Mohamed Emran bin Mohamed Ali v Public Prosecutor
[2008] SGHC 103

Case Number : MA 117/2007

Decision Date : 27 June 2008

Tribunal/Court : High Court

Coram : Tay Yong Kwang J

Counsel Name(s) : S K Kumar (S K Kumar & Associates) for the appellant; David Khoo (Attorney-General's Chambers) for the respondent

Parties : Mohamed Emran bin Mohamed Ali — Public Prosecutor

Constitutional Law – Equal protection of the law – Drug trafficking – State entrapment – Failure to prosecute entrapping state agent – Whether entrapped person's rights to equal protection breached – Article 12 Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint)

Evidence – Admissibility of evidence – Drug trafficking – State entrapment – Whether state agent provocateur protected from disclosure – Section 23 Misuse of Drugs Act (Cap 185, 2001 Rev Ed)

27 June 2008

Tay Yong Kwang J:

1 The appellant Mohamed Emran Bin Mohamed Ali was charged in the District Court on one count of drug trafficking and a separate count of having in his possession paraphernalia for the purposes of consuming controlled drugs. He claimed trial to the trafficking charge. At the end of the trial, the District Judge ("DJ") convicted the appellant on the trafficking charge. Subsequent to the appellant's conviction on the trafficking charge, he pleaded guilty to the possession charge. He was then given the minimum sentence of five years imprisonment and five strokes of the cane for the trafficking charge and a sentence of four months imprisonment on the possession charge. Both sentences were ordered to run concurrently. The present appeal against the DJ's decision in *PP v Emran Bin Mohamed Ali and Another* [2007] SGDC 256 related only to the appellant's conviction in respect of the trafficking charge.

2 The events leading up to the appellant's arrest were not in dispute. According to the appellant, a fortnight or so before his arrest on 22 November 2006, he was introduced to one Kechik through a mutual acquaintance. Unknown to the appellant, Kechik was actually playing the role of an *agent provocateur* in a CNB-sanctioned sting operation targeting drug traffickers. A week after the introduction, Kechik began to call the appellant at his home two to three times daily asking for Subutex on the pretext that he was an addict in desperate need for the drugs as he was suffering from withdrawal symptoms. As the appellant was also an addict who was in the process of weaning himself from Subutex, he empathised with Kechik. In order to placate Kechik, the appellant told Kechik that he would help him procure the drugs, although it was alleged that the appellant actually did not have the intention to do so.

3 A week after the first request for Subutex was made, the appellant finally decided to act on Kechik's requests. On the day of his arrest, the appellant contacted an acquaintance and asked whether she could supply him with Subutex. He also told her that the Subutex was for Kechik. After obtaining the requisite confirmation from the acquaintance, the appellant then contacted Kechik and arranged a meeting with him. Kechik in turn told the appellant that he was unable to meet the appellant in person and that he would send one Ijat to collect the drugs on his behalf. The appellant

subsequently collected two Subutex tablets from his acquaintance. Later, he went to meet Ijat (who was in reality an undercover Central Narcotics Bureau ("CNB") officer) and passed the two Subutex tablets to Ijat in return for $300. The appellant was then placed under arrest.

The decision below

4 In the court below, counsel for the appellant did not dispute his client's *mens rea* and *actus reus* for the offence of trafficking. Instead, counsel submitted that the appellant's defence was one of entrapment as he was incited and instigated by a state agent to traffic in drugs. In answer to this argument, the DJ referred to *How Poh Sun v PP* [1991] SLR 220 ("*How Poh Sun*"), where the Court of Appeal held that entrapment was not recognised as a substantive defence in Singapore, and rejected the appellant's submission. Further, the appellant's credibility as a witness was also called into question by the DJ (see the relevant paragraphs of the grounds of decision reproduced hereunder).

