Chew Seow Leng v Public Prosecutor
[2005] SGCA 11

Case Number : Cr App 16/2004

Decision Date : 07 March 2005

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; Lai Kew Chai J; Yong Pung How CJ

Counsel Name(s) : Lim Choon Mong (David Rasif and Partners) and Teo Choo Kee (CK Teo and Co) for the appellant; Bala Reddy and Seah Kim Ming Glenn (Deputy Public Prosecutors) for the respondent

Parties : Chew Seow Leng — Public Prosecutor

Criminal Law – Statutory offences – Misuse of Drugs Act – Chain of custody – Whether there was break in chain of custody of drugs seized

Criminal Law – Statutory offences – Misuse of Drugs Act – Mandatory death penalty – Whether mandatory death penalty legal

Criminal Law – Statutory offences – Misuse of Drugs Act – Statutory presumption of possession for purpose of trafficking – Drug trafficking paraphernalia seized together with drug exhibits – Whether paraphernalia circumstantial evidence supporting statutory presumption – Section 17(c) Misuse of Drugs Act (Cap 185, 2001 Rev Ed)

Criminal Procedure and Sentencing – Charge – Amalgamation of charges – Separate quantities of drugs seized from different locations – Weight of each quantity exceeded statutory threshold triggering mandatory death penalty under Misuse of Drugs Act – Whether amalgamation of charges bad for duplicity – Whether failure of justice occasioned

Criminal Procedure and Sentencing – Statements – Voluntariness – Accused did not challenge voluntariness of statements at trial – Whether trial judge correct to place weight on statements

7 March 2005

Lai Kew Chai J:

1 The appellant was convicted on 8 September 2004 on the following charge:

> You, Chew Seow Leng, Male/43 years, NRIC No S1510659Z
>
> are charged that you, on or about the 7th day of January 2004 between 11.45 am and 12.05 pm, did traffic in a controlled drug specified in Class A of the First Schedule to the Misuse of Drugs Act, Chapter 185 ("the Act") by having in your possession,
>
> > (i) 4 packets of granular substance containing not less than 149.1 grams of diamorphine in a taxi bearing registration number SHA 3884X along Puay Hee Avenue, Singapore; and
> >
> > (ii) a total of ten (10) packets, two (2) straws and one (1) container of granular substance containing not less than 77.47 grams of diamorphine at No 2 Topaz Road #03-01, Topaz Mansion, Singapore,
>
> *totalling 226.57 grams of diamorphine, of which more than 15 grams of diamorphine are* for the purpose of trafficking, without any authorisation under the Act or the Regulations made thereunder, and you have thereby committed an offence under section 5(1)(a) read with section 5(2) of the Act and punishable under section 33 of the Act.

[emphasis added]

2 We dismissed the appeal against conviction and sentence, and set out our reasons below.

The facts

3 On 7 January 2004, officers from the Central Narcotics Bureau ("CNB"), acting on information received, spotted and trailed the appellant. The officers intercepted the taxi the appellant was travelling in and arrested him. A red paper bag, containing another yellow paper bag, was found next to the appellant on the rear seat. The red paper bag was later found to contain 149.1g of diamorphine.

4 After his arrest, the appellant gave a statement to Senior Station Inspector Siew Lai Lone. He admitted to owning the red paper bag, and said that it contained 4*lb* of heroin that he had obtained from his supplier. He also disclosed the address of his rented apartment ("the apartment").

5 A second party of CNB officers, led by Staff Sergeant Tony Ng ("SSgt Ng"), took over custody of the appellant and the exhibits seized from the taxi. The appellant was brought to the apartment, where two Chinese males, Boo Hang Guang ("Boo") and Tan Ah Leng ("Tan"), were found, and arrested. The appellant led the officers to various parts of the master bedroom and adjoining toilet, from which a total of 77.47g of diamorphine was seized. A pocket weighing scale and more than 3,000 small empty plastic packets were also recovered.

