IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2022] SGCA 15

Criminal Appeal No 18 of 2021

Between

Gunasilan Rajenthiran

… *Appellant*

And

Public Prosecutor

… *Respondent*

EX TEMPORE JUDGMENT

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

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Gunasilan Rajenthiran
v
Public Prosecutor

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Court of Appeal — Criminal Appeal No 18 of 2021
Judith Prakash JCA, Steven Chong JCA and Chao Hick Tin SJ
23 February 2022

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Steven Chong JCA (delivering the judgment of the court *ex tempore*):

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

2 The appellant was charged with and convicted on one charge ("the Charge") of importing not less than 1,475.3 grams of cannabis under s 7 punishable under s 33(1) of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) ("the MDA"). The Prosecution issued a certificate of substantive assistance and the trial Judge ("the Judge") exercised her discretion under s 33B(1) of the MDA not to impose the death penalty, as the appellant's involvement with the drugs was limited to acting as a courier. The appellant was sentenced to life imprisonment with 15 strokes of the cane. He appealed against both his conviction and sentence.

Background

3 The factual background leading up to the arrest is largely undisputed and has been detailed in the Grounds of Decision ("GD") below. We briefly highlight the following facts.

4 The appellant is a 29-year-old Malaysian male. At the material time, he was a production worker at Nelco Products Pte Ltd ("Nelco"). On 25 July 2018 at 7.35am, the appellant rode a motorcycle bearing Malaysian registration number JRV1017 ("the Motorcycle") and entered Singapore from Malaysia via the Tuas Checkpoint. There, he was subjected to a routine check, and was taken into custody by the Central Narcotics Bureau ("CNB") officers, and escorted to the A3 Garage at Tuas Checkpoint ("the Garage").

5 At the Garage, the appellant told one Sgt Muhammad Fadhil Bin Amar Tugiman ("Sgt Fadhil") that there was something in the front storage box of the Motorcycle, and stated that there were items on his body. The drugs in relation to the Charge were one block of vegetable matter (later marked "B1A") which was wrapped in a pair of folded raincoat pants and found in the front storage box, and four blocks of vegetable matter that were strapped onto the appellant's body (marked as "BW-F1", "BW-F2", "BW-B1" and "BW-B2"). These five bundles were found to contain not less than 1,475.3g of cannabis ("the Drugs"). In addition, two packets containing granular and/or powdery substance were found underneath the Motorcycle seat. These do not form the subject of the charge.

6 During the investigation, a forensic analysis was performed on the appellant's phone, which revealed the details of his communications with one

Pandian and one Jo, with whom he made and received several phone calls from after his arrest, between 8.45am and 4.06pm on 25 July 2018.

7 In his first contemporaneous statement recorded at 9.45am on the day of his arrest, the appellant stated that the one block of vegetable matter wrapped in his raincoat pants was "ganja", and that he had used the raincoat pants to wrap around the block to hide it. For the four blocks of "ganja" that were found on the appellant's body, he admitted that he had hidden "2 blocks of 'ganja' on [his] back and 1 block on the front", and the last block was hidden underneath his left armpit.

8 In his interviews with the psychiatrist from the Institute of Mental Health, Dr Stephen Phang ("Dr Phang"), the appellant informed Dr Phang that one Pandian had asked him to do a delivery job, which he understood was "something related to drugs". While Pandian told the appellant that he had given the appellant "book" and "food chocolate", the latter did not believe that what Pandian gave him was a real book and chocolate, because he thought "it looked like ganja", having previously seen the drug on Whatsapp and on his phone. He accepted the job because he was in need of money. While he did not know the exact contents of the blocks, he knew that it was "drugs, and something illegal".

Procedural challenges raised by the appellant in the court below

9 The appellant raised several procedural objections in the hearing before us. These are essentially the same as those arguments raised by his previous solicitors before the Judge below:

(a) the weight of the cannabis in the charge ought to be based on its purity;

(b) the Prosecution should have preferred separate charges against the appellant in respect of each block of cannabis;

(c) the amended HSA certificates were not valid because they were amended by the HSA based on the advice of the Attorney-General's Chambers ("AGC"), and because the testing procedure was improper;

(d) the voluntariness and consequent admissibility of the appellant's statements; and

(e) the late disclosure of two witness statements in breach of the Prosecution's disclosure obligations (the *Kadar* breach).

10 The appellant's substantive case on appeal is largely the same as his case below.

Our decision

Procedural objections

11 We do not find the procedural objections meritorious, and the Judge did not err in dismissing them.

12 The challenge against the framing of the charge based on the weight and not on the purity of the cannabis is a non-starter. In *Saravanan Chandaram v Public Prosecutor and another matter* [2020] 2 SLR 95 ("*Saravanan*"), this court explained that the purity, in terms of the amount of tetrahydrocannabinol ("THC") and cannabinol ("CBN") in the cannabis mixture, is irrelevant. We see no reason to depart from our holdings where the charges concern pure cannabis. We find that the charge correctly dealt with the gross weight of the cannabis.

