Public Prosecutor v Kwek Seow Hock
[2009] SGHC 202

Case Number : CC 8/2008

Decision Date : 11 September 2009

Tribunal/Court : High Court

Coram : Chan Seng Onn J

Counsel Name(s) : Peter Koy, Toh Shin Hao and Gordon Oh (Attorney-General's Chambers) for the prosecution; Foo Cheow Ming (KhattarWong) and Thong Chee Kun (Rajah & Tann LLP) for the defendant

Parties : Public Prosecutor — Kwek Seow Hock

Criminal Law – Statutory offences – Misuse of Drugs Act

11 September 2009 Judgment reserved.

Chan Seng Onn J:

Introduction

1 The accused, Kwek Seow Hock, was charged with one count of trafficking in a Class "A" Controlled Drug listed in the First Schedule to the Misuse of Drugs Act (Cap. 185, 2008 Rev Ed Sing) ("*MDA*") by having in his possession, for the purpose of trafficking, 46 packets containing not less than 25.91 grams of diamorphine. This was an offence under s 5(1)(*a*) read with s 5(2) of the *MDA*, punishable by death under s 33 of the *MDA*. Throughout this trial, the terms "diamorphine" and "heroin" were used interchangeably, and both terms are employed in this judgment to refer to the same substance.

The Facts

2 The facts, including the background of the accused and the events leading up to his arrest, were largely undisputed.

Background of the Accused

3 The accused is a 51-year-old odd-job worker. At the time of his arrest, he was staying at his friend's one-room flat for $50 a month. He has been separated from his ex-wife for more than ten years. He has a 28-year-old son who works as a buffet delivery man. After four years' imprisonment for a previous conviction, he worked for his elder brother as a deliveryman for four months, earning $40 a day. From around April or May 2004 to March or April 2007, he worked as a laundry valet at Grand Copthorne Waterfront Hotel. Then, his net salary amounted to about $1200 per month.

4 The accused has been consuming heroin since he was 21. While he used to inject himself with subutex and dormicum, he has always consumed heroin by inhalation. Since 1979, he has been admitted into the Drug Rehabilitation Centre for heroin consumption four times, for periods ranging from five to eighteen months.

5 In Queenstown Remand Prison in 2000, the accused met a Singaporean known to the former only as "Ah Long". Both were in prison for drug trafficking offences. Some time in 2005, the accused

met Ah Long again at a hawker centre in Ang Mo Kio where they exchanged phone numbers. Subsequently, in June 2007, Ah Long called the accused up and asked him if he was interested in helping the former sell drugs, mainly heroin. The accused agreed. By then, the accused was consuming 2 to 3 "straws" of heroin a day. In my analysis of the accused's defence I will explicate the concept of a "straw" of heroin.

Events Leading to the Arrest

6 On the morning of 20 July 2007, Ah Long called the accused up to tell him that he would send a man "Ah Seng" to deliver some drugs that day, namely "peh" (*ie*, heroin), "leng" (*ie*, ice), ecstasy, "k" (*ie*, ketamine) and "5" (*ie*, Erimin 5). Ah Long instructed the accused to pass the drugs and $6,650 to "Jackie" at Block 23 Hougang Ave 3 ("Block 23") as well as to collect $650 from him. Like Ah Seng, Jackie was a "runner" for Ah Long, *ie*, they delivered drugs for him. After that conversation on the mobile phone with Ah Long, the accused deleted Ah Long's number from his mobile phone. Ah Long always called him on a different number.

7 At around 8pm that same day, the accused went to a hawker centre facing Kovan MRT station to meet Ah Seng to receive heroin and other drugs. He had met Ah Seng previously to handle other consignments.

8 At around 9.30pm, Ah Seng approached the accused from Kovan MRT station with two paper bags, one from "Hugo Boss" ("the 'Hugo Boss' bag") and another from "Ever Rich Duty Free Shop" ("the 'Duty Free' bag"). Without saying anything, Ah Seng passed both paper bags to the accused.

9 After that, the accused entered a toilet in the nearby Heartland Mall, taking both paper bags with him. In one of the cubicles of that toilet, he inspected the contents of the paper bags and found two plastic bags and three loose sachets in the 'Hugo Boss' bag. In one of the plastic bags, he found 46 packets of heroin and in the other he found 13 packets of ice. The accused estimated that each of the 46 packets contained between 7 and 8 grams of heroin.

10 The accused then transferred the contents of the 'Hugo Boss' bag into the 'Duty Free' bag and then placed the 'Duty Free' bag into the now empty 'Hugo Boss' bag. He also took out a wad of $6,650 in cash, secured by a rubber band, from his trousers pocket and placed it into the 'Duty Free' bag. Following that, the accused left Heartland Mall with the cash and drugs in the 'Duty Free' bag placed inside the 'Hugo Boss' bag, and walked to Block 23 to meet Jackie who was supposed to arrive in a black-coloured car. He had met Jackie four to five times previously.

11 At about 11.15pm, the accused was arrested by CNB officers at the car park of Block 23. Upon arrest, the 'Hugo Boss' paper bag and its contents were seized.

The Investigations

12 In the accused's presence, CNB officers Insp Jason Tan Teck Hong and W/Sgt Michelle Chin counted the moneys and the packets of drugs that were inside the 'Duty Free' bag that was placed within the 'Hugo Boss' bag and found the following:

(a) a white coloured plastic bag containing 43 sachets of a white granular substance;

(b) three sachets of a white granular substance;

(c) one OCBC red packet containing one sachet and one straw containing a white granular substance ("the OCBC red packet");

(d) 1290 "Erimin 5" tablets;

(e) three bundles wrapped in black tape and paper containing a total of five sachets of white powdery substance;

(f) one orange-coloured plastic bag containing 13 sachets of a white crystalline substance;

(g) three sachets containing a total of 75 Ecstasy tablets;

(h) four sachets containing a total of 100 Ecstasy tablets;

(i) eight sachets containing a total of 200 Ecstasy tablets;

(j) five sachets containing a total of 125 Ecstasy tablets;

(k) one white packet containing 100 Ecstasy tablets;

(l) one "Crocodile" red packet containing 6½ Dormicum tablets ("the 'Crocodile' red packet"); and

(m) $6,650 in cash.