6 SSgt Ng recorded a second statement from the appellant, in which the appellant again admitted that there were 4*lb* of heroin in the red paper bag. He said that while Boo and Tan occasionally went to the apartment to consume heroin and spend the night, they had nothing to do with the drugs seized.

7 SSgt Ng took custody of the exhibits seized from the apartment. He later handed over custody of all the exhibits seized from the taxi and the apartment to the investigating officer, Assistant Superintendent Goh Boon Pin ("ASP Goh"), after informing ASP Goh of where the exhibits were found. ASP Goh took the exhibits back to the CNB headquarters, where they were kept in a locked safe and cabinet in his office. On the night of 7 January 2004, ASP Goh weighed the drugs in the presence of the appellant, who did not dispute their weight.

8 The appellant exhibited drug withdrawal symptoms later that night and was referred to Changi Prison Hospital. There, he told both a staff nurse and Dr Mohd Emran Mamat ("Dr Emran") that he had consumed about one packet of heroin a day for the preceding two months, and three straws on the morning of 7 January 2004. The appellant subsequently recovered and was discharged.

9 In his statements to ASP Goh made after his discharge from Changi Prison Hospital, the appellant, who was unemployed, said that he had resumed selling heroin because he was heavily indebted to loan sharks. The heroin seized from the apartment was the remainder of 4*lb* he had purchased from his supplier in December 2003. He would repack 1*lb* of heroin into 56 smaller packets, which he sold for $300 each. He would also take heroin from the small packets whenever he wanted to and consumed about one packet a day. The appellant reiterated that Boo and Tan had nothing to do with the drugs seized from the apartment, and said that he gave the two men heroin free of charge, although they would sometimes give him money and buy food for him.

10 At trial, the Prosecution applied to amalgamate into one charge the original two separate charges in respect of the drugs seized from the taxi and the apartment. Defence counsel did not object, and the trial proceeded on the basis of the amalgamated charge. The appellant did not challenge the voluntariness of his statements. Boo and Tan both testified that the appellant had given them heroin free of charge. Tan added that he considered the appellant to be a heavier consumer of heroin than himself. However, Dr Emran testified that he was of the opinion that the appellant suffered only mild withdrawal symptoms. If the appellant actually consumed heroin at the rate he claimed, the symptoms that would have been exhibited would be more severe. The Prosecution's expert witness, Dr Rasaiah Munidasa Winslow ("Dr Winslow"), concurred with Dr Emran's assessment. The appellant elected to remain silent when called upon to enter his defence, and no defence witnesses were called.

The decision below

11 Tay Yong Kwang J found that the Prosecution's evidence proved that the appellant was in possession of the drugs seized from the taxi and the apartment (see [2004] SGHC 227). He was satisfied, on the evidence, that SSgt Ng had taken custody of the drugs seized from the taxi and had retained them until he handed them over to ASP Goh. Tay J likewise accepted ASP Goh's evidence as to his handling of the exhibits, and noted that the appellant neither disputed the weight of the drugs when they were weighed in his presence nor qualified the amount seized in his later statements under s 122(6) of the Criminal Procedure Code (Cap 68, 1985 Rev Ed) ("the CPC"). Thus, Tay J found that there was no break in the chain of custody of the drugs.

12 Since the amount of diamorphine seized from the appellant exceeded 2g, the statutory presumption in s 17(c) of the Misuse of Drugs Act (Cap 185, 2001 Rev Ed) (" the MDA") applied. The appellant was presumed to have had the drugs in his possession for the purpose of trafficking, and bore the burden of rebutting the presumption on a balance of probabilities. Defence counsel, relying on the appellant's statements to ASP Goh, submitted that the appellant consumed about 7.5g of heroin daily from his stock whenever he wanted to. He disagreed with the two doctors' assessment of the severity of the appellant's drug addiction. Finally, counsel submitted that it would be prudent to assume that the appellant would want to hold on to his heroin supplies because of, firstly, his high rate of consumption, and secondly, his evidence that his supplier would contact him when supplies were available but he could not contact his supplier to ask for supplies.

