

Abdul Salam bin Musthafa v Public Prosecutor
[2010] SGCA 38

Case Number : Criminal Appeal No 2 of 2010
Decision Date : 08 November 2010
Tribunal/Court : Court of Appeal
Coram : Andrew Phang Boon Leong JA; V K Rajah JA; Kan Ting Chiu J
Counsel Name(s) : R Thrumurgan @ Thiru (Thiru & Co) and Amarick Gill (Amarick Gill & Co) for the appellant; Ng Cheng Thiam and Geraldine Kang (Attorney-General's Chambers) for the respondent.
Parties : Abdul Salam bin Musthafa — Public Prosecutor

Criminal Law

Criminal Procedure and Sentencing

[LawNet Editorial Note: This was an appeal from the decision of the High Court in [\[2010\] SGHC 81.](#)]

8 November 2010

Andrew Phang Boon Leong JA (delivering the grounds of decision of the court):

Introduction

1 The appellant in the present appeal, Abdul Salam bin Musthafa (“the Appellant”), claimed trial to five charges of conspiracy to traffic in controlled drugs, an offence under s 5(1)(a) read with s 12 of the Misuse of Drugs Act (Cap 185, 2001 Rev Ed). He was found guilty and convicted of all five charges (see *Public Prosecutor v Abdul Salam bin Musthafa* [2010] SGHC 81). The Appellant was sentenced to a total of 30 years’ imprisonment with effect from 2 January 2008 and 24 strokes of the cane. The Appellant appealed against both his conviction and his sentence.

2 Of the five charges which the Appellant faced at his trial, two charges (“the Main Charges”) concerned offences alleged to have been committed on 31 December 2007, while the remaining three charges (“the Remaining Charges”) concerned offences alleged to have been committed on 27 December 2007. The Main Charges were that, on or about 31 December 2007, the Appellant engaged in a conspiracy with Khairul Anwar bin Zaini (“Khairul”), Jamaliah binti Yacab (“Jamaliah”), Maryati binte Sipon (“Maryati”) and one “Boy Cino” to traffic in two different types of controlled drugs, namely, not less than 14.99g of diamorphine and 0.42g of methamphetamine (the charges relating to these two quantities of drugs will be referred to hereafter as, respectively, “the First Charge” and “the Second Charge”). The Remaining Charges were that, on or about 27 December 2007, the Appellant engaged in a conspiracy with Khairul, Jamaliah and Boy Cino to traffic in three different types of controlled drugs, namely, 8.76g of methamphetamine, not less than 6.43g of diamorphine and 0.01g of morphine (the charges relating to these three quantities of drugs will be referred to hereafter as, respectively, “the Third Charge”, “the Fourth Charge” and “the Fifth Charge”).

3 The trial judge (“the Judge”) found the Appellant guilty of all five charges and convicted him on 21 January 2010. On 15 March 2010, the Appellant was sentenced to 25 years’ imprisonment and 15

strokes of the cane in respect of the First Charge, five years' imprisonment and nine strokes of the cane in respect of the Second Charge, and, in respect of the Third Charge, the Fourth Charge and the Fifth Charge, five years' imprisonment and five strokes of the cane for each of those charges. The terms of imprisonment in relation to the First Charge and the Second Charge were to run consecutively, while the terms of imprisonment in relation to the Third Charge, the Fourth Charge and the Fifth Charge were to run concurrently with the term of imprisonment in respect of the First Charge. The Appellant was therefore sentenced to a total of 30 years' imprisonment with effect from 2 January 2008 and 24 strokes of the cane.

4 Subsequent to the trial, the sentence of caning was remitted by the Judge on 28 September 2010. This was due to a letter from a medical officer of the Singapore Prison Service, dated 6 September 2010, stating that the Appellant was confirmed as being HIV (positive) and was therefore permanently unfit for caning.

5 The Appellant appealed against his conviction and his sentence for all five charges. After hearing submissions from the parties, we allowed the appeal against conviction in part, in so far as we found that the Remaining Charges, *viz*, the charges relating to the offences alleged to have been committed on 27 December 2007 (*ie*, the Third Charge, the Fourth Charge and the Fifth Charge), were not proved beyond a reasonable doubt. We thus set aside the Appellant's conviction in respect of those charges. With respect to the Main Charges (*ie*, the First Charge and the Second Charge), however, we agreed with the Judge that those charges were proved beyond a reasonable doubt, and dismissed the appeal against conviction in so far as those charges were concerned.

6 In respect of the appeal against sentence, we allowed the appeal in so far as we reduced the term of imprisonment for the Main Charges from a total of 30 years' imprisonment to a total of 25 years' imprisonment with effect from 2 January 2008.

7 We now give the detailed grounds for our decision. As we fully agree with the reasoning and the findings of the Judge with respect to the Main Charges, we shall address only the Remaining Charges.