They also found cash amounting to $2,409.15 in the accused's wallet.

13 Immediately following his arrest, at around 1.40am on 21 July 2007, Insp Jason Tan recorded an oral statement from the accused in the CNB office ("the oral statement"). After that, at about 2.30am that same morning, the accused went for an Instant Urine Test and tested positive for opiates and benzodiazepines.

14 On 22 July 2007 after recording a statement from the accused under section 121 of the *Criminal Procedure Code* (Cap 68, 1985 Rev Ed Sing) ("*CPC*"), CNB officers referred the accused at about 6.45pm to Changi Prison Hospital for observation of drug withdrawal symptoms. He was admitted into the Changi Prison Complex Medical Centre ("CMC") and observed by the medical staff there from 22 to 25 July 2007. According to the medical report ("the CMC medical report") produced by Dr Mohd Emran Mamat ("Dr Emran"), his examining doctor, Dr Norkhalim found the accused to be well, with stable vital signs, save for his complaints of runny nose. Dr Norkhalim's impression was that the accused had "possible mild withdrawal" symptoms. During the accused's stay in CMC, he was reviewed thrice by Dr Emran who did not note any observable withdrawal symptoms. The accused was then discharged on 25 July 2007.

15 After his discharge, the Investigation Officer ASP Senthil Kumaran began recording a series of statements under s 121 of the *CPC*. In all, five s 121 statements ("the s 121 statements") (including the one recorded on 22 July 2007) were admitted into evidence as the defence did not challenge their admissibility:

S/No	Date of Recording	Time of Recording	Exhibit No
1	22 July 2007	2.20pm	P47
2	25 July 2007	3.10pm	P48
3	26 July 2007	2.45pm	P49
4	13 September 2007	11.10am	P50A
5	3 October 2007	12 noon	P51A

16 By 26 October 2007, the Health Sciences Authority's analysis of the 43 sachets containing white granular substances seized from the accused showed that they contained not less than 25.91grams of diamorphine.

The Prosecution's Case

17 The prosecution's case is straightforward. When the accused was arrested, he had in his possession a 'Hugo Boss' paper bag. In the 'Duty Free' bag that was found inside the 'Hugo Boss' bag, an assortment of substances suspected to be various types of controlled drugs were found, in particular 46 plastic sachets containing a total of not less than 25.91grams of diamorphine.

18 In the oral statement and the s 121 statements, the accused admitted that the drugs found in his possession came from Ah Long and he had helped Ah Long deliver to his customers. In return, the accused was paid a commission by Ah Long. On the day of his arrest, the accused was carrying out instructions from Ah Long. He obtained the drugs from Ah Seng and was on his way to deliver it to Jackie at Block 23. The $6,650 cash found in the 'Duty Free' bag was meant for Ah Long, being payment for the drugs that the accused received from him.

19 The prosecution submitted that it was clear from the evidence that the accused had the 46 sachets of heroin (analysed to contain more than 25.91 grams of diamorphine) in his possession and he knew that those sachets contained heroin. Thus, pursuant to section 17(*c*) of the *MDA*, the accused is "presumed to have had that drug in possession for the purpose of trafficking unless it is proved that his possession of that drug was not for that purpose".

20 At the close of the prosecution's case, having regard to the evidence adduced by the prosecution thus far, I found that the prosecution had made up a case of trafficking in not less than 25.91 grams of diamorphine against the accused. Accordingly, I called upon the accused to enter his defence.

The Defence

21 The defence did not dispute the essential elements of the charge. Instead, the defence sought to rebut the presumption under s 17 of the *MDA* ("the s 17 presumption") by proving that the accused intended to retain half of the diamorphine (*ie*, 23 packets) for his own consumption and that only half of the remaining packets were intended for sale. That is to say, the accused only intended to traffic in 12.96 grams of diamorphine, which would then be below the 15 grams threshold for the charge to

be capital in nature.

The Accused's Rate of Consumption of Heroin

The Accused's Evidence

22 The accused is a long-term drug abuser. His long history of heroin abuse spans almost over a quarter of a century. In 1983, when he began consuming heroin, he took approximately two 2-cm straws of heroin daily.

23 Heroin abusers commonly measure their drug consumption in terms of "straws". Each straw (cut from the normal drinking straws) is about 2 cm long and is usually filled with 0.2 grams of heroin. Usually, the drug abuser will finish one straw in about two or three occasions of consumption. They use up a certain amount of the substance at any one time, and re-seal the straw using a lighter flame. The market rate for each 2-cm straw of heroin is around $50.

24 Gradually, the accused's rate of heroin consumption progressed over time. In the 1990s, he smoked half a packet of heroin—equivalent to 10 straws' worth—a day, an astonishing amount by any standards. By 2000, he was consuming ten 2-cm straws of heroin everyday.

25 Around three months prior to his arrest, he was consuming three 6-cm straws a day. This amounted to a daily consumption of 1.8 grams of heroin. By his own estimate, he could make twelve 6-cm straws from each packet. Therefore, 23 packets of diamorphine would have lasted him two to three months.