13 However, Tay J decided that the appellant's undisputed statements and the drug paraphernalia seized actually buttressed the statutory presumption that the appellant was trafficking in heroin. Further, he found no evidence upon which a meaningful apportionment of the drugs could be made between that meant for the appellant's personal consumption and that meant for trafficking. In any event, even if the appellant's contentions were accepted, there was no chance of arguing that the appellant had trafficked in 15g or less of diamorphine, such that he could escape the death penalty. Therefore, Tay J amended the charge to include the italicised words as shown at [1] above. The amended charge was read back to the appellant, who maintained his plea of "not guilty".

14 Finally, in response to the argument by defence counsel that the mandatory death penalty imposed under the MDA was unconstitutional, Tay J expressed his agreement with the decision of Kan Ting Chiu J in the High Court in *PP v Nguyen Tuong Van* [2004] 2 SLR 328.

The appeal

15 At the hearing before us, the appellant's present counsel criticised the amalgamation at the trial of the two original charges against the appellant. Other points were raised in written submissions but not pursued at the hearing. In addition, counsel contested the legality of the mandatory death penalty imposed under the MDA, notwithstanding the decision of the Court of Appeal in *Nguyen Tuong Van v PP* [2005] 1 SLR 103 upholding the decision of Kan J in the High Court. We will address each issue in turn.

Amalgamation of charges

16 Counsel for the appellant argued that Tay J should not have allowed the Prosecution to proceed with the amalgamated charge, as the drugs seized from the taxi and the apartment constituted two distinct and separate charges. Consequently, the amalgamated charge was bad for duplicity and contrary to s 168 of the CPC, which requires each distinct offence to be the subject of a separate charge. Recognising that s 396 of the CPC operated such that the appellant's conviction would be disturbed only if the duplicity of charges alleged occasioned a failure of justice, counsel cited case authorities where duplicity of charges was held to occasion a failure of justice.

17 We rejected this argument. It was not disputed that the two quantities of drugs seized were found at different places and times. However, counsel for the appellant failed to explain how this fact advanced the appellant's case that the two quantities should have been the subject of two separate charges.

18 As the Prosecution submitted, the crux of the appellant's charge was that the appellant was in possession of the drugs for the purposes of trafficking. For the appellant to be found to have been in possession of the drugs, he must have had physical control of the drugs and knowledge of their existence: *Fun Seong Cheng v PP* [1997] 3 SLR 523.

19 There could be no issue as to the drugs seized from the taxi. The drugs were found in the red paper bag next to the appellant, and the appellant admitted in his statements that he owned the bag and knew what its contents were.

20 As for the drugs seized from the apartment, the appellant clearly knew of their existence. Indeed, he indicated their locations to the CNB officers conducting the search. With regards to physical control, the appellant was not precluded from being in possession of the drugs in the apartment at the time of his arrest merely because he was arrested in the taxi before the apartment was searched. The drugs need not be found on the appellant physically for him to be in physical control of the drugs for the purposes of s 17 of the MDA: *Shahary bin Sulaiman v PP* [2004] 4 SLR 457 at [10].

21 The apartment was rented by the appellant alone. All the drugs seized from the apartment were found in the master bedroom and adjoining toilet. The appellant repeatedly said in his statements that Boo and Tan used the other bedroom when they slept over, and that they had to inform him first before they entered or left the apartment. Since only the appellant had access to and the use of the master bedroom and toilet, he had custody and control of, and thus was in possession of, the drugs seized from the apartment.

22 In the circumstances of this case, the amalgamation of the original charges was proper. It is clear that the Prosecution has a wide discretion to determine the charges that are preferred against an offender: *Thiruselvam s/o Nagaratnam v PP* [2001] 2 SLR 125. Multiple charges of drug possession

for the purposes of trafficking in different locations and at different times may be amalgamated: *Yong Yow Chee v PP* [1998] 1 SLR 273. The weight of each of the two quantities of heroin seized from the appellant exceeded the 15g threshold that would trigger the mandatory death penalty under the MDA. The two quantities were seized in quick succession within 20 minutes. The same standards of proof and statutory presumptions would have been applicable. This case, however, did not involve the amalgamation of multiple charges of drug possession where the quantity involved in each charge fell below the statutory threshold for invoking the death penalty, but where the combined quantity would cross the threshold.

