SELECTED UNREPORTED DECISION

YAP FOO YUEN v. P.P.
Criminal Case No. 31 of 1982
Criminal Appeal No. 7 of 1983

THIS was a Singapore case involving the traffic in a large quantity of controlled drugs contrary to section 3(a) of the Misuse of Drugs Act 1973.[1] The accused was a 49 year old Malaysian male. He drove his car through the Immigration check-point at Woodlands and stopped at the Seletar Reservoir carpark where he opened the boot of his car and slashed open the spare tyre. The accused then drove to a track off Upper Serangoon Road and met a Chinese man, X, who was waiting for him beside another car. The accused took out a plastic bag from the boot of his car and handed it to X. At this stage, narcotics officers apprehended both the accused and X and seized the bag from X as well as the spare tyre in the boot of the accused's car. The bag seized from X was subsequently found to contain three packets of opium. Another three packets of opium and one of heroin were recovered from the spare tyre.

In his voluntary statement,[2] the accused admitted that he worked for an opium syndicate based in Malaysia. He had been instructed by the syndicate to drive from Kuala Lumpur to Singapore where he was to distribute three packets of opium each to two men. X was the first recipient and the other was to be contacted outside a cinema in the inner city. The accused also confessed that he knew of the packet of heroin.[3]

The accused was charged with trafficking in 133.5 grammes of heroin, an offence which was punishable with death.[4] In addition, he faced a second charge of trafficking in 11.8 kilogrammes of opium which attracted a minimum sentence of 20 years imprisonment and 15 strokes of the cane and a maximum of 30 years imprisonment and 15 strokes.[5]

The first charge of trafficking in heroin was tried before the High Court with the second charge relating to opium being tried on a separate date.[6]

1 No. 5 of 1973. Hereinafter termed "the Act".
2 Made under section 121(6) of the Criminal Procedure Code, Cap. 113, Singapore Statutes, 1970 Rev. Ed., Reprint No. 2 of 1980.
3 This statement was admitted after the accused had unsuccessfully challenged its voluntariness.
4 See Second Schedule of the Act which imposes the death penalty on a trafficker in more than 15 grammes of diamorphine (or heroin).
5 See Second Schedule, *ibid*., in relation to trafficking in more than 6 kilogrammes of opium.
6 This accords with the holding in *Chow Kim Hoong* v. *P.P.* [1971] 2 M.L.J. 137 that a capital charge cannot be tried together with a non-capital charge by virtue of section 10 of the Supreme Court of Judicature Act, Cap. 15, Singapore Statutes, 1970 Rev. Ed.

Held: (1) The accused was acquitted of the first charge because the learned judges, Kulasekaram and Rajah JJ, believed his story that he was an opium smuggler and gave him the benefit of the doubt that he was unaware of the packet of heroin. Consistent with this finding, the judges felt it unsafe to rely on the accused's confessional statement that he had known of the heroin.

(2) The accused pleaded guilty to the second charge and Kulasekaram J. convicted and sentenced him to 25 years imprisonment and 15 strokes of the cane.

The accused later appealed against his sentence but his appeal was dismissed by the Court of Criminal Appeal.[7]

Commentary

Two interesting issues may be gleaned from the judgments of the High Court and the Court of Criminal Appeal. The first concerns the defence of being unaware of having physical possession of a controlled drug and the second relates to the sentencing practice in drug-trafficking cases. While these issues do not involve difficult questions of law, it was felt that they were nevertheless worthy of comment. This is because the case is a rare instance when the defence of "planting" succeeded. The case might, in addition, represent a new departure in the sentencing of drug-traffickers. It would be appropriate at the outset to briefly discuss the elements required to be proven for the offence of drug-trafficking.

Elements of the offence of trafficking:

In order to sustain a charge of trafficking, the prosecution has to prove that (1) the accused possessed a controlled drug and (2) was involved in some legally prescribed way in the traffic of such drug. A failure to prove one of these elements will cause the accused either to be acquitted or convicted only of the lesser offence of possession.

The first element of possession requires proof that the accused knew that the thing (which turns out to be a controlled drug) is under his control. If a drug is surreptitiously slipped into a person's handbag, room or car, that person has mere physical custody but has no knowledge and therefore no control of the drug.[8] Knowledge of the thing under his control also means knowledge of its physical characteristics, for example, that they were tablets. The Misuse of Drugs Act greatly assists the prosecution's task by providing that a person is presumed to have a controlled drug in his possession, until the contrary is proved, if he has in his possession,[9] custody or under his control anything containing a controlled drug or the keys of anything containing a controlled drug.[10] Relating the law to the facts in the present case, this statutory presumption clearly applied since controlled drugs were found in the boot of the accused's car. We shall shortly discuss

7 Criminal Appeal No. 7 of 1983.

8 *Tan Ah Tee & Anor.* v. P.P. [1980] 1 M.L.J. 49.

9 This presumably refers to physical possession; otherwise the proposition is tautologous.

10 Section 16(1), which also applies to the possession, custody or control of the keys of any place in which a controlled drug is found, or a document of title to a controlled drug.

in detail how the accused succeeded in rebutting this presumption in respect of the packet containing heroin.