26 Upon his arrest, two red packets were seized from the accused. One, the OCBC red packet, contained a packet of about 6 grams of heroin and a 6-cm straw of heroin. Both belonged to the accused and he had packed the heroin in the 6-cm straw for his own use.

Expert Witnesses' Opinions

27 The defence called Dr Ung Eng Khean ("Dr Ung"), a consultant psychiatrist at Adam Road Medical Centre, as an expert witness primarily to testify that there is no clinical evidence of a correlation between the quantity of heroin consumed and the extent of the withdrawal symptoms manifested. In preparing his report, he reviewed medical notes from various medical examinations of the accused relating to his drug offences and the transcripts of the accused's cross-examination during the trial of this case.

28 Even though he never interviewed or examined the accused, Dr Ung came to the conclusion, based on his review of the relevant documents, that the accused was a *moderate to severe* heroin abuser. The prosecution's rebuttal expert witness, Assoc Prof Munidasa Winslow ("Prof Winslow"), who interviewed the accused on 28 August 2008 and reviewed the CMC medical report and the sickbay medical notes, was of the opinion that the observation of mild withdrawal symptoms by the doctor at CMC would generally correlate with *mild use, though it would not exclude moderate use*. However, he too agreed that there is no good correlation between the amount consumed and opiate withdrawal symptoms although generally, the higher the dose, the worse the withdrawal symptoms.

Correlation Between Quantity Consumed and Withdrawal Symptoms

29 In its closing submissions, the defence contended that the prosecution had sought to refute the accused's defence by adducing evidence that the accused was observed to have suffered only

mild withdrawal symptoms, implying that he did not suffer sufficiently severe withdrawal symptoms to justify the rates of consumption which he had claimed in his evidence (*ie*, three 6-cm straws of heroin a day).

30 I accepted Dr Ung's conclusion from his literature review that there is no straightforward direct correlation between the amount of heroin consumed and the severity of the withdrawal symptoms suffered by the drug abuser. Thus, it has not been scientifically proven that the higher the amount of heroin consumed, the more severe the withdrawal symptoms suffered. According to Dr Ung's research, 11 factors have been reported to have an influence on the severity of the heroin withdrawal symptoms, namely:

(a) the nature of the particular opioid taken;

(b) the dose of the opioid taken;

(c) the potency or purity of the heroin consumed or used;

(d) the duration of chronic administration;

(e) the personality of the addict;

(f) the expectations of the addict regarding the withdrawal (*ie*, the expectation that suffering would be relieved by medication);

(g) the ability of the addict to tolerate the discomfort of withdrawal or stress;

(h) the mode of use of the opioid (injection of heroin would generally lead to more severe withdrawal symptoms than inhalation);

(i) the physical environment or circumstances related to the withdrawal (*eg*, heroin withdrawal symptoms may be milder in subjects in police custody);

(j) the state of health of the individual abuser; and

(k) individual sensitivity to opioid withdrawal symptoms.

Even in the most recent study that Dr Ung was able to find that did show a positive correlation between the dose and severity of withdrawal (A Glasper et al, "Influence of the Dose on the Severity of Opiate Withdrawal Symptoms During Methadone Detoxification", [2008] 81 *Pharmacology* 92), the dose effect was reported to be a modest 7% of the total variance, *ie*, at best the dose effect could only account for such a correlation in 7% of the cases.

31 Taking into consideration Dr Ung's findings, as well as Prof Winslow's opinion that the accused's reported use of three straws per day at the time of his arrest would be consistent with his observed withdrawal symptoms, I accepted the accused's evidence that he had been consuming three 6-cm straws a day, and that 23 packets of heroin could therefore last him two to three months at that rate of consumption.

Rate of Consumption Not Determinative of Defence of Consumption

32 In *Fung Choon Kay v PP* [1997] 3 SLR 564 ("*Fung Choon Kay*"), the accused was found with

18.73 grams of diamorphine, and charged with drug trafficking. He claimed that had he not been arrested, he would have consumed one sachet containing 0.45 grams of diamorphine. His defence was that 3.73 grams of the diamorphine he was caught in possession of would be for his own personal consumption. An expert witness for the defence, Dr Lim Yun Chin, a consultant psychiatrist, testified that the accused was capable of consuming half a sachet a day. Rejecting the accused's defence of consumption, Yong Pung How CJ held at [17]:

> Although the fact that the [accused] was an addict lent support to [his] defence of consumption that fact by itself was *not conclusive*. The trial judge had to look at the totality of the evidence and decide whether he was satisfied, on a balance of probabilities, that part of the heroin was for the [accused's] own consumption. [Emphasis added.]

33 In another case, *Tan Chuan Ten & Anor v PP* [1997] 2 SLR 348 ("*Tan Chuan Ten*"), the trial judge found that there was ample evidence of the first accused's severe addiction but ultimately held that the accused had failed to discharge the burden of rebutting the presumption that he had the drugs in his possession for the purpose of trafficking. The Court of Appeal saw no ground for disturbing his decision.

34 Having accepted the accused's evidence as to his rate of consumption, regardless whether it is classified as mild, moderate or severe, I also considered other evidence in order to satisfy myself whether on a balance of probabilities, the 23 packets of heroin were indeed for his own consumption.

The Accused's Financial Means to Purchase the 23 Packets of Heroin

Income and Expenses

35 In *Tan Chuan Ten*, the trial judge considered the first accused's resources to finance his purchase of drugs and found ultimately that he would have had to traffic in drugs to finance his severe addiction; he was earning about $1,000 a month and his capacity to work was adversely affected by his severe addiction.