> 38. As stated in the preceding paragraphs, our jurisprudence clearly does not recognise the defence of entrapment as a valid defence (*How Poh Sun v PP*). On that account alone, Emran would fail in his defence. However, for the sake of completeness, it would be useful to scrutinise and examine the role of Kechik and the circumstances leading to the commission of the offence. It is clear from the evidence that Emran was the target of a classic sting operation of the kind normally conducted by CNB to ferret out and apprehend drug pushers. In the prosecution of the sting operation, it would be reasonable to assume that both Kechik and [Ijat] would have concocted stories and lies in order to allay any doubt in Emran's mind about their *bona fides*. Although this method might seem repulsive to some, it is nevertheless a necessary evil in the fight to combat the menace of drugs in our society. From the evidence, I do not accept that Emran had been subjected to undue harassment such that he had been coerced into committing the offence. I am however satisfied that the drug sale was a straight-forward drug transaction for purely commercial reasons. I have grave doubts about Emran's credibility as a witness.
>
> 39. Emran's described Kechik as a total stranger. They had only been introduced two weeks prior to Emran's arrest. He claimed that he does not easily trust a stranger. So that was why he did not refer Kechik to his other friends to obtain the drugs. He said he did not like to introduce a stranger to his friends. He also claimed that he would not help any of his addict friends to obtain Subutex because he knew that it was against the law. Yet despite all these assertions, he went out of his way to help Kechik to obtain the Subutex. When asked to explain this untenable position, he contradicted himself by saying incomprehensibly that he did that because Kechik and him had already met as friends. Further, he had taken pity on Kechik because he believed, from Kechik's tone of voice, that Kechik was suffering from drug withdrawal. His weak explanations did not clear up the murkiness of his evidence.
>
> 40. I am also not satisfied that the harassment was so inordinate that Emran's will to resist was sapped. Kechik had only called him at his residential telephone line 2 to 3 times a day for about a week. And based on his own evidence, it would be reasonable to infer that on some of the days during that particular week, he would have been at work and therefore uncontactable. This was because he was then working part-time as a lashing worker all the way until the date of his arrest. His work schedule comprised 2 to 3 work days a week averaging 15 to 20 hours each day. So on at least 2 to 3 days when Kechik was purportedly calling him up at his home, Emran would have been at work. Another pertinent point to note is that despite the harassment, Emran had been able to ignore Kechik's entreaties until 22 Nov 06. There is no conceivable reason for Emran to have suddenly succumbed on 22 Nov 06. There is also another possible explanation for these telephone calls. Emran had testified that he had lied to Kechik by promising to look for a seller. So it would not be unreasonable for Kechik to call Emran subsequently each day to make inquiries

about the progress.

5 In respect of the Prosecution's refusal to disclose Kechik's identity so that his attendance as a witness could be secured by the Defence, the DJ wrote:

> 42. To my mind whether Kechik is an informer or an *agent provocateur* is not relevant for the purpose of this trial. The key question is whether Kechik would be a relevant witness in the trial before me. I am of the opinion that he is not relevant to the trial before me for the following reasons. Firstly, the defence of entrapment is not recognised. Secondly, the prosecution did not challenge Emran's evidence concerning Kechik. Therefore the prosecution is deemed to have accepted that part of Emran's evidence. Under these circumstances, I do not see how calling Kechik to testify would add any value to the evidence already adduced.

6 In the premises, the DJ convicted the appellant on the trafficking charge and after taking into account the circumstances leading to the commission of the offence and the plea in mitigation, imposed the minimum mandatory sentence of five years imprisonment and five strokes of the cane.

The appeal

7 The appeal against the DJ's decision was first heard on 16 November 2007 when I adjourned the matter pending the Court of Three Judges' decision in *Law Society of Singapore v Tan Guat Neo Phyllis* [2007] SGHC 207 ("*Phyllis Tan*"). Having had the benefit of the decision in *Phyllis Tan*, counsel for the appellant then sought to challenge his client's conviction on the basis that the latter's right under Art 12 of the Constitution of the Republic of Singapore (1999 Rev Ed) ("the Constitution") was breached as Kechik was not charged for his role in instigating and inciting the appellant to traffic in drugs. Counsel also submitted that Kechik should have been called as a witness as his evidence might have tilted the balance in deciding whether or not his client's constitutional rights were infringed.

