Public Prosecutor v Tan Loon Lui
[2003] SGHC 87

Case Number : MA 55/2002

Decision Date : 11 April 2003

Tribunal/Court : High Court

Coram : Yong Pung How CJ

Counsel Name(s) : Hui Choon Kuen (Deputy Public Prosecutor) for the Appellant; Ch'ng Lye Beng (Tan Lye and Ngaw Partnership) for the Respondent

Parties : Public Prosecutor — Tan Loon Lui

Criminal Law – Controlled drugs – Consumption without authorisation – Presumption of actus reus and mens rea – Whether 'spiked drink' defence valid – Consequence of such defence – s 22 Misuse of Drugs Act (Cap 185, 1998 Rev Ed)

Evidence – Proof of evidence – Admissions – Witness admitted spiking of drink – Credibility of such witness – Treatment of such witness

1 This was an appeal by the Public Prosecutor against the decision of district judge Malcom B H Tan to acquit the respondent Tan Loon Lui of two charges under s 8(b) of the Misuse of Drugs Act (MDA) Chapter 185 for consuming controlled drugs without authorisation under the MDA.

Facts

2 On 30 June 2001, the respondent went to Johor Baru with his wife Lee Lai Choon. Accompanying the respondent and his wife were some relatives and friends. Lee Mong Chee, the sister of Lee Lai Choon, was part of this group. At a little after midnight, this group had supper in the Taman Sentosa vicinity. After supper, the group was invited by Lee Mong Chee's husband, Ng Wan Sing, to go to a discotheque called 'Jazz and Blues' where live music was being played.

3 The group arrived at 'Jazz and Blues' at about 1am on 1 July and ordered two jugs of beer. While they were enjoying their beer, some friends of Ng Wan Sing joined the group. This second group brought with them their own jugs of beer. Ng Wan Sing was a bookie as were all his friends. Amongst his friends was Lim Beng Chuan who later became a key witness for the defence at trial. This second group of men were all Malaysians.

4 After the two groups merged, they continued to drink and make-merry. At about 2.45 am on 1 July 2001, the Malaysian Police raided the discotheque. Instant Urine Tests (IUTs) were conducted on the patrons and a number of Singaporeans tested positive. These Singaporeans were then escorted to Singapore and handed over to Central Narcotics Bureau (CNB) officers at the Woodlands Checkpoint. IUTs were again conducted and those with positive results had their urine samples taken and sent to the Heath Sciences Authority (HSA) for further testing. The respondent's urine was found to contain Methamphetamine, a Class 'A' controlled drug, and Ketamine, a Class 'B' controlled drug. He was the only one among the entire party of his family and friends who was tested positive by HSA for controlled drugs.

The law

5 Section 8(b)(i) of the MDA states:

> Except as authorised by this Act, it shall be an offence for a person to smoke, administer to himself or

otherwise consume a controlled drug other than a specified drug.

Section 8A(1) of the MDA deals with the consumption of drugs outside Singapore. To this end, s 8A(1) states:

> Section 8(b) shall have effect in relation to a person who is a citizen or a permanent resident of Singapore outside as well as within Singapore where he is found as a result of urine tests conducted under s 31 to have smoked, administered to himself or otherwise consumed a controlled drug or a specified drug.

6 Section 22 of the MDA provides for a statutory presumption that both the mens rea and actus reus of an offence of drug consumption are satisfied once a controlled drug is found in the urine of the accused person. This statutory intention was affirmed in *Cheng Siah Johnson v Public Prosecutor* [2002] 2 SLR 481 where I stated:

> I had previously in *Vadugaiah Mahendran v PP* [1996] 1 SLR 289 held that the statutory presumption in s 22 was twofold in that proof of the primary fact by the prosecution, ie a controlled drug was found in the urine as a result of both urine tests in s 31, triggered the actus reus of consumption and the mens rea required for the offence. The burden of proof hence fell upon the defence who would have to disprove either element on a balance of probabilities. It was insufficient if the appellant (the accused) merely raised a reasonable doubt.

It is clear from *Cheng Siah Johnson* that the accused has to disprove on a balance of probabilities either element of the offence.