36 At the time of his arrest, the accused in the present case had $1,200 in his POSB bank account and $2,409.15 was found in his wallet. During his cross-examination, he initially said that the sum of money found in his wallet was made up partly of his commission from the sale of drugs and partly of his savings. When shown his statement to CNB, which included an explanation of that sum as winnings from an illegal gambling den, he then appeared unsure whether it was his gambling winnings, his salary or his commission from Ah Long.

37 The accused estimated his monthly expenses to be around $900. A large proportion of that monthly expenditure could be accounted for as follows:

S/No	Item	Amount per day	Amount per month

1	Living Expenses consisting of: Packet of cigarette that lasts two days 3 meals per day Travelling	$20 $5 $7 $10	$600
2	Mobile Phone (using a top-up card)	$5	$150
Rough estimate of monthly regular expenditure			$750

Although he did not pay any maintenance fees to his wife or son, he gave his son $50 two to three times a year.

The Accused's Earnings from Ah Long

38 In his examination-in-chief, the accused testified that Ah Long paid him a commission of $250 to $300 for each delivery of drugs that he made and charged him $250 to $300 per packet of heroin, allowing him to pay by instalments. The accused had dealt with Ah Long on three previous occasions and on the day of his arrest, Ah Long had sent Ah Seng to deliver drugs to the accused for a fourth consignment.

39 In the oral statement, the accused stated that he received $500 to $600 per trip from Ah Long. In his s 121 statement recorded on 26 July 2007, the accused stated that Ah Long would give him $600 per trip. In that same s 121 statement, he also claimed that he had been collecting drug consignments from Ah Seng on four occasions, including the one he was carrying out on the day of his arrest. In another s 121 statement recorded on 13 September 2007, the accused again stated that he had so far collected about four consignments from Ah Long, including the one on 20 July 2007, but on the issue of commission, he reverted back to the rate of $250 per assignment.

40 Thus far, the accused has been relatively consistent in his testimony as to the number of consignments he had carried out for Ah Long: he had received four consignments, including the one he was carrying out on the night of 20 July 2007. In his testimony as to the amount of commission he received per consignment, he vacillated between $250 and $600.

41 However on cross-examination, the number of consignments that the accused said he had delivered for Ah Long ballooned to about ten deliveries a month, thus amounting to about 60 to 70 deliveries for Ah Long in all. This way, he made $2,500 in commission from Ah Long every month. I noted that in his estimation of these monthly $2,500 earnings in commission, he once again returned to the sum of $250 commission earned for each consignment. I therefore took this amount, *ie*, $250, to be the operative figure for his earnings from each consignment.

42 I rejected the accused's testimony on cross-examination as to the total number of consignments he had undertaken for Ah Long. In his examination-in-chief, the accused clearly stated that on the 20th of July 2007, that was the *fourth* time that Ah Long had sent someone to deliver drugs to him:

Q: Okay. So that is to say, on the 20th of July 07, that is the fourth time Ah Long had sent someone to deliver drugs to you, is that correct?

A: Yes, it's true, yes.

He also stated the same total number of consignments in two s 121 statements recorded on 26 July 2007 and 13 September 2007 respectively. Therefore, I found that the accused had not been honest in his description of the number of consignments on cross-examination by the prosecution. When the deputy public prosecutor questioned him on this discrepancy, he could give no satisfactory explanation for it:

Q: So… so now you can recall that your evidence [on cross-examination] was that you had started delivering drugs for Ah Long sometime in January 2007 until the time of your arrest. That's about a 6-months [*sic*] period and for each month there were about 10 deliveries, making the total for that period about 60 to 70 deliveries. You remember that is—that was his evidence?

A: Yes.

Q: All right. Okay. So now that we've confirmed that, look at page 107, page 107 of the bundle. This is the statement that just now I asked you to confirm, P49. Now page 108 of the bundle, you had told the recording officer at paragraph 39, you told him and this is recorded: [Reads] "I stated this sometime in June. I have been collecting from Ah Seng on four occasions including the time I got arrested." Now this paragraph meant or implies that you had started delivering the drugs for Ah Long only sometime in June and you had done so, excluding the time you got arrested, only three times. So this is obviously inconsistent with what you had testified in Court previously. Do you have a – an explanation for this inconsistency?

A: (No audible answer)

Q: Do you have an explanation?

A: No.

Q: You don't have an explanation. All right.

Without a reasonable explanation for the discrepancy, the accused's testimony on cross-examination on this issue should be disbelieved. Thus, I found that he had made only four deliveries for Ah Long, including the one that he was on his way to make on 20 July 2007. Obviously he would not have been paid for that last consignment. His earnings from Ah Long thus far would therefore have amounted to $750 in total. This is by no means a substantial amount of money.

Payment in Instalments

43 The accused himself testified in his examination-in-chief and on cross-examination that Ah Long charged him $250 per packet of heroin. 23 packets of heroin would have cost him $5,750. This would have taken him 23 consignments' worth of commission to pay Ah Long. The accused also stated that he could pay Ah Long in four to five instalments: each instalment would amount to about $1,150. The

accused further testified that each instalment would be payable within two to three months.

44 At the time of his arrest, the accused only had a total of $3,609.15 in his POSB account and his wallet. He did not appear to me to be sure about how he planned to handle his finances. At one point in his cross-examination he said that the amount of cash he had was meant as a standby. Yet, at a later point he said that he might have considered using some of the money to pay Ah Long for the 23 packets of heroin.