Besides proof of possession of a controlled drug, the prosecution must also prove that the accused was involved in the traffic of drugs. The Act defines "traffic", in part, as "to sell, give, administer, transport, send, deliver or distribute."[11] On the facts of the present case, there was more than sufficient evidence to show that the accused had given or delivered part of the drugs to X or, alternatively, had transported [12] all the drugs from Malaysia into Singapore. The prosecution could further rely on the statutory presumption in section 15 of the Act, namely, that the accused was in possession of the drugs for the purpose of trafficking therein. This was because the amounts seized from the accused far exceeded the quantities required for the section to apply.[13] It appears then that the prosecution had a very strong case against the accused in respect of both the charges.

No Knowledge of the Presence of Heroin:

At the trial of the charge of trafficking in heroin, the accused contended that he dealt solely with the traffic of opium and was consequently totally unaware of the additional packet of heroin found in the spare tyre of his car. In effect, the accused was submitting that the element of possession (necessary for the charge of trafficking) had not been proven because he had no knowledge whatsoever of being in control of the drug. To cite Lord Pearce in the leading English drug case of *Warner* v. *Metropolitan Police Commissioner:*

> … a person [does] not have possession of something which had been slipped into his bag without his knowledge. One may therefore exclude from the 'possession' intended by the Act the physical control of articles which have been 'planted' on him without his knowledge.[14]

The High Court accepted the accused's story for a number of possible [15] reasons. The accused had maintained throughout the trial that he knew only of the six packets of opium in his possession. There was also the particular arrangement of the packets of drugs in the spare tyre, with three packets of opium wedged on either side of the packet of heroin. It was conceivable that this arrangement had prevented the accused from noticing the packet of heroin even when he took out the packets of opium from the tyre for X. Finally, the accused's demeanour in court must have played an important role in persuading the judges that he might be telling the truth.

[11] Section 2. The term also includes "to offer to do" any of the acts listed in the first part of the definition.

[12] The term "transport" in the definition of "traffic" has been interpreted by the local court to mean the mere moving of a thing from one place to another. See *Wong Kee Chin* v. *P.P.* [1979] 1 M.L.J. 157; *Ong Ah Chuan* v. *P.P.* [1981]

[13] MLJ. 64. See also Yeo, "The 'Transporting' Drug Trafficker — Dictionary or Legal Sense?" (1981) Mal. L.R. 275.

[14] Section 15 is applicable in cases where an accused is found in possession of more than 2 grammes of heroin or more than 100 grammes of opium.

W [1969] 2 A.C. 256, at p. 305, considering the provisions under the Drugs (Prevention of Misuse) Act 1964 (U.K.). This passage was cited with approval by the Singapore Court of Criminal Appeal in *Tan Ah Tee* v. P.P. *supra,* note 8, *per* Wee C.J. at p. 53.

[15] There was no written judgment available since the prosecution did not appeal against the order of acquittal.

There appear to be very few cases where the defence under consideration has been raised successfully in court.[16] Most of the reported Singapore and Malaysian cases on drug-trafficking involve situations where the accused admits to knowing that he was in control of a package but denies having any knowledge of its contents or that he believed it to contain something other than drugs.[17] It should be noted that these situations are distinguishable from the present case as the accused was denying any knowledge of the presence of the package containing heroin.

The defence also succeeded in the Singapore case of *Poon Soh Har & Anor.* v. P.P.[18] Quantities of heroin were recovered from the letter-box of a flat and charges of trafficking were brought against two occupants of the flat. The court convicted the first accused of the charge but acquitted the second accused because he was not shown to have exclusive possession of the keys to the letter box. Furthermore, there was no evidence that the heroin in the lettex-box had been kept by the first accused with the knowledge and consent of the second accused. Hence the second accused escaped criminal liability by denying any knowledge of the presence of heroin in the letter-box.

More recently, in the Malaysian case of *Syed All bin Syed Abdul Hamid & Anor.* v. P.P.[19] one of two accused charged with trafficking in opium was also acquitted by the Federal Court when it believed his story that he was totally unaware of the presence of opium and had merely been the driver of the car in which the drug was hidden. The other accused was, however, convicted of the charge upon the finding that he knew of the opium concealed in the car.

