be as follows:

(a) The Appellant did not have the financial means to purchase half of the Packets, and there was no arrangement to pay Ah Long in instalments (see [35]–[46] and [73] of the GD).

(b) As the Appellant admitted that he had a ready supply or access to heroin, it was unlikely that he would have needed to stockpile 23 of the Packets for himself (see [47] and [73] of the GD).

(c) An adverse inference could justifiably be drawn against the Appellant, as he had failed to mention the defence of consumption in his long statements (see [65]–[70] and [74] of the GD).

(d) The Appellant had stated in his long statement dated 25 July 2007 that all of the drugs that were seized, save for the drugs in the two red packets, were for sale (see [65] and [74] of the GD).

(e) If the Appellant had really intended to keep 23 of the Packets for himself, it would have been reasonable to expect him to separate out those that he had intended to keep before he met Jackie to pass the rest to him (see [76] of the GD).

In relation to (c) above, the Judge did not draw an adverse inference from the Appellant's failure to mention the defence of consumption in his cautioned statement (*ie*, a statement recorded pursuant to s 122(6) of the CPC), after having regard to the fact that the statement was recorded early in the morning and the probable poor state of the Appellant at that point in time (see [60]–[64] of the GD).

The submissions on appeal

The main submissions of the Appellant

7 The Appellant's case, in essence, was that the Judge had made the wrong findings of fact on the evidence in coming to the conclusion that the presumption under s 17 of the Act had not been rebutted. It was, in particular, submitted that:

(a) The Appellant intended to hand over only the money to Jackie, and that was why he did not separate the half of the Packets which he had intended to keep for his own use.

(b) The Appellant had the financial means to pay for half of the Packets. He had S$2,409.15 in cash (which was found on him) and S$1,200 in his bank account, and expected to receive S$650 from Jackie. Also, he could pay Ah Long in instalments.

(c) The Appellant did not have ready access to heroin as he received an average of one consignment of drugs from Ah Long every two months, and given that the Appellant was a heavy user of heroin, it was reasonable for him to stockpile a sufficient quantity of heroin to satisfy his needs until the next consignment.

8 The Appellant also contended that the Judge had erred in law in drawing an adverse inference against him for his failure to disclose the defence of consumption in his long statements. Counsel for the Appellant pointed out that when those statements were recorded, the Appellant was under the impression that he would face a charge of trafficking 335g of heroin (which would be substantially above the capital offence threshold of 15g), and, therefore, he did not think that it would have mattered whether or not he stated that 23 of the Packets were intended for his own consumption.

The main submissions of the Prosecution

9 The Prosecution's case, in essence, was that the Judge had made the correct findings and that the defence of consumption was an afterthought. The Prosecution contended that:

(a) The fact that the Appellant was a heavy user of heroin did not necessarily mean that he had intended to keep 23 of the Packets for his own consumption.

(b) The Judge's finding that the Appellant had intended to deliver both the drugs and the money to Jackie was supported by the Appellant's long statement dated 22 July 2007 where he stated that Ah Long had instructed him to pass the drugs to someone at Block 23 Hougang Avenue 3 (where he was arrested).

(c) The Appellant had no reason to stockpile two to three months' supply of heroin since he admitted that he had ready access to Ah Long, and, furthermore, it was risky for him to keep so many packets of heroin in his possession.

(d) The Appellant did not have the financial resources to purchase 23 of the Packets, as he did not have sufficient cash or a real source of income, and, further, there was no evidence to support his claim that he could pay Ah Long in instalments.

10 The Prosecution also submitted that the Judge was not wrong to have drawn an adverse inference against the Appellant due to his failure to disclose the defence of consumption in his long statements. In this regard, reference was made to the decision of this court in *Lim Lye Huat Benny v Public Prosecution* [1995] 3 SLR(R) 689 ("*Lim Lye Huat Benny*"). In that case, this court upheld the decision of the trial court to draw an adverse inference against the appellant due to his failure to

mention his defence or the material aspects of it in his long statement.

The decision of this court

The findings of fact

11 Based on the evidence before the Judge, it was our view that the Judge had not erred in his findings of fact. The Appellant had, to begin with, admitted in his long statement dated 25 July 2007 that the Packets were meant for "selling" (see [4] above). That aside, the Judge was justified in finding on the evidence that the Appellant had no reason to stockpile 23 of the Packets when he had ready access to a supply from Ah Long, and also that he would not have been able to finance the purchase of 23 of the Packets. In his long statement dated 22 July 2007, the Appellant also stated that he had been instructed to deliver both the drugs and the money to Jackie. He said: [note: 9]

> [Ah Long] told me to pass [the drugs] to someone at [Block] 23 Hougang Ave 3. ... He also told me to pass the $6[,]650 to the person. The money will be together with the drugs.