45 Thus, it seemed that the terms of the accused's payment in instalments were unclear. The accused's testimony on cross-examination was that he had called Ah Long on the night of 20 July 2007 to confirm that he would be taking half of the 46 packets for his own consumption. This was after he received the 'Hugo Boss' bag from Ah Seng and counted the number of packets contained in that bag. If he had deleted Ah Long's mobile phone number from his mobile phone, how could he have called Ah Long again to confirm that he would only be delivering half of what Ah Seng had passed to him to Jackie? In those circumstances, it is most unlikely that Ah Long would have allowed the accused to retain half of those 46 packets and deliver only half of what he was given. That would have entailed an inconvenient further change of instructions from Ah Long to Jackie, or whomever the accused was supposed to deliver to. Furthermore, I found the accused's explanation that he had remembered Ah Long's mobile phone number on that occasion, even though he had already deleted it and despite Ah Long's habit of changing his mobile phone numbers frequently, to be unbelievable.

46 Therefore, I found that the accused's rendition of his arrangements with Ah Long to pay the latter in instalments to be false. That explanation was an afterthought. It was a weak defence against the prosecution's attack on his ability to pay Ah Long for the 23 packets of heroin that he purportedly kept for his own consumption. Taking his expenses and weighing them against his earnings, I found that he had little financial means with which to pay Ah Long for his purported purchase of those 23 packets of heroin.

Ready Supply or Access to Heroin

47 On cross-examination, the accused testified that whenever he needed supplies of heroin, he would call Ah Long and within two to three days, he would be able to obtain the heroin for his own consumption. I found this puzzling. If he was able to get heroin within two or three days of "ordering" from Ah Long, why would he have needed to stockpile 23 packets for himself? Upon further questioning, the accused volunteered that this was so that he could buy the drugs cheaper from Ah Long if he purchased in bulk. The discount per packet was about $150 less than the price of the packets bought loosely.

48 However, earlier in his cross-examination, the accused testified that Ah Long charged him $50 less than he charged other customers who presumably bought loose packets from Ah Long:

Court: How much is Ah Long charging them per packet? These six customers [who bought loose packets]?

A: Er, one packet is about, er, 300…

Court: $300?

A: Yes.

Court: For you it's $250, for them it's 300?

A: Yes.

Court: $50 difference?

A: Yes.

49 This inconsistency in the accused's testimony as to the amount of discount he obtained from Ah Long, particularly since he only mentioned the higher discount later, led me to disbelieve his evidence that he bought in bulk because it was cheaper. The discount he would have obtained from Ah Long should have been a significant fact to him that he ought to have been certain about. After all, according to him, it was precisely because of that significant discount that he decided to buy in bulk. I found that he was making an attempt to exaggerate the discount that Ah Long offered him in order to proffer an explanation for why he had to buy 23 packets in bulk, rather than contact Ah Long for a few packets each time.

The Accused's Failure to Raise Defence of Consumption in Statements to CNB

First Mention at Trial

50 Before the accused's examination-in-chief, there was no mention anywhere in any of his recorded statements that he intended to keep half of the 46 packets of diamorphine for his own consumption ("defence of consumption"). This defence of consumption was mentioned for the first time at trial in the following manner:

Q: Okay. Did you do anything else whilst in the cubicle in the gents at level two of Heartland Mall? Did you do anything else in respect to the ['Hugo Boss' bag and 'Duty Free' bag]?

A: Erm, yah, after that, I – I took out from my pocket a bundle of, er, cash. This is about 6,000 plus – 6,500 -- $650, into the bag at the same time.

Court: How much was the amount?

A: Together – together with the drugs, 6 -- $6,650.

Court: That's you [*sic*] took out from you pocket?

A: Yes.

Court: And where did you put it?

A: I put it in the—together.

Court: The smaller bag?

A: Yes.

Court: Which was, by this time, already in the bigger bag?

A: Yes.

Court: Okay.

Q: Thank you, your Honour. Okay, is that all?

A: And actually, I intended to – to – to take out, er, half of the – I mean about 23 packets of the drugs, er, for my own use; that is for my own consumption, half of the amount of the heroin.

Q: Before we come to that, I'm still talking about you being in the gents' cubicle, right? You have now merged the two bags into one. You have also said you then took out $6,650 from your pocket and put it into the bag. Is that all?

A: Yes.

No Mention in Investigation Statements

51 Before that, the accused never once raised his defence of consumption. In the oral statement, he stated:

Q1) What are these? [Recorder Notes: Pointing to all the exhibits recovered in the black colour 'Hugo Boss' paper bag]

A1) Heroin, Erimin, Ketamine, Ecstasy, Ice Dormicum and money.

Q2) Who does all these belong to? [Recorder Notes: Pointing to Exhibits only]

A2) It all belong [*sic*] to 'Ah Long'. I helped 'Ah Long' to deliver to my customers.

52 In his s 122(6) statement, he stated that he had "[n]othing to say". In his s 121 statement recorded on 22 July 2007, he stated that:

Ah Long did not tell me how much drugs he will be giving me. He told me to pass it to someone at [Block 23]. He told me that he will call me later in the evening. He also told me to pass the $6650 to the person. The money will be together with the drugs.

His s 121 statement recorded on 25 July 2007, after he was discharged from CMC, was even more telling:

All the drugs found in the black bag are for selling. Only the one packet of heroin, 1 straw of heroin and 6½ Dormicum tablets are for my consumption, the rest are for selling.

53 When confronted squarely on his failure to mention the defence of consumption anywhere else in his investigation statements, the accused said that he felt that the CNB officers would not have believed him and that he was not paying attention to the questions that the recording officer was

asking him since he was feeling very sick and weak at that time. Further, at the time of the recording of those statements, he felt that his replies to the investigating officer's questions did not matter as he did have in his possession a large amount of drugs.

The Applicable Law

54 There are two prongs on which the accused's failure to mention his defence should be analysed:

(a) Under s 123(1) of the *CPC*, I may draw an adverse inference from his failure to mention his defence in his s 122(6) cautioned statement; and

(b) I may also draw an adverse inference from his failure to raise his defence in the rest of his statements to the CNB investigating officers.

