Shan Kai Weng v Public Prosecutor
[2003] SGHC 274

Case Number : Cr Rev 13/2003, MA 144/2003

Decision Date : 06 November 2003

Tribunal/Court : High Court

Coram : Yong Pung How CJ

Counsel Name(s) : Bhargavan Sujatha (Bhargavan & Co) for the appellant; James E Lee (Deputy Public Prosecutor) for the respondent

Parties : Shan Kai Weng — Public Prosecutor

Criminal Procedure and Sentencing – Revision of proceedings – Principles – Whether accused understood nature and consequences of plea – Whether accused admitted offence without qualification

Criminal Procedure and Sentencing – Sentencing – Possession of controlled drug under s 8(a) of the Misuse of Drugs Act (Cap 185, 2001 Rev Ed) – Whether sentence manifestly excessive

1 This was a petition for criminal revision of a decision of a subordinate court, and an appeal against the sentence imposed. I dismissed the application for revision, but allowed the appeal against sentence and reduced the sentence imposed. I now give my reasons.

The undisputed facts

2 On 7 July 2003, the appellant was driving into Singapore at 2.30am when he was stopped by the police, and his vehicle searched at the Woodlands Checkpoint Arrival Car Inspection Pit. The police officers found a tablet inside a red wrapper at the driver's seat near the dashboard. The appellant admitted to ownership of the tablet and was placed under arrest. His urine tested negative for drug consumption.

3 Upon analysis by the Health Sciences Authority, the tablet was found to contain nimetazepam, a Class C controlled drug listed in the first schedule to the Misuse of Drugs Act (Cap 185)(the "MDA").

4 On 5 August 2003, the appellant appeared before the district judge in person and pleaded guilty to the following charge for unlawful possession of drugs:

> You, Shan Kai Weng, M/27 years old, IC No S76111491, are charge [*sic*] that you, on or about the 7th day of July 2003 at about 0230 hrs, at Woodlands Checkpoint Arrival Car Inspection Pit, Singapore, did have in your possession a controlled drug as specified in Class C of the First Schedule to the Misuse of Drugs Act (Chapter 185), to wit, one tablet marked "028" on one side and "5" on the other side which was analysed and found to contain nimetazepam, without authorization under the said Act or the Regulation made thereunder, and you have thereby committed an offence under Section 8(a) and punishable under Section 33 of the Misuse of Drugs Act (Chapter 185).

5 The Notes of Evidence for the relevant court proceedings state:

> Charge read, explained and understood in English.

Punishment prescribed by law explained to Accused.

Accused pleads guilty.

Understands nature and consequences of plea.

Statement of Facts "A".

Statement of Facts read.

Facts admitted without qualification.

Court: Guilty and convicted.

Antecedents: Nothing known.

Mitigation: I am pleading for a light sentence.

Court: Six months' imprisonment.

The appellant's case

6 The appellant did not deny possession of the tablet. However, he claimed before me that he did not know the nature of the tablet in his possession, believing it to be a sleeping pill. His version of events was as follows: –

7 Whilst playing volleyball at Sentosa in mid-May 2003, the appellant complained about having constant headaches from early May. An acquaintance, one "John", told him that he had some tablets for headaches, which had helped him. John gave the appellant a tablet, which the appellant believed to be a sleeping pill. The appellant took the tablet. Since he did not have a headache at the time, he left the tablet in his car.

8 On 19 June 2003, the appellant had to undergo minor surgery to remove three of his wisdom teeth. He was given eight days medical leave after surgery. The dentist told him that his headaches could have been caused by his problems with his teeth. After the surgery, the appellant no longer experienced the headaches. Having no need of the tablet, he left it in his car and forgot about it until the police officers found it.

9 When stopped at the Woodlands checkpoint, the appellant's immediate response to the investigating officers was that the tablet was a sleeping pill. Upon further questioning, he explained to them how he had come by the tablet; that he had believed all along that it was a sleeping pill, and that he only came to know it was a controlled drug when the officers told him so. In reply, the police officers told him that since they had found him with the drug, they would charge him for possession of the drug, regardless of whether he knew what it was.