On the evidence, the only person whom the Appellant intended to meet at Block 23 Hougang Avenue 3 was Jackie. Therefore, the Judge was well entitled to conclude that the "someone at [Block] 23 Hougang Ave 3" was in fact Jackie. Counsel for the Appellant argued that the evidence indicated that the Appellant had only admitted that he would pass money to Jackie, but not drugs. The Judge did not accept this argument as it contradicted the Appellant's own words. We agreed with the Judge.

12 These reasons alone would be sufficient to explain our dismissal of the appeal. However, for completeness, we will touch on the question of whether the Judge was correct to draw an adverse inference against the Appellant for failing to state the defence of consumption in his long statements.

The adverse inference

13 Under s 122(6) of the CPC, a person, when charged with an offence or officially informed that he may be prosecuted for an offence, has to be served with a notice informing him that if he holds back any fact that he intends to rely on in his defence till he goes to court, his evidence may be less likely to be believed. The basis for a court to draw adverse inferences from a failure to mention material facts when subjected to this caution can be found in s 123(1) of the CPC, which states:

> Where in any criminal proceedings against a person for an offence evidence is given that the accused, on being charged with the offence or officially informed that he might be prosecuted for it, failed to mention any such fact, being a fact which in the circumstances existing at the time he could reasonably have been expected to mention when so charged or informed, as the case may be, the court, in determining whether to commit the accused for trial or whether there is a case to answer, and the court, in determining whether the accused is guilty of the offence charged, may draw such inferences from the failure as appear proper; and the failure may, on the basis of those inferences, be treated as, or as capable of amounting to, corroboration of any evidence given against the accused in relation to which the failure is material.

14 In the present case, the Appellant omitted to mention the defence of consumption in his cautioned statement. However, the Judge declined to draw an adverse inference for this omission. In this regard, he stated ([61]–[62] of the GD):

> 61 I take certain guidance from the Court of Appeal's analysis in *Lim Lye Huat Benny*, the facts

of which are rather similar to the present facts before me. ...

62 I ... found that there could be a plausible explanation for the [Appellant's] failure to mention his defence in his s 122(6) statement. It was early in the morning and he probably did not have any rest or food at the time the s 122(6) statement was recorded. He had just been arrested the night before. Also, he was probably feeling unwell due to his craving for heroin and his consequent withdrawal symptoms, some six to seven hours after his last consumption. I therefore opted not to draw an adverse inference against this instance of failure to mention his defence.

The case that the Judge referred to, *viz*, *Lim Lye Huat Benny*, was a case where this court accepted the appellant's contention that no adverse inference should be drawn against him with respect to his cautioned statement as it had been recorded at an unearthly time when he had been too tired and hungry to think of his defence.

15 The Judge, in contrast, drew an adverse inference against the Appellant for failing to state the defence of consumption in his long statements. The Judge explained as follows ([68]–[70] of the GD):

68 At the time that [the Appellant] gave his s 121 statement, it ought to have been apparent to him that it would be important to state material aspects of his defence, such as that half of [the Packets] found on him [were] for his own consumption, rather than emphasise that the drugs were for selling. I rejected defence counsel's explanation in submissions that the [Appellant] was still suffering from inner restlessness and that his mental faculties were still affected at the time his statement was recorded. This was not the first time he has been charged with an offence of drug trafficking. He should have known that the fact that he had intended to keep for his own consumption half of the drugs he had been caught in possession of – certainly a significant amount – would have been an important fact in his defence to a drug trafficking charge. ...

69 Furthermore, he had two other opportunities to mention his defence when further statements were recorded under s 121 from him on 13 September 2007 and 3 October 2007. Yet, on those occasions, he never uttered a word on [the] defence of consumption. ...

70 I therefore drew an adverse inference against the [Appellant] in respect of his failure to mention anything at all about the defence of consumption in any of his s 121 statements.