(1) Failure to Mention Defence in s 122(6) Statement

55 Section 122(6) of the CPC provides as follows:

(6) Where any person is charged with an offence or officially informed that he may be prosecuted for it, he shall be served with a notice in writing, which shall be explained to him, to the following effect:

"You have been charged with/informed that you may be prosecuted for —

(set out the charge).

Do you wish to say anything in answer to the charge? If there is any fact on which you intend to rely in your defence in court, you are advised to mention it now. If you hold it back till you go to court, your evidence may be less likely to be believed and this may have a bad effect on your case in general. If you wish to mention any fact now, and you would like it written down, this will be done."

56 Section 123(1) of the CPC reads:

Where in any criminal proceedings against a person for an offence evidence is given that the accused, on being charged with the offence or officially informed that he might be prosecuted for it, failed to mention *any such fact, being a fact which in the circumstances existing at the time he could reasonably have been expected to mention when so charged or informed*, as the case may be, the court, in determining whether to commit the accused for trial or whether there is a case to answer, and the court, in determining whether the accused is guilty of the offence charged, *may draw such inferences from the failure as appear proper*; and the failure may, on the basis of those inferences, be treated as, or as capable of amounting to, corroboration of any evidence given against the accused in relation to which the failure is material. [Emphasis added.]

57 The inference to be drawn under s 122(6) and s 123(1) of the CPC against an accused for an omission of a material fact which he could reasonably have been expected to mention at the time the statement was recorded is really a matter of judgment for the trial judge: *Lau Lee Peng v PP* [2000] 2 SLR 628 ("*Lau Lee Peng*"), per Chao Hick Tin JA at [40]. Chao JA observed further:

> [The trial judge] would no doubt consider it in the light of the nature of the omitted fact(s) in relation to the charge the accused faced. Another pertinent factor would be whether any challenge has been raised by the accused concerning the adequacy of the explanation given to him. There could also be other factors.

58 The whole purpose of s 123 is to compel the accused to outline the main aspects of his defence immediately upon being charged so as to guard against the accused raising defences at trial which are merely afterthoughts: *Yap Giau Beng Terence v PP* [1998] 3 SLR 656 ("*Yap Giau Beng Terence*"), per Yong Pung How CJ at [38].

(2) Failure to Mention Defence in Other Statements

59 An adverse inference can also similarly be drawn against the accused for failing to mention his defence in his s 121 statements. In *Lim Lye Huat Benny v PP* [1996] 1 SLR 253 ("*Lim Lye Huat Benny*"), the Court of Appeal upheld the trial judge's drawing of an adverse inference against the accused for failing to mention his defence during the recording of his s 121 statement.

No Adverse Inference Drawn with Respect to s 122(6) Statement

60 The accused's s 122(6) statement was recorded on the morning following his arrest, between 5.40am to 6.10am. According to his testimony in court, six to seven hours after his last consumption of heroin, he would start feeling the craving and withdrawal symptoms. These symptoms include nausea, body aches, running nose etc. Assuming that he had consumed heroin between receiving the consignment from Ah Seng at around 9 pm, and his arrest at 11.15 pm, he would have started feeling the craving and withdrawal symptoms at around the time that his s 122(6) statement was taken.

61 I take certain guidance from the Court of Appeal's analysis in *Lim Lye Huat Benny*, the facts of which are rather similar to the present facts before me. The accused in that case was charged with trafficking in 38.52 grams of diamorphine. In his s 122(6) statement, he stated that he had nothing to say. In his s121 statement he said that he had been promised $3,000 by one Richard for delivering the package. He knew that the bag contained two styrofoam boxes but he had not opened them to check what they contained. His defence was that he had believed that he was delivering counterfeit money to Richard, but this belief never surfaced in any of his statements made to the CNB officers. The trial judge drew an adverse inference against the accused. However, the Court of Appeal agreed with counsel's submission that not much weight should be attached to the accused's failure to mention his defence at the time when the charge and the warning were read out to him. LP Thean JA reasoned thus, at 262:

> The s 122(6) statement was recorded at the unearthly time between 4.25am and 4.55am on 18 February 1995, and the [accused] said that at that time he was too tired and hungry to think of his defence, *ie*, to mention that he believed that he was carrying counterfeit money. That could be a plausible explanation in the circumstances.

62 I, too, found that there could be a plausible explanation for the accused's failure to mention his defence in his s 122(6) statement. It was early in the morning and he probably did not have any rest or food at the time the s 122(6) statement was recorded. He had just been arrested the night before. Also, he was probably feeling unwell due to his craving for heroin and his consequent withdrawal symptoms, some six to seven hours after his last consumption. I therefore opted not to draw an adverse inference against this instance of failure to mention his defence.

63 I note Yong CJ's analysis of s 123 in *Yap Giau Beng Terence* at [38]:

> [I]t is not in every case that an adverse inference is drawn against an accused who keeps silent upon being charged. An adverse inference will be drawn only if he fails to mention facts which he could reasonably have been expected to mention upon being charged.

In *Yap Giau Beng Terence*, the accused was charged with corruptly offering gratification to two witnesses (including one Susan Goh) to an accident he had caused as an inducement for forbearing to report him to the police for running away from the accident scene. In his cautioned statements to the charges, the accused simply stated that he would like to consult his lawyer. In his defence, the accused said that he had thought that Susan Goh was one of the victims and he had wanted to offer her compensation and later asked her to negotiate with the other victims on his behalf. Yong CJ held at [38] that:

> It must have been evident to the [accused], even without the benefit of consultation with a lawyer, that these facts afforded a legitimate explanation for the offers of money he allegedly made, and that it would be in his interest to mention them. These were thus facts which the [accused] could reasonably have been expected to mention upon being charged, and the trial judge was perfectly entitled to draw an adverse inference against the [accused] under s 123 for failing to mention these material aspects of his defence in his cautioned statements.