13 As for the HSA certificates, the Judge rightly rejected the appellant's contention. The HSA amendments were done to clarify what was previously known as "cannabis mixture" to be fragments of vegetable matter containing THC and CBN, as this court had held in *Saravanan* and subsequently in *Abdul Karim bin Mohamed Kuppai Khan v Public Prosecutor* [2021] 1 SLR 1390 ("*Abdul Karim*") that the HSA may not certify the fragments of plant parts alone as cannabis mixture. The amendments did not affect the underlying analyses that had already been performed on the Drugs. The appellant's contention concerning the testing method by HSA as being contrary to the recommendations by the United Nations Office on Drugs and Crime ("UNODC") is similarly unmeritorious. The evidence by the HSA analyst, Ms Ong, that the testing method was in line with the recommendations by the UNODC was not contradicted by any expert evidence on behalf of the appellant (GD at [24]).

14 The appellant also disputed the admissibility of all the statements, on the basis that there was inducement, threat or promise by the relevant officers. The Judge below admitted only the first contemporaneous statement, which the appellant now seeks to exclude on the basis that the officers involved did not administer the Mandatory Death Penalty notice in writing ("the MDP notice"). We do not find this submission meritorious. Before the recording of the first contemporaneous statement, the appellant had signed the MPD notice under which he was notified that, under s 33B of the MDA, he may avoid the mandatory death penalty if he is deemed by the Public Prosecutor to have substantively assisted the CNB. The MDP notice was duly served on the appellant and was signed by him. Nor can the appellant succeed in his argument that the contents of the MDP notice constituted a threat, inducement or promise.

Explanation 2(*aa*) of s 258(3) of the Criminal Procedure Code 2010 (2020 Rev Ed) ("CPC") puts paid to this argument.

15 As for the alleged *Kadar* breach based on the assertion that the Prosecution belatedly disclosed two witness statements, the appellant contended below that his case was irreversibly prejudiced by the Prosecution's late disclosure, as he could no longer elect to remain silent. The Judge rejected this objection. We agree. The two witnesses were appellant's supervisors at Nelco who had stated that the appellant had a close relationship with Pandian. The Prosecution, in our view, had rightly and swiftly disclosed these statements that could support the Defence's case, upon hearing the appellant's case at the trial, where he testified that he was close to Pandian. There was no *Kadar* breach to speak of. In any event, there was no prejudice, as the appellant chose not to call the two witnesses, and in any event could not have rebutted the presumption of knowledge under s 18(2) of the MDA if he had elected to remain silent, because only his testimony would be relevant to establishing his knowledge of the nature of the Drugs.

Substantive case of the appeal

16 We turn to consider the appellant's substantive case. We agree with the Judge that the appellant had failed to rebut the s 18(2) presumption. Section 18(2) provides for the presumption of knowledge of the specific nature of the drug. To rebut the presumption, the accused must prove, on a balance of probabilities, that he did not know of the nature of the drug. The appellant needs to show that he *genuinely believed* that he was in possession of something innocuous or of some contraband item or drug *other than* the specific drug in possession (*Gobi a/l Avedian v Public Prosecutor* [2021] 1 SLR 180 ("*Gobi*") at [58]–[59]).

17 The appellant had failed to prove that he had a genuine belief that these items were merely contraband items and not drugs. While he claimed at the trial that he thought the Drugs were "5 books and 2 food chocolates", his assertion is contradicted by his own previous admissions in both his first contemporaneous statement, and his interviews with Dr Phang. He admitted that he wrapped the "ganja", meaning cannabis, using the raincoat pants. He also told Dr Stephen Phang that he did not believe that these were real books and chocolate. His subsequent disavowal of his knowledge of the drugs at the trial thus cannot be believed.

18 Crucially, he had conceded at the trial that he did not genuinely believe that they were books, as Pandian had repeatedly told him that they were "wrong things" that needed to be hidden. He admitted that the "books" must have been "illegal items because nobody would hide the real book and food chocolates". The appellant was also promised a monetary reward of RM5,000 in return for delivering the drugs. His attempt to distance himself from the monetary reward by claiming that it was not for the delivery was rightly rejected by the Judge.

