IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2022] SGHC 265

Criminal Case No 34 of 2021

Between

Public Prosecutor

And

Shen Hanjie

JUDGMENT

[Criminal Procedure and Sentencing — Sentencing — Misuse of Drugs Act — Courier]

Public Prosecutor
v
Shen Hanjie

[2022] SGHC 265

General Division of the High Court — Criminal Case No 34 of 2021
Dedar Singh Gill J
27 October 2022

27 October 2022 Judgment reserved.

Dedar Singh Gill J:

1 On 9 May 2022, I convicted the accused, Shen Hanjie, of one charge of trafficking not less than 34.94g of diamorphine, which is an offence under s 5(1)(*a*) read with s 5(2) of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) ("MDA"). I now deliver my decision on sentencing using the same abbreviations defined in the judgment on conviction which can be found at *Public Prosecutor v Shen Hanjie* [2022] SGHC 103. By s 33(1) of the MDA read with its Second Schedule, the mandatory punishment prescribed for trafficking more than 15g of diamorphine under s 5(1) of the MDA is death. If the accused qualifies for the alternative sentencing regime under ss 33B(1)(*a*) or 33B(1)(*b*) of the MDA, the mandatory death sentence can be substituted with a sentence of life imprisonment. As the accused in the present case does not fall within either ss 33B(1)(*a*) or 33B(1)(*b*) of the MDA, I pass the mandatory death sentence on him.

2 These are my reasons.

3 The criteria that an offender must meet to benefit from the alternative sentencing regimes are set out in ss 33B(1)–(3) of the MDA:

> **33B.**—(1) Where a person commits or attempts to commit an offence under section 5(1) or 7, being an offence punishable with death under the sixth column of the Second Schedule, and he is convicted thereof, the court —
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> (*a*) may, if the person satisfies the requirements of subsection (2), instead of imposing the death penalty, sentence the person to imprisonment for life and, if the person is sentenced to life imprisonment, he shall also be sentenced to caning of not less than 15 strokes; or
>
> (*b*) shall, if the person satisfies the requirements of subsection (3), instead of imposing the death penalty, sentence the person to imprisonment for life.
>
> (2) The requirements referred to in subsection (1)(*a*) are as follows:
>
> (*a*) the person convicted proves, on a balance of probabilities, that his involvement in the offence under section 5(1) or 7 was restricted —
>
> (i) to transporting, sending or delivering a controlled drug;
>
> (ii) to offering to transport, send or deliver a controlled drug;
>
> (iii) to doing or offering to do any act preparatory to or for the purpose of his or her transporting, sending or delivering a controlled drug; or
>
> (iv) to any combination of activities in sub-paragraphs (i), (ii) and (iii); and
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> (*b*) the Public Prosecutor certifies to any court that, in his determination, the person has substantively assisted the Central Narcotics Bureau in disrupting drug trafficking activities within or outside Singapore.
>
> (3) The requirements referred to in subsection (1)(*b*) are that the person convicted proves, on a balance of probabilities, that —
>
> (*a*) his involvement in the offence under section 5(1) or 7 was restricted —

> (i) to transporting, sending or delivering a controlled drug;
>
> (ii) to offering to transport, send or deliver a controlled drug;
>
> (iii) to doing or offering to do any act preparatory to or for the purpose of his or her transporting, sending or delivering a controlled drug; or
>
> (iv) to any combination of activities in sub-paragraphs (i), (ii) and (iii); and
>
> (*b*) he was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts and omissions in relation to the offence under section 5(1) or 7.

To fall within s 33B(1)(*a*) of the MDA, the accused has to establish two cumulative requirements, namely, that his involvement in the offence for which he was convicted was restricted to the acts enumerated in s 33B(2)(*a*) of the MDA (which I shall refer to as the acts of a "courier"), and that he has been issued a certificate of substantive assistance by the Public Prosecutor (s 33B(2)(*b*) of the MDA). To qualify for the alternative sentencing regime under s 33B(1)(*b*) of the MDA, the accused has to meet two cumulative requirements, that is, his involvement in the offence for which he was convicted was restricted to the acts of a courier (s 33B(3)(*a*) of the MDA), and he was suffering from an abnormality of mind within the meaning of s 33B(3)(*b*) of the MDA.

