Zulfikar bin Mustaffah v Public Prosecutor
[2001] SGCA 8

Case Number : Cr App 21/ 2000

Decision Date : 31 January 2001

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; L P Thean JA; Yong Pung How CJ

Counsel Name(s) : SS Dhillon (Dhillon Dendroff & Partners) for the appellant; Han Ming Kuang and Mohamed Nasser Ismail (Deputy Public Prosecutor) for the respondent

Parties : Zulfikar bin Mustaffah — Public Prosecutor

Criminal Law – Statutory offences – Misuse of Drugs Act – Failure to disclose identity of informer – Whether adverse should be inference drawn against prosecution – s 23 Misuse of Drugs Act (Cap 185)

Criminal Law – Statutory offences – Misuse of Drugs Act – Possession of controlled drugs for purposes of trafficking – Element of possession – Requisite knowledge of contents of packages – Wilful blindness as to contents no defence – s 5 Misuse of Drugs Act (Cap 185)

1 On the evening of 4 April 2000, several officers from the Central Narcotics Bureau ("CNB") lay in wait on the 12th floor of Block 701, Yishun Avenue 5. At about 6.45pm, they received instructions to proceed three floors below, to the ninth floor of the same block. The officers did so. Upon their arrival at the ninth floor staircase landing, the officers saw the appellant. He was engaged in a conversation over his mobile phone, with his back facing the officers. The appellant also had a plastic bag (P22) in his possession. One of the officers announced their arrival by shouting "CNB", whereupon they rushed up and apprehended the appellant.

2 Inside the plastic bag carried by the appellant were five bundles. Each bundle was wrapped in newspapers. Each bundle also had a plastic layer surrounding the newspaper wrapping. The five bundles were later found to contain a powdery substance ("the drugs") which had a total diamorphine content of not less than 72.58 grams.

3 The appellant was further found to be in possession of two wads of money. The first wad consisted of ten dollar notes amounting to a sum of S$2,240. The second wad consisted of fifty dollar notes which added up to a sum of S$2,650.

4 After his arrest, the appellant's home was searched but the police were unable to find any drug-related paraphernalia. A urine test for drugs conducted on the appellant also yielded negative results.

The trial below

5 The appellant was charged in the High Court as follows:

> … you … on 4 April 2000, at about 6.45pm, at the 9th floor staircase landing of Blk 701 Yishun Avenue 5, Singapore, did traffic in a controlled drug specified in Class 'A' of the First Schedule to the Misuse of Drugs Act (Cap 185), to wit, by having in your possession for the purpose of trafficking, 1 plastic carrier containing 5 plastic packets of diamorphine weighing 72.58 grams (nett) at the said place without any authorisation under the said Act or the regulations made thereunder, and you have thereby committed an offence under s 5(1)(a) read with s 5(2), and punishable under s 33 of the Misuse of Drugs Act.

6 The trial was held before Judicial Commissioner Choo Han Teck.

The prosecution's case

7 It was the prosecution's case that the appellant knew what lay inside the five newspaper-wrapped bundles. It was further argued that this knowledge, coupled with the appellant's physical control over the bundles, established the requisite element of possession of the drugs in the bundles. The prosecution then relied on s 17 of the Misuse of Drugs Act (Cap 185), for the presumption that the appellant was in possession of the drugs for the purpose of trafficking.

The defence below

8 The appellant's defence, as laid down both by his long statement and by his testimony in court, was as follows.

9 On the night of 3 April 2000, which was the eve of his arrest, the appellant went by himself to the "Europa" pub at East Coast for a drink. While he was there, a Chinese man who introduced himself as "Ah Boy" approached the appellant. The appellant recognised "Ah Boy", although he could not quite place his finger on where he had met "Ah Boy" before. In the course of the conversation that ensued between the two men, 'Ah Boy' found out that the appellant was unemployed, whereupon he offered to find the appellant a job. At "Ah Boy's" request, the appellant gave "Ah Boy" his mobile phone number. They continued chit-chatting thereafter, until about midnight, when "Ah Boy" left the pub.