The decision below

7 The district judge placed emphasis on the fact that Lim Beng Chuan (Lim) had owned up to the fact that he had spiked the respondent's drink at 'Jazz and Blues.' The district judge was convinced that there was clear evidence that Lim had spiked the drinks with the two types of drugs found in the respondent's urine. At the trial below, Lim admitted to putting drugs into the five jugs of beer which his group of friends had bought. It was out of these jugs of beer that Lim poured the respondent a drink. This happened after Lim's group of friends 'table-hopped' to join the respondent's group of friends.

8 The district judge gave his reasons why he believed Lim was telling the truth. He stated that whilst Lim was a man of immoral means and practices – he was a bookie by trade and a drug-abuser by choice – this alone did not taint the sincerity of Lim's evidence at trial. The district judge believed Lim's testimony that he thought the respondent an upright man and that he (Lim) was genuinely sorry that his actions caused the respondent to be charged.

9 The district judge was convinced that there was no evidence that Lim had ulterior motives in admitting that he spiked the drinks. There was no evidence that he had been paid to take the 'fall'. The district judge also assessed the respondent to be a simple man. In particular, the district judge stated that he was not convinced that a man of the respondent's character would be able to make up a story that his drink had been spiked. After assessing the demeanour of both the respondent and Lim at trial, and the evidence before him, the district judge was convinced that the respondent had rebutted the presumption of consumption under s 22 of the MDA on a balance of probabilities.

The appealHE APPEAL

10 While I dismissed the Public Prosecutor's appeal, I was concerned with the potential abuse of the justice process which this 'spiked drink' defence could bring. In future, any defence witness who 'confesses' to spiking the accused's drink should be arrested immediately after giving his evidence for abetting such consumption. If this measure is not taken, there will be no end to the number of 'remorseful spikers' who, perhaps for a fee, will take the 'fall' for these drug consumers. Whether or not the accused's drink was spiked should remain a question of fact – the answer to which depends on the unique facts of each case – but it should be made clear that the consequence of a spiker's confession would be his immediate arrest. I now address the appeal proper.

11 It is settled law that a witness's credibility must be tested against known objective facts and evidence as stated in my judgment in *Simon Joseph v PP* [1997] 3 SLR 196. I therefore looked carefully at the objective facts, in light of the spiked drink defence.

12 The DPP posed a good question: If the defence was that the respondent's group of friends shared beer with the group of bookies, why was it that only the respondent's urine was tested positive by HSA for controlled drugs? Whilst this was a sound observation, I found it insufficient to prove that the respondent did not rebut the presumption under s 22 of the MDA. By posing that question, I took the appellant as wanting to advance the argument that since only the respondent's urine tested positive, it must therefore have been the respondent himself who had knowingly consumed the controlled drug. I challenged this argument in the reverse. To my mind, one should ask the following question: Even if all the members in the respondent's group tested positive for controlled drugs would this make any difference to the respondent's case? It would certainly have improved the respondent's case. But, by the same token, because all the others in the group did not test positive for controlled drugs was not enough to discredit the respondent's case.

13 The fact that the respondent's wife tested positive for amphetamines on the IUT conducted in Johor Baru was a point in the respondent's favour. Whilst the respondent's wife tested positive in Johor Baru, her results showed negative for Methamphetamine when tested by the HSA in Singapore. I was convinced of the validity of HSA analyst Ann Young's explanation as to why such an inconsistency could arise. The relevant segment in her cross-examination was:

> Ct: So is it possible that the IUT for methamphetamine to be positive, but subsequently for the HSA analysis to be negative?
>
> A: Yes, Your Honour.
>
> Ct: Any reason for that?
>
> A: The IUT measures a wide-range of amphetamine-type drugs including over-the-counter medicinal preparations, whereas we will only specifically look for controlled drugs.
>
> Q: Is it possible that the quantity ingested could have something to do with the IUT having a positive reading and subsequently when the sample is submitted to HSA, it then shows negative?
>
> A: It's possible and sometimes after taking the first urine samples at the CNB, the Accused then consumes water as he cannot produce urine, which can give rise to the possibility that the urine is diluted.
>
> Q: Following from that question. Would it be correct to say that if you have a higher level of

methamphetamine in your system, it'll take a longer time to dilute the process such as in the example you gave, of drinking water?

