

Public Prosecutor v Abdul Kahar bin Othman
[2013] SGHC 222

Case Number : Criminal Case No 8 of 2013
Decision Date : 24 October 2013
Tribunal/Court : High Court
Coram : Choo Han Teck J
Counsel Name(s) : Jean Chan, Lim How Khang and Wong Woon Kwong (Attorney-General's Chambers) for the Public Prosecutor; Johan Bin Ismail (Johan Ismail & Company) and Abdul Rahman Bin Mohd Hanipah (J.R.B. Law LLP) for accused.
Parties : Public Prosecutor — Abdul Kahar bin Othman

Criminal Law – Statutory offences – Misuse of Drugs Act – Discretion of court not to impose sentence of death

[**LawNet Editorial Note:** In Criminal Reference No 6 of 2013, the Court of Appeal quashed the High Court judge's finding that the respondent was a courier and remitted the case back to the judge for a fresh determination. See [\[2014\] SGCA 59.](#)]

[LawNet Editorial Note: The appeal to this decision (and to the decision in [\[2013\] SGHC 222](#)) in Criminal Appeal No 4 of 2015 was dismissed by the Court of Appeal on 1 October 2015. See [\[2016\] SGCA 11.](#)]

24 October 2013

Judgment reserved.

Choo Han Teck J:

1 The accused faced two charges, one of trafficking not less than 26.13g of diamorphine and one of trafficking not less than 40.64g of diamorphine, offences under s 5(1)(a) read with s 5(2) and punishable under s 33 of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) (“the Act”). On 27 August 2013, I convicted the accused and handed down a written judgment explaining my reasons for doing so (*Public Prosecutor v Abdul Kahar bin Othman* [2013] SGHC 164). Prior to 1 January 2013, when a number of legislative amendments came into effect, a sentence of death would have been mandatory upon such a conviction. However, the newly-enacted s 33B of the Act provides that, in certain circumstances, a sentence of death that would have been mandatory will no longer be so. Accordingly, I adjourned the question of sentencing to a later date.

2 I have in *Public Prosecutor v Chum Tat Suan* [2013] SGHC 221 (“*Chum Tat Suan*”) described what the Act calls the “[d]iscretion of court not to impose sentence of death” in s 33B, and I do not propose to repeat myself. I need only say that, in order for the accused to bring himself within either of the two sets of circumstances in which the death penalty is not mandatory, he must prove on a balance of probabilities that his involvement in trafficking drugs was restricted to transporting, sending or delivering the drugs and/or offering to do so and/or doing or offering to do acts preparatory to or for the purpose of transporting, sending or delivering the drugs. As in *Chum Tat Suan* I will for convenience use the term “courier” to refer to a person whose involvement in trafficking drugs was restricted to those activities.

3 The evidence in this case showed that the accused might not have just transported, delivered,

or sent the drugs. I would go further and say that, on the evidence before me, I am satisfied that the accused's involvement in trafficking went beyond transporting, sending or delivering them. The CNB found in the accused's bedroom a stained metal spoon, pocket digital scale and a packet of red rubber bands, and the accused admitted that the items belonged to him and that he used them to repack drugs into smaller packets. I have no doubt that this was the true state of affairs. It would also explain an otherwise inexplicable fact, that of the sum of \$69,169 which he had and the sum of about \$100,000 which was in the bank account of his 76-year-old unemployed mother. It is difficult to believe that one involved only in transporting, sending or delivering drugs would be able to amass sums of money in these amounts. However, this is not the conclusive consideration.

4 Although I find that the accused person's involvement here went beyond transporting, sending, or delivering the drugs, in fairness to the accused person, he must know what had lain beyond "transporting, sending, or delivery". Does that include or exclude "re-packing" or must the prosecution show that the courier was paid not for transporting but obtained a commission or a similar kind of profit? The Act does not set out what the extra acts involve, and so the courts will have to define those circumstances or acts that take the accused beyond the role of a "courier". Although re-packing and collecting payment might be considered acts beyond transporting, delivering or sending, I do not think that Parliament intended to exclude such ancillary acts as acts beyond those that define a "courier". Thus, although I find that the accused did more than just transporting, delivering or sending, this accused is caught in the cusp of a new law that concerns life and death. In this exceptional situation, the accused ought to be given the benefit of the doubt at least until counsel can advance their arguments as to what is and what is not beyond "transporting, delivering or sending", and the courts (or Parliament) have expressed the law clearly so that an accused knows what that law is that he has been accused of offending. These issues were considered by the High Court in *Public Prosecutor v Abdul Haleem bin Abdul Karim and another* [2013] 3 SLR 734, but the opinion provided therein at [52]–[55], while helpful, is in my opinion of too narrow a scope to constitute fair warning of what acts will bring an accused person beyond "transporting, delivering or sending".

5 Further, in *Chum Tat Suan*, I referred to some potential problems in the new procedure consequent upon the enactment of s 33B of the Act. Those considerations apply with equal force in this case. Although the evidence in this case is not as equivocal as that in *Chum Tat Suan*, I will hold nevertheless that the accused here had acted as a "courier" only. I would caution that in future cases, the courts might consider the possession of vast sums of money beyond the means of the accused as evidence of his (the accused) acting more than just a courier. The explanation of the accused in this case was borderline but in view of the fact that his was among the first cases under the new provisions, I am giving him the benefit of doubt.