# Shahary bin Sulaiman v Public Prosecutor
# [2004] SGCA 39

**Case Number** : Cr App 3/2004

**Decision Date** : 03 September 2004

**Tribunal/Court** : Court of Appeal

**Coram** : Chao Hick Tin JA; Choo Han Teck J; Yong Pung How CJ

**Counsel Name(s)** : James Bahadur Masih (James Masih and Co) and Ramli Salekhon (Ramli and Co) for appellant; Kan Shuk Weng and Benjamin Yim Geok Choon (Deputy Public Prosecutors) for respondent

**Parties** : Shahary bin Sulaiman — Public Prosecutor

*Criminal Law – Statutory offences – Misuse of Drugs Act – Presumptions of trafficking and possession under ss 17 and 18 of Misuse of Drugs Act – Whether proof of physical possession of drugs restricted to drugs found on accused person physically – Whether presumption required to convict where direct evidence of guilt existing – Sections 17, 18 Misuse of Drugs Act (Cap 185, 2001 Rev Ed)*

*Criminal Procedure and Sentencing – Appeal – Findings of fact by trial judge – Whether trial judge's findings should be interfered with*

3 September 2004

**Choo Han Teck J (delivering the judgment of the court):**

1 The appellant was convicted on a charge of trafficking in a Class "A" controlled drug specified in the First Schedule to the Misuse of Drugs Act (Cap 185, 2001 Rev Ed). The drug in question was diamorphine with a gross weight of 583.04g and a net weight of 35.19g. The appellant was a 34-year-old rag-and-bone man who plied his trade in a rented cargo van, registration number GU9114C, which belonged to one Rahmah bte Arshad. Rahmah was not concerned in this case other than as the person who rented her vehicle to the appellant.

2 On 14 April 2003, about 12.10am, the appellant was driving the van along Hougang Avenue 7 with one Sazali bin Omar as his passenger. They were stopped by police officers Sergeant Pek Chee Keong ("Sgt Pek") and Corporal Yeo Kee Hwa ("Cpl Yeo") who were on patrol duty. The officers stopped the van because it was being driven without its headlights on.

3 The officers conducted a quick search of the van. Although at that time they saw nothing incriminating in the back compartment of the vehicle, Sgt Pek found a sachet of yellowish substance in the ashtray of the front compartment. At that point, Sazali threw something away and both he and the appellant ran in different directions. The two police officers gave chase and managed to capture the appellant. Sazali was caught later after police reinforcements arrived. After the two persons were brought back to the van, Sgt Pek searched the van again. This time he found three bags, namely, a black "Lafuma" brand bag which was a haversack, a black "Hayrer" brand bag, and a paper bag advertising "Soo Kee Jewellery". The trial judge found that the evidence as to the precise spots from which these bags were found was not very satisfactory. However, it was clear from his findings that the bags were recovered from the front compartment of the van (as opposed to the rear cargo compartment). There was no challenge in respect of the "Hayrer" and "Soo Kee" bags, but the appellant disputed the prosecution evidence that the "Lafuma" bag was also found in the front compartment.

4 The "Lafuma" bag was found to contain a large packet of substance suspected to be heroin,

a plastic bag containing 30 sachets of suspected heroin, another plastic bag containing 12 sachets of suspected heroin, a Ziploc bag containing seven sachets of suspected heroin, and a digital weighing scale. The "Hayrer" bag contained a plastic bag with several smaller plastic bags, 12 straws of suspected heroin, 13 empty straws, and a plastic bag containing ten white tablets. The "Soo Kee" bag had a Ziploc bag, which contained crystalline substances, as well as another container, which also had crystalline substances. Sgt Pek also found three sachets of yellowish substances on the ground at the front of the van. The Central Narcotics Bureau ("CNB") was notified of the arrests and discovery of the substances.

