IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2022] SGCA 11

Criminal Appeal No 16 of 2021

Between

Arun Ramesh Kumar

… *Appellant*

And

Public Prosecutor

… *Respondent*

EX TEMPORE JUDGMENT

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

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v
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Andrew Phang Boon Leong JCA (delivering the judgment of the court *ex tempore*):

Introduction

1 We have carefully considered the arguments raised by the appellant. This is our decision.

2 The present appeal concerns, in the main, the scope of the defence of "bailment" in the context of drug trafficking. In particular, is the defence available to an accused person who claims that he was instructed by a purported "bailor" to collect certain packages which are subsequently found to contain drugs, and that he was to return to the said "bailor" via a third party?

3 It may be questioned whether an accused person who collects as opposed to receives drugs does not know or intend that his act is part of the process of

supply or distribution of the drugs, such that he may avail himself of the defence. The subsequent transfer of the drugs to a third party is also presumptively part of the said process, which underlies the principal legislative policy behind the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) ("MDA"), namely, the disruption of supply and distribution of drugs to end-users. As we shall see, much, of course, will turn on the precise facts and circumstances of each case. Furthermore, in the present case, even assuming that the appellant was only safekeeping the drugs, it cannot, in any event, be said that he did not know or intend that such an arrangement was part of the process of their supply or distribution.

4 The appellant in this case, a 28-year-old male, was convicted following trial on two charges under s 5(1)(*a*) read with s 5(2) of the MDA of possession for the purpose of trafficking in controlled drugs. The first charge involved five packets containing not less than 79.07g of diamorphine and the second charge involved four packets containing not less than 324.41g of methamphetamine (collectively, "the drugs"). The Prosecution issued a certificate of substantive assistance and the trial Judge ("the Judge") exercised his discretion under s 33B(1)(*a*) of the MDA not to impose the death penalty, as he found that the appellant's involvement with the drugs was limited to acting as a courier. The appellant was therefore sentenced to life imprisonment and the mandatory minimum of 15 strokes of the cane for each charge, with caning limited to the maximum of 24 strokes by virtue of ss 328(1) and (6) of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) ("CPC"). The Judge's decision can be found at *Public Prosecutor v Arun Ramesh Kumar* [2021] SGHC 172 ("the GD").

5 The appellant now appeals against his conviction and sentence in respect of the two charges. In particular, he maintains that he intended to return the drugs to one "Sara", on whose instructions he had collected the drugs.

Factual background

6 The factual background leading to the arrest of the appellant is largely undisputed and has been detailed at [3]–[12] of the GD. We briefly highlight the salient facts.

7 On 3 April 2018 at about 4.29pm, the appellant entered Singapore from Malaysia on a motorcycle, with a pillion rider whom he claimed was his relative. They were arrested by several officers from the Central Narcotics Bureau ("CNB") at about 6.45pm, after leaving a multi-storey carpark in Alexandra Road on the motorcycle.

8 Several keys were seized from the appellant, one of which was later used to open a drawer in the appellant's locker in the cleaners' room at Basement One of Harbourfront Tower One. The following items were seized:

(a) One red plastic bag containing one blue plastic bag containing four packets of methamphetamine or "ice";

(b) One red plastic bag containing four blue plastic bags and one small red plastic bag each containing one packet of diamorphine or "heroin" (*ie*, a total of five packets of diamorphine); and

(c) One green plastic bag containing a digital weighing scale.

9 The appellant testified that he had placed all three plastic bags in his locker. He testified that he had been asked by one "Sara" (initially identified as "S2") to do a favour for him, in exchange for a RM1,500 loan from "Sara". On "Sara's" instructions, he had gone to collect a plastic bag inside a dustbin at Tuas. He was told to wait for someone to collect the plastic bag from him but

nobody showed up, so he thought of putting it in his workplace locker. There, he opened the plastic bag and saw the three plastic bags inside.