10 The appellant was not represented by counsel when he appeared before the trial judge. At the time his plea was taken, he believed that there was nothing more he could add to its contents, as he had already stated his position to the police officers earlier. He thus pleaded guilty to the charge, and intimated that he knew the nature and consequences of his plea. As reflected in the Notes of Evidence, he also admitted to the Statement of Facts without qualification after it was read to him.

The relevant portion of the Statement of Facts reads:

> Upon checking the vehicle driver's seat near the steering wheel dashboard, complainant recovered one tablet inside a red wrapper with the marking "5" believed to be a controlled drug. Accused was the driver of the vehicle and he admitted ownership to the one tablet. Accused was then placed under arrest for possession of controlled drugs.

11 The Statement of Facts went on to say that upon analysis, the tablet was found to contain nimetazepam, a class C controlled drug listed in the MDA. The appellant claimed that he believed that he had to admit to the Statement of Facts since it was true that he was found with the tablet. He was not aware of the presumption under s 18 of the MDA, which provides:

> (1) Any person who is proved to have had in his possession or custody or under his control –
>
> (a) anything containing a controlled drug;
>
> ……
>
> shall, until the contrary is proved, be presumed to have had the drug in his possession.
>
> (2) Any person who is proved or presumed to have had a controlled drug in his possession shall, until the contrary is proved, be presumed to have known the nature of that drug.

As such, he argued that he was unaware that he should qualify his plea by informing the court that he was unaware that the tablet was a controlled drug, so as to rebut the presumption that he knew the nature of the drug

12 The appellant also told the court that he was worried about the consequences should his employers find out about the case. He thought that if he pleaded guilty, he would simply be fined, and could "move on with his life".

13 It was on this basis that the appellant petitioned for criminal revision. In the alternative, he appealed against the sentence of six months imprisonment as being manifestly excessive.

Petition for criminal revision

Principles of revision

14 The High Court's revisionary powers are conferred by s 23 of the Supreme Court of Judicature Act (Cap 322)(the "SCJA") and s 268 of the Criminal Procedure Code (Cap 68)(the "CPC"). It is trite law that these powers of revision are discretionary, and will be exercised sparingly: *Mok Swee Kok v PP* [1994] 3 SLR 140. It is not the purpose of criminal revision to become "a convenient form of 'backdoor appeal' against conviction for accused persons who had pleaded guilty to their charges", as articulated in *Teo Hee Heng v PP* [2000] 3 SLR 168 at 172.

15 The test laid down by the courts is whether the failure to exercise revisionary powers will result in serious injustice being done. No precise definition of what constitutes serious injustice is possible – however, it must generally be shown that there was something palpably wrong in the decision by the court below, which strikes at its basis as an exercise of judicial power: see *Ang Poh Chuan v PP* [1996] 1 SLR 326 at 330, followed in *Ngian Chin Boon v PP* [1999] 1 SLR 119 and *Balasubramanian Palaniappa Vaiyapuri v PP* [2002] 1 SLR 314.

16 Whereas the function of the appellate court is to examine the evidence and come to an independent finding on each issue of fact, the revisionary court should confine itself to errors of law or procedure. It should deal with questions of evidence or finding of facts only in exceptional circumstances to prevent a miscarriage of justice: *Sarjit Singh s/o Mehar Singh v PP* [2002] 4 SLR 762 at 767.

