IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2019] SGCA 9

Criminal Appeal No 15 of 2017

Between

Zamri bin Mohd Tahir

... Appellant

And

Public Prosecutor

... Respondent

GROUNDS OF DECISION

[Criminal Law] — [Statutory offences] — [Misuse of Drugs Act]

Zamri bin Mohd Tahir
v
Public Prosecutor

[2019] SGCA 9

Court of Appeal — Criminal Appeal No 15 of 2017
Sundaresh Menon CJ, Judith Prakash JA and Tay Yong Kwang JA
22 January 2019

11 February 2019

Sundaresh Menon CJ (delivering the grounds of decision of the court):

Introduction

1 The appellant was convicted in the High Court of one charge of having in his possession, for the purpose of trafficking, not less than 40.37g of diamorphine. The Judicial Commissioner ("the Judge") who heard the matter, held that the alternative sentencing regime ("the courier exception") under s 33B(1)(*a*) of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) ("MDA") was unavailable to the appellant because he had not proven that his involvement in the offence in question was restricted to the acts enumerated in s 33B(2)(*a*) of the MDA (which we shall, for convenience, refer to as the acts of a "courier"), and, further and in any case, because the Public Prosecutor had indicated that he would not issue a certificate of substantive assistance. The Judge accordingly sentenced the appellant to the mandatory death penalty.

2 The appellant appealed against both his conviction and sentence and the matter was fixed for hearing on 9 July 2018. The hearing was subsequently adjourned to enable the Public Prosecutor to consider afresh whether he would issue a certificate of substantive assistance in light of further information which the appellant furnished in a statement recorded on 26 June 2018. On 29 November 2018, the Public Prosecutor confirmed that his decision not to issue a certificate remained unchanged.

3 When the matter came before us for hearing on 22 January 2019, Mr Eugene Thuraisingam, counsel for the appellant, indicated that in the light of the Public Prosecutor's position, the appellant accepted that he would not qualify to be considered for the alternative sentencing regime under s 33B(1)(*a*) of the MDA. This was so because it would be necessary for the appellant to establish *both* the requirements that are referred to there, namely that the appellant had acted only as a courier in relation to the offence in question, and also that he had been issued a certificate of substantive assistance. Mr Thuraisingam also indicated that he had nothing further to put before us in respect of his appeal.

4 Having reviewed the evidence and the parties' submissions, we were satisfied that the conviction was well-founded; in particular, the elements of possession, knowledge, and proof that possession of the drug was for the purpose of trafficking were made out, and there was no reason for us to disturb the Judge's findings in that regard. Nor was there any basis for us to interfere with the mandatory sentence imposed by the Judge given the Public Prosecutor's decision not to issue a certificate of substantive assistance. For these reasons, we dismissed the appeal against conviction and sentence.

5 That said, we disagreed with the Judge's finding that the appellant was

not a courier, and, more fundamentally, with his approach to applying the courier exception in circumstances where the offender's intention in relation to the drugs was simply to do as instructed, and where no instructions had been given by the time of his arrest. While this would not affect the outcome of the present appeal, in light of the Public Prosecutor's decision not to issue a certificate of substantive assistance (which in and of itself forecloses any possibility of recourse to the alternative sentencing regime), we nevertheless considered it appropriate to state our views on the Judge's reasoning and his finding that the appellant was not a courier in circumstances where, on the evidence, the appellant's intended course of action in relation to the drugs which form the subject matter of the charge was at most, inchoate. In short, the most that could be said on the evidence was that at the time of his arrest, the appellant had no idea what he would in fact do with the drugs after he had collected them.

Background

6 The relevant facts may be set out briefly. On 14 October 2014, the appellant was arrested as he was trying to exit a Housing Development Board carpark in a van almost immediately after collecting five black bundles of granular substance. These five bundles were later analysed and found to contain not less than 40.37g of diamorphine ("the Fourth Consignment"). Drug paraphernalia used for repacking drugs were also seized from the appellant at the time of his arrest.