5 Inspector Sim Wui Tong ("Insp Sim") arrived at the scene with his team of CNB officers and interviewed the appellant through a Malay interpreter. The evidence adduced at trial, with regard to this interview, was that the appellant confessed that the "Lafuma" bag, the Ziploc bag and the "Soo Kee" bag, as well as the heroin in the "Lafuma" and Ziploc bags, belonged to him. He also admitted that the substance known as "Tawas" in the "Soo Kee" bag belonged to him.

6 The appellant and Sazali were jointly charged for trafficking in the heroin seized from the van. Consequently, a statement under s 122(6) of the Criminal Procedure Code (Cap 68, 1985 Rev Ed) was recorded from the appellant. In it, he stated:

> The heroin belongs to me. Sazali has nothing to do with the heroin. I want to plead for leniency as this is the first time encounter with this kind of stuff. That's all.

The appellant also gave three other statements under s 121 of the Criminal Procedure Code. These are generally referred to as "investigation statements". In these statements he gave an account of his involvement in the heroin trade. He stated that he was offered a parcel of heroin by a man known to him as "Ah Seng". He purchased this heroin from Ah Seng for $15,000. He repacked the heroin and sold some to Sazali for $1,000. After selling to Sazali, the appellant gave Sazali a lift in the van and shortly after that the two of them were arrested when Sgt Pek and Cpl Yeo stopped the van.

7 The oral evidence of the appellant at trial differed significantly from the story in his statements. He testified that in referring to the "black bag" during his interview by Insp Sim he meant the "Hayrer", and not the "Lafuma", bag. His explanation was that the "Lafuma" bag was probably left in the van by Ah Seng. In his testimony he said that Ah Seng had borrowed his van on 12 April 2003 to transport some wares he had agreed to purchase from the appellant. He (Ah Seng) returned the van about 9.00pm on 13 April 2003. At that point a further deal was struck between them in that he (Ah Seng) would pay the appellant $500 for the wares he had taken, but would, in turn, sell ten sachets of heroin to the appellant for $3,000. The appellant agreed and took the heroin back home where he repacked part of the drugs into 12 straws, which he then put into the "Hayrer" bag together with another six of his own. He kept another four sachets in the ashtray in the front compartment of the van. He then went to meet Sazali to settle a debt in respect of drinks they had had previously. After that he gave Sazali a lift to Hougang where they were arrested at Avenue 7.

8 On appeal before us, the appellant's first two grounds related to the judge's finding that the "Lafuma" bag was in the possession of the appellant, and his rejection of the appellant's explanations in court as to why he gave a different account in his statements to the police. No matter how the question is cast, the issue as to whether the "Lafuma" bag was in the front of the van together with the "Hayrer" and "Soo Kee" bags, or by itself in the rear of the van, was an issue of fact. The trial judge concluded that the "Lafuma" bag was in the possession of the appellant at the time of his arrest. There was nothing in the appellant's appeal before us that warranted a pointed examination as to how those findings of fact were made. In this case, it was a matter of whether the appellant's testimony in court adequately raised a reasonable doubt against the evidence adduced by the

Prosecution which included the confessions of the appellant. The trial judge did not accept the appellant's explanation. It was a finding that an appellate court will not interfere with, especially when it would have hinged on an evaluation of the appellant's evidence in court.

9 The only ground of appeal that we ought to consider concerned the question of how the presumptions under ss 17(c) and 18(1) of the Misuse of Drugs Act are to be used. For convenience, these two presumptions are set out verbatim:

**Presumption concerning trafficking**

17. Any person who is proved to have had in his possession more than —

(a) 100 grammes of opium;

(b) 3 grammes of morphine;

(c) 2 grammes of diamorphine;

(d) 15 grammes of cannabis;

(e) 30 grammes of cannabis mixture;

(f) 10 grammes of cannabis resin;

(g) 3 grammes of cocaine;

(h) 25 grammes of methamphetamine; or

(i) 10 grammes of any or any combination of the following:

(i) N, α-dimethyl-3,4-(methylenedioxy)phenethy-lamine;

(ii) α-methyl-3,4-(methylenedioxy)phenethyla-mine; or

(iii) N-ethyl-α-methyl-3,4-(methylenedioxy)phene-thylamine,

whether or not contained in any substance, extract, preparation or mixture shall be 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.