The evidence against the Appellant

8 The Prosecution's evidence against the Appellant in respect of the Remaining Charges consisted of:

- (a) Maryati's testimony and plea in mitigation;
- (b) Khairul's statement of 26 August 2008; and
- (c) the telephone call-cum-SMS records.

We shall address these in turn.

Maryati's testimony and plea in mitigation

9 The relevant portions of Maryati's testimony which appeared to implicate the Appellant with respect to the Remaining Charges are as follows. First, Maryati testified that she had previously delivered money for the Appellant prior to 31 December 2007, although (and this is a significant point which we shall return to below (at [\[11\]](#)–[\[12\]](#))) she was unable to recall exactly when she had done so: [\[note: 1\]](#)

Q: Right. All right, your earlier evidence was that 31st December 2007 wasn't the first time that you have sent money from Singapore to Malaysia for [the Appellant]. Right. So my question is, when was the first time? Can you remember?

A: *I cannot remember.*

Q: All right.

A: *It's been one year plus, I cannot remember.*

Q: All right. *Can you remember how many times?*

A: *No.*

Q: Right. Okay. And those occasions that you had previously delivered the money from Singapore to Malaysia, to whom did you pass the money to?

A: Boy Cino.

[emphasis added]

The following testimony is also relevant: [\[note: 2\]](#)

Q: *On those previous occasion [sic], when you brought the money from Singapore to Malaysia to pass to Boy Cino, was the money passed to you by [the Appellant]?*

A: Yes.

[emphasis added]

10 On cross-examination by counsel for the Appellant at the trial, Mr S S Dhillon, Maryati disagreed with counsel's contention that, since the Appellant's telephone line had not been in use in the week prior to 27 December 2007, the Appellant could not have been involved in the drug transaction of 27 December 2007. Maryati's evidence on this point was as follows: [\[note: 3\]](#)

Q: Now, witness, I'm putting it to [you] that [the Appellant] was never involved in any drug dealings on 27th December because his phone call records prove that his phone was shut down from 20th December to 26th December.

A: I disagree because the shutdown of his handphone was on the 20th to 26th December but the – the – the incident happened on the 27th December.

11 On re-examination by Deputy Public Prosecutor Mr Ng Cheng Thiam, Maryati was unable to confirm if she had gone to Johor Bahru on 27 December 2007 to send money as part of a drug transaction or to attend to personal matters: [\[note: 4\]](#)

Q: Next question, you have said that for the 27th of December 2007, you would be telling a lie if you say that you did not agree that you were involved in the tran – in the drug transaction on that day. All right, and you had also admitted that you went to Johor Bahru on the

27th of December 2007.

A: Yes.

Q: I see. The question is why did you go to Johor Bahru on the 27th of December 2007?

A: To send monies.

Q: What?

A: *But I cannot remember.*

Q: What money?

A: *The monies – maybe – I did go to Malaysia on the 27th December but I'm not sure whether I went to Malaysia to send monies or to do my personal things. There are certain dates as appeared in my passport, I just went to Johor to do personal things. I can't – I can't recall exactly which dates but I did send monies about 7 to 8 times.*

Q: For who?

A: Accused [*ie*, the Appellant].

[emphasis added]

12 Although Maryati's testimony (as reproduced above) alludes *generally* to some previous involvement by the Appellant in drug transactions, it is far from compelling with respect to the Appellant's alleged involvement in the drug transaction of *27 December 2007*. Indeed, Maryati was unable to confirm *specifically* that the Appellant was involved in a drug transaction *on 27 December 2007 itself*.

13 Maryati's plea in mitigation is not much more helpful to the Prosecution's case. The relevant extracts are as follows: [\[note: 5\]](#)

8. Sometime in or around the last quarter of 2007, [the Appellant] contacted [Maryati] and asked her whether she was keen to make some money by running a small errand for him into Malaysia. He explained to her that every now and then he would have to pay his business partner in Malaysia. This Malaysian partner was known to her as "Boy Cino". She agreed and in the first few couriers she was paid about S\$300 for each trip.

9. Up until a couple of weeks before her arrest, she did not know that the money she couriered into Malaysia was connected with drugs. She had laboured under the false believe [*sic*] that it was money paid for a legitimate business. When she first discovered from "Boy Cino" that the money she had couriered was in connection with drugs, she confronted [the Appellant] about it and wanted to stop.

10. [The Appellant] managed to convince and assure her that as long as she wasn't the one carrying the drugs, she was not committing any offence. Foolishly she accepted the assurances and carried on the service for [the Appellant].

11. [Maryati] knew it was wrong [of her] to have carried the money into Johor *that fateful day*.

She regrets her actions. She now realises how foolish she was in believing [the Appellant].

[emphasis added]

14 Notably, Maryati's plea in mitigation refers to "that fateful day", [\[note: 6\]](#) which, presumably, means 31 December 2007 since Maryati could not say for sure that she brought money into Malaysia as part of a drug transaction on 27 December 2007. Maryati's plea in mitigation therefore does not address the events that transpired on 27 December 2007; neither does it address the Appellant's alleged involvement in the drug transaction of 27 December 2007.