23 The cases cited by counsel for the appellant on the duplicity of charges were all distinguishable from this case. *Tham Wing Fai Peter v PP* [1988] SLR 424 and *Chinniah v PP* [1948] MLJ 59 were cases where the offenders were properly convicted on multiple distinct charges where each criminal act constituted a separate offence. The case of *See Yew Poo v PP* [1949] MLJ 131 involved one charge that disclosed an offence punishable under two different provisions. Finally, *Wee Hui Hoo v PP* [1987] 1 MLJ 498 and *Muthan v PP* [1947] MLJ 86 were cases that involved alternative provisions creating separate and distinct offences. None of these situations were applicable to this appeal, and there was no issue as to any duplicity of charges in this case.

24 In any event, there was nothing to suggest that the appellant was misled by the amalgamation of the original charges, or that a failure of justice was occasioned as a result. The appellant was represented by counsel at his trial, and neither he nor his counsel raised any objections to the amalgamation. In these circumstances, it was insufficient for the appellant to submit on appeal that he had been misled because he was a layman ignorant of the law.

Chain of custody of the drug exhibits

25 The appellant criticised the evidence of SSgt Ng and ASP Goh as to the custody and handling of the drugs seized from him. It is trite law that an appellate court will not disturb the findings of fact made by the trial judge, unless they are clearly reached against the weight of the evidence or plainly wrong. The appellate court must bear in mind that it has neither seen nor heard the witnesses and has to pay due regard to the trial judge's findings and reasons: *Lim Ah Poh v PP* [1992] 1 SLR 713, *Ameer Akbar v Abdul Hamid* [1997] 1 SLR 113. This is especially the case where the findings turn on the trial judge's assessment of the credibility and veracity of the witnesses: *Yap Giau Beng Terence v PP* [1998] 3 SLR 656.

26 The appellant seized on the apparent lack of clarity in SSgt Ng's evidence on SSgt Ng's cross-examination by defence counsel, which was said to cast doubt on the chain of custody of the various drug exhibits. However, what was evident from the transcript was that there was some degree of miscommunication and antagonism between SSgt Ng and defence counsel, which affected to some degree the clarity of SSgt Ng's evidence. Nevertheless, the essence of SSgt Ng's evidence could still be discerned.

27 Tay J had found that SSgt Ng had taken custody of the red paper bag seized from the taxi. SSgt Ng had brought the bag to the apartment and had held on to it until ASP Goh arrived, after which he handed over custody of the bag to ASP Goh. Although SSgt Ng could not recall exactly when the handover took place and did not make a record of the handover, there was nothing to suggest that the handover did not take place, or that there was any mix-up or impropriety with the handling of the bag. Likewise, the evidence was clear that SSgt Ng had taken and retained physical custody of the exhibits seized from the apartment until he handed them over to ASP Goh. He made it clear in his evidence that he had in fact handed the exhibits over, and did not merely recite as his

evidence the usual practice for handling drug exhibits. No other quantities of drugs were seized from the appellant apart from those seized from the taxi and the apartment, and CNB did not conduct any other arrests on 7 January 2004.

28 Turning to ASP Goh, Tay J noted that there was no requirement that ASP Goh give SSgt Ng a written acknowledgment when the latter handed over the exhibits to him. We saw no reason to depart from this, although it may be desirable as a matter of practice for such acknowledgments to be given when drug exhibits are transferred by one officer to another, to ensure that the exhibits are accounted for at all times. In light of the evidence of ASP Goh, the absence of this acknowledgment did not undermine the Prosecution's case. ASP Goh had fully accounted for his handling of the exhibits at all times, and there was no evidence that the integrity of the exhibits was impaired by their storage in his locked safe and cabinet. The appellant argued that the drugs, which had been weighed in his presence, should also have been sealed in his presence, with him acknowledging that the weighing and sealing had been conducted before him. However, there was no requirement that the exhibits be sealed in the appellant's presence.