4 The Defence rightly acknowledges that there is no evidence of the accused suffering from an abnormality of mind and has confirmed that it is not contending otherwise.[1] Indeed, Dr Raja Sathy Velloo's unchallenged evidence

[1] 9 May 2022 Transcript at p 4 lines 11–13; Further Submissions of the Accused Person dated 13 June 2022 ("DSS") at footnote 2.

is that the accused has no mental disorder or intellectual disability and was not of unsound mind at the time of the offence.[2] The alternative sentencing regime under s 33B(1)(*b*) of the MDA is thus inapplicable to the accused. Neither is the alternative sentencing regime under s 33B(1)(*a*) of the MDA available to the accused since the Public Prosecutor has indicated that he will not be issuing the accused a certificate of substantive assistance.[3] For these reasons alone, the accused is not eligible for the alternative sentence of life imprisonment under s 33B(1) of the MDA.

5 Nevertheless, since parties have submitted on whether the accused's involvement in the offence for which he was convicted was restricted to the acts of a courier, I will proceed to consider this point.

6 The accused bears the burden of proving that his involvement in the offence for which he was convicted was restricted to the acts of a courier as defined in ss 33B(2)(*a*) and 33B(3)(*a*) of the MDA. Placing aside the primary acts of transporting, sending or delivering controlled drugs to the intended recipient and offering to do such acts, the common thread that runs through the other types of conduct falling within ss 33B(2)(*a*) or 33B(3)(*a*) of the MDA is that they are all acts that are "facilitative of" or "incidental to" these primary acts (*Zainudin bin Mohamed v Public Prosecutor* [2018] 1 SLR 449 ("*Zainudin*") at [81]).

7 In this case, the conduct which can potentially take the accused out of ss 33B(2)(*a*) or 33B(3)(*a*) of the MDA is his repacking of some of the Drugs found in exhibits D4, D6, D7 and D8 (the "Repacked Drugs"). That he did so is

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2 AB 267.

3 Prosecution's Submissions on Sentence dated 13 June 2022 ("PSS") at para 13.

undisputed by the Prosecution and the Defence. This explains why the accused's DNA was found on exhibits D4, D4C2, D6A, D6A1, D6A2, D6B, D7A, D7B, D7C and D8A.[4] The evidence does not go so far as to show that the accused had repacked the rest of the Drugs. The question is whether the accused has shown that his act of repacking the Repacked Drugs *simpliciter* is a facilitative or incidental act of the sort falling within ss 33B(2)(*a*) or 33B(3)(*a*) of the MDA.

8 Acts which are "incidental to" the primary acts of transporting, sending or delivering controlled drugs are secondary or subordinate acts that occur or are likely to occur in the course or as a consequence of such sending, transporting or delivering (*Zainudin* at [84]), and are "highly proximate to the *nature and purpose* of those primary acts" [emphasis in original] (*Zainudin* at [86]). An example of such an act is the receipt of money, which is natural and appurtenant to a drug delivery given the inherently transactional nature of the activity (*Zainudin* at [86]). The Court of Appeal in *Zainudin* at [85] cautioned that a "controlled and generally restrictive approach" to what constitutes incidental acts must be taken in the light of Parliament's clear intention to circumscribe the remit of s 33B of the MDA. Hence, "[b]road assertions that the offender's act can be regarded as incidental, unsupported by any explanation of how the act in question satisfies the definition provided above and without adequate reference to the factual circumstances of the case, will generally not be accepted" (*Zainudin* at [85]). Here, the Defence does not appear to have drawn a distinction between "incidental acts" and "facilitative acts". Consequently, the Defence has not provided an explanation of how the accused's act of repacking the Repacked Drugs *simpliciter* is "highly proximate to the nature and purpose" of drug delivery such that it is an act that will occur

[4] 16 July 2021 Transcript at p 13 lines 18–25 and p 25 line 1 to p 27 line 18; PSS at para 6; DSS at para 13 (read with ASOF at para 29 which states which exhibits have the accused's DNA found on it).

or is likely to occur in the course or as a consequence of drug delivery. In my judgment, having regard to the circumscribed nature of s 33B of the MDA and the nature and purpose of transporting, sending or delivering drugs in general, repacking drugs, without more, has no role in these primary acts in the ordinary course of things. Accordingly, it is not incidental to these primary acts.

9 Nevertheless, repacking can still be an act that facilitates these primary acts on the facts of a particular case. To be a facilitative act, the repacking must be "preparatory to" or "for the purpose of" transporting, sending or delivering controlled drugs; it must "enable or assist" the offender to carry out these primary acts, and not to accomplish any unrelated aims which the offender may have in mind (see *Zainudin* at [82]). In this connection, the court must have close regard to the accused's reason or purpose for repacking drugs, which is to be objectively ascertained upon taking into account all the facts and context of the case (see *Zainudin* at [92]). It is in this context that the accused's evidence of the reason he repacked the Repacked Drugs assumes critical importance (see *Zainudin* at [92]–[95] and [110]–[111]).