19 Finally, the Judge's finding that he was indifferent as to the true nature of the drug was not against the weight of the evidence. He had ample opportunity to check what the items were, since he had personally wrapped them and strapped four blocks on his body, including one under his armpit. At any time between his meeting with Pandian in Selesa Jaya when he collected the Drugs till his arrival at the Tuas Checkpoint, he could have easily checked the contents of the packages Pandian had given him. He also admitted that he knew the severe consequences of bringing drugs to Singapore including the death penalty, which should have incentivised him to ensure that they were not drugs. Further, it is the appellant's evidence that he was able to identify what the Drugs were after he was arrested, as he had seen images of "ganja". Had he inspected

the items, he would have known what those items were. Hence, he was clearly indifferent as to the nature of what he was carrying, and had thus failed to rebut the presumption of knowledge.

Conclusion and additional remarks

20 Although neither party has raised it on appeal, we have reservations about the Judge's reasoning below in excluding the rest of the statements, and her approach in examining the Prosecution's case against the appellant. We emphasise that these two issues are not material and do not affect our judgment. It is not strictly necessary for us to address them to dispose of the appeal.

21 First, in relation to the admissibility of the statements, the Judge had found at [32] of the GD that the MDP notice was administered *prior* to the recording of *any* of the statements. It was also not disputed that the CNB officers made the oral remarks concerning the MDP notice only because the appellant had raised certain queries with reference to it. The Judge, however, proceeded to exclude the rest of the statements for which no written MDP notice was separately administered. In our view, it was entirely reasonable for the CNB officers to have responded to the appellant's queries. It would be unrealistic to expect the CNB officers not to respond, or to *repeat* the administration of the written MDP notice as the Judge appeared to have suggested at [37] of the GD.

22 Further, the fact that the oral remarks might strictly fall outside of Explanation 2(*aa*) does not put an end to the issue as to the admissibility of the appellant's subsequent statements. It remains necessary for the Judge to consider the remarks objectively to determine whether they constitute an inducement, threat or promise. The context in which the oral remarks were made cannot be overlooked. After all, they were made expressly in response to the

appellant's queries in relation to the MDP notice which had earlier been administered. The fact that Explanation 2(*aa*) does not apply to oral remarks does not necessarily render the oral remarks an inducement, threat or promise. As we recently clarified in *Jumadi bin Abdullah v Public Prosecutor and other appeals* [2021] SGCA 113, the MDP notice itself does not constitute a threat, inducement or promise given that the conditions for an accused person to be eligible for alternative sentencing are beyond the control of the CNB. It follows that oral remarks explaining the same, by themselves cannot amount to any threat, inducement or promise. This is especially so in this case as the CNB officers had specifically informed the appellant that the sentence was "up to the courts", which means that whether the appellant could get a sentence other than the death penalty was out of the CNB officers' hand.

23 Secondly, the Judge's approach conflated the Prosecution's primary case with its secondary case. As we stated in *Saravanan* at [29], where the Prosecution submits that the accused has actual knowledge, it is incumbent on the Prosecution to prove the fact of actual knowledge, whereas the reliance on the presumption of knowledge under s 18(2) MDA entails a separate analysis *altogether*. To conflate the two separate bases might result "in shifting the burden of proof impermissibly". The Judge was fully cognisant that the Prosecution ran two separate arguments in their closing submissions: one was premised on actual knowledge, and the other on the s 18(2) presumption. The Judge however framed her analysis by assuming that the Prosecution's primary case based on actual knowledge and its secondary case based on the presumption were one and the same because the common factual basis was that of actual knowledge. With respect, this was incorrect. While the two approaches might both ultimately seek to achieve the same result, they are based on separate and distinct concepts. Following from that premise, the Judge conflated these

two bases and found at [54] that "it would be artificial to consider evidence as to the accused's actual knowledge without consideration of the excuse he raised to rebut the s 18(2) presumption". This in turn led her to examine the Prosecution's case in the *reverse* order by first examining whether the presumption had been rebutted before examining the Prosecution's primary case of actual knowledge.

24 In our view, the proper approach would be to examine the Prosecution's primary case of actual knowledge *first* before examining its secondary case based on the s 18(2) presumption. To begin with, the burden and standard of proof of these two bases are different. For actual knowledge, the burden is on the Prosecution to prove knowledge beyond a reasonable doubt. As for the presumption, the burden is on the accused person to rebut it on a balance of probabilities. Next, if Prosecution is able to establish actual knowledge, it would inexorably follow that the accused person would not be able to rebut the presumption. However, the converse is not so because the fact that the accused person might not be able to rebut the presumption, does not necessarily mean that actual knowledge is likewise established against that accused person.

25 For the reasons stated above, we dismiss the appellant's appeal, and uphold the conviction and sentence imposed by the Judge.

Judith Prakash
Justice of the Court of Appeal

Steven Chong
Justice of the Court of Appeal

Chao Hick Tin
Senior Judge

The appellant in person and unrepresented;
Yvonne Poon and Teo Pei Rong Grace (Attorney-General's Chamber) for the respondent.