29 We found no reason in the present case to disturb the findings of fact made by Tay J. It is crucial to note that the appellant never challenged the weight of the drugs seized from him, both when the drugs were weighed before him on the night of 7 January 2004 and in his cautioned statements recorded later. Tay J had also ruled out the possibility of a mix-up in the exhibits.

Circumstantial evidence confirming the presumption of trafficking

30 The appellant argued that Tay J had wrongly found that the empty plastic packets and pocket weighing scale seized from the apartment supported the presumption of trafficking under s 17(c) of the MDA. He claimed that he could have finished all the drugs seized given sufficient time as he was a hard-core addict who had been detained at drug rehabilitation centres on six previous occasions. He asserted that the two doctors' assessments of his drug addiction on the basis of the withdrawal symptoms he exhibited were inconclusive. Finally, Tan had given evidence that he considered the appellant to be an even more severe addict than he was.

31 The appellant was found in possession of two quantities of heroin. The weight of each quantity far exceeded the 2g threshold for diamorphine beyond which the presumption of trafficking under the MDA applied. As the learned judge said, the burden therefore fell on the appellant to rebut this presumption. However, the appellant failed to do so.

32 It is established law that possession of drug trafficking paraphernalia may be relevant as circumstantial evidence of drug trafficking: *Chan Hock Wai v PP* [1995] 1 SLR 728. The pocket weighing scale and empty plastic packets would have been useful for the purposes of drug trafficking, and had been recovered from the apartment along with a substantial quantity of heroin. The appellant did not explain why these items were found there, which he would have had little need for had he merely been a drug consumer.

33 Tay J had correctly refused to apportion the drugs seized from the appellant into portions for the appellant's consumption and for trafficking. The test for apportionment in *Jusri bin Mohamed Hussain v PP* [1996] 3 SLR 29 requires credible evidence that part of the drugs seized was meant for self-consumption, as well as of the offender's rate of consumption and the number of days the drugs were meant for. It was insufficient to rely on the mere say-so of the offender. However, at trial, the appellant relied almost entirely on his statement to ASP Goh that he consumed one packet of heroin a day. This evidence was clearly inadequate. No new evidence pertaining to the appellant's drug

consumption and addiction was adduced before us.

34 Furthermore, Tay J, after refusing to apportion the drugs seized from the appellant, had nonetheless gone on to comprehensively consider the appellant's arguments, assuming the appellant's stated rate of consumption to be correct. He concluded that there was a significant shortfall that was unaccounted for between the 4*lb* the appellant obtained in December 2003 and the 2*lb* seized from the apartment, factoring in the amount the appellant could have consumed. As for the drugs seized from the taxi, Tay J had found it unlikely that the appellant had obtained that substantial quantity to hoard it for his own consumption, when he was unemployed and heavily indebted to loan sharks. The appellant himself had said that his financial difficulties were the reason he resorted to drug trafficking. Once again, the appellant failed to demonstrate why Tay J's decision here should be disturbed.

35 It was insufficient for the appellant to simply rely on the possibility raised in the evidence of Dr Emran and Dr Winslow of exceptional cases where a severe drug addict would fail to exhibit correspondingly severe drug withdrawal symptoms, without going on to show that he was indeed such an addict. Dr Emran, who had examined the appellant, was of the opinion that the appellant exhibited only mild withdrawal symptoms. Dr Winslow, concurring with Dr Emran, added that it was generally unlikely for a severe drug addict to exhibit only mild withdrawal symptoms. In the face of the evidence of Dr Emran and Dr Winslow, Tan's evidence was of little value in this case. Tan based his opinion on his observing the appellant consuming heroin on each of the seven or eight times he stayed over at the apartment, presumably using his own drug consumption as a yardstick. This was an inadequate and inconclusive basis for any credible conclusion on the severity of the appellant's drug addiction.