The law on entrapment

Was the appellant entrapped?

8 The first question I had to consider was whether the appellant was entrapped. The Court of Appeal in *Wong Keng Leong Rayney v Law Society of Singapore* [2007] 4 SLR 377 ("*Rayney Wong*") defined entrapment broadly at [27] as:

> "Entrapment" involves luring or instigating the defendant to commit an offence which otherwise, or in ordinary circumstances, he would not have committed, in order to prosecute him. Entrapment invariably entails unlawful conduct by an *agent provocateur*, in the form of abetment of the offence by instigation or intentionally aiding the defendant to commit the offence (see s 107 of the Penal Code). However, obtaining evidence illegally or improperly does not necessarily involve any instigation or inducement on the part of the agent.

9 In *Phyllis Tan*, the Court of Three Judges referred to both *Rayney Wong* and the House of Lords decision in *R v Looseley* [2001] 1 WLR 2060 ("*Looseley*") and explained at [53] the essential difference between entrapment, opportunity and illegality as:

> Basically, entrapment as envisaged by the House of Lords in *Looseley* involves unlawful conduct by the state or its agents in instigating, cajoling or pressuring the defendant into committing an offence which he would not otherwise have done. This abuse of power results in an abuse of the court's process if the evidence is then used to prosecute the defendant for the offence which he

was instigated to commit. This is distinguished from merely providing the defendant with an opportunity to commit the offence. Illegally obtained evidence shares the element of unlawfulness, but the element of instigation is absent, and it does not always, unlike entrapment evidence, provide evidence of the *actus reus* of the offence.

10 While the House of Lords in *Looseley* had highlighted the difficulty in identifying conduct that was caught by imprecise words such as "lure", incite", "entice" or "instigate", I was of the view that the broad definition of entrapment in *Rayney Wong* and *Phyllis Tan* would, for our purposes, suffice. This is for the reason that post-*Looseley*, state entrapment in England was regarded *per se* to be an abuse of executive power and that the use of entrapment evidence to prosecute was seen as an abuse of process. It therefore follows that a precise definition of entrapment is necessary as the fate of an accused tried under English law would be decided solely based on whether he had been entrapped or otherwise. As we shall see later, this is not the case in Singapore. Thus, applying the broad definition of entrapment adopted in both *Rayney Wong* and *Phyllis Tan*, I am satisfied that on the evidence before the court, the appellant was entrapped in the broad sense of the word in that he was lured out.

The legality of state entrapment

11 The law on entrapment has been comprehensively dealt with by the Court of Three Judges in *Phyllis Tan* and with this in mind, I will seek only to briefly restate the more salient points in relation to the legality of state entrapment under the common law.

The position in England

12 In *R v Sang* [1980] AC 402, the House of Lords held that the defence of entrapment did not exist in English law. In particular, Diplock LJ added that "the court is not concerned with how [the evidence] was obtained. It is no ground for the exercise of discretion to exclude that the evidence was obtained as the result of the activities of an *agent provocateur*."

13 In *Looseley*, the House of Lords again reconsidered the issue of entrapment evidence. Such reconsideration was perhaps not untimely as according to Lord Nicholls, the English criminal law had "undergone substantial development over the comparatively short period of 20 years since *R v Sang* was decided". First, s 78 of the Police and Criminal Evidence Act 1984 gave the courts in England the power to exclude evidence which would have an adverse effect on the fairness of the proceedings; second, the English common law recognised that the courts have the power to stay proceedings and to order the release of the accused where there is a "serious abuse of power by the executive" (*Re Ex p Bennett* [1994] 1 AC 42); and third, there was a real concern that the adoption of entrapment evidence might contravene an accused's rights to a fair hearing under Art 6 of the European Convention on Human Rights.