10 He knew that the first plastic bag contained methamphetamine, as he looked inside the bag and had previously consumed the drug. However, he testified that he was not aware of the contents of the second plastic bag which contained diamorphine. The drugs were subsequently analysed by the Health Sciences Authority and certified to contain a total of not less than 79.07g of diamorphine and 324.41g of methamphetamine. The appellant did not challenge the integrity and custody of the exhibits seized by the CNB officers.

11 A total of 13 statements recorded from the accused were admitted into evidence. These included three contemporaneous statements recorded at about 8.02pm, 10.45pm, and 11.48pm on 3 April 2018; three cautioned statements recorded under s 23 of the CPC on 4 April 2018 at about 1.53pm, 2.22pm and 2.53pm; and seven long statements recorded under s 22 of the CPC between 10 April 2018 and 23 October 2018. Significantly, in the appellant's second contemporaneous statement recorded just before the locker was opened, the appellant had stated as to the contents of the locker, that: "There are 5 packets of chocolate, same like the one I gave to the person just now and 4 packets of ice and one weighing scale". The appellant also did not challenge the testimony given at trial by several CNB officers that "chocolate" and "ice" were street names for diamorphine and methamphetamine, respectively.

12 The appellant additionally stated, in his third contemporaneous statement recorded after the locker was opened and searched, that the locker was his and only he had the keys to it. He identified the packets as consisting of "ice" and "saapadu", the latter of which he stated meant heroin. He stated that it belonged to "S2", who had asked him to "keep it somewhere". He said he had

been contacted by "S2" to take the plastic bags on Saturday night (31 March 2018), and that he had not been told what to do with the drugs. He also did not know what the weighing scale was for, but that it had been in the plastic bag which contained the drugs.

13 The appellant accepted that the 13 investigative statements were made voluntarily and did not challenge their admissibility. However, he contested their accuracy and reliability.

The decision below

14 The Judge found that the three key elements of the offence of possession of controlled drugs for the purpose of trafficking were satisfied, namely: (a) possession of the controlled drugs (which may be proved or presumed); (b) knowledge of the controlled drugs (which may be proved or presumed); and (c) proof that the possession of the controlled drugs was for the purpose of trafficking (see the decision of this court in *Masoud Rahimi bin Mehrzad v Public Prosecutor and another appeal* [2017] 1 SLR 257 at [28]).

15 He observed that the first element was undisputed. He further found that the second element was satisfied, as the appellant had actual knowledge of the drugs. Such knowledge was, amongst other things, apparent from the appellant's second and third contemporaneous statements. The appellant had "volunteered relevant incriminating information" even before the locker was opened in his presence (see the GD at [31]).

16 The presumption in s 17 of the MDA that the appellant was in possession of the drugs for the purpose of trafficking therefore applied, and was unrebutted by the appellant (see the GD at [69]). In this regard, the Judge rejected the appellant's alleged intention to return the drugs to "Sara" as an

afterthought. Such intention was only raised in his interviews with an Institute of Mental Health consultant Dr Yeo Chen Kuan Derrick ("Dr Yeo") for psychiatric assessment, which took place over three days in April and May 2018; and was elaborated on for the very first time at trial. Yet, none of the ten investigative statements recorded from him prior to his first interview with Dr Yeo on 26 April 2018 had mentioned any intention to return the drugs to "Sara". The Judge was of the view that the versions the appellant offered about the involvement of "Sara" and how he acted on his instructions were "vague and shifting", and his reliability was questionable in light of the different versions of dates and times when he had picked up the plastic bag from Tuas (see the GD at [53]–[55]).

17 Crucially, the appellant's evidence in his investigative statements was that someone would collect the drugs from him. His evidence had not been that "Sara" requested the appellant to keep the drugs for him; he had only kept them in his locker on his own initiative, having allegedly waited for someone who was supposed to collect them from him earlier. Given that it was only at trial, three years after the event, that the appellant mentioned for the first time that "Sara" would be collecting the drugs from him, and in the face of the contrary evidence in his statements, the isolated mention of an intention to return the drugs to "Sara" when interviewed by Dr Yeo did not ultimately assist (see the GD at [56]–[58]).