**Presumption of possession and knowledge of controlled drugs**

18.—(1) Any person who is proved to have had in his possession or custody or under his control —

(a) anything containing a controlled drug;

(b) the keys of anything containing a controlled drug;

(c) the keys of any place or premises or any part thereof in which a controlled drug is found; or

(d) a document of title relating to a controlled drug or any other document intended for the delivery of a controlled drug, shall, until the contrary is proved, be presumed to have had that drug in his possession.

10 The presumption under s 17 is one of trafficking, not of possession. Therefore, the Prosecution may invoke the presumption only after it has proved beyond reasonable doubt that the accused person had the drugs in his possession. What then is meant by "possession" in this provision? That seemed to be the point counsel for the appellant was hoping to thrust before us. Relying on a brace of decisions from this court, namely in *Low Kok Wai v PP* [1994] 1 SLR 676 and *Fun Seong Cheng v PP* [1997] 3 SLR 523, counsel stressed that the obligation to prove possession must mean that the Prosecution had to prove "physical possession" of the drugs at the time of the arrest. So far, he has been correct. But, thereafter, counsel made an argument that, if accepted, would place an unreasonable strain on the meaning of the phrase "physical possession". This term is not restricted to apply only where the drugs are found on the accused person physically. If a person walks into a restaurant with a bag in his hand and the knowledge that it contained drugs, he is clearly in physical possession of the bag and the drugs. The sense does not change when he places the bag on the ground next to him. The bag is physically detached from his person, but no one would argue that the bag was no longer in the physical possession of the man. Does the man lose physical possession if he leaves the bag where he had put it, and walks two steps to an adjoining table? We would think not. The question will then arise as to how far he needs to go before it can be said that the bag was no longer in his possession. That is a question of fact depending on the circumstances of the case. If the court finds that the man had left a considerable gap in terms of space and time between him and the bag, it may only mean that the stated timing of the moment of possession would have to be amended to reflect when it was that the man could still be regarded as being in possession of the bag.

11 Section 18, on the other hand, is a presumption of possession, not of trafficking. The material evidence, that the Prosecution needed to prove before the presumption can be invoked, is evidence that the accused person was in physical possession of a key to anything containing drugs, or of any container that contained drugs, or keys to any premises in which drugs are found, or of any document of title relating to drugs. It can easily be seen that s 18 is wider than s 17 and, consequently, there could be situations in which parts of it might overlap with s 17. The present case is an example in point. A person in possession of a bag of drugs, knowing that he was carrying a bag of drugs, would thus attract the application of s 17, but it would also naturally have attracted s 18(1)(a).

12 The trial judge found as a fact that the "Lafuma" bag was in the front compartment of the van of which the appellant was the driver at the material time. The judge further found that the bag belonged to the appellant. It was also found that the "Lafuma" bag contained the bulk of the heroin seized. The relevant part of his grounds ([2004] SGHC 135 at [59]) states as follows:

> At the conclusion of my review of the evidence and the defence, I found the defence to be entirely unworthy of belief. There was no doubt in my mind that the accused was in possession of the Lafuma bag, the Hayrer bag and the heroin in them, as well as the sachet in the ashtray, and that he had admitted that they belonged to him.

However, on the evidence accepted by the trial judge, including the confession of the appellant to selling heroin to Sazali, no presumption of law under the Misuse of Drugs Act was in fact required to convict the appellant on the charge. Moreover, even if the trial judge had relied on the presumption under s 17 (as he was entitled to in this case), he had found no evidence to rebut it. Similarly, had the judge relied on the s 18 presumption, there was sufficient evidence of trafficking, and nothing sufficient to persuade the court to find a reasonable doubt. In cases such as the present, it is

desirable that the court states whether its finding of guilt was based on direct evidence (as would be in this case), or under the presumption in s 17 or 18 as the case may be.

13 We are of the opinion that there was no error in fact or law that required us to set aside the conviction and sentence. The appeal was therefore dismissed.