10 Here, the accused's explanation is that he had repacked the Repacked Drugs into what were subsequently labelled exhibits D4, D6, D7 and D8 because their original packaging was torn. This forms the thrust of the Defence's case.[5] I reject the accused's explanation and the Defence's case.

11 Firstly, I agree with the Prosecution that the accused gave inconsistent evidence as to whether the original packaging was torn when he received the Repacked Drugs.[6]

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5 DSS at para 3.

6 PSS at paras 8–9.

12 In the accused's 2nd Long Statement, the accused said that "when [he] received the big black packet *marked with D4*, [he] did not open up to see what [was] inside" [emphasis added].[7] This indicated that exhibit D4 was the original packaging. There was also *no mention* of there being an earlier packaging which was torn, which required the accused to use exhibit D4 as a replacement packaging. However, at trial, the accused said that he had received some of the Repacked Drugs in a torn black zip lock bag and proceeded to repack them into exhibit D4 on Alan's instructions. As a result, his DNA was found on exhibits D4 and D4C2.[8] When the accused's attention was drawn to the conflict between his 2nd Long Statement wherein he said that he did not open up exhibit D4, and his aforementioned explanation for the presence of his DNA on exhibit D4, the accused said that he could not remember which bags were torn and required repacking,[9] and was uncertain whether he opened the packaging of the Repacked Drugs found in exhibit D4.[10]

13 In the accused's 3rd Long Statement, the accused said:[11]

> … For Photo 42 to Photo 46, ***I only recogni[s]e the big black plastic marked with D5, D6, D7, D8 and D9 in Photo 42 and Photo 43. I received them from 'Alan' and they were already in the big black plastic.*** However, sometimes, if some of the big black plastic is torn, then I will then put them into a similar big black plastic. I do not know what is inside the big black plastic when I collected them as ***I did not open up to check***. I also did not ask 'Alan' what is inside, but I know that it is something illegal. I have the similar big black plastic with me to pack the torn ones because they were also given to me by 'Alan'. For the rest of the items in Photo 43 to Photo 46, ***I do***

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7 AB 375–376 (para 26).

8 16 July 2021 Transcript at p 24 lines 3–12 and p 25 lines 1–28; 21 July 2021 Transcript at p 44 lines 26–29; see also 22 July 2021 Transcript at p 15 lines 3–14.

9 16 July 2021 Transcript at p 35 lines 2–9.

10 21 July 2021 Transcript at p 34 lines 7–9 and p 35 lines 23–24.

11 AB 398 (para 29).

> ***not recogni[s]e them and I have never seen them before and have never touched them before***. … [emphasis added in bold italics]

The 3rd Long Statement indicated that exhibits D6, D7 and D8 were the original packaging at the time of collection. There was no mention that the original packaging was torn. The accused also expressly stated in his 3rd Long Statement that he did not open up the exhibits to check their contents, and that he had never seen the contents of exhibits D6, D7 and D8 prior to the recording of this statement. Again, the accused's evidence shifted at trial. On the stand, the accused claimed that he had discovered that there was no Erimin-5 in exhibits D6, D7 and D8 when he "wanted to change the bag which were torn" and "saw the things inside".[12]

14 Secondly, the first time the accused claimed that the original packaging of the Repacked Drugs was torn was during his examination-in-chief, when he was asked to explain the presence of his DNA on various exhibits.[13] Although the accused in his 3rd Long Statement said that "sometimes, if some of the big black plastic [bags were] torn, [he would] put them into a similar big plastic",[14] he was merely describing his general practice. He did not specifically mention in his statements that he had repacked the Repacked Drugs because their original packaging was torn. This specific point was only raised at trial. Even though the DNA reports were only issued by the HSA on 16 April 2019 after seven out of eight of the investigative statements were taken,[15] the accused could still have mentioned that he had repacked the Repacked Drugs in his statements

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12 22 July 2021 Transcript at p 15 lines 27–30 (see also p 16 lines 4–12).

13 16 July 2021 Transcript at p 25 line 1 to p 27 line 13.

14 AB 398 (para 29).

15 Agreed Statement of Facts at para 29; AB 135–208.

at any point in time, regardless of when the DNA reports were issued. The belatedness of this point undermines its veracity.