16 This approach is consistent with the approach taken in *Lim Lye Huat Benny*, where this court stated (at [25]):

However, the same [*ie*, that an adverse inference cannot be drawn] cannot be said with reference to [the appellant's] failure to mention in his s 121 statement that he believed that he was carrying counterfeit money. That was a lengthy statement given by him on 21 February 1995, which was some three days after his arrest and it was recorded at the time between 10.30am and 3.10pm with a break in between. That statement contained a detailed account of his first meeting with Richard, of his subsequent contacts with Richard, of what Richard asked him to do when they met on the 17 February 1995, *ie* the day of the offence, and of what Richard handed to him at that meeting. However, not a word was mentioned of Richard's representation to him that what he was asked to deliver was counterfeit money and of how he came to possess the counterfeit note of RM50. His explanation was that his brother had told him that his brother would engage a lawyer to defend him and therefore he did not think that it was important to mention that the plastic bag contained counterfeit money. But that explanation was not accepted by the learned trial judge. In our judgment, the learned trial judge was entitled to take

this view of his evidence and to draw an adverse inference against him. The learned judge also held that the appellant had failed to convince him that it was unremarkable to be paid $3,000 for carrying a plastic bag from Rochor Road to Bedok Reservoir Road. In consequence, the learned trial judge did not find his evidence sufficiently convincing and did not accept his evidence that he believed that the content of the plastic bag was counterfeit money. Looking at the evidence on the totality, we cannot say that the learned trial judge was plainly wrong in this finding. In the circumstances, the appellant has not, in our judgment, rebutted the presumptions under ss 18(1) and 18(2) of the Act. This appeal accordingly fails.

17 It is necessary to add that the court is not always entitled to draw an adverse inference for failure to disclose a material fact in long statements. The reason is that s 121 of the CPC allows an accused to withhold mentioning any fact or circumstance that, if disclosed, may incriminate him. Section 121 provides as follows:

> **Examination of witnesses by police.**
>
> **121**.—(1) A police officer making a police investigation under this Chapter may examine orally any person supposed to be acquainted with the facts and circumstances of the case and shall reduce into writing any statement made by the person so examined.
>
> (2) *Such person shall be bound to state truly the facts and circumstances with which he is acquainted concerning the case except only that he may decline to make with regard to any fact or circumstance a statement which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture*.
>
> (3) A statement made by any person under this section shall be read over to him and shall, after correction if necessary, be signed by him.
>
> [emphasis added]

18 Section 121 of the CPC is a straightforward provision. The person under investigation is "bound to state truly the facts and circumstances with which he is acquainted concerning the case", except that he may decline to state any fact or circumstance which would incriminate him in any way. He is entitled to remain silent in so far as self-incrimination is concerned. In our view, because an accused has such a right against self-incrimination when he makes a long statement under s 121, no adverse inference, in general, may be drawn against him for failing to state any fact or circumstance which may incriminate him in any way.

19 If, however, the fact or circumstance that is withheld will exculpate the accused from an offence, a court may justifiably infer that it is an afterthought and untrue, unless the court is persuaded that there are good reasons for the omission to mention that exculpatory fact or circumstance. This accords with common sense – if an accused believes he is not guilty of an offence that he might be charged with, he would be expected to disclose why he has such a belief. For a self-confessed trafficker like the Appellant, consumption would be an exculpatory fact. Furthermore, an exculpatory fact or circumstance has more credibility if disclosed to an investigating officer at the earliest opportunity after arrest. Thus, in *Chou Kooi Pang and another v Public Prosecutor* [1998] 3 SLR(R) 205, this court (without referring to *Lim Lye Huat Benny*) held, in regard to one of the appellants, that his "failure to mention a material part of his defence at an earlier stage meant that it was less likely to be believed" (at [30]).

20 In the present case, the fact of an intention to retain 23 of the Packets for self-consumption

(if proved) would effectively have exculpated the Appellant from an offence of trafficking that carries the death penalty. Accordingly, it would have been in his own interest to have mentioned it at the first opportunity to the investigating officer. He did not. Instead, he gave an explanation as to why he did not do so – this being that he thought that it would be of no use. The Judge, in our view, rightly rejected this explanation. That said, it was not necessary for the Judge to draw an adverse inference against the Appellant in order to reject the defence of consumption as being not credible in the circumstances. A court is entitled to disbelieve the evidence of a witness without having to draw an adverse inference against him for omitting to earlier mention some material fact which, if disclosed, would be in his favour.

Conclusion

21 For the above reasons, we agreed with the Judge's decision, and dismissed this appeal.

[note: 1] Record of Proceedings ("RP") vol 3 p 36

[note: 2] RP vol 3 p 39

[note: 3] RP vol 3 p 227

[note: 4] RP vol 3 p 245

[note: 5] RP vol 3 pp 246–247

[note: 6] RP vol 3 pp 19–20 and 243

[note: 7] RP vol 3 p 247

[note: 8] RP vol 3 p 39

[note: 9] RP vol 3 pp 36–37