IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2019] SGHC 33

Criminal Case No 67 of 2018

Between

Public Prosecutor

And

(1) Moad Fadzir Bin Mustaffa
(2) Zuraimy Bin Musa

JUDGMENT

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

Public Prosecutor
v
Moad Fadzir bin Mustaffa and another

[2019] SGHC 33

High Court — Criminal Case No 67 of 2018
Choo Han Teck J
25–28 September, 13–16 November 2018; 4 February 2019

15 February 2019 Judgment reserved.

Choo Han Teck J:

1 Moad Fadzir bin Mustaffa ("Moad") is 40 years old this year. He worked as a warehouse assistant and part-time lorry driver during the day, and on some nights he attended a course in Diploma in Warehouse Operations at the Singapore Polytechnic. The second accused Zuraimy bin Musa ("Zuraimy") is 50 years old this year, and is a friend of Moad. Zuraimy lived in his uncle's flat at Block 1 Holland Close ("Holland Close").

2 On 11 April 2016, Moad attended his class at the Singapore Polytechnic until 10.00pm. He then drove a rented Mazda car, SKV 4443H to Holland Close where he picked up Zuraimy and then left together to Blk 157 Toa Payoh Lorong 1 ("Toa Payoh"). Moad parked the car at the loading/unloading bay of Blk 157 and waited in the car with Zuraimy. An Indian man went up to the car and threw a white plastic bag through the front window, onto Moad's lap. Moad then passed a bundle of folded $50 notes to the Indian man. Subsequently, Moad

handed the plastic bag to Zuraimy who tied it before placing it into Moad's black sling bag.

3 Moad then dropped Zuraimy along Commonwealth Avenue West and Zuraimy walked a short distance from there to Holland Close where he was arrested by officers of the Central Narcotics Bureau ("CNB"). Moad, meanwhile, drove back to his own flat at Block 623 Woodlands Drive 52, arriving at 12.08am (of 12 April). He remained in the car until 12.15am when he decided to get out of the car with the black sling bag. He was promptly arrested by officers from the CNB, and his black sling bag was seized. The white plastic bag was taken from this sling bag in Moad's presence. The white plastic bag had four evenly packed taped bundles of granular substances, analysed to be 36.93g of diamorphine ("the Drugs"). Both men were charged for trafficking in this 36.93g of diamorphine.

4 Moad's charge reads

> You, MOAD FADZIR BIN MUSTAFFA are charged that you, on 12th April 2016, at or about 12.15a.m., at the vicinity of Blk 623 Woodlands Drive 52, Singapore, together with one Zuraimy bin Musa, NRIC No. SXXXXX06E, in furtherance of the common intention of both of you, did traffic in a controlled drug specified in Class 'A' of the First Schedule to the Misuse of Drugs Act (Cap 185, 2008, Rev Ed), to wit, by having in your possession for the purpose of trafficking, four packets of granular substances that were analysed and found to contain not less than 36.93 grams of diamorphine, without any authorization under the said Act or Regulations made thereunder and you have thereby committed an offence under section 5(1)(a) read with section 5(2) of the Misuse of Drug Act read with section 34 of the Penal Code (Cap 224, 2008 Rev Ed) which offence is punishable under section 33(1) of the misuse of Drug Act.

and Zuraimy's charge reads

> You, ZURAIMY BIN MUSA are charged that you, on 12th April 2016, at or about 12.15a.m., at the vicinity of Blk 623

> Woodlands Drive 52, Singapore, together with one Moad Fadzir bin Mustaffa, NRIC No. SXXXXX12F, in furtherance of the common intention of both of you, did traffic in a controlled drug specified in Class 'A' of the First Schedule to the Misuse of Drugs Act (Cap 185, 2008, Rev Ed), to wit, by having in your possession for the purpose of trafficking four packets of granular substances that were analysed and found to contain not less than 36.93 grams of diamorphine, without any authorization under the said Act or Regulations made thereunder and you have thereby committed an offence under section 5(1)(a) read with section 5(2) of the Misuse of Drug Act read with section 34 of the Penal Code (Cap 224, 2008 Rev Ed) which offence is punishable under section 33(1) of the Misuse of Drug Act.

5 I will first deal with the case of Moad. The Prosecution relied on statements marked P84 and P85, which were Moad's statements recorded an hour after his arrest. The Prosecution further relied on two statements marked P94 and P95. Moad tried to stop the admission of P84 and P85 into evidence, but after an inquiry into the recording of those statements, I found that Moad made those statements freely and without coercion and so admitted them into evidence. Those two statements were particularly incriminating.

6 In his cautioned statement, Moad did not deny any wrongdoing or raised any fact relevant to his defence in court. All he stated was: "I have nothing to say at all. I am now confused and unable to think properly". This statement was recorded on 12 April 2016 at 11.37am.

