Mohd Akebal s/o Ghulam Jilani *v* Public Prosecutor and another appeal [2019] SGCA 81

Case Number	: Criminal Appeals Nos 17 and 20 of 2019
Decision Date	: 28 November 2019
Tribunal/Court	: Court of Appeal
Coram	: Sundaresh Menon CJ; Tay Yong Kwang JA; Steven Chong JA
Counsel Name(s)	: Rupert Seah Eng Chee (Rupert Seah & Co) and B Uthayachanran (Essex LLC) for the appellant in Criminal Appeal No 17 of 2019; The appellant in Criminal Appeal No 20 of 2019 in person; and Mark Jayaratnam, Chin Jincheng and Chong Yong (Attorney General's Chambers) for the respondent in Criminal Appeal Nos 17 and 20.
Parties	: Mohd Akebal s/o Ghulam Jilani — Public Prosecutor — Mohammed Rusli Bin Abdul Rahman

Criminal Law – Statutory offences – Misuse of Drugs Act

[LawNet Editorial Note: This was an appeal from the decision of the High Court in [2019] SGHC 44.]

28 November 2019

Sundaresh Menon CJ (delivering the judgment of the court *ex tempore*):

Introduction

1 These appeals arise from the joint trial of Mohd Akebal s/o Ghulam Jilani ("Akebal"), Mohammed Rusli Bin Abdul Rahman ("Rusli") and Andi Ashwar Bin Salihin ("Andi").

(a) Akebal was convicted on a single charge of trafficking not less than 29.06g of diamorphine, an offence under s 5(1)(*a*) of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) ("MDA"), and sentenced to death.

(b) Rusli was convicted on three charges: an amended charge of instigating Andi to collect *one* packet containing not less than 14.46g of diamorphine under s 5(1)(*a*) read with ss 5(2) and 12 of the MDA; possession of not less than 6.02g of methamphetamine under s 8(*a*) of the MDA; and consumption of morphine under s 8(*b*)(ii) of the MDA. Rusli was sentenced to 30 years' imprisonment in total.

(c) Andi was convicted on one charge of possessing not less than 29.06g of diamorphine for the purpose of trafficking under s 5(1)(*a*) read with s 5(2) of the MDA, and sentenced to life imprisonment and 15 strokes of the cane.

Akebal appeals against his conviction and sentence while Rusli appeals against his sentence. Andi has not appealed against his conviction or sentence.

Facts

2 On the evening of 21 August 2014, Andi agreed, in the course of a telephone call with Rusli, to collect drugs on behalf of Rusli the next day. Andi was a regular drug courier for Rusli, a secret

society member. Andi also worked for other members of the secret society, including Azman s/o Sheik Osman ("Azman"). Whilst he would collect larger quantities of diamorphine for Azman, Andi's assignments involving Rusli always involved *one* bundle of drugs, meaning that it would be below the capital threshold.

3 On the morning of 22 August 2014, Rusli instructed Andi to make the necessary arrangements with someone, who was variously referred to as "Bala" or "Bai", and to that end, he sent Andi that person's mobile number. A series of calls were then exchanged between Andi and the person who was using that mobile number. Andi was instructed to meet in the vicinity of Block 716, Woodlands Avenue 7. He was also told to meet as soon as possible as "Bala" or "Bai" had a urine test to attend that same day.

4 At about 9.45am, Andi drove his car to the agreed location. At about 10.30am, a male Indian carrying an orange plastic bag approached Andi's vehicle. He opened the front passenger door and placed the bag on the front passenger seat. During this handover, Andi testified that he had a good opportunity to observe the face of the male Indian. The male Indian was also observed by Central Narcotics Bureau ("CNB") officers who were, acting on information received, conducting surveillance of the area.

5 Shortly thereafter, Andi drove to Rusli's residence. At about 12.45pm, Andi and Rusli were arrested. The orange bag was recovered from Andi's car and was found to contain two bundles containing not less than 14.60g and 14.46g of diamorphine, respectively. Various exhibits, which Rusli admitted were his, were also recovered from Rusli's car. Seven of these were found to contain in total not less than 6.02g of methamphetamine. Upon his arrest, Rusli's urine sample was taken and traces of morphine, a known metabolite of diamorphine, were found. In the contemporaneous statement that Andi made to the arresting officers, he was shown a board containing 13 photographs and among others, he identified a photograph of Akebal as the person who had earlier handed him the drugs.