10 At about 10am the next morning, on 4 April 2000, the appellant woke up to find himself on a beach near the "Europa" pub where he had been drinking the night before. He made his way to a nearby food court to get some breakfast. At about 1pm, he received a telephone call from "Ah Boy". "Ah Boy" reminded the appellant about the job offer which he made to the appellant the night before, and then gave the appellant certain instructions to follow. The appellant was told to turn up at the front of Riverdale Primary School at Sengkang, at 3.30pm that same afternoon. He was also given a telephone number, 9354 7663 ("the first number"), to call.

11 The appellant proceeded to follow "Ah Boy's" instructions dutifully. He took a taxi and arrived at the school in Sengkang. At the appointed time, a Chinese man whom the appellant had never seen before, approached the appellant. The man did not identify himself, but merely handed the plastic bag P22 to the appellant. The man spoke in a mixture of Chinese and English, telling the appellant that the plastic bag belonged to "Ah Boy", and that "Ah Boy" would contact the appellant later. As the man walked away, the appellant peered into the plastic bag, inserted his hand inside, and counted the five bundles.

12 Five minutes after the Chinese man's departure, the appellant received another call from "Ah Boy", instructing him to call the first number. The appellant did so, but the line was engaged. Subsequent attempts to get through failed. The appellant decided to go to a nearby block of flats to await further instructions. At about 5.00pm, "Ah Boy" called again. When the appellant reported his unsuccessful attempts to get through the first number, "Ah Boy" gave him a second number to call. The appellant accordingly called the second number, but this time the person picking up the phone told the appellant that it was the wrong number. The appellant decided to try calling the first number again. This time, he managed to get through. A man answered his call, whereupon the appellant identified himself as "Ah Boy's" friend. The man instructed the appellant to go to Block 701, Yishun Avenue 5 (i.e. the block where the appellant was subsequently arrested).

13 Pursuant to these instructions, the appellant took a taxi from Sengkang and travelled to Yishun. Along the journey, he started feeling that something was amiss, and wondered whether "Ah Boy" had orchestrated the entire exercise simply to make a fool of him. However, the appellant never for once suspected that the bundles within the plastic bag contained drugs.

14 Upon his arrival at Yishun, the appellant received a call from "Ah Boy". This time, "Ah Boy" instructed the appellant to put the plastic bag into "a dustbin". No instructions were given for identifying which particular dustbin was to be used. As the appellant alighted at his destination, he saw a dustbin nearby, and placed the plastic bag into it. He then called the first number and asked the man (the one who had instructed him to go to Yishun) to come down and collect the bag. When the man refused, the appellant proceeded to walk to the block opposite block 701, to await for further instructions from "Ah Boy". When it became apparent that no call from "Ah Boy" was forthcoming, the appellant called the first number again. By that time, it was already about 6.00pm, and the appellant complained to the man that it was getting late. The man instructed the appellant to bring the plastic bag up to the ninth floor. The appellant thus retrieved the bag from the dustbin and went upstairs. It was when the appellant was at the 9th floor that he was arrested by the CNB officers.

15 In a nustshell, the appellant's defence was that he was merely an innocent courier who had been made use of by "Ah Boy". He never knew what the contents of the bundles were. Contrary to the testimonies of the arresting CNB officers, he did not attempt to run away when he was arrested.

16 As for the huge sums of money found on him at the time of his arrest, he claimed to have won $3,000 in a 4D lottery two to three weeks prior to the arrest. To authenticate this claim, he gave the relevant lottery number to the Investigating Officer, who verified that it was indeed a winning number. The appellant further claimed to have won $1,000 in illegal horse-betting about a week after winning the 4D lottery. It was the appellant's claim that the huge sums of money found on him were attributable to the proceeds from both these winnings.