A: I wouldn't say longer. I would say it would be easier to dilute a sample if the amount ingested is less.

I found this passage told three important things. First, the respondent was not the only one in his group of friends to have tested positive for drugs. His wife tested positive on the IUT conducted in Johor Baru. Secondly, drinking of water can dilute the urine. Thirdly, the ease with which a sample of the controlled drug is diluted is inversely proportionate to the amount of the sample ingested – ie the less of the controlled drug ingested, the easier its dilution.

14 The first point showed that the respondent was not the only one who tested positive for controlled drugs. He was the only one tested positive by HSA. As regards points two and three, I found it very plausible that the respondent's wife drank less beer than he did. These three findings matched the explanation given by Ms Ann Young.

15 I found that the trial judge did not err in law in failing to draw an adverse inference from the respondent's failure to call members of his group as witnesses. The case of *PP v Nurashikin bte Ahmad Borhan* [2003] 1 SLR 52 must be distinguished from the present case. In the *Nurashikin* case, I stated:

> In my opinion, the respondent's failure to call Natasha to the stand should have resulted in an adverse inference being drawn against her under illustration (g) to s116 of the Evidence Act….If the prosecution has made out a complete case against the defendant and yet the defence has failed to call a material witness when calling such a witness is the only way to rebut the prosecution's case, illustration (g) to s 116 of the Evidence Act then allows the court to draw an adverse inference against the defendant: *Choo Chang Teik & Anor v PP* [1991] 3 MLJ 423 and *Mohamed Abdullah s/o Abdul Razak v PP* [2000] 2 SLR 789. This is based on the commonsense notion that if the only way for the defence to rebut the prosecution's case is to call a particular witness, then her failure to do so naturally raises the inference that even that witness's evidence will be unfavourable to her.

Unlike the *Nurashikin* case, the respondent in this case did produce his key witness whose testimony formed the backbone of his case.

16 The appellant argued that the fact that the trial judge referred to Lim as 'a man of shady character, a bookie, and a member of the pill-popping, drug taking sub-culture that exists on the underbelly of society,' showed that the trial judge should have in fact discredited Lim's evidence rather than capitalise on it. I disagreed with this argument for two reasons. First, I found that the reason why the trial judge articulated, in his grounds, the less than moral background of the key defence witness was to assure the parties that he had addressed fully this aspect of the defence witness – that he was aware of Lim's background when sizing up his evidence. This was evident from the following passage of the district judge's grounds:

> I do not find his (Lim's) reason for agreeing to assist the Accused far-fetched either, as suggested by the learned DPP. It is clear to me that if he had decided that the Accused had been arrested because he himself is a 'bad hat', he would have abandoned the Accused. However, Beng Chuan (Lim) apparently felt remorseful that the Accused, whom he assessed to be a normal upright businessman had been charged as a result of his (Lim's) actions.

It was far better for the trial judge to have articulated his assessment of Lim's shady past than not to have, since such articulation showed that he had indeed addressed this point about the character of Lim and in spite of this still believed his story. If the trial judge had not addressed the shadiness of Lim's past, this could have been a large plus in favour of the appellant since this could very plausibly have signalled an oversight on the district judge's part. But I found this not to be the case.

17 I disagreed with the appellant's argument that the respondent, due to his suspicion of the other group, had not in fact consumed any drinks poured by Lim. The district judge addressed this argument at trial. He stated:

> The learned DPP has cross-examined the two (the respondent and his wife) on how it was quite unlikely for them to simply accept drinks from strangers. They have, however, explained that they did so because they (the Malaysian group) were the friends of Ng Wan Sing, the Accused's brother-in-law. I do not find this particularly surprising.

I agreed with this finding. The respondent was happy to go to 'Jazz and Blues' at the invitation of Ng Wan Sing. This showed that he was not in a guarded mood toward Ng on that night. This also explained why the respondent was not in a guarded mood against Ng's friends. Even if the respondent ought to have been suspicious of Ng's friends, such suspicion was insufficient to prove that the respondent failed to rebut the presumption imposed on him by s 22 of the MDA. Furthermore, Ng's later attitude towards the respondent whilst the respondent's trial was being heard shed no light on how the two were acting towards each other on the relevant night.