6 On the same day, at about 8.25pm, Akebal was arrested on suspicion of being the male Indian who had placed the orange bag in Andi's car. A mobile phone was found in Akebal's possession. The number of the mobile was the same as the number that Andi had been provided earlier in the day to contact "Bala" or "Bai" and to arrange the handover of the drugs. Subsequent investigations showed that multiple phone calls had been exchanged between the user of that mobile phone and Rusli and Andi on 22 August 2014.

Decision below

7 Akebal's defence in the court below was that he had been incorrectly identified, by CNB officers and Andi, as the man who placed the orange bag in Andi's car. The High Court Judge ("the Judge") rejected this defence. He was satisfied that the evidence identifying Akebal was of a good quality. As a result, the presumptions under ss 18(1)(*a*) and 18(2) of the MDA were triggered: Akebal was presumed to have had the drugs in his possession and to have known the nature of the drugs. Since Akebal did not adduce any evidence to rebut the presumptions, and since in delivering the drugs he had plainly trafficked, the Judge convicted him on the capital charge. Akebal was not issued a certificate of substantive assistance and the Judge passed the sentence of death accordingly.

8 On the other hand, the Judge found that the Prosecution had failed to prove beyond a reasonable doubt that Rusli had knowledge of the nature of the drugs that were contained in both the packets. Rusli had maintained, and this was supported by Andi's evidence, that he only ever dealt with one bundle because of the risk of capital punishment. The Judge amended the charge against Rusli to one of instigating Andi to traffic in not less than 14.46g of diamorphine (being the amount of

diamorphine in one packet of drugs) and convicted him accordingly. Rusli was sentenced to 27.5 years' imprisonment for this charge. The Prosecution also proceeded on two other charges against Rusli, to which he pled guilty (see [1(b)] above): an enhanced possession charge and a consumption charge. The Judge imposed a sentence of 2.5 years' and 12 months' imprisonment for these respective offences. He ordered the first two sentences to run consecutively and the last concurrently, resulting in an aggregate term of imprisonment of 30 years.

Substance of the appeals

9 Akebal submits that the Judge erred in fact and law in regarding the identification evidence before him as being of a sufficiently good quality. At the hearing before us, counsel for Akebal, Mr Rupert Seah ("Mr Seah") also raised, for the first time, the possibility of a conspiracy involving Azman, Rusli and Andi to frame Akebal.

10 As for Rusli, he contends that the sentence of 27.5 years' imprisonment imposed by the Judge for his amended trafficking charge is manifestly excessive. He also submits that the sentences for the amended trafficking charge and the enhanced possession charge should run concurrently, rather than consecutively.

Decision

Akebal's appeal

11 The central question in Akebal's appeal is whether Akebal had been correctly identified by the co-accused Andi as the person who placed the bag of drugs in Andi's vehicle on the day in question. In our judgment, there are four key points to be noted.

12 First, there is the consistent testimony of Andi. As we have noted above, Andi identified Akebal as the man who handed him the orange bag that contained the drugs in his contemporaneous statement, which was made several hours *before* Akebal's arrest. He subsequently repeated this in his long statement. There was no reason for Andi to falsely implicate Akebal and prior to the appeal, this had not been suggested. At the appeal, Mr Seah for the first time, attempted to suggest that there might have been a conspiracy to which Andi was a party, to frame Akebal. This had never been explored or suggested at trial. Mr Seah accepted this and candidly admitted that he was just putting forward possible inferences that could be drawn from the evidence and suggested that this should be considered by us before dispensing with the appeal. We see no basis for mounting such a contention. Nonetheless, having regard to the fact that Andi was a co-accused, we would have been prepared to reconsider the weight of his testimony had this been the sole basis for convicting Akebal. But any such possibility of a conspiracy or of false testimony being led against Akebal, as well as the suggestion that Andi's identification of Akebal in his contemporaneous statement should be viewed with circumspection because he was having withdrawal symptoms at the time, is not weighty once the surrounding circumstances are considered.

13 This leads us to our next point. This is the mobile phone evidence that links Akebal with the text messages and phone calls that pertained to the transaction in question. Mr Seah accepted that the phone had been at the place of the offence, at the time of the offence. In that sense, it directly links whoever had the phone with the offence. In our judgment, it would have been an incredible coincidence for Andi to have wrongly identified Akebal as the person with whom he had been speaking and who later handed him the drugs, and for Akebal to later be arrested with the incriminating phone in his possession. It should be emphasised that Andi had identified Akebal as the man he had spoken to and who handed him the bag at a time when Akebal had not been arrested. At that time, Andi

could not possibly have known that several hours later, Akebal would be arrested and that he would have that phone in his possession. Akebal claimed that he had passed the phone to someone else during the critical period in question but he could adduce no evidence or particulars of who precisely that person was. This was not credible and much too convenient. Mr Seah also said that the person on the phone had been referred to variously as "Bala" or "Bai" but in our judgment, it is entirely irrelevant what others called him. The key issue is what is the inference to be drawn from the fact that Akebal was in possession of the phone at the time he was arrested. In truth no plausible explanation for this was ever advanced by Akebal.