Choo JC's findings

17 Choo JC observed that "possession" in s 5 of the Misuse of Drugs Act implies possession with knowledge. Choo JC then went on to reject the defence advanced, i.e. that the appellant was only an innocent courier who had no knowledge as to the contents of the five bundles. Choo JC held:

> The more relevant question is, what was he doing with the plastic bag over the three hours? The accused gained possession of the drugs in the bag, not by a purchase of what he thought to be something innocuous; not by an innocent or chance finding in circumstances that do not give rise to suspicion; but from a person he hardly knew, and for no clearly defined purpose other than mere delivery. The unusual and suspicious nature of the way the bag was given to him and the instructions which he had to follow are not in doubt. The accused himself admitted that at some point he felt 'something amiss' about it all. He had seen that the bag contained packed bundles which he counted to be five in total. He obeyed the instructions of a virtual stranger and carried the bag from Sengkang to Yishun. By the same token, it is inexplicable that 'Ah Boy' would entrust the large consignment of drugs to a person he hardly knew. He deposited the bag in a public waste bin, and then retrieved it to bring it to the 9th floor of a block of flats. Not only do I find the instructions of his contact person to be suspicious, but his own very conduct itself was suspicious. In such circumstances, the accused cannot say that he had neither opportunity nor reason to find out what he was carrying. If he was unable to find out, his only recourse was to abandon the bag. The accused claimed that although he spoke to 'Ah Boy' a couple of times over the handphone he could not ask what the bag contained because 'Ah Boy' kept hanging up on him. I find this unacceptable. Only a person with an extremely simple mind would have been led around in the way described by the accused. Any reasonable person would have enquired from 'Ah Boy' what it was that he was asked to carry, and what remuneration was in store for that service. No evidence whatsoever in this regard was adduced and the accused did not appear to me as a simple-minded person.

18 Choo JC accordingly found that the prosecution had successfully established 'possession' of the

drugs by the appellant. Choo JC further held that this triggered off the presumption under s 17 of the Misuse of Drugs Act, so that the appellant was deemed to have had the drugs in his possession for the purpose of trafficking, unless he could prove otherwise. Choo JC then made the finding that the presumption had not been rebutted by the appellant.

19 Consequently, Choo JC held that the charge against the appellant had been made out. The appellant was convicted and sentenced to suffer the death penalty.

The appeal

20 Several points of appeal have been raised. They are canvassed below.

The fact that the drugs were wrapped up

21 For the element of "possession" (within the meaning of s 17 of the Misuse of Drugs Act) to be established, it must not only be shown that the accused had physical control of the drugs at the relevant time; the prosecution must also prove that the accused possessed the requisite knowledge as to the contents of what he was carrying: see *Warner v Metropolitan Police Commissioner* [1969] 2 AC 256; *Tan Ah Tee v PP* [1978–1979] SLR 211; [1980] 1 MLJ 49. In the course of the appeal before us, counsel for the appellant relied heavily on the fact that the contents of the bundles were securely wrapped in newspapers and could not be identified. We were accordingly invited to draw the inference that the appellant had no knowledge of the contents of the bundles.

22 We were unable to accede to this request. While the fact that the contents of the bundles were hidden from view may have been relevant in determining whether the requisite knowledge was absent, this factor should still not be given too much weight. Otherwise, drug peddlers could escape liability simply by ensuring that any drugs coming into their possession are first securely sealed in opaque wrappings. Rather, the court must appraise the entire facts of the case to see if the accused's claim to ignorance is credible. As Yong Pung How CJ remarked in *PP v Hla Win* [1995] 2 SLR 424 (at 438):

> In the end, the finding of the mental state of knowledge, or the rebuttal of it, is an inference to be drawn by a trial judge from all the facts and circumstances of the particular case, giving due weight to the credibility of the witnesses.

23 Looking at the sequence of events as narrated by the appellant's testimony in the trial below, we were of the view that the appellant's story as to how he came into possession of the bag was wholly unconvincing. He was standing in a pub when "Ah Boy" approached him and offered him a job. The very first question that springs to mind at this juncture is why "Ah Boy" would seek to employ the appellant as a courier for such a large amount of drugs when, by the appellant's own account, "Ah Boy" and the appellant hardly knew each other.

