

IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2024] SGCA 8

Court of Appeal / Criminal Motion No 36 of 2023

Between

(1) Merlur Binte Ahmad

... Applicant

And

(1) Public Prosecutor

... Respondent

FOUNDATIONS OF DECISION

[Criminal Law — Statutory offences — Corruption, Drug Trafficking and
Other Serious Crimes (Confiscation of Benefits) Act]

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Merlur Binte Ahmad

v

Public Prosecutor

[2024] SGCA 8

Court of Appeal — Criminal Motion No 36 of 2023
Tay Yong Kwang JCA, Steven Chong JCA and Belinda Ang JCA
1 March 2024

18 March 2024

Tay Yong Kwang JCA (delivering the grounds of decision of the court):

Introduction

1 The applicant, a Singaporean, is a divorcee who was about 48 years old at the time of the offences in 2018. She was educated to O-levels and worked as an operations assistant manager for a company for almost 30 years, earning a monthly salary of about \$2,000 a month in 2018.

2 She became acquainted with a person called Wayne Mark (“Mark”) through Facebook soon after her divorce in 2012. Over time, she fell in love with Mark and they continued to communicate with each other online. She never met Mark in person.

The Charges

3 The applicant was convicted by a District Court on seven charges under s 47(3) of the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (Cap 65A) (“CDSA”) for having in her possession monies in her DBS bank account, having reasonable grounds to believe that the monies were Mark’s benefits from criminal conduct. The monies in these seven charges amounted to \$83,000. These charges will be referred to as the Possession Charges.

4 In addition, the applicant was convicted on seven charges under s 47(2)(b) of the CDSA for removing from Singapore monies, having reasonable grounds to believe that such monies were Mark’s benefits from criminal conduct, by making overseas telegraphic transfers to the bank accounts of two entities in Malaysia. These will be referred to as the Removal Charges.

Factual background to the Charges

5 From July to August 2018, the monies in question were transferred into the applicant’s bank account by three Malaysian females who were the victims of crime. At the time of the transfers, the applicant was not aware that her bank account was being used to receive the monies and was not a part of and had no knowledge of the deception practised on the Malaysian victims. However, Mark messaged the applicant to inform her about the transfers after they were made into her bank account and gave her various reasons why the monies were in her bank account. Mark asked the applicant to transfer those monies to the two entities in Malaysia for reasons such as paying the tax that he owed and payments to a ministry. The applicant complied with Mark’s request. She did

not keep any part of the monies since she knew that the monies did not belong to her.

6 In October 2015, the applicant also assisted Mark to transfer two amounts out of her bank account. Again, she was not aware that the monies had been deposited into her bank account. Mark told her only after the deposits went into her bank account. Mark did not ask for her permission to use her bank account. This was despite the applicant having told him not to share her bank account details with others without her knowledge.

7 In April 2016, the applicant was called by the police to attend an interview. There, she was told that someone had made a complaint in relation to the two amounts transferred into her bank account. However, she was not told who the complainant was or what the nature of the complaint was. The applicant confronted Mark about these transfers after the call from the police to attend the interview. Mark assured her that the money was for his friend and suggested that the complaint could have arisen from a misunderstanding. Mark promised her that he would not use her bank account to help others.

8 Several months later, the applicant was informed by the police that the matter was settled and was asked to go to the police station to receive a letter. There, an officer gave her an advisory letter (exhibit P23) and asked her to sign to acknowledge receipt. She claimed that she did not read it because she did not know it was important and she subsequently forgot about it.

9 The said advisory letter referred to a police report and stated that it served as “official notice” that the funds received in the applicant’s bank account were derived from fraud transactions. In addition, it advised her to

refrain from receiving or dealing with funds from “unknown and/or dubious sources” and warned her that this could render her liable to prosecution for offences under the Penal Code or the CDSA.

The decision of the District Court

10 As mentioned at [3] and [4] above, the District Court convicted the applicant. The aggregate sentence imposed was 30 weeks’ imprisonment.

The appeal to the High Court

11 The applicant appealed to the High Court against her conviction and sentence. The High Court dismissed her appeal.

12 In a brief oral judgment, the High Court dealt with four key issues:

- (a) Whether the applicant was in possession of the monies for the purpose of s 47(3) CDSA;
- (b) Whether the Possession Charges and the Removal Charges resulted in double counting which penalised the applicant twice;
- (c) Whether the applicant had reasonable grounds to believe that the monies were Mark’s benefits from criminal conduct; and
- (d) Whether the aggregate sentence was manifestly excessive.

13 The High Court rejected the applicant’s contention that possession could be made out on the facts only if there was some additional element of personal benefit or a greater degree of involvement with the monies. The Judge held that the factual element of possession was established once the monies went into the

applicant's bank account and she knew that the monies were there. He stated that this view was wholly consistent with precedents and with the definitions of "possession" (which includes actual and constructive possession of property) and of "property" (which includes money) in s 2 CDSA. The applicant's definition of "possession" would be internally inconsistent with the provisions of the CDSA itself and would frustrate the legislative intent of the CDSA.