14 Thus, with the above backdrop, it came as no surprise that the House of Lords held in *Looseley* that it would be an abuse of process and a misuse of state power if a person was lured, incited or pressurised into committing a crime which he would not otherwise have committed. Notwithstanding this, it is however important to note that the House of Lords also made it clear that active complicity by the state or its agents did not always necessarily equate an abuse of executive power warranting the attendant consequences. The crucial determinant revolves around the degree of state involvement; see Lord Nicholls' speech in *Looseley* at [3]:

> Moreover, and importantly, in some instances a degree of active involvement by the police in the commission of a crime is generally regarded as acceptable. Test purchases fall easily into this

category. In *Director of Public Prosecutions v Marshall* [1988] 3 All ER 683 a trader was approached in his shop in the same way as any ordinary customer might have done. In breach of his licence he sold individual cans of lager to plain-clothes police officers. In *Nottingham City Council v Amin* [2000] 1 WLR 1071a taxi was being driven in an area not covered by its licence. The driver accepted plain-clothes police officers as fare paying passengers. Police conduct of this nature does not attract reprobation even though, in the latter case, the roof light on the taxi was not illuminated. The police behaved in the same way as any member of the public wanting a taxi in the normal course might have done.

15 A persistent request for drugs by a state agent is also regarded as falling within the sphere of legitimacy. In this regard, Lord Hutton in *Looseley* said at [102]:

> In considering the distinction (broadly stated) between a person being lured by a police officer into committing an offence so that it will be right to stay a prosecution and a person freely taking advantage of an opportunity to commit an offence presented to him by the officer, it is necessary to have in mind that a drugs dealer will not voluntarily offer drugs to a stranger, unless the stranger first makes an approach to him, and the stranger may need to persist in his request for drugs before they are supplied. Therefore, in my opinion, a request for drugs, even if it be persistent, need not be regarded as luring the drugs dealer into committing a crime with the consequence that a prosecution against him should be stayed. If a prosecution were not permitted in such circumstances the combating of the illegal sale of drugs would be severely impeded, and I do not consider that the integrity of the criminal justice system would be impaired by permitting a prosecution to take place. In my opinion a prosecution should not be stayed where a police officer has used an inducement which (in the words of McHugh J in *Ridgeway v The Queen* 184 CLR 19, 92) "is consistent with the ordinary temptations and stratagems that are likely to be encountered in the course of criminal activity"…

16 However, Lord Nicholls also cautioned that while persistence *per se* could not be faulted, there are also limits to as to what is acceptable; *Looseley* at [4]:

> Thus, there are occasions when it is necessary for the police to resort to investigatory techniques in which the police themselves are the reporters and the witnesses of the commission of a crime. Sometimes the particular technique adopted is acceptable. Sometimes it is not. For even when the use of these investigatory techniques is justified, there are limits to what is acceptable. Take a case where an undercover policeman repeatedly badgers a vulnerable drug addict for a supply of drugs in return for excessive and ever increasing amounts of money. Eventually the addict yields to the importunity and pressure, and supplies drugs. He is then prosecuted for doing so. Plainly, this result would be objectionable. The crime committed by the addict could readily be characterised as artificial or state-created crime. In the absence of the police operation, the addict might well never have supplied drugs to anyone.

The position in Australia

17 In *Ridgeway v The Queen* (1995) 184 CLR 19, the majority of the Australian High Court held that the concept of abuse of process warranting a stay of prosecution was not applicable to a prosecution that was founded on entrapment evidence. Notwithstanding this, the court also cautioned that entrapment evidence could be excluded on the basis of public policy; see the joint judgment of Mason CJ, Deane J and Dawson J at p 41:

> The critical question was whether, in all the circumstances of the case, the considerations of public policy favouring exclusion of the evidence of the appellant's offence, namely, the public

interest in maintaining the integrity of the courts and of ensuring the observance of the law and minimum standards of propriety by those entrusted with powers of law enforcement, outweighed the obvious public interest in the conviction and punishment of the appellant of and for the crime against s 233B(1)(c) of the Act of which he was guilty.