24 What was even more unusual was that the appellant accepted the job the very next day, without even inquiring as to the nature of the job or the terms of remuneration. As the day proceeded, the appellant religiously followed every one of "Ah Boy's" instructions given over the phone, without even inquiring as to the objective of the whole exercise of carrying the plastic bag from one point to another. The servility allegedly displayed by the appellant towards someone who was for all intents and purposes a stranger to him was, to say the least, unbelievable.

25 In the light of "Ah Boy's" vague and open-ended instructions, one would have expected the appellant to get "Ah Boy's" contact number, so that the appellant could call him whenever there was any need for clarification. This, the appellant failed to do. The appellant claimed that "Ah Boy" hung up the phone each time before he could even ask for "Ah Boy's" number. This excuse might have held water if the appellant managed to have only one or two conversations with "Ah Boy". However, the

appellant claimed to have received intermittent calls from "Ah Boy" throughout the afternoon and evening of the day of his arrest. The very first time that "Ah Boy" called the appellant was at about 1.00pm, when the appellant was still at East Coast. "Ah Boy" called him again just after 3.30pm, when the appellant was at Sengkang, after having collected the plastic bag from the Chinese man. While still at Sengkang, the appellant received another call from "Ah Boy", at about 5.00pm. The appellant had subsequently left Sengkang and headed towards Yishun in a taxi. Just as he arrived at Yishun, "Ah Boy" called him again to tell him to deposit the plastic bag into "a dustbin". It is hard to believe that, despite having had so many conversations with "Ah Boy", the appellant never for once had the opportunity to ask for "Ah Boy's" contact number. Not surprisingly, Choo JC found that the appellant's reason for failing to get "Ah Boy's" number was "unacceptable".

26 The reasonable conclusion to be drawn from the above observations was that the appellant's story as to how he came into possession of the bag was obviously cooked up to distance himself from any knowledge that he might have had as to the bag's contents. We were more inclined to draw the inference that the appellant knew what the five bundles contained. Such an inference would be supported by the fact that, at the time of his arrest, the appellant was found to be in possession of $4,890 in cash, denominated in S$10 and S$50 notes. His explanation that these were the proceeds from his gambling winnings was ridiculous. Firstly, it is highly unusual for an unemployed man to go around carrying such large amounts of cash in his pocket. Secondly, he claimed to have won the moneys two to three weeks before his arrest, so that did not explain why he was still carrying the moneys on the day he was arrested. Even Choo JC was still "not entirely satisfied with his account of how he came into such large sums of money given his financial and job records". Rather, a more plausible deduction would be that the cash found on the appellant was payment for him to act as a courier for the five bundles. If this deduction were correct, then the appellant's claim that he did not know what the five bundles contained would, in light of the large sum of money involved, be rendered a lot more difficult to believe.

27 Even if one were to accept the appellant's account of how he came into possession of the plastic bag, his conduct as narrated by his own evidence displayed nothing short of wilful blindness towards the contents of the five bundles. The entire experience of

- receiving strange instructions from 'Ah Boy' over the telephone,
- taking delivery of a plastic bag containing five suspicious bundles from a stranger at Sengkang,
- being told by Ah Boy to transport the bag from one point to another without even being informed of the objective of the whole exercise,
- observing "Ah Boy's" perpetual tendency to hang up before the appellant could ask for his number and
- being instructed by "Ah Boy" to deposit the bag into, of all places, a dustbin at a HDB void deck

should have alerted the appellant to the illicit character of the plastic bag's contents. The suspicious nature of the entire charade must have been further highlighted by the fact that "Ah Boy" was practically a stranger to him. Despite this, the appellant was content to continue executing "Ah Boy's" instructions ever so meticulously.