14 The High Court found the applicant's reliance on the English cases of *R v GH* [2015] UKSC 24 ("*R v GH*") and *R v Haque (Mohammed)* [2019] EWCA [2020] 1 WLR 2239 ("*R v Haque*") to be misplaced. *R v Haque* was a case that dealt with the definition of "acquisition" rather than "possession" and this was different from the Possession Charges in the present case. The English CA in *R v Haque* had in fact recognised that a charge on the possession limb would likely be made out. The High Court observed that notwithstanding that the applicant was not supposed to hold on to the monies and that her bank account was merely being used as a conduit, that did not mean that she was not in possession of the monies.

15 On the second issue, the High Court held that there was no double counting because the elements of the two offences were separate and distinct. It followed that there was no double penalisation.

16 On the third issue, the High Court referred to the evidence adduced at the trial and concluded that the DJ was correct in finding that the applicant had reasonable grounds to believe that the monies in her bank account were Mark's benefits from criminal conduct.

17 On the final issue of sentence, the High Court held that the aggregate sentence imposed was in line with or even lower than the precedent cases. It was not manifestly excessive. The appeal was dismissed accordingly.

The application before the Court of Appeal

18 The applicant was on bail pending the hearing of this Criminal Motion (“CM”). In this CM, the applicant sought permission to refer the following four purported questions of law of public interest to the Court of Appeal:

Question 1: What is the definition of possession for the purposes of the CDSA?

Question 2: Is there a distinction at law between receipt of monies and possession of monies for the purpose of an offence under section 47 of the CDSA?

Question 3: Different to the offences of ‘acquires’ or ‘uses’, does the law intend that the mere receipt of monies into a bank account, without the recipient’s knowledge, consent or involvement, amount to possession of those monies? i.e. is the position that the recipient does not have to have taken any active steps, as is required to be guilty of acquiring or using the benefits of criminal conduct?

Question 4: If the answer to Question 2 is no, or the answer to Question 3 is yes, is there a defence available to the recipient?

We will refer to these questions as Q1, Q2, Q3 and Q4 respectively. The four questions concerned the Possession Charges only.

The Court of Appeal’s decision

19 On Friday, 1 March 2024, we dismissed the application after hearing both parties. In our view, the only question that may be relevant for this CM is Q1 because possession was an issue before the High Court. The High Court dealt with it and its decision on that issue affected the outcome of the appeal.

20 Q2 involved the issue of whether receipt was distinct from possession under the CDSA. There could be no dispute that the applicant received the monies in her bank account. Whether that fact and the factual situation of this case amounted to possession will be answered adequately in the answer to Q1.

21 To the extent that Q3 was related to the issue of possession, it was merely an offshoot of Q1 and the answer to Q1 will also answer Q3. Insofar as Q3 concerned acquiring or usage of the benefits of criminal conduct, those are separate offences under the CDSA and were not in issue in the appeal to the High Court and did not feature in the Judge's decision to dismiss the appeal.

22 As for Q4, on the facts of this case, it was clearly a hypothetical question as it was premised on the position of an innocent recipient of funds. The applicant was not such an innocent person as she was convicted for possessing the monies while having reasonable grounds for believing that they were the benefits of criminal conduct.

23 We therefore deal with only Q1 as it is the only question of relevance in this CM. Mr Andre Jumabhoy, counsel for the applicant, agreed with the court's observation that the other three questions were really dependent on the answer to Q1.

24 The Possession Charges alleged that the applicant possessed the monies in her bank account, having reasonable grounds to believe that the said monies were Mark's benefit from criminal conduct. Although the applicant could have been unaware initially that the monies had gone into her bank account from various sources, it was not disputed that Mark informed her about the transfers subsequently and asked her to transfer the monies to the Malaysian accounts.

Having that knowledge, she transferred the monies willingly on seven occasions on different days over a period of about three weeks.

25 In making the finding that the applicant had reasonable grounds to believe that the monies were Mark’s benefits from criminal conduct, the DJ considered that the applicant had been interviewed by the police in 2016, about two years before the incidents in the applicant’s charges, concerning this sort of unsolicited transfers into her bank account. The applicant was advised by the police to refrain from receiving or dealing with funds from “unknown and/or dubious sources” and was duly warned that this could render her liable to prosecution for offences under the Penal Code or the CDSA. The applicant had also told Mark that he must not disclose her bank account details to third parties without her knowledge. Despite all this, when Mark told her about the transfers in issue and asked her to transfer the monies to the Malaysian accounts, she did not refuse him. She also did not inform the bank or report to the police. Instead, she allowed the monies to remain in her account and then complied with his request to move them out of Singapore on seven separate occasions.