18 The Judge also rejected the appellant's defence of duress, which was premised on alleged threats by "Sara" that he would harm the appellant's family if the appellant did not comply with his instructions. The allegations of such threats first surfaced in the course of the appellant's interviews with Dr Yeo. Yet, the appellant did not provide Dr Yeo any details of the alleged threats from "Sara", and had not expressed any fears about his safety or that of his family in

the ten investigative statements that were recorded from him prior to that time. The appellant's conduct on 3 April 2018 was also inconsistent with any such concern. In any event, the appellant had never alleged that "Sara's" threats related to an apprehension of instant death, as required by the defence (see the GD at [43]–[46] and [48]–[49]).

19 We agree generally with the reasoning as well as decision of the Judge. The Judge did not err in finding that the appellant was in possession of and had knowledge of the drugs. He was fully justified in placing weight on the appellant's admissions as to his knowledge of the drugs in his second and third contemporaneous statements. The Judge also did not err in rejecting the appellant's defence of duress. The appellant's claims of threats from "Sara" were inconsistent with the contemporaneous evidence, had surfaced belatedly, and were only claimed to involve the possibility of death in his closing submissions at trial. As the appellant's appeal focuses on the defence of "bailment", it is to that issue which we now turn.

Appeal against conviction

20 The appellant makes four points in support of his argument that he intended to return the drugs to "Sara".

21 First, he observes in relation to the three contemporaneous statements and portions of his fourth and fifth long statements that these were recorded in a question and answer format. He questions why the interviewing officers had not asked him about his intention in relation to the drugs. He claims that he had mentioned his intention to return the packages in the plastic bag to "Sara" and not to deal with "Sara" further to Dr Yeo, as the latter had asked him about it.

22 Second, he argues that although his evidence in his investigative statements was that someone would collect the items from him, he had gotten that information from "Sara". This did not detract from an intention to return the items to "Sara". He harboured such an intention all the more because "Sara" had told him that someone would collect the items from him the day he collected them, but that did not take place.

23 Third, he argues that he had not mentioned in all his investigative statements that, having seen the "ice" and weighing scale inside the plastic bag, he intended to deliver the drugs to someone else. Rather, he had stated in his third long statement that, after seeing the "ice" and weighing scale, he was scared and told "Sara" that he would throw away the items if nobody came to collect them.

24 Fourth, he submits that although he had "change[d] [his] story" at trial, this was only because his counsel had agreed and confirmed at the time that it was "ok" for him to do so.

Defence of "bailment"

25 We make some brief observations on the defence of "bailment" before addressing the points raised by the appellant.

26 As we had recognised in *Ramesh a/l Perumal v Public Prosecutor and another appeal* [2019] 1 SLR 1003 ("*Ramesh*") and recently elaborated upon in *Roshdi bin Abdullah Altway v Public Prosecutor and another matter* [2021] SGCA 103 ("*Roshdi*"), an accused person who takes custody of drugs cannot without more be liable for trafficking if he intends to and in fact returns them to the person who initially entrusted him with the drugs (see *Ramesh* at [110]; *Roshdi* at [111]–[113]). This is because such a transfer would not necessarily

form part of the process of distributing drugs to end-users, which is what underlies the principal legislative policy behind the MDA (see *Ramesh* at [110]; *Roshdi* at [111]).