7 In P84, which was recorded at 3.00am of 12 April 2016, Moad was asked to whom the taped bundles in his sling bag belong and Moad replied: "They asked me to pick up at Toa Payoh". He clarified by saying that it was "Abang" who instructed him to collect the bundles. Then Senior Station Inspector Tony Ng ("SSI Tony Ng") asked "what is inside the four taped bundles?" and Moad replied, "They told me to be careful, is heroin". In the same statement Moad also said that Abang instructed him to go to Toa Payoh with

"Lan" and that he was to pick up "Lan" who will then show him the way to Toa Payoh. In court, Moad identified Zuraimy as this "Lan". In a turn of events, it transpired that the phone records showed that the call that was alleged by Moad to have been made by "Abang", was in fact made by Zuraimy. Faced with this evidence, Moad admitted that "Abang" was in fact Zuraimy. It is clear to me that Moad initially tried to shield Zuraimy by creating the imaginary "Abang" and "Lan".

8 Moad's defence to the charge was simply that he thought the four taped packets contained cigarettes. Apart from the fact that he did not say this in his cautioned statement, and the fact that he could not give a good account as to how he could have mistaken four packets of hard, irregularly shaped granular substances for cigarettes, this defence was contradicted by his admission in P84. I found that there was nothing that should worry me as to whether P84 was in any way unreliable. I can accept that by 3.00am Moad might have been a little tired, but the evidence as to the circumstances of the evening of 11 April to 3.00am of 12 April did not seem to me to have affected Moad such that he could have given such specific answers to SSI Tony Ng which were consistent with the Prosecution's case. There is no other evidence that helped Moad rebut the presumption of trafficking under section 17 of the Misuse of Drugs Act (Cap 224, 2008 Rev Ed) ("MDA"). The drugs were undisputedly found in his possession at the time of his arrest, and he knew that the drugs were diamorphine.

9 The uncontested evidence is that Moad drove to Holland Close past 10.00pm to pick up Zuraimy, to drive to a place he was not familiar with, only to pick up a packet from another person he did not know. The packet, it has been proved, contained the four bundles of diamorphine. A lot more than what he had testified is required to persuade me that it was understandable for him to believe

the packet contained merely cigarettes. I am satisfied that the Prosecution had proved its case against Moad, and I therefore found him guilty as charged and sentence him to suffer death.

10 I now turn to the case of Zuraimy. Zuraimy's rambling defence was that he received a call from Moad and he (Zuraimy) agreed to accompany him (Moad) to Toa Payoh. Sensing that this stark and random account to be in need of elaboration, Zuraimy testified that he met Moad that night to celebrate the end of Moad's course at the Singapore Polytechnic. This elaboration did not enhance his defence or credibility in the slightest, not just because it came out late, but no evidence seems to support it; the most important of which was, there was no celebration to speak of; no party, no friends joining in the event. The closest to a party and guests was the appearance of the Indian man who threw the plastic bag with the bundles of diamorphine onto Moad's lap, and which Moad handed over to Zuraimy to tie.

11 Zuraimy's role in this escapade is clear. The evidence shows that Zuraimy liaised with one "Benathan" through a series of calls and messages which ended with the Indian man throwing the Drugs onto Moad's lap. As of 10 April 2016, Zuraimy had only $1.24 in his bank account, and Moad withdrew $3,000 from his bank account on the evening of 12 April 2016 before meeting Zuraimy that same night. After the Indian man threw the Drugs onto Moad's lap, Moad passed him a bundle of $50 notes, presumably the $3,000 (or part thereof) that he withdrawn, to pay for the Drugs. If Moad knew who "Benathan" was, Moad could have directly arranged with "Benathan" to purchase the Drugs without Zuraimy's help. I am satisfied that Zuraimy's role in this escapade is one of an abettor who arranged the drug transaction.

12 The charge against Zuraimy directly corresponds to the charge against

Moad, and that is, Zuraimy was charged for acting in furtherance of a common intention, under s 34 of the Penal Code ("PC") read with ss 5(1) and 5(2) of the MDA, with Moad to be in possession of the four packets of diamorphine for the purposes of trafficking.

13 "Possession for the purposes of trafficking" under s 17 of the MDA is not a legal principle setting the conditions of an offence. It is a legislative enactment shifting the burden of proof to the defence. Generally, the Prosecution has to prove beyond a reasonable doubt that Zuraimy was in possession of the Drugs, and knew that the Drugs were diamorphine. The law provides that when possession is proved beyond reasonable doubt, the accused is presumed to be in possession of those drugs for the purposes of trafficking. As the Prosecution sought to rely on the presumption in s 17 of the MDA against Zuraimy, the Prosecution cannot then in conjunction, rely on the presumption of possession under s 18(4) of the MDA against Zuraimy (see *Mohd Halmi bin Hamid and Anor v Public Prosecutor* [2006] 1 SLR 548 at [7] – [8]).