26 With the DJ’s decision affirmed on appeal, this finding of fact stands and cannot be challenged before us because there is no further right of appeal. So long as this factual finding stands, the applicant is not an innocent possessor of the monies.

27 Q1 on what is the definition of possession can be answered by reference to s 2 CDSA. Section 2 defines “possession” in the following way:

“possession”, in relation to any property, means actual or constructive possession of the property.

Section 2 CDSA also defines “property”:

“property” means money and all other property, movable or immovable, including things in action and other intangible or incorporeal property.

28 Like the High Court, we did not see why there must be personal benefit from or greater involvement with the monies in order to be in possession of the monies. Those matters relate to the purposes of possession and are not intrinsic to the very act of possession. In any case, having dealt with the monies when the applicant proceeded to transfer them out of Singapore, she could not even be described as a mere passive possessor of the monies in her bank account.

29 It is not necessary for us to deal with the English decisions cited as they did not concern statutory provisions which are worded similarly with the CDSA. We agreed with the High Court that *R v Haque* was a decision on “acquires criminal property” rather than on “possession of criminal property” in the English statute. However, we also have our reservations about the way the relevant provisions were construed in *R v Haque*.

30 In that case, two members of the public received phone calls by individuals pretending to be police officers and were persuaded to transfer money to the defendant’s bank account. Thereafter, sums of money corresponding to the amount transferred were withdrawn in cash or transferred to the account of a company controlled by the defendant. The defendant was charged with acquiring criminal property contrary to s 329(1)(a) of the English Proceeds of Crime Act 2002, on the basis that by the transfers to his account, he had acquired criminal property. The statement of offence stated that he acquired criminal property, namely the bank transfers, knowing or suspecting them to represent in whole or in part the proceeds of fraud.

31 The English Court of Appeal held that “criminal property” in that provision meant property that was criminal property prior to its acquisition by the defendant and that it followed that at the moment of its transfer into the defendant’s bank account, the money had not been “criminal property”. Further, the court there held that “acquires” in the said s 329(1)(a) had a meaning which was not coextensive with “uses” in s 329(1)(b) or “has possession of” in s 329(1)(c). It followed that the defendant’s dealing with the money after the transfer, although amounting to use and possession of criminal property, did not amount to acquisition. “Criminal property” was defined in s 340 of the English statute as follows:

Property is criminal property if –

- (a) it constitutes a person’s benefit from criminal conduct or it represents such a benefit (in whole or in part and whether directly or indirectly), and
- (b) the alleged offender knows or suspects that it constitutes or represents such a benefit.

32 On our part, we do not see why the money transferred to the defendant’s bank account by the victims, who were hoodwinked by fraudsters posing as police officers, did not qualify as criminal property in the definition cited above. The money was obviously transferred as a result of fraud and that should be sufficient to constitute “benefit from criminal conduct” and the defendant would have acquired it when he knew that the money had gone into his bank account. If the English Prosecution were able to prove the requisite knowledge or suspicion on the defendant’s part, as alleged in the statement of offence, we would have thought that a conviction would be the correct outcome. However, as we have indicated, the correctness or otherwise of the outcome in the English decision would not affect the applicant’s case before us.

33 In our view, the High Court’s commonsensical interpretation of “possession” in s 47(3) CDSA was entirely correct. It was also consistent with the CDSA’s legislative intent and with existing case law. There were no conflicting decisions and no legal controversy about what “possession” in the CDSA meant. The High Court dealt with all the relevant legal issues using s 2 CDSA and established principles of law and we agreed with its decision. There was therefore no public interest in debating further on this point. Accordingly, permission to refer Q1 was refused.

34 Looking at the theme of all four questions in this application, it was clear that they were premised on innocent possession of property. As we have mentioned earlier, the applicant was found not to be an innocent possessor of the monies in her bank account. She was not an innocent possessor of the monies by the time Mark informed her about the transfers into her bank account and this finding of fact is unassailable in the present application for permission to refer questions of law to the Court of Appeal.

Conclusion

35 The application for permission to refer the four questions to the Court of Appeal was refused in its entirety. The CM was dismissed accordingly.

36 The prosecution did not submit on costs in its written submissions and when the Court asked DPP Hon Yi about this issue, he replied that he had no instructions on costs. We therefore did not concern ourselves with the question of costs for this application.

37 At the applicant’s request, she was granted a deferment of her aggregate imprisonment sentence of 30 weeks as she needed to give two months’ notice

to her employers. Her bailor was agreeable to the deferment. The applicant was therefore released on bail and her sentence will commence on Monday 6 May 2024.

Tay Yong Kwang
Justice of the Court of Appeal

Steven Chong
Justice of the Court of Appeal

Belinda Ang
Justice of the Court of Appeal

Andre Darius Jumabhoy and Aristotle Eng (Andre Jumabhoy LLC)
for the applicant;
Hon Yi and Lee Zu Zhao (Attorney-General's Chambers) for the
respondent;