27 We held in *Roshdi* that where a "bailee" receives drugs intending to return them to the "bailor", the key inquiry as to whether the "bailee" is liable for trafficking, or possession for the purpose of trafficking, is if he knew or intended that the "bailment" was in some way part of the process of supply or distribution of the drugs (see *Roshdi* at [115]). We were of the view that this logically follows from a purposive interpretation of the term "traffic" in the MDA: a "bailee" who engages in a "bailment" arrangement knowing or intending that the arrangement will be part of this process of supply or distribution would fall within the class of persons targeted by the legislative policy behind the MDA. It should be noted that in this context, the use of the term "bailment" is not concerned with the law of bailment or notions of legal entitlement or property in the drugs, but as a shorthand to refer to such an arrangement as described above (at [26]) (see *Ramesh* at [100]; *Roshdi* at [107]).

28 In our view, the manner in which the appellant came to possess the drugs takes him outside of the defence of "bailment". The appellant did not claim to have received the drugs from "Sara" but had, on his own evidence, collected them on "Sara's" behalf with the purpose of delivering to someone who would collect them from him. Given that the test is one of the knowledge or intention of the purported "bailee" as to whether the arrangement is part of the supply or distribution chain, it seems to us that, where this takes place, it would follow that the subject accused did possess such knowledge or intention. This is because, as we observed in *Ramesh* and *Roshdi*, the defence of "bailment" contemplates that the drugs in question are returned to a person "who originally deposited those drugs with him" (see *Ramesh* at [110]; *Roshdi* at [109]). Where

drugs appear to have been collected or obtained by an accused person on behalf of another person, it is less clear whether they had in fact been originally deposited with the accused by that other person, or whether this act moves the drugs towards their ultimate consumer, by constituting a new link in the supply chain. If it is in fact the latter, then such an act of collection would be understood as falling within the definition of "traffic" in s 2 of the MDA, *ie*, to "sell, give, administer, transport, send, deliver or distribute". In particular, "transport" has been defined as moving from one place to another to promote the distribution of the drug (see *Ong Ah Chuan and another v Public Prosecutor* [1979–1980] SLR(R) 710 at [10]).

29 We note, in this regard, that the typical factual scenario in which the question of safekeeping may arise is one where an accused person is found with drugs that he or she claims to have been *deposited* with him or her by another. The present appeal is also distinct from cases where an accused person may have been present at the time of an act involving trafficking but was apparently not privy to the arrangements to traffic in the drugs (see, for example, *Ramesh*, where one of the co-accused persons passed to the other a bag which turned out to contain drugs, with instructions to hold on to it and that he would take it back later; and *Moad Fadzir bin Mustaffa v Public Prosecutor and other appeals* [2019] SGCA 73 at [79]–[80], albeit that the defence was rejected due to the accused person's lack of credibility).

30 Returning to the present situation, regard must, in our view, be had to the normative underpinnings of the defence, which rests on the knowledge or intention of the accused person as to whether the "bailment" arrangement was part of the process of supply or distribution of the drugs. It is in the absence of such knowledge or intention that the mere act of an accused person in receiving drugs from and returning them to a "bailor" may be said to fall short of the

element of trafficking, as the act of returning the drugs "runs counter" to their movement from a source of supply towards the recipients to whom they are to be supplied (see *Ramesh* at [110]; *Roshdi* at [109]). In such a situation, the "bailee" cannot be said to have "trafficked" in a purposive sense (see *Roshdi* at [116]). Whether or not the act of collecting or obtaining drugs on behalf of another person would enable the accused to successfully raise the defence of "bailment" or whether (on the contrary) the accused would be considered to be moving those drugs towards their ultimate consumer, thus constituting a new link in the supply chain (and therefore *precluding* reliance on the defence of "bailment") would, in the final analysis, *depend on the precise facts and circumstances concerned*.

31 However, even assuming *arguendo* that "Sara" had deposited the drugs with the appellant for safekeeping, the Judge did not, in any event, err in rejecting the appellant's claim that he intended to return the drugs to "Sara". We now consider the appellant's submissions on his alleged intention.