14 Relying on *Muhammad Ridzuan bin Md Ali v Public Prosecutor* [2014] 3 SLR 721 ("*Ridzuan v PP*"), the Prosecution submitted that Zuraimy was in joint possession of the Drugs because he had been instrumental in putting Moad in physical possession of the Drugs. I accept that Zuraimy played a role, and this court is bound by the decisions of the Court of Appeal. However, with due respect to the Prosecution, *Ridzuan v PP* does not apply to the case before me. In *Ridzuan v PP*, the two accused were in joint possession of diamorphine as they entered into a partnership to purchase and then sell the diamorphine. On the contrary, there was no evidence of any pre-arranged plan between Moad and Zuraimy in relation to the Drugs, such that Zuraimy could be said to have retained control, and hence possession over the Drugs even though Moad had physical possession of it. The indisputable evidence was that Zuraimy was not

found in possession of the diamorphine.

15 Further, Moad's testimony that Zuraimy told him to keep the Drugs on his (Zuraimy) behalf was unconvincing, as there was no pre-arranged plan between the parties to sell or subsequently deal with the Drugs, and it was Moad who paid for the Drugs and kept the Drugs in his physical possession. Nothing else apart from Moad's testimony supports the finding of fact that the Drugs belonged to Zuraimy. As such, the Prosecution has failed to prove beyond a reasonable doubt that Zuraimy was in joint possession of the Drugs.

16 Next, I will consider whether Zuraimy is constructively liable for the capital offence of trafficking pursuant to s 34 PC, on the basis that there was a common intention between Zuraimy and Moad, for Moad to possess the 36.93g of diamorphine for the purposes of trafficking. If the Prosecution were to charge a person with a common intention to possess drugs for the purposes of trafficking, they are obliged to prove the elements of that phrase, namely, to prove beyond a reasonable doubt the following three elements (see *Daniel Vijay s/o Katherasan and others v Public Prosecutor* [2010] 4 SLR 1119):

(a) The criminal act element. This refers to the diverse acts which collectively give rise to the offence of possession for the purposes of trafficking;

(b) The common intention element. This refers to the common intention to commit the very criminal act done by Moad; possession of 36.93g of diamorphine for the purposes of trafficking; and

(c) The participation element. This refers to Zuraimy's participation in the Moad's specific criminal act of possession for the purposes

> of trafficking, or some other criminal act done in furtherance of the common intention of both of them.

17 The criminal act element and the participation element were made out because Zuraimy abetted Moad in obtaining actual physical possession of the Drugs by arranging and driving Moad to Toa Payoh to collect the Drugs. To prove a common intention to traffic, the Prosecution has to prove that Zuraimy had the common intention with Moad, for Moad to be in possession of this 36.93g of diamorphine for the purposes of trafficking. The Prosecution cannot rely on the presumption under s 17 of the MDA against Zuraimy since he was not in possession of the Drugs. Although Zuraimy may have known the quantity and the nature of the Drugs, this does not necessarily imply that Zuraimy knew Moad was purchasing the Drugs for the purposes of trafficking. Zuraimy might possibly have thought that Moad purchased these drugs for his own consumption. Given this uncertainty, I am not satisfied that the Prosecution has proven beyond a reasonable doubt that Zuraimy had the common intention with Moad, for Moad to be in possession of the 36.93g of diamorphine for the purposes of trafficking.

18 Zuraimy was the middle man in this escapade, and I think that the particulars of his charge should more accurately reflect his role as that of an abettor. I hereby amend the charge as follows –

> You, ZURAIMY BIN MUSA are charged that you, between the evening of 11th April 2016, to at or about 12.15am on the 12th April 2016, did abet by intentionally aiding one Moad Fadzir bin Mustaffa, NRIC No. SXXXXX12F, to possess a Class 'A' controlled drug listed in the First Schedule to the Misuse of Drugs Act (Cap 185, 2008, Rev Ed), namely, four packets of granular substances that were analysed and found to contain not less than 36.93 grams of diamorphine, without any authorisation under the said Act or the Regulations made thereunder, *to wit*, by directing, arranging and accompanying Moad Fadzir bin Mustaffa to Blk 157 Toa Payoh Lorong 1 to

> collect the four packets of granular substances, and you have thereby committed an offence under section 8(a) read with section 12 and punishable under section 33(1) of the Misuse of Drugs Act.

19 I therefore find Zuraimy guilty on the amended charge and convict him accordingly. I shall adjourn the sentencing of Zuraimy to 25 February 2019 when parties can address me on the sentence.

- Sgd -
Choo Han Teck
Judge

Muhamad Imaduddien Bin Abd Karim and Prakash Otharam (Attorney-General's Chambers) for the Prosecution;
Peter Keith Fernando (M/s Leo Fernando) and Lim Hui Li Debby (Shook Lin & Bok LLP) for the First accused;
Eugene Singarajah Thuraisingam and Chooi Jing Yen (Eugene Thuraisingam LLP) for the Second accused.