14 Third, Akebal lived at Woodlands Avenue 7 Block 719. The transaction in question took place in the vicinity of the nearby Block 716 and it would be yet another coincidence that the alleged other person to whom the phone was allegedly handed, would carry out the transaction close to Akebal's home and then get the phone to Akebal in time for him to be arrested with the incriminating phone. To put it another way, it would be another incredible coincidence that the person who was arrested, namely Akebal, happened to live in the vicinity of the place of the transaction and to have the phone that had been used in connection with that very transaction at the time he was arrested, when all along he allegedly had no involvement in this transaction at all.

15 Fourth, Andi said in his long statement that the person he had spoken to told him he had to rush off for his urine test when they were arranging the meeting. Indeed, this being something Andi could not have known otherwise, Akebal did go for a urine test at Jurong police station at 12.22pm that day.

16 Taking these pieces of evidence together, we are amply satisfied that it was Akebal that handed the bag to Andi. That would mean that he had actual possession of the bag with the drugs, that he handed it to Andi and so engaged in the act of trafficking. The Prosecution is entitled to invoke the presumption of knowledge, which has not been rebutted. Akebal's appeal is therefore without merit and accordingly dismissed.

Rusli's appeal

17 In determining the appropriate sentence for the offence of trafficking in diamorphine, the court begins by looking at the sentencing range and if it is more than 10g up to 14.99g, the prescribed sentencing range is between 20 and 30 years' imprisonment (s 33(1) read with the Second Schedule of the MDA). It is clear from our jurisprudence that in trafficking cases, considerable emphasis is placed on the quantity of drugs as a weighty consideration in sentencing because this is a proxy indicator of harm (*Vasentha d/o Joseph v Public Prosecutor* [2015] 5 SLR 122 at [19]; *Suventher Shanmugam v Public Prosecutor* [2017] 2 SLR 115 at [21]). In these circumstances, it is unsurprising that the court was looking at the higher end of that range having regard to the quantity that was involved in this case, that being 14.46g.

18 Having said that, we accept that this by itself might not have warranted a sentence of 27.5 years. There are, however, a number of factors in this case that the Prosecution relies on in seeking the imposition of a higher sentence. Mr Mark Jayaratnam ("Mr Jayaratnam"), Deputy Public Prosecutor, mentioned two in particular. The first is that the appellant was not a one-off trafficker but the evidence suggested that he had been involved in this as a business. Second, it appeared that the appellant was involved as part of a group of operatives who were conducting these activities. These are well-established aggravating factors.

19 Mr Jayaratnam also noted that the appellant is not eligible for caning. This is another factor that the court may take into account in adjusting the prison sentence. The appellant also faced a

number of other charges that he consented to being taken into consideration for the purposes of sentencing. This too is a factor that the court may have regard to in enhancing the sentence (*Re Salwant Singh s/o Amer Singh* [2019] SGHC 225 at [48]—[49]). Finally, the appellant had a number of related antecedents. Taken together, it did not appear to be the case at all that the sentence imposed by the Judge was excessive, much less manifestly so. We therefore had no hesitation in dismissing the appeal against sentence.

20 We also take this opportunity to comment on the approach that should be taken to sentencing guidelines. In *Soh Qiu Xia Katty v Public Prosecutor* [2019] 3 SLR 568 ("*Katty Soh*"), a number of observations were made in respect of seeming gaps and discrepancies in the guidelines set out by another bench of the High Court in *Public Prosecutor v Lai Teck Guan* [2018] 5 SLR 852 ("*Lai Teck Guan*"). We make three observations.

(a) First, guidelines are a means to an end and the relevant end is the derivation of sentences that are just and are broadly consistent in cases that are broadly similar.

(b) Second, sentencing guidelines are not meant to yield a mathematically perfect graph that identifies a precise point for the sentencing court to arrive at in each case. Rather, they are meant to guide the court towards the appropriate sentence in each case using a methodology that is broadly consistent.

(c) Third, sentencing guidelines are meant to be applied as a matter of common sense in the light of the foregoing observations.

In the circumstances, we see the fine differences in the methodology adopted by the High Court benches respectively in *Katty Soh* and *Lai Teck Guan* as matters of detail that do not invite further comment from this Court. We also do not see that these fine differences would in practice yield any difference in the outcome.

Conclusion

21 For these reasons, we dismiss the appeals.