7 In his statements, the appellant gave evidence that he had dealt with three previous consignments for one "Abang" prior to his arrest. On the first two occasions ("the First and Second Consignments"), Abang had instructed the appellant merely to deliver those consignments to other persons. It is not in dispute that on those occasions, the appellant did no more than act as a courier.

However, after the completion of the second delivery, Abang arranged for the appellant to receive drug paraphernalia that was to be used for repacking drugs. For the Third Consignment, Abang instructed the appellant to repack the drugs for distribution, and the appellant did as instructed. The appellant was arrested after he collected the Fourth Consignment.

8 It was undisputed that *if* the appellant had repacked the drugs in the Fourth Consignment (as he had done in respect of the Third Consignment), his actions would have gone beyond those of a mere courier. This followed from our decision in *Zainudin bin Mohamed v Public Prosecutor* [2018] 1 SLR 449, in which we held that where the act of division and packing was not merely a preparatory step to *deliver* but an antecedent step to facilitating *distribution* to more than one recipient, such an act would not fall within the scope of s 33B(2)(*a*)(iii) of the MDA (at [101]).

9 It was also undisputed that at the point of the appellant's arrest, he had done nothing more than to collect and transport the drugs, because he had been arrested almost immediately thereafter. Further, he had not in fact received any instructions from Abang as to what he was to do with the drugs.

10 As to what the appellant had *intended* to do with the drugs, his unequivocal evidence was that he had intended to do whatever he might have been instructed by Abang to do. The appellant confirmed, on multiple occasions, that if Abang had instructed him to repack the drugs, he would have done so. Equally, if Abang had simply told him to deliver the drugs to someone else, he would have done that.

(a) The appellant first said this in his contemporaneous statement recorded on 14 October 2014:

> Q11 What will you do with the five bundles?
>
> A11 See what instruction from my boss, Abang. Sometimes he asked to send, sometimes asked to pack.

(b) The appellant confirmed this in cross-examination:

> Q: But you knew that for sure, the heroin was meant to be delivered to somebody else. Yes.
>
> A: Correct.
>
> Q: And that was regardless of whether it was meant to be divided or delivered as five bundles.
>
> A: Yes.
>
> Q: Yes. Okay. Thank you, Mr Zamri. *And in the event Abang told you to divide up the five bundles of heroin into smaller Ziploc bags or---yes, into smaller Ziploc bags, then you would have proceeded to do so. Is that correct?* Assuming you never got arrested.
>
> A: *If he told me or instructed me, yes, I would do that.*
>
> [emphasis added]

11 The fact remained however that:

(a) No instructions had in fact been given by Abang to the appellant at the time of his arrest; and

(b) No evidence could be or was led as to what such instructions would, in fact, have been.

The decision below

12 Following from the appellant's evidence that he would have done as instructed, the Judge took the view that the issue of whether the accused was a mere courier "reduced itself to the question of what Abang would have asked the accused to do" (Grounds of Decision ("GD") at [19]).

13 On this basis, the Judge held that the appellant had to prove on a balance of probabilities that it was more likely than not that Abang would have instructed him to deliver the Fourth Consignment *without repacking it*. Since the evidence as to what Abang might have instructed the appellant to do was "indeterminate" and "equivocal" (GD at [31]), the appellant had failed to discharge his burden of proof and was therefore held not to have fulfilled the conditions in s 33B(2)(*a*) of the MDA.

Our decision

14 As we have already noted, we were satisfied on the evidence that the conviction was sound. Instead, the focus of the proceedings below and on appeal was on sentence; specifically, whether the alternative sentencing regime under s 33B of the MDA was available to the appellant. Section 33B provides as follows:

> **Discretion of court not to impose sentence of death in certain circumstances**
>
> **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 —
>
> > (*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 ...
>
> ...
>
> (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 transporting, sending or delivering a controlled drug; or
>
> (iv) to any combination of activities in sub-paragraphs (i), (ii) and (iii); and
>
> (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.