18 The appellant argued that the wife's evidence which largely corroborated the respondent's should have been treated with more caution by the district judge. The case of *Soh Yang Tick v PP* [1998] 2 SLR 42 is authority for the assertion that one cannot merely point at the fact that a witness is in some way related to the accused in order to invite the court to treat his evidence as suspect. As regards the wife's evidence in this case, I found that the district judge addressed this issue adequately. In his grounds of decision, he stated:

> I must point out that after hearing the two (the respondent and his wife) the only conclusion that the Court can draw, notwithstanding whatever positive things the Accused's wife and brother say of the Accused, is that the two of them appear to me to be very simple and not capable of mental gymnastics.

There was nothing at the appeal stage that prompted me to disturb this finding. The wife was incapable of concocting a story other than what actually happened as she remembered it.

19 Even if there were discrepancies between the respondent's and his wife's evidence, due to their inability to remember the full sequence of events, such minor inconsistencies were immaterial in light of Lim's unambiguous admission.

20 The appellant argued that the respondent insufficiently explained why the rest of his group apart from his wife were not detained by the Malaysian Police after IUTs were conducted in Johor Baru. I found that the district judge addressed this point at trial. He stated:

> .. As I have pointed out, the two of them (respondent and his wife) do not appear street-smart, nor are they familiar with Police procedures. In any case, the context the two of them were in has to be considered, as the DPP pointed out. They were taken to a station, handcuffed, and made to line up. Then they were made to hand up urine specimens, with all instructions in Malay. For a more worldly-

> wise lot, it may be unreasonable to conclude that they did not know what was going on. For these two, however, I am of the view, that it is not too unbelievable.

I was of the view that the trial judge's finding should not be disturbed.

21 The appellant argued that the respondent said nothing in his statement to the Police that he had drunk beer belonging to anyone else. I disagreed with this argument. Close scrutiny of the respondent's statement showed that the respondent did in fact say:

> About half an hour later after we reached the discotheque, four to five people in the discotheque come [*sic*] to our table and look [*sic*] for 'Seng'. I do not know [*sic*] any of their names. *They then joined us for drinks. A while later after having some drinks, I felt giddy and I stopped drinking.* I then stayed with them till the Malaysian Police raided the discotheque. (my emphasis).

At an early stage the respondent maintained: (a) that he was drinking with the Malaysian group who had joined his group and (b) that he was feeling giddy after consuming the beer. To fault him for not specifically saying that he drank the beer from the other group's jugs would be imposing too heavy a burden on the respondent in his effort to rebut the presumption under s 22 of the MDA. In any event the respondent would have been hard pushed to tell which jugs belonged to his group of friends and which jugs belonged to the Malaysian group since the tables were small and the jugs of beer many.

22 The recent case of *PP v Tan Chui Yun Joselyn* [2003] SGHC 19 worked to the benefit of the respondent. In that case I stated:

> While the Courts should be sensitive to the efficacy of the presumption in combating drug consumption, it is equally true that the presumption should not place too onerous a burden on a defendant. In order to rebut the presumption the defence is not required to show, beyond a reasonable doubt, that someone has tampered with the drinks. That would be tantamount to making the offence one of strict liability. Whether the defence has managed to rebut the presumption remains a question of fact to be decided on the totality of the circumstances of each case.

To the respondent's favour was the fact that in the *Joselyn Tan* case the defence did not have the actual 'spiker' testify that he did in fact spike Joselyn's drink. But because Joselyn was fully aware one week before she went for the urine test that she was under investigation for drug-related activities, this convinced me that she was innocent and that her drink had indeed been spiked. In this case there was concrete evidence that the accused's drink was spiked. Lim admitted that he did the job. In light of this, I was of the view that the unique facts of this case showed that the respondent had successfully rebutted the presumption under s 22 of the MDA.

Conclusion

23 In light of the above reasons, I decided that the public prosecutor's appeal be dismissed.

Appeal dismissed.