17 Bearing these principles in mind, I turn to the petition at hand.

Validity of the plea of guilt

18 The appellant's arguments that he did not realise the need to qualify his plea before the judge, and his belief that he would only be given a fine, essentially challenged the validity of his plea of guilt. The common law has evolved various procedural safeguards to ensure that a plea of guilt can safely form a basis for conviction. The test has been definitively laid down in *Ganesun s/o Kannan v PP* [1996] 3 SLR 560, and followed in *Rajeevan Edakalavan v PP* [1998] 1 SLR 815 and *Koh Thian Huat v PP* [2002] 3 SLR 28. As such, the following safeguards must be observed before a plea of guilt can be deemed valid and unequivocal. First, the court must ensure that it is the accused himself who wishes to plead guilty. As such, the accused should plead guilty by his own mouth, and not through his counsel. Second, the court must ascertain whether the accused understands the nature and consequences of his plea. Third, the court must establish that the accused intends to admit without qualification the offence alleged against him.

Pleading guilty by his own mouth

19 In my view, there was no dispute that the appellant pleaded guilty to the charge by his own mouth.

Understanding the nature and consequences of his plea

20 Clarifying what the second requirement of understanding the nature and consequences of one's plea means, this court held in *Balasubramanian* that understanding the "nature" of the plea means that the accused must know exactly what he is being charged with. To understand the "consequences" of the plea, the accused must be aware of the punishment prescribed by the law so that he knows the possible sentence he will receive upon conviction.

21 The appellant argued that he failed to appreciate that possession of the drug with knowledge of it being a controlled drug was an important ingredient of the offence. Further, he did not understand the consequence of his plea, since he thought that he would be let off with a fine.

22 I found this argument unmeritorious. First, the appellant could not have been unaware that he was pleading guilty to a charge of possession of controlled drugs. This was laid out very clearly in the charge and Statement of Facts which were both read to him, and which he indicated that he understood. The Notes of Evidence also record that the punishment prescribed by law – a maximum of ten years imprisonment, a fine of $20,000, or both – was explained to him before he pleaded guilty. There was no suggestion that his plea was made involuntarily, or that the trial judge had deviated from the requisite procedure. The appellant did not attempt to impute any deception on the part of the court or the prosecution. Moreover, the appellant was working as an Information Technology Support Staff at the time of his arrest. Given all these considerations, I found no issue of the appellant being prejudiced as a result of illiteracy or inability to understand the proceedings. I also drew support for my conclusion from the case of *Rajeevan Edakalavan*, where I held that:

> The fact that the petitioner was not informed of his right to counsel or the defences open to him did not make the plea any less valid and unequivocal…

23 The appellant's contention that he did not understand the nature of his plea because he was unaware that knowledge of the drug was an important ingredient of the offence is untenable for another reason. As noted earlier, ss 18(1) and 18(2) of the MDA lay down a "double" statutory presumption. Where a person is in possession of a bag or package which, in fact, contains a controlled drug, it is presumed that he is in possession of and knows the nature of the controlled drug. It is open to the accused to rebut these presumptions: *PP v Hla Win* [1995] 2 SLR 424, *Lim Lye Huat Benny v PP* [1996] 1 SLR 253. The Court of Appeal in *Tan Ah Tee & Another v PP* [1978-1979] SLR 211 considered the sort of explanation required to rebut the presumption of knowledge of the nature of the drug under s 18(2) of the MDA (then s 16 of the MDA 1973). The Court approved the approach of Lord Pearce in the House of Lords decision, *R v Warner* [1969] 2 AC 256, accepting that the word "possession" in the MDA should be construed as Lord Pearce had construed it. Thus, the Court held that:

> … the term "possession" is satisfied by a knowledge only of the existence of the thing itself and not its qualities, and that ignorance or mistake as to its qualities is not an excuse … *Though I reasonably believe the tablets which I possess to be aspirin, yet if they turn out to be heroin I am in possession of heroin tablets.* This would be so I think even if I believed them to be sweets. It would be otherwise if I believed them to be something of a wholly different nature. (my emphasis)

24 The position under our law, therefore, is that possession is proven once the accused knows of the existence of the thing itself. Ignorance or mistake as to its qualities is no excuse. The appellant knew that the tablet was in his car. He believed it to be a sleeping pill, which, like the aspirin of the hypothetical in *Warner* and *Tan Ah Tee*, is a drug. As such, his ignorance as to the qualities of the tablet did not provide him a defence to the charge of possession, and his contention that he did not understand the nature of his plea could not stand.