15 While we accept that the burden of proof under s 33B(2)(*a*) is on the accused, in our judgment, the Judge, with respect, erred when he framed the relevant issue in terms of whether the appellant could prove that Abang would not have instructed the appellant to repack the drugs. The focus of the inquiry required by s 33B(2)(*a*) of the MDA is on *the accused's* acts in relation to the particular consignment of drugs which form the subject matter of the charge against him. Had he kept that focus, he might have realised, for reasons we elaborate on momentarily, that the appellant's intentions at the relevant time were inchoate in the sense that they depended entirely on what someone else might decide or do at a point in time when no such decision or action had been made or taken.

16 In the present case, on the evidence before the court, it was, in truth, unknown and unknowable what the accused would have done after he had taken delivery of the drugs. As we have just noted, the appellant's subsequent actions depended entirely on the decision and intentions of Abang, who was not before the court. Nor was there any basis for finding what Abang's intentions or decision would have been having regard to the preceding interactions between the parties. If the circumstances were such that the appellant eventually received the instructions of Abang, those instructions could have been either to deliver

the bundles as they were or to repack them. There was just no basis at all, on the evidence in this case, for the court to make a finding as to what those instructions would on a balance of probabilities have been, making the inquiry into that question inappropriate in the circumstances. The appellant said he would do as instructed, and *if* he had been instructed to deliver the drugs and nothing more, then had he adhered to those instructions, he would have acted as a courier. This analysis does not change even if, subjectively, he was willing to do more had he been asked to do more. In the absence of evidence that he had in fact already resolved to do more, even in the absence of any further instructions, or that he was committed to doing more, unless he was otherwise instructed, there was simply no basis to find that he was *not* a courier.

17 We accept that in many instances where the accused is arrested before he has been able to deal with the drugs, the court may nevertheless infer that his role was to do more such that he should not be found to be a courier. This would be the case, for instance, where the accused has already been instructed or engaged, or is otherwise already committed and resolved to do other things such as to divide and pack the drugs. But this will only be so where the evidence allows the court to find that he would have gone on to do such acts but for his arrest. Thus, in *Public Prosecutor v Ranjit Singh Gill Menjeet Singh and another* [2017] 3 SLR 66 ("*Ranjit Singh*"), the High Court found that the accused was no mere courier on the basis of his admission under cross-examination that he "was going to use that paraphernalia to repackage the heroin in the Robinsons bag before delivering it" (at [63]), even though at the time of his arrest he had not yet divided and packed any drugs.

18 We further note, from the reasoning of the court in *Ranjit Singh* at [63]–[66], that having found that the accused was going to repack the drugs as aforesaid, the remaining issue on which attention was then focused was the

purposes for which such repacking was to be undertaken. On the evidence, the judge found at [64] that the role of the accused person in the operation was to weigh and repack the drugs into smaller packets weighing between 7.7g and 7.9g in order to facilitate "*distribution or sale*" (emphasis in original), and not to enable the drugs to be transported.

19 The important point is that in *Ranjit Singh*, the court had been able to conclude on the evidence that the accused had *resolved* to divide and repack the drugs. This was simply not the case on the present facts. Here, the only conclusion supportable on the evidence was that the appellant intended to do as he was told. In the absence of any evidence that the appellant had already been instructed to repack the drugs, or had a particular role in the operation which committed him to doing so unless otherwise instructed, it could not be said that the appellant had in fact done or was committed to doing anything that would take him outside the ambit of s 33B(2)(*a*) of the MDA.

Conclusion

20 For these reasons, we consider that the Judge erred in finding that the accused was not a courier. However, for the reasons we have already explained, this does not affect the outcome of the appeal in this case, which we accordingly dismissed.

Sundaresh Menon
Chief Justice

Judith Prakash
Judge of Appeal

Tay Yong Kwang
Judge of Appeal

Eugene Thuraisingam (Eugene Thuraisingam LLP) and Ho Thiam Huat (T H Ho Law Chambers) for the appellant;
April Phang and Zhou Yihong (Attorney-General's Chambers) for the respondent.