36 The appellant asserted in written submissions that the rate of consumption of a hard-core heroin addict with easy access to heroin would rise exponentially, as he required ever higher quantities to achieve the same level of satisfaction. This was a completely new point that was not canvassed at trial, and was not substantiated in submissions. Further, counsel for the appellant saw fit to support this bare assertion by including as exhibits pages apparently downloaded off the Internet without making a proper application to adduce fresh evidence on appeal. In any case, the material exhibited would not have satisfied the test for adducing fresh evidence set out in *Ladd v Marshall* [1954] 1 WLR 1489 and affirmed in cases such as *Juma'at bin Samad v PP* [1993] 3 SLR 338. The material could have been obtained with reasonable diligence for use at trial. A perusal showed it to be extremely broad and general, with no indication of the credentials of the writer and publisher, which thus undermined its relevance and credibility.

Reliance on the appellant's statements

37 Counsel for the appellant submitted that Tay J was wrong to place much weight on the appellant's statements when the voluntariness of the statements had not been tested. This argument is seriously flawed. At no time during the trial did the appellant challenge the voluntariness of any of his statements, expressly or otherwise. Consequently, there was no need for the Prosecution to prove that the statements were made voluntarily in this case: *PP v Mohamed Noor bin Jantan* [1979] 2 MLJ 289. In his written submissions on appeal, he also did not challenge the voluntariness of his statements. The statements were admissible as evidence, and Tay J was free to place such weight on them as was appropriate in light of the circumstances and other evidence. To accept the appellant's arguments would mean accepting the illogical proposition that the appellant's silence in the face of his inculpatory statements rendered the statements unreliable, when there was no material to test the statements against.

38 The appellant never denied in his statements that he was engaged in drug trafficking or that he had given drugs free of charge to Boo and Tan. In his cautioned statements to ASP Goh, he went into significant detail as to how he carried out drug trafficking activities. During the trial, he did not dispute or deny the contents of these inculpatory statements, choosing to keep silent when called upon to enter his defence. Tay J had carefully scrutinised the statements and there was nothing to suggest that the weight Tay J had placed on the statements was wrong.

Legality of the mandatory death penalty

39 Counsel for the appellant recognised that the Court of Appeal had just recently reiterated its position on the legality of the mandatory death penalty imposed under the MDA in its decision in *Nguyen Tuong Van v PP* ([15] *supra*). We had held, after hearing exhaustive and wide-ranging argument, that the mandatory death penalty was constitutional and did not breach customary international law. Yet, in the same breath, counsel submitted that the death sentence imposed by the trial judge was unlawful and contravened the Constitution and international law, and invited this court to reconsider its position *vis-à-vis* the mandatory death penalty. There was an obvious contradiction in counsel's submissions that he did not appear to be conscious of. Be that as it may, we affirmed the decision in *Nguyen Tuong Van v PP*, and have nothing further to add.

40 The rest of counsel's submissions on this issue were disposed of briefly as they were generally not on point. Counsel's suggestion that this court send a "memorandum of concern" to the Cabinet to consider an alternative sentence of life imprisonment for drug-trafficking offences was wholly inappropriate in view of the clear separation of powers under the Constitution. We also respectfully disagreed with counsel's assertion that our society is indifferent to whether a convicted drug trafficker is hanged or imprisoned for life, now that a term of life imprisonment is for the remainder of the convict's natural life. The mandatory death penalty imposed under the MDA reflects our society's abhorrence of drug trafficking, and counsel presented nothing before this court to show that society's views have changed on this issue. Furthermore, any changes to the MDA to reflect changing social attitudes towards drug offences, if indeed a change has taken place, is a matter that is, more appropriately, within the purview of Parliament.

Conclusion

41 The appellant failed to sustain any of his grounds of appeal. He consistently maintained that he alone was in possession of the drugs seized from him, and his statements in this regard remained unchallenged. His silence in the face of his own voluntary statements and the circumstantial evidence was telling. No serious challenge was mounted to the chain of custody of the drug exhibits or to the findings of Tay J. In these circumstances, there was no reason to disturb the appellant's conviction and sentence.

Appeal dismissed.