A comparison of the facts of these two cases with those in the present case shows how much more difficult it was for the accused to have succeeded in his defence. This was because, unlike Poon and Syed Ali who claimed to having no dealings whatsoever in controlled drugs, the accused had confessed to being an opium trafficker. It was quite conceivable that, with his direct connections with a drug syndicate, he would have ready access to heroin and thereby be tempted to traffic in it for a significantly higher fee. Fortunately for him, his defence succeeded for otherwise, he would probably not have had the benefit of any other defence. Had the court disbelieved his story of being solely an opium smuggler it would have meant that it was satisfied that he knew of the presence of the packet of heroin. He might then have pleaded two defences; either that he did not have any reasonable opportunity to determine the contents of the packet[20] or that he mistakenly believed it to contain opium.[21] However, on the facts, it

16 Of course, it is possible that this defence has influenced the prosecution to drop or reduce the charge in the light of insufficient evidence against the accused.
17 For example, see *Tan Ah Lam* v, *P.P.* [1979] 1 M.L.J. 155; *Tan Ah Tee* v. *P.P. supra,* note 8; *Loong Phong Hoy* v. P.P. [1981] 2 M.L.J. 55.
18 [1977] 2 M.L.J. 126.
19 [1982] 1 M.L.J. 132. For a recent Malaysian case where the defence of being unaware of the drug was unsuccessfully pleaded, see P.P. v. *Saubin Beatrice* [1983] 1 M.L.J. 307.
20 *Tan Ah Tee* v. P.P. *supra,* note 8, at p. 53 citing *Warner supra,* note 13, where it was held to be a defence if the accused had no reasonable opportunity since receiving the package of acquainting himself with its actual contents.
21 *Id.,* where a belief that a package contained something of a wholly different nature from the drug actually found in it was regarded as a valid defence.

is unlikely that the first defence would have succeeded since the accused had ample opportunities to examine the contents of his spare tyre. The second defence would likewise have failed as opium would clearly not be "something of a wholly different nature"[22] from heroin especially when the latter drug is a derivative of the former.

Sentencing on the Charge of Trafficking in Opium:

The accused pleaded guilty before the High Court to the charge of trafficking in 11.8 kilogrammes of opium three weeks after the charge concerning heroin was dismissed. The defence counsel pleaded a number of mitigating factors and asked the court to impose the minimum mandatory sentence of 20 years imprisonment and 15 strokes. These factors were that the accused was a first offender; he had already suffered mental anguish as a result of the capital charge he originally faced; he had pleaded guilty to the opium charge from the very first instance when he was arrested; he had cooperated with the narcotics officers thereby showing remorse over his crime; and the minimum sentence would mean that the accused would be released from prison after he was well over 60 years of age.

The court took into account these factors but, nevertheless, imposed a sentence (of 25 years imprisonment and 15 strokes) which was considerably higher than the minimum sentence allowed for by the Act. The aggravating factor highlighted by the court was that the accused had trafficked in an amount of opium which was almost twice the quantity prescribed by the Act for the range of punishments pertinent to his case.[23] The trial court's decision was later upheld by the Court of Criminal Appeal hearing the accused's appeal against his sentence.

The fact that the court imposed a sentence beyond the mandatory minimum sentence appears to be somewhat out of line with previous sentencing practice. The courts have normally prescribed the minimum stipulated sentence for drug offenders as this sentence is usually considered adequate for deterrence purposes, being more severe than most of the maximum punishments for other offences involving property or violence.[24] For instance, in *Yam Fong* v. *P.P.*,[25] the accused, a 42 year old male, had pleaded not guilty to a charge of trafficking in 25.19 kilogrammes of opium. He was given the mandatory minimum sentence of 20 years and 15 strokes. It is difficult to appreciate why the minimum sentence was imposed in *Yam Fong's* case but not in the present case. This is especially so when it is noted that the accused, unlike Yam Fong, had pleaded guilty to the charge and had trafficked in less than half the amount of opium found on Yam Fong.

It is uncertain whether the present case reflects a new and tougher sentencing policy against drug-traffickers or whether it is an isolated departure from the sentencing practice of imposing the minimum sentence for such cases. One possible reason for the more severe

[22] *Id.*

[23] The Act prescribes the range of punishment from 20 years imprisonment and 15 strokes to 30 years and 15 strokes for trafficking in more than 6 kilogrammes of opium.

[24] See the empirical study on appeals against sentence to the High Court by English, "Sentencing in Singapore" (1981) Mal. L.R. 1 at pp. 8 and 30.

[25] Magistrate's Appeal No. 97 of 1978.

sentence might have been due to the packet of heroin found in the spare tyre of the accused's car. Although the court could not expressly take into consideration this fact when sentencing the accused, it might have been mindful that, had the accused not been apprehended, he would probably have sold the heroin for a large profit after having discovered it. Another reason might be that the accused was tried during a period when much publicity was being given to the changes in Malaysian drug legislation imposing the death penalty on virtually all drug-traffickers.[26] After all, the accused had worked for a drug syndicate based in Malaysia and had transported opium through half the length of that country.

Conclusion:

It has been seen the charge of trafficking in heroin was dismissed because the court believed the accused's story that he had no knowledge of the presence of that drug. However, the accused received a sentence well above the mandatory minimum punishment in respect of the opium-trafficking charge. In the light of this case, it is possible that a drug-trafficker of less potent drugs may be tempted to carry a small quantity of heroin hidden among his other drugs. On the other hand, such a trafficker would face the risk that the court would disbelieve his story of being unaware of the presence of heroin with the consequence that he may find himself before the gallows.

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[26] Dangerous Drugs (Amendment) Act 1983, A 553, Laws of Malaysia.