25 I noted however, that although the law does not accept ignorance of the qualities of the drug as a defence to a charge of possession, such ignorance may be accepted as a valid mitigating factor: *PP v Chan Choon Chye* (MA 59/2002, DC, unreported judgment dated 25/4/2002).

Intending to admit without qualification the offence alleged against him

26 This third safeguard requires the court to establish that the accused intends to admit without qualification the offence alleged against him – that is, he must admit to all the ingredients of the offence contained in the Statement of Facts without qualification: *Rajeevan Edakalavan* and *Toh Lam Seng v PP* [2003] 2 SLR 346.

27 The appellant contended under this limb that his plea of guilt was qualified by his belief that the tablet was a sleeping pill. Although he did not voice this qualification to the judge, this was because he had already declared his belief to the police officers, and thought that it would be on the record.

28 A plea of guilt is only qualified by statements in the mitigation plea where such statements indicate a lack of *mens rea* or *actus reus*: *Balasubramanian*. In *Toh Lam Seng*, the petitioner alleged that his claim of provocation in his mitigation plea qualified his plea of guilt to a charge of voluntarily causing hurt under s 323 of the Penal Code (Cap 224), making it equivocal. This court rejected the petitioner's argument on the grounds that his allegations of provocation did not contradict his

admissions to the material elements of the Statement of Facts or to the charge. Further, the instances of the alleged provocation fell short of satisfying the requirements of "grave and sudden provocation", and could only be a mitigatory circumstance.

29 Similarly, I found that in the present case, the appellant's belief that the tablet was a sleeping pill was no defence to the charge of possession and could only be a mitigatory circumstance. I considered that the appellant did not even make mention of his belief when making his plea in mitigation. Even if I considered this un-communicated belief to form part of his mitigation plea, I found it plain that neither of the *Balasubramanian* requirements was satisfied on the facts. As such, I was of the view that the appellant's belief, even if expressed to the court, would not have qualified his plea of guilt.

30 For the foregoing reasons, I found it very clear that the appellant failed to make out his application for criminal revision. Accordingly, I dismissed the application.

Appeal against sentence

31 The punishment prescribed by law for an offence under s 8(a) of the MDA is a maximum of ten years' imprisonment, a fine of $20,000 or both.

32 In considering this appeal against sentence, I was mindful of the principles governing an appellate court when faced with such an appeal. It is trite law that an appellate court will only interfere with a sentence imposed by a lower court if it is satisfied that (a) the sentencing judge made the wrong decision as to the proper factual basis for sentence; (b) there was an error on the part of the trial judge in appreciating the material placed before him; (c) the sentence was wrong in principle or (d) the sentence imposed was manifestly excessive: *Tan Koon Swan v PP* [1986] SLR 126 and *Lim Poh Tee v PP* [2001] 1 SLR 674.

33 The appellant appealed on the fourth ground – that the sentence of six months imposed on him was manifestly excessive in view of the fact that he had no antecedents or convictions. The prosecution, on the other hand, contended that the sentence correctly reflected the concern of the courts with the growing trend of synthetic drug abuse, and furthermore, that the sentence was within the sentencing tariff for similar offences.

Current sentencing tariffs for Class C drugs

34 In coming to his decision as to sentence, the trial judge noted that, although nimetazepam is a Class C controlled drug, it is nevertheless "equally insidious in its reach and appeal to young drug offenders" when compared to Class A or B synthetic drugs, which have a starting point of ten to twelve months imprisonment. The trial judge also found that the current sentencing tariff for illegal possession of small quantities of a Class C type drug is a jail sentence ranging from six to nine months. In a very exceptional case, the offender may be sentenced to three months imprisonment. In reaching this conclusion, the trial judge considered two cases which involved possession of the same quantity of nimetazepam tablets as in the present case.