28 In *Warner v Metropolitan Police Commissioner*, Lord Pearce observed that a bailee will be held to have refuted the inference of possession of a package when (at pp 305H–306B):

> … he was a servant or bailee who had no right to open it *and no reason to suspect that its*

contents were illicit or were drugs … [emphasis added]

29 It is thus not enough for an accused merely to assert absence of knowledge. The facts of the case must be examined as a whole to see whether he had good reason to suspect that he was carrying drugs. In *Yeo Choon Huat v PP* [1998] 1 SLR 217, this court held (at pp 226–227):

> *In short, ignorance is a defence only when there is no reason for suspicion and no right and opportunity of examination; ignorance simpliciter is not enough: Ubaka v PP* [1995] 1 SLR 267. In the instant case, the appellant's suspicions must have been aroused by the surreptitious way in which Ah Soon had placed the bag in the appellant's car without his knowledge and had called to inform the appellant about the bag only after the appellant had cleared the customs checkpoint and entered Singapore. In the circumstances, one would have thought it incumbent on the appellant to open up the bag to ascertain its true contents. The appellant also had ample opportunity to examine the contents of the bag. Yet, upon opening up the bag to find it filled with packets wrapped in brown paper, the appellant had not displayed any further interest in the contents of the packets and had gone on to deliver the bag to Koh without question … The appellant's suspicions must have been aroused by this time, and his apparently nonchalant reaction to having discovered all these alien items in his car simply defies logic and credulity [emphasis added]

No other facts to connect the appellant to the drugs

30 The appellant also argued that there were no other facts to implicate him, other than the fact of possession. No drug-related paraphernalia were found in his house. His urine did not test positive for drugs. However, these factors did very little to buffer the appellant's case as they were equally consistent with the appellant having been a knowing courier for the drugs.

31 The appellant further argued that his fingerprints were not found on the plastic wrappings surrounding the five bundles. Again, while this may have supported the contention that the appellant had no part in the preparation of the bundles, it was not inconsistent with the appellant having known what the contents of the bundles were: see *Osman bin Din v PP* [1995] 2 SLR 129 (at 138); *Yeo See How v PP* [1997] 2 SLR 390 (at p 402).

Failure to call the informer as a witness

32 The appellant also contended that an adverse inference should have been drawn against the prosecution for not calling their informer and for not giving the informer's particulars to the defence during the trial. We rejected this suggestion in the light of s 23 of the Misuse of Drugs Act, which affords protection to the identity of informers. The provision states:

> (1) Except as provided in subsection (3)
>
> (a) no information for an offence under this Act shall be admitted in evidence in any civil or criminal proceedings; and
>
> (b) no witness in any civil or criminal proceedings shall be obliged
>
> (i) to disclose the name and address of any informer who has given information with respect to an offence under this Act; or
>
> (ii) to answer any question if the answer thereto would lead, or would tend to lead, to the discovery of the name or address of the informer.
>
> …

(3) If in any proceedings before a court for an offence under this Act the court, after full inquiry into the case, is satisfied that an informer wilfully made a material statement which he knew or believed to be false or did not believe to be true, or if in any other proceedings the court is of the opinion that justice cannot be fully done between the parties thereto without the disclosure of the name of an informer, the court may permit inquiry and require full disclosure concerning the informer.

33 The present case was not one where justice could not fully be done without disclosure of the informer's name. The appellant was caught red-handed, with the plastic bag containing the drugs. It was thus incumbent on him to explain what he was doing with the drugs. The informer's evidence was not vital to the prosecution's case. There was therefore no duty on the prosecution to disclose the identity of the informer: *Lai Kam Loy v PP* [1994] 1 SLR 787; *Osman bin Din v PP* [1995] 2 SLR 129; *Vinit Sopon v PP* [1994] 2 SLR 226.

34 In the trial below, a suggestion was made by the defence that the police informer was the man who had instructed the appellant to proceed to Yishun and who had told the appellant to come up to the 9th floor (i.e. the man who answered the telephone when the appellant dialed the first number). Giving the appellant the benefit of the doubt, even if this man was indeed the police informer, and even if he had come forward to testify that his dealings were entirely with "Ah Boy" (if there really was such a person) and not with the appellant, this would defeat any claim to the appellant having been the party directly supplying the drugs. It would nevertheless not be at odds with this court's finding that the appellant was a knowing courier for the drugs.

Conclusion

35 For the above reasons, we dismissed the appeal.

Appeal dismissed.

Reported by Christopher Tan Pheng Wee