15 Thirdly, and relatedly, all these (at [11]–[14] above) cohere with the finding in the judgment on conviction that the accused was a witness lacking in credit. This is further reinforced by the conflict between the accused's evidence that he repacked the Repacked Drugs because the original packaging was torn (which was first raised in his oral testimony) and his position in his 2nd and 3rd Long Statements that he did not see the contents of the exhibits at all. If the former was true, the accused would have seen at least some of the items found within the exhibits; if the latter was true, that would undermine the credibility of his claim that the original packaging was torn which prompted him to repack the Repacked Drugs.

16 That said, to the accused's credit, he consistently stated in his 3rd Long Statement and oral testimony that he would change the drug packaging whenever the original packaging was torn.[16] However, this does not take the accused very far. This may be a general practice of the accused, but the inquiry for the purposes of ss 33B(2)(*a*) and 33B(3)(*a*) of the MDA must be directed towards the accused's acts in relation to the particular consignment of drugs which form the subject matter of the charge against him (*Zamri bin Mohd Tahir v Public Prosecutor* [2019] 1 SLR 724 at [15] and *Mohammad Farid bin Batra v Public Prosecutor and another appeal and other matters* [2020] 1 SLR 907 at [95]). Evidence of the accused's general practice of repacking drugs to replace the original torn packaging has some probative value to this inquiry. However, when weighed against his lack of credit as a witness, his inconsistent evidence

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16 21 July 2021 Transcript at p 39 lines 11–12, p 40 lines 19–21 and p 44 line 25; AB 398 (para 29).

as to whether the original packaging was torn when he received the Repacked Drugs (which are part of the particular consignment of drugs which form the subject matter of his charge), and the belated nature of this explanation, I disbelieve the accused's explanation that he had repacked the Repacked Drugs into what were subsequently labelled exhibits D4, D6, D7 and D8 because their original packaging was torn.

17 I now turn to deal with a few other arguments raised by the Defence. I agree with the Defence that the evidence does not show that the accused had weighed and divided the Drugs into smaller quantities, and neither is there any indication that the accused had altered or adulterated the original mass or quantity of the Drugs.[17] It is also not the Prosecution's case that the accused had done these acts. However, the mere absence of other acts which would take the accused out of the courier exception does little to advance the Defence's case that the accused had repacked the Repacked Drugs because their original packaging was torn. The Defence complains that the Prosecution did not go further in cross-examination to establish that the accused had repacked the Repacked Drugs for another purpose apart from drug delivery.[18] This is a meritless point, since the burden is on the Defence to show that the accused's purpose of repacking the Repacked Drugs was to facilitate drug delivery; the onus is not on the Prosecution to show otherwise. The Defence also points to the fact that the accused intended to deliver the Drugs to third-party recipients.[19] In my judgment, this fact is present each time an offender is convicted on a trafficking charge and is thus insufficient on its own to support an inference that the accused's conduct of repacking is to facilitate the drug delivery.

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17 DSS at paras 10, 12 and 14.

18 DSS at para 14.

19 DSS at para 11.

18 Lastly, there is some merit in the Prosecution's submission that there was simply no reason for the accused to repack the Repacked Drugs even if their original packaging was torn – if the original packaging was torn, it would be more logical for the accused to contain the torn bags in a new black plastic bag.[20] When the Prosecution put this point to the accused at trial, the accused agreed but said that he had changed the packaging anyway.[21] In my judgment, this is an unsatisfactory response. In any case, even without accepting this submission by the Prosecution, there are sufficient reasons to reject the accused's explanation that he had repacked the Repacked Drugs because their original packaging was torn (see above at [11]–[16]).

19 In sum, having rejected the accused's explanation that he had repacked the Repacked Drugs into what were subsequently labelled exhibits D4, D6, D7 and D8 because their original packaging was torn, the evidence shows that the accused had repacked the Repacked Drugs, without establishing that the purpose of this act was to enable or assist him in his drug delivery. Hence, the accused's act of repacking has not been shown to be an act of a courier. This constitutes another reason why the accused does not qualify for the alternative sentencing regimes in s 33B(1) of the MDA, in addition to those already set out at [4] above.

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20 PSS at para 11.

21 21 July 2021 Transcript at p 48 lines 15–18.

20 I therefore sentence the accused to the mandatory death penalty.

Dedar Singh Gill
Judge of the High Court

Wuan Kin Lek Nicholas, Pavithra Ramkumar and Heershan Kaur
(Attorney-General's Chambers) for the Prosecution;
Cheong Jun Ming Mervyn (Advocatus Law LLP) and Lau Kah Hee
(BC Lim & Lau LLC) for the accused.