The position in Singapore

18 In *How Poh Sun v PP*, the Court of Appeal followed the earlier House of Lords decision in *R v Sang* [1980] AC 402 and held that the defences of *agent provocateur* and state entrapment did not exist under Singapore law; see *How Poh Sun* at p 224:

> The observations of the Law Lords that the defences of agent provocateur and entrapment do not exist in English law would also reflect the position in Singapore. It is not the province of the court to consider whether the CNB should have proceeded about its work in one way or the other. The court can only be concerned with the evidence before it.

19 The law on these defences has been revisited in *Phyllis Tan*. In *Phyllis Tan*, the Court of Three Judges, after considering at length the local case-law on state entrapment as well as the jurisprudence in both England and Australia, held unequivocally that the position in Singapore was that the courts have no discretion under the Evidence Act to exclude illegally obtained evidence and that a prosecution founded upon entrapment evidence was not an abuse of process.

> 138 As a matter of legal logic (and on constitutional grounds which will be discussed later), we agree with the reasoning of the majority judges in *Ridgeway*. In our view, the true nature of abuse in state entrapment cases is the abuse of state power, as the judgments in *Looseley* recognise, by state agents deliberately breaking the law to instigate the accused to commit an offence which he otherwise would not have committed and then prosecuting him for that offence. The nature of the abuse is not directed at the process of the courts, whose function is to determine the guilt or otherwise of the accused on the evidence produced before the court. We find the logic and reasoning in the joint judgment and that of Brennan J in *Ridgeway* (see [85] above) unassailable. We agree that the invocation of the court process *for the* bona fide *prosecution of criminals* (as opposed to any of the extraneous purposes mentioned above at [132]) is not an abuse of process, even though the evidence against the accused may have been obtained by state entrapment or illegally by law enforcement officers.
>
> 139 If a prosecution founded on the use of entrapment or illegally obtained evidence is not an abuse of process, then the question of staying the prosecution for abuse of process does not arise. For this reason, *Looseley* has no application in Singapore. In *Looseley*, their Lordships were particularly troubled by the prospect of law enforcement agencies resorting to state entrapment to create, and thereby increase artificially, offences, as that would not be in the public interest. We are also mindful of this possibility, but, in the context of our criminal justice system, admitting entrapment evidence does not necessarily mean that the court is bereft of any power to check an abuse or the unconstitutional exercise of prosecutorial power.

20 Thus, applying the principles elucidated in *Phyllis Tan*, the fact that the appellant had been entrapped was of no relevance as entrapment is not a substantive defence in Singapore law.

21 Before moving on to consider the constitutional issues raised by counsel, I would add that even if one were to apply the House of Lords decision in *Looseley* to the present facts, the sting operation targeting the appellant would still have been regarded as legitimate. This is for the reason that a persistent request for drugs by a state agent acting under the sanction of the state is not an abuse

of process under English law (see [15] above).

Article 12 of the Constitution

22 I now turn to the constitutional issues raised by counsel. In *Phyllis Tan*, the court stated at [149] that "the exercise of the prosecutorial discretion is subject to judicial review in two situations: first, where the prosecutorial power is abused, *i.e.*, where it is exercised in bad faith for an extraneous purpose, and second, where its exercise contravenes constitutional protections and rights."

23 Relying on the above passage, counsel argued in his written submissions that:

> It is further submitted that since in the present case the Prosecution has to rely on entrapment evidence to prosecute [Your Appellant], his constitutional right to equality has been breached. It is also submitted that the fact that Kechik, a controlled agent of the state, has not been charged must mean that [Your Appellant's] rights to equal protection of the law has also been violated.

The use of entrapment evidence

24 On a plain reading of *Phyllis Tan*, counsel's first submission challenging the use of entrapment evidence *per se* as unconstitutional was clearly a non-starter as a *bona fide* prosecution founded on entrapment evidence was permissible. In this regard, it is pertinent that counsel had chosen not to submit (and rightly so) that the prosecutorial process was tainted by bad faith or that there had been an abuse of prosecutorial power as such submissions would, on the facts of this case, have been clearly unsustainable.