64 The accused in *Yap Giau Beng Terence* was not suffering from any physical symptoms that would have made him uncomfortable or ill at ease at the time of his s 122(6) statements with respect to his charge under s 27 of the *Prevention of Corruption Act* (Cap 241. 1993 Rev Ed Sing). In fact, the s 122(6) statement in question was recorded at least a year after the accident which occurred on 2 January 1996. In March 1997 the witnesses to the accident were interviewed on local television and the Television Corporation of Singapore then reported the matter to the Corrupt Practices Investigation Bureau. Thus, the potentially traumatic effects of arrest and lack of sleep and so on were far removed and had ceased to operate on the accused by the time he gave the material s 122(6) statement. The circumstances that Yap Giau Beng Terence was in at the time his s 122(6) statement was recorded were vastly different from those that the accused in the present case was in when the latter gave his cautioned statement.

Adverse Inference Drawn in Relation to s 121 Statements

65 Unfortunately for the accused, the same cannot be said with respect to his s 121 statements, in particular, the statement recorded on 25 July 2007 at 3.10 pm, in which he stated that "[a]ll the drugs found in the black bag [*ie*, the 'Hugo Boss' bag] are for selling".

66 In the CMC medical report, Dr Emran noted that after three reviews of the accused between 23 July 2007 and 25 July 2007, he did not find that the accused was suffering from runny nose or tremors, and the urine test produced "unremarkable" results. The nurses observing him also reported that the accused had slept and eaten well in CMC and he had no further complaint.

67 Thus, I found that when the accused was giving his s 121 statement on 25 July 2007, he was in a healthy state of body and mind. Even according to his testimony in court, the withdrawal symptoms would have peaked two to three days after his last consumption of heroin, and that would have been during his stay at CMC. In this regard, I accepted Dr Ung's explanations for the mild withdrawal symptoms observed of the accused during his examination and observation period in CMC: the accused, being in police custody, would have known that no medication relieving his withdrawal

symptoms would be forthcoming, particularly since he was not in CMC for detoxification treatment. Even so, the voluntariness of that s 121 statement has not been challenged by defence counsel.

68 At the time that he gave his s 121 statement, it ought to have been apparent to him that it would be important to state material aspects of his defence, such as that half of the 46 packets of heroin found on him was for his own consumption, rather than emphasise that the drugs were for selling. I rejected defence counsel's explanation in submissions that the accused was still suffering from inner restlessness and that his mental faculties were still affected at the time his statement was recorded. This was not the first time he has been charged with an offence of drug trafficking. He should have known that the fact that he had intended to keep for his own consumption half of the drugs he had been caught in possession of—certainly a significant amount—would have been an important fact in his defence to a drug trafficking charge. In fact, in *Garnam Singh v PP* [1994] 2 SLR 243, the Court of Appeal held that in order for the withdrawal symptoms to affect his medical and psychological condition to render any statement involuntary, the accused must be in a state of "near delirium", that is to say, "that his mind did not go with the statements he was making" (at [31]). That was clearly not the case here. The accused knew what he was saying when his s 121 statements were recorded and was nowhere near being in a state of delirium.

69 Furthermore, he had two other opportunities to mention his defence when further statements were recorded under s 121 from him on 13 September 2007 and 3 October 2007. Yet, on those occasions, he never uttered a word on his defence of consumption. It can hardly be said that on these further occasions he was still suffering from withdrawal symptoms or inner mental turmoil and therefore was not paying attention to the questions which were asked of him.

70 I therefore drew an adverse inference against the accused in respect of his failure to mention anything at all about the defence of consumption in any of his s 121 statements.

On a Balance of Probabilities, Accused Has Not Rebutted the Presumption

71 Having considered all the factors in the accused's defence laid out above, I found that on a balance of probabilities, he has not succeeded in rebutting the presumption under s 17 of the *MDA*.

72 Since I accepted his evidence on his rate of consumption, I also accepted that the 23 packets of heroin would last him about two to three months. I appreciated that the amount of heroin purportedly meant for his own consumption was not as exorbitant as that found in cases such as *Mohamad Noor bin Abdullah v PP* [2001] SGCA 60 (58.83 grams of diamorphine, amounting to a seven-month supply) and *PP v Ng Chong Teck* [1992] 1 SLR 664 (68.6 grams of diamorphine, sufficient to last the accused more than 62 months). However, I also noted Yong Pung How CJ's observations in *Jusri bin Mohamed Hussain v PP* [1996] 3 SLR 29 on the issue of apportionment of drugs found on an accused for his own consumption, at 39-40:

> In conclusion, I was of the view that before any meaningful apportionment can be made, there must be credible evidence that part of the drugs found were meant for self-consumption. There must also be credible evidence of the *rate of consumption* as well as the *number of days the supply is meant for*. So far as the last item is concerned, as was noted by Rajendran J in *PP v Dahalan bin Ladaewa*, this should be looked at in connection with the *frequency of supply*.
>
> In this respect, credible evidence does not mean the mere say-so of the accused. I appreciate that it is often difficult for an accused to adduce any other evidence apart from his own testimony. However, it seems to me that it must follow from the statutory presumption in s 17 of the Misuse of Drugs Act that an accused found in possession of a large quantity of drugs faces an uphill task. It cannot be right that the court is obliged to accept in all cases the bare allegation of the accused. That would make nonsense out of s 17.
>
> [Emphasis added.]