35 In *Tang Wai Mun v PP* (MA 298/2001, DC, unreported judgment dated 20/11/2001), the accused, also a first offender, claimed in mitigation that he had been given the tablet by two girls as part of a "dare". He took it knowing that it was a drug, and pocketed it, planning to throw it away later. As there were no aggravating factors or exceptional mitigating circumstances, he was sentenced to three months imprisonment.

36 In *Tan Wang Hiang Dawn v PP* (MA 13/2002, DC, unreported judgment dated 22/1/2002), the accused claimed that the drug was given to her by a friend to help her with her sleeping problems. It appears that she was aware of the nature of the drug when she accepted it. She did not consume the tablet. The trial judge was not convinced of her explanation, but accepted that she was not an addict, and sentenced her to nine months imprisonment.

37 Counsel for the appellant referred me to the case of *Ching Ling Kah @ Lincoln Cheng v PP* (MA 235/95, HC, unreported judgment dated 27/2/1996). The appellant in that case was charged with possession of 116 tablets of a Class C drug, triazolam, which he took for his chronic insomnia. He had no prior convictions. I set aside his jail sentence of 6 months, ordering him to pay the maximum fine of $20,000 instead. The facts of that case were rather exceptional, since the appellant had been prescribed the tablets by his doctor, and had been consuming them for years.

38 I also considered another recent case not cited by the trial judge, *PP v Chan Choon Chye*, where the accused was sentenced to six months imprisonment for possession of six tablets of class C drugs. In arriving at this sentence, the judge considered the plea of the accused in mitigation – that he had a medical problem and had been given the six tablets by a friend who said that the tablets would help him. The judge noted that the quantum of drugs was small, and that a short custodial sentence was justified. The accused had various previous convictions, including a conviction for consumption of a controlled drug. In contrast, I noted the fact that the appellant in the present case has no prior convictions whatsoever.

39 I surveyed the cases and took into account the sentences meted out in each case, but also bore in mind that each case, and the sentence imposed therein, should ultimately be decided on its own facts.

Mitigating factors

40 In reaching his decision as to sentence, the trial judge noted that the appellant had not offered any explanation as to how he came to be in possession of the drug. As such, the judge felt that there were no mitigating factors of exceptional significance. Rather, the fact that he was caught bringing the drug into Singapore was treated as an aggravating factor.

41 A sentence may be manifestly excessive when it fails to accommodate the extenuating circumstances or mitigating circumstances: *Sim Boon Chai v PP* [1982] 1 MLJ 353.

42 After careful consideration of the facts, I noted that the appellant had no record of drug abuse, and had substantiated his claim of bad headaches by producing his medical report and medical certificate given after his wisdom teeth operation. In my view, it was not inconceivable that his impacted wisdom teeth could have caused his headaches. As such, the appellant's version of events leading up to his possession of the tablet was not far-fetched. I further considered the fact that the appellant's claim was not an afterthought, as he raised it before the police officers, only to be told that it was to no avail. Moreover, this was his first brush with the law, as well as his first appearance in court, made without the benefit of defence counsel. As such, I gave credence to his claim of ignorance of the fact that what he told the police officers would not be on record before the trial judge. I also accepted that what the police officers had told him may have had some effect on his failure to bring the mitigating circumstances to the attention of the court.

43 In view of these exceptional circumstances, including the lack of evidence that the appellant had actively procured the drug, I came to the conclusion that the appellant's version of events was not implausible, and should be considered in mitigation when meting out his sentence. By the same

token, I did not consider the fact that he drove into Singapore with the drug to be an aggravating factor. The appellant was not importing the drug – it merely happened to be in his car when he drove out of Singapore into Johore Bahru and back again, remaining unopened all the while.

44 For all these reasons, I came to the conclusion that on the very special facts of this case, a sentence of six months was too harsh and manifestly excessive.

Conclusion

45 Accordingly, I dismissed the petition for revision, and reduced the sentence to one month's imprisonment.

Petition dismissed.

Appeal allowed.