Alleged intention to return the drugs to "Sara"

32 The appellant's present claim that he ought to have been asked about his intention as regards the drugs is unmeritorious. The thrust of this submission is that his purported intention to return the drugs to "Sara" was not mentioned in his investigative statements, because the recording officers had not asked him words to the effect as to what his intention was. This is misconceived as: (a) the questions by the recording officers did involve ascertaining his intention as regards the drugs; and (b) he had accordingly attested to having an intention for them that did *not* involve returning the drugs to "Sara", *ie*, that "someone [would] come to collect it from [him] on that day".

33 For example, in his third contemporaneous statement, the appellant was asked whether "S2 [told] him what to do with all the 'ice' and saapadu", to which he replied in the negative. In his fourth long statement, he was asked whether he had queried "S2" on what to do with the plastic bag he had collected from Tuas. The appellant stated that he did ask and that he was told "someone will come to collect it from [him] on that day". This was in fact the consistent account which emerged from his statements, as correctly noted by the Judge (see the GD at [58]). Yet, this is fatal to the defence of "bailment" and amounts to classic trafficking: even if he had collected the drugs from "Sara", it was for the purpose of delivering them to someone else who would collect them from him. It was *not* that he was told by "Sara" to keep them for him and return them to him at a later date, which was an account that only partially emerged at trial. Therefore, taking the appellant's case at its highest, his purported intention to return the drugs to "Sara" because no one collected them did not constitute him as a "bailee". At best, it was an intention to avoid the consequences arising from an abortive attempt to traffic the drugs to that other person.

34 We observe as well that the defence of "bailment" does *not* ordinarily contemplate that a purported "bailee" may claim that he intended to return the drugs via a third party. Even assuming in the appellant's favour that there was indeed an arrangement between the appellant and "Sara" to safekeep the drugs, his intended act of passing the drugs to a third party presumptively formed part of the process of moving the drugs along the chain of supply and distribution, which comes within the definition of "traffic" in s 2 of the MDA (see *Ramesh* at [110]; *Roshdi* at [111]).

35 We also agree with the Judge that, in any event, the appellant had knowledge of "Sara's" involvement in supplying and distributing the drugs, such that his defence of "bailment" must be rejected (see the GD at [62]). The

appellant's evidence was that he was instructed to pick up a plastic bag "from a certain place", in a forested area near Tuas. He had even stated in his second cautioned statement and his third long statement that he was "told to deliver it to another person" or that the plastic bag "was to be delivered to someone else in Singapore by [him]". He continued to keep the drugs in his workplace locker despite knowing what they were, as seen from his admissions in his second and third contemporaneous statements. The appellant was therefore undoubtedly aware that by supposedly safekeeping the drugs, he was facilitating their intended supply and distribution. Such a conclusion is also supported by the fact that he had some monetary incentive to collect the drugs, *ie*, in exchange for a loan from "Sara" (see *Roshdi* at [118]). We turn now to the appellant's allegation against his previous counsel.

Change of story

36 It is unfortunate that the appellant has chosen to make such an allegation against his previous counsel (the details of which we will come to in a moment), particularly without giving the latter a chance to respond. As we indicated in *Mohammad Farid bin Batra v Public Prosecutor and another appeal and other matters* [2020] 1 SLR 907 ("*Mohammad Farid*"), natural justice requires that where a previous counsel has been accused of some wrong, he ought to be given notice of the allegations made and have a reasonable opportunity to respond to them (see *Mohammad Farid* at [137]). At the same time, in *Mohammad Farid*, we had emphasised that as long as counsel act in accordance with their clients' instructions and in line with their duty to the court and their professional obligations, "they must be given the deference and the latitude" in deciding how to conduct the case (see *Mohammad Farid* at [135]). We had additionally cautioned that such allegations against previous counsel could well lead to a situation of indefinite collateral attacks against court decisions. The court must

be careful to prevent such an abuse of its processes (see *Mohammad Farid* at [136]; see also the decisions of this court in *Murugesan a/l Arumugam v Public Prosecutor* [2021] SGCA 118 at [11] and *Syed Suhail bin Syed Zin v Public Prosecutor* [2021] 2 SLR 377 at [39]).