73 I found the accused's evidence to be credible on his rate of consumption and the number of days the supply was meant for. However, his testimony that he could order drugs from Ah Long and receive it in two to three days undermined his defence. If he could get drugs in such short notice, there was no necessity for him to stockpile two to three months' worth of heroin. I also rejected his evidence that he could afford to pay Ah Long for those two to three months' supply of heroin because they had an arrangement for him to pay Ah Long in instalments. He was not able to give exact details of this purported instalment plan even though he testified that it was a long-standing arrangement between the two of them. Given that he had only undertaken three successful consignments for Ah Long and his drug addiction would have adversely affected his ability to work, I found that he had little financial means to pay Ah Long for two to three months' supply of heroin. Furthermore, I also accepted Prof Winslow's evidence in his report and in court that in his practical experience (having spent 12 years in the field of addictions and personally observed a few hundred opiate withdrawals), few chronic heroin dependent persons had the ability to resist using more of the heroin when it was in their possession. If so, the 23 sachets might have lasted him less than the two to three months claimed, and he would have had to order even more drugs from Ah Long, exacerbating his dire financial situation.

74 What was most damning to the accused was his failure to mention his defence of consumption at all in any of the s 121 statements. As I stated above, owing to the circumstances in which his s 122(6) statement was recorded, I did not draw an adverse inference against him. However, I found no credible reason why he should have omitted to even mention any aspect of his defence of consumption when his s 121 statements were recorded on 25 July 2007, 13 September 2007 and 3 October 2007. I rejected his evidence that he had felt at the time of recording the material s 121 statements that the CNB officers would not have believed him and that there was "no point" in telling them that he had intended the 23 packets of heroin to be for his own consumption. He was not physically unwell, and I found that he was probably not suffering from withdrawal symptoms at the time that those three s 121 statements were recorded. He also never challenged the admissibility of the statements for lack of voluntariness on any ground. Even if he did not think that the CNB officers would believe him, there was no need at all for him to state that the drugs were for selling, save for those drugs found on him that already belonged to him, *ie*, one sachet of heroin, one straw of heroin and 6½ dormicum tablets found in the OCBC red packet and 'Crocodile' red packet (items (c) and (l) in [12] above).

75 In *Fung Choon Kay*, the accused said in his s 121 statements that he intended to consume the sachet of heroin containing 0.45 grams of diamorphine. Later, when giving evidence in his defence, he claimed to have intended to consume more than 3.73 grams. The Court of Appeal dismissed his appeal, holding that his failure to mention this in either his cautioned statement or his s 121 statements indicated that his defence was an "afterthought". In such a situation, the trial judge was entitled to rely on these omissions in disbelieving the accused's defence: *Govindarajulu & Anor v PP* [1994] 2 SLR 838. As the accused could not give a credible explanation for the inconsistency between his s 121 statements and his testimony in court, I found that he had lied in court, claiming that the 23 packets of heroin were for his own consumption. It was an afterthought in an attempt to escape the death penalty. Just as the accused in *Fung Choon Kay* was found to have intended to consume only 0.45 grams of diamorphine, I found that the accused in the present case only intended to consume the drugs found in the OCBC red packet and the 'Crocodile' red packet, and had not intended to retain 23 packets of heroin for his own consumption.

76 With regard to his testimony that he would have carried the 23 packets of heroin in his trousers pocket after delivering the drugs to Jackie, the prosecution submitted that this was inconceivable whereas defence counsel submitted that there was nothing inherently incredible about that. I found that if he really intended to take home the 23 packets of heroin after delivering the other 23 packets to Jackie, it would have been reasonable to expect him to separate the 23 packets for his own consumption from those that he was about to deliver. However, when he was arrested, the 46 packets of heroin were found together, undivided, in the 'Duty Free' bag. Given the way Ah Seng delivered the drugs to him, by merely passing him the bags without saying or doing anything else, I surmised that the accused would probably have done the same with Jackie. I found it highly doubtful that he would have met Jackie and separated out those packets that he had intended for his own consumption then and there in the vicinity of Block 23.

77 I also found that the accused's demeanour in court did not lend itself to establishing an impression that he was a credible witness. There were often long pauses between his statements in court and he often appeared unsure. I accepted counsel's submission on behalf of the accused that he had received very little education and was a simple man. Further, he spent much of his life dependent on drugs and was rarely clear-headed. I accepted therefore that his uncertainty about some parts of his testimony did not mean that he was being intentionally evasive. In *Fung Choon Kay*, Yong CJ observed at [17] that :

> Here, apart from the medical evidence, the appellant was unable to adduce any independent evidence to support his testimony in court that part of the heroin was for self-consumption. Much thus depended on the trial judge's assessment of the appellant's credibility.

There were some material facts which he ought to have been sure about and where he appeared uncertain on these facts, I drew the inference that he was not being forthright. In particular, when he appeared unsure about the exact details of the arrangements between Ah Long and himself, and, when he could not give credible explanations for the inconsistencies in his s 121 statements and his testimony in court as to the number of consignments he had handled for Ah Long as well as for his failure to mention his defence at all during the recording of his s 121 statements, I found that he was not being forthright in those instances and therefore rejected his evidence on those issues.

Conclusion

78 Having rejected the accused's defence of consumption on a balance of probabilities, I found that the presumption under s 17 of the *MDA* has not been rebutted. The Prosecution has proven its case beyond a reasonable doubt that the accused had in his possession not less than 25.91grams of

diamorphine for the purpose of trafficking, thus committing an offence under s 5(1)(*a*) read with s 5(2) of the *MDA*.

79 Therefore, I convicted and sentenced him according to the law stated in s 33 of the *MDA*.