The failure to prosecute law enforcement authorities

25 The groundwork for counsel's second submission in relation to the non-prosecution of Kechik was set out in *Phyllis Tan* at [147]:

> But, if, in such a case, the Attorney-General condones the unlawful conduct of the law enforcement officers, which is particularly egregious, by not prosecuting them as well, this may constitute discriminatory treatment that may infringe the offender's constitutional rights to equality before the law and the equal protection of the law.

26 It is settled law that the concept of equality under Art 12 of the Constitution meant that all persons in like situations should be treated alike. It does not mean that all persons are to be treated equally (see *PP v Taw Cheng Kong* [1998] 2 SLR 410 at [54]). The Court of Appeal in *Taw Cheng Kong* also stated that the prohibition of unequal protection is not absolute and that a differentiating law or *executive act* which satisfies the classification test would not be considered to be in contravention of Art 12. In my view, the exercise of the Attorney-General's prosecutorial discretion is an executive act as envisaged in *Taw Cheng Kong*.

27 The classification test was set out by Mohamed Azmi SCJ in *Malaysian Bar v Government of Malaysia* [1987] 2 MLJ 165 at p 170 as follows:

> (a) The first question to be asked is, is the law discriminatory, and that the answer should then be - if the law is not discriminatory, it is good law, but if it is discriminatory, then because the prohibition of unequal treatment is not absolute but is either expressly allowed by the constitution

or is allowed by judicial interpretation, we have to ask the further question, is it allowed? If it is, the law is good, and if it is not the law is void.

(b) Discriminatory law is good law if it is based on "reasonable" or "permissible" classification, provided that -

(i) the classification is founded on an intelligible differentia which distinguishes persons that are grouped together from others left out of the group; and

(ii) the differentia has a rational relation to the object sought to be achieved by the law in question. The classification may be founded on different bases such as geographical, or according to objects or occupations and the like. What is necessary is that there must be a nexus between the basis of classification and the object of the law in question.

28 Before I consider the question whether there are intelligible and rational differentia justifying the Public Prosecutor's decision to prosecute entrapped drug traffickers but not to bring charges against state *agents provocateurs*, it would be apt to restate the English position in relation to test drug purchases. In *Looseley* at [2], Lord Nicholls alluded to the fact that the police are not expected to act as passive observers in combating the drug trade:

If police officers acted only as detectives and passive observers, there would be little problem in identifying the boundary between permissible and impermissible police conduct. But that would not be a satisfactory place for the boundary line. Detection and prosecution of consensual crimes committed in private would be extremely difficult. *Trafficking in drugs is one instance.* With such crimes there is usually no victim to report the matter to the police. And sometimes victims or witnesses are unwilling to give evidence. (*emphasis added*)

29 In a similar vein, Lord Hutton stated that a persistent request for drugs should not be regarded as an abuse of process warranting a stay of prosecution as, in his view, "if a prosecution were not permitted in such circumstances the combating of the illegal sale of drugs would be severely impeded" (see [15] above). Likewise in *How Poh Sun*, the Court of Appeal stated categorically (see [18] above) that "[i]t is not the province of the court to consider whether the CNB should have proceeded about its work in one way or the other."

30 Bearing the above pronouncements in mind, I was of the view that the failure to prosecute Kechik did not contravene the appellant's rights under Art 12 of the Constitution. First, there is no doubt an intelligible differentiation between entrapped drug traffickers and state *agents provocateurs*. The former class of persons belongs to one that has demonstrated both the *mens reas* and *actus reas* to promote the drug trade. The latter group, on the other hand, has the sanction of the state and it would be entirely correct to say that the operative *mens reas* of these state agents is to curb and curtail the drug trade rather than to promote it. There is likewise a perfectly rational nexus between entrapment operations and the socially desirable and laudable objective of containing the drug trade. Such operations are necessary to flush out suppliers of drugs. Further, they serve as an important deterrent against the traffic in drugs as they introduce a clear and present risk of instant arrest into the equation for drug traffickers. The drug trade remains a grave menace to our society today. In this regard, I cannot agree more with the observations made by V K Rajah J (as he then was) in *PP v Tan Kiam Peng* [2007] 1 SLR 522 at [8]:

The drug trade is a major social evil. While drug peddlers may not be visibly seen or caught taking away or damaging lives, they nonetheless inflict alarmingly insidious problems on society that have the potential to destroy its very fabric if left unchecked. Each successful trafficker has the

> disturbing potential to inflict enormous and enduring harm over an extremely wide circle of victims. Apart from the harm that drugs inflict on an addict's well-being, drug trafficking engenders and feeds a vicious cycle of crime that inexorably ripples through the community.

31 Thus, in combating such a threat to our society, it is imperative that active involvement by the authorities ought to be regarded as reasonable and legitimate. It would be absurd to have to convict one state agent (for abetment) for every drug trafficker convicted in a covert operation. If that were the law, illicit drug suppliers would prosper and flourish while enforcement agencies wither and perish. Applying the sound principles set out in case law, I was of the view that the degree of involvement by CNB in the present case was clearly within acceptable norms. Accordingly, I dismissed the appellant's contention that his constitutional rights were breached.

Particularly egregious conduct

32 However, notwithstanding the constitutional legality of entrapment operations in general, it is also evident from *Phyllis Tan* that the enforcement authorities do not have the *carte blanche* to carry out such activities in an unfettered and unchecked manner. In *Phyllis Tan*, the Court of Three Judges noted that the Attorney-General's discretion under Art 35(8) of the Constitution to institute, conduct or discontinue any proceedings for any offence is unfettered *save for unconstitutionality*. Thus, if the unlawful conduct of the law enforcement officers are *particularly egregious* and the Attorney-General condones such conduct by not prosecuting the offending officers, then that might constitute discriminatory treatment contrary to Art 12 of the Constitution (see *Phyllis Tan* at [145] – [147]). As to what constitutes egregious conduct, some guidance may be found in *R v Sang*, where Lord Salmon said at 443:

> I would now refer to what is, I believe, and hope, the unusual case, in which a dishonest policeman, anxious to improve his detection record, tries very hard with the help of an agent provocateur to induce a young man with no criminal tendencies to commit a serious crime; and ultimately the young man reluctantly succumbs to the inducement. In such a case, the judge has no discretion to exclude the evidence which proves that the young man has committed the offence. He may, however, according to the circumstances of the case, impose a mild punishment upon him or even give him an absolute or conditional discharge and refuse to make any order for costs against him. The policeman and the informer who had acted together in inciting him to commit the crime should however both be prosecuted and suitably punished. This would be a far safer and more effective way of preventing such inducements to commit crimes from being made, than a rule that no evidence should be allowed to prove that the crime in fact had been committed.

33 The undercover operations in this case were clearly targeted at suppliers of drugs in order to lure them out. The appellant was exposed as a trafficker through necessary subterfuge rather than persuaded or pressurized into becoming one.

Protection of informers

34 I turn now to consider the appellant's argument that an *agent provocateur*, as opposed to a passive informer, is not entitled to protection from disclosure under s 23 of the Misuse of Drugs Act (Cap 185, 2001 Rev Ed), which provides as follows:

> 23**.** —(1) Except as provided in subsection (3) —
>
> (a) no information for an offence under this Act shall be admitted in evidence in any civil or

criminal proceedings; and

(b) no witness in any civil or criminal proceedings shall be obliged —

(i) to disclose the name and address of any informer who has given information with respect to an offence under this Act; or

(ii) to answer any question if the answer thereto would lead, or would tend to lead, to the discovery of the name or address of the informer.