37 The court will not look favourably upon on such serious allegations as made by the appellant in the present case. The appellant's allegation that he only "change[d] [his] story" at trial because his previous counsel had agreed to it and apparently confirmed the same at the time has hardly been particularised or substantiated (see *Mohammad Farid* at [137]). Apart from the appellant's failure to provide notice of this allegation to his previous counsel as mentioned, the assertion is also baseless. As we recently stated in *Thennarasu s/o Karupiah v Public Prosecutor* [2022] SGCA 4 ("*Thennarasu*"), such grave allegations against previous counsel for alleged incompetence and/or indifference should not be lightly made, and the court will not hesitate to make adverse costs orders against those who persist in making them without the support of strong and cogent evidence (see *Thennarasu* at [15]). We make several observations in relation to the substance of the appellant's allegation:

(a) First, as pointed out by the Prosecution, this does not assist his case as there would be no need to "change [his] story" had he been truthful from the start.

(b) Second, assuming that his version of events in his statements were true, they are also inconsistent with the objective evidence. For example, he had stated therein that he received instructions from "Sara" on 31 March 2018 and came to Singapore to collect the drugs that day. However, his phone records showed no incoming calls from "Sara" to him on that date, and only one outgoing call from him to "Sara" lasting

30 seconds. There were also no messages passing between him and "Sara" that day.

(c) Third, having regard to the two-step approach in assessing allegations of inadequate legal assistance as set out in *Mohammad Farid*, the appellant has no basis for complaint. Under the approach in *Mohammad Farid*, the first step is to assess counsel's conduct of the case and the second, to assess whether that conduct affected the outcome of the case, in that it resulted in a miscarriage of justice (see *Mohammad Farid* at [134]). However, there is nothing to demonstrate that the counsel's conduct of the trial was "so clearly below an objective standard of what a reasonable counsel would have done or would not have done in the particular circumstances of the case" such that his conduct could be "fairly described as flagrant or egregious incompetence or indifference" (see *Mohammad Farid* at [135]). The defences which the counsel eventually submitted on were reasonably made on the basis of the appellant's testimony at trial. Apart from those defences, there was nothing in the appellant's investigative statements that would have apparently exculpated him.

38 Thus, although it is not clear what aspect of his evidence the appellant claims his counsel had permitted him to change at trial, the appellant's conviction ultimately rested on evidence he had provided of his own accord, even before the involvement of counsel, *viz*, his investigative statements. This evidence pointed to his actual knowledge of the drugs in question and provided no basis for rebutting the presumption of trafficking in s 17 of the MDA. While the appellant's testimony in court affected the Judge's assessment of his credibility, it did not affect the underlying evidential basis for his conviction. We therefore dismiss the appeal against conviction.

Appeal against sentence

39 Finally, while the appellant has not substantiated his appeal against sentence, there is no basis for the said appeal. In arriving at the appellant's sentence, the Judge had exercised his discretion under s 33B(1)(*a*) of the MDA, which stipulates life imprisonment and caning of not less than 15 strokes as an alternative to the imposition of the death penalty. The aggregate sentence of caning imposed of 24 strokes in respect of the two charges under s 5(1)(*a*) read with s 5(2) of the MDA on which the appellant was convicted thus represented the mandatory minimum, and was capped pursuant to ss 328(1) and (6) of the CPC. There is no scope for an alternative penalty. We therefore dismiss the appeal against sentence as well.

Andrew Phang Boon Leong
Justice of the Court of Appeal

Steven Chong
Justice of the Court of Appeal

Chao Hick Tin
Senior Judge

The appellant in person;
Dwayne Lum, Samuel Yap and Pavithra Ramkumar (Attorney-General's Chambers) for the respondent.