(2) …

(3) If –

(a) in any proceedings before a court for an offence under this Act, the court, after full inquiry into the case, is satisfied that an informer wilfully made a material statement which he knew or believed to be false or did not believe to be true; or

(b) if in any other proceedings, the court is of the opinion that justice cannot be fully done between the parties thereto without the disclosure of the name of the informer,

the court may permit inquiry and require full disclosure of the name of the informer.

35 Counsel relied on *PP v Ee Boon Keat* [2006] 2 MLJ 633 ("*Ee Boon Keat*"), a Malaysian High Court decision which dealt with s 40(1) of the (Malaysian) Dangerous Drugs Act 1952, as authority. The Malaysian provision and s 23 of our Misuse of Drugs Act are largely similar, as they share their origins from the almost identical pre-independence drugs laws enacted in the early 1950s in both Singapore and Malaysia. In *Ee Boon Keat*, Augustine Paul J held at [8] that an *agent provocateur* has no protection under s 40(1) of the Dangerous Drugs Act.

> Clearly, the part played by the informer is beyond that of one who merely supplied information. He had participated in the commission of the offence as he had played an active role in the transaction between PW6 and the accused. He is therefore an agent provocateur. Accordingly, he loses the protection afforded by s 40(1) of the Act and is legally competent to be a witness.

36 I do not think *Ee Boon Keat* is applicable in Singapore. First, it must be observed that according to Augustine Paul J at [6], s 40A of the (Malaysian) Dangerous Drugs Act (reproduced hereunder) provides that the evidence of *agents provocateurs* is admissible. There is no such equivalent section in our Misuse of Drugs Act. The said s 40A reads:

> **40A.** — (1) Notwithstanding any rule of law or the provisions of this Act or any other written law to the contrary, no agent provocateur shall be presumed to be unworthy of credit by reason only of his having attempted to abet or abetted the commission of an offence by any person under this Act if the attempt to abet or abetment was for the sole purpose of securing evidence against such person.
>
> (2) Notwithstanding any rule of law or the provisions of this Act or any other written law to the contrary, and that the agent provocateur is a police officer whatever his rank or any officer of customs, any statement, whether oral or in writing made to an agent provocateur or by any person who subsequently is charged with an offence under this Act shall be admissible as evidence at his trial.

37 Second, to restrict s 23 of the Misuse of Drugs Act to only passive informers would be unduly restrictive. This is because in an entrapment operation, informers are often expected to play an active role; see *Looseley* at [36] where Lord Hoffman stated that "[e]ntrapment occurs when an agent of the state – usually a law enforcement officer or a *controlled informer* – causes someone to commit an offence in order that he should be prosecuted." Further, the value of an informer (both passive and active) is the ability to operate anonymously. Once a CNB operative's identity has been revealed, he or she ceases to be effective and, in some instances, might even be subject to reprisal.

38 I therefore have no hesitation in holding that the protection accorded by s 23(1) of the Misuse of Drugs Act extends to *agents provocateurs*. There was no contention that the exception in s 23(3) could be invoked in this case. In any event, even if it could, the court retains the discretion whether to order full disclosure concerning the informer. In the premises, the Prosecution was therefore not obliged to call Kechik or to offer him to the Defence.

39 As a further string to the bow, it ought to be noted that in *Lee Lee Chong v PP* [1998] 4 MLJ 697, the Malaysian Court of Appeal held that even while an *agent provocateur* was not entitled to the protection afforded by s 40 of the (Malaysian) Dangerous Drugs Act, the failure to call the *agent provocateur* or to make him available as a witness to the defence would not necessarily be fatal to the prosecution`s case if the agent's evidence was neither material or relevant. On the present facts, it is evident that Kechik's evidence was neither material nor relevant given that the defence of entrapment is not recognised in Singapore and that there was no hint of any egregious conduct on the part of the enforcement authorities. Thus, the DJ was correct in deciding that calling Kechik as a witness would not add any value to the evidence already adduced and that he did not need to be called.

Conclusion

40 For the foregoing reasons, I dismissed the appeal.