15 Having regard to the evidence of Maryati as a whole, therefore, neither her testimony nor her plea in mitigation implicates the Appellant *specifically* with respect to the Remaining Charges. In particular, her testimony and her plea in mitigation do *not* implicate the Appellant *specifically* with respect to *the drug transaction of 27 December 2007*, and thus do not assist the Prosecution's case in so far as the Remaining Charges are concerned. Nevertheless, in our estimation, the portions of Maryati's testimony extracted above (at [\[9\]](#) and [\[11\]](#)) certainly do not undermine Maryati's testimony with respect to the offences allegedly committed on *31 December 2007*. In fact, had Maryati been intent on implicating the Appellant, rather than being uncertain about the events that transpired on 27 December 2007, it would have made more sense for her to have emphatically testified that the Appellant had been involved in the drug transaction of 27 December 2007. This, therefore, does not undermine the credibility of Maryati as a witness and her testimony with respect to the Main Charges.

Khairul's statement of 26 August 2008

16 The next piece of evidence in the Prosecution's case against the Appellant with respect to the Remaining Charges was Khairul's statement of 26 August 2008, which we shall hereafter refer to as "P142" for short. The material parts of P142 which appear to implicate the Appellant are as follows: [\[note: 7\]](#)

82 I wish to explain that I had held back on telling the truth on [the Appellant] being the one giving me instructions to receive the controlled drugs and distributing the controlled drugs which [were] seized because I feel that telling the truth now is better than lying. I do not know whether [the Appellant] is the boss of the drug syndicate. *However, [the Appellant] is the one that had been giving me instruction[s] pertaining to receiving the previous consignment of controlled drugs which was seized in my house on the day of my arrest too, except for the subutex tablets which "Boy Nizam" delivered to me before my arrest. ... [The Appellant] is the one who is paying me money for helping him to receive the controlled drugs consignment from Malaysia and distributing the re-packed drugs of heroin and ice in Singapore.* [emphasis added]

The italicised portion of the above extract from P142 appears to refer to acts that are directly connected with the Remaining Charges, while the rest of the extract refers to the Appellant's role in drug transactions generally.

17 However, the italicised portion of the aforesaid extract fails, in our view, to disclose sufficiently whether the "previous consignment" [\[note: 8\]](#) refers to the drugs which were the subject matter of the drug transaction of 27 December 2007, or to drugs which were the subject matter of some other drug transaction. Khairul's testimony was of little help to the Prosecution as, in court, Khairul sought to distance himself from P142 and alleged that he had made the statement due to coercion (notwithstanding this allegation by Khairul, the Appellant's counsel subsequently consented to Khairul's statements, P142 included, being admitted). Although (as we have seen) Maryati alluded in

her testimony to the Appellant's involvement in other drug transactions, P142 does not indicate if the Appellant was involved in the drug transaction of 27 December 2007 specifically, as opposed to some other previous drug transaction. P142 therefore does not add much – if any – weight to the Prosecution's case against the Appellant *vis-à-vis* the Remaining Charges.

The telephone call-cum-SMS records

18 The last piece of evidence which the Prosecution relied on for its case against the Appellant with respect to the Remaining Charges consisted of the telephone call-cum-SMS records. The Prosecution argued that the flurry of communications between the Appellant and the conspirators on 27 December 2007 led one to the conclusion that the conspirators were making arrangements for the drug transaction which was to take place that day. This was so especially since the conspirators, who had all pleaded guilty to various drug trafficking offences, were also calling each other to make the necessary arrangements *vis-à-vis* their particular roles. This (so the argument ran) therefore meant that the Appellant must have been communicating with the conspirators on drug transactions (including the transaction which was alleged to have occurred on 27 December 2007).

19 However, in our view, the above corroborative evidence against the Appellant is precisely that: merely corroborative evidence. It is insufficient to establish the Prosecution's case against the Appellant *vis-à-vis* the Remaining Charges beyond a reasonable doubt when the other evidence against the Appellant with respect to those charges is so weak.

Conclusion

20 Taking into account the totality of the evidence against the Appellant in respect of the Remaining Charges, we were of the view that the Prosecution's case against the Appellant on these charges was not established beyond a reasonable doubt. Maryati was unable to confirm if the Appellant had been involved in a drug transaction on 27 December 2007. P142, while suggesting that the Appellant had been involved in the trafficking of a previous consignment of drugs, shed little light on whether that consignment was the one which was the subject matter of the drug transaction of 27 December 2007, or whether it was the subject matter of a drug transaction on some other date. The telephone call-cum-SMS records were insufficient (in and of themselves) to establish the Prosecution's case beyond a reasonable doubt, and had to be considered together with the other evidence, which evidence (as we have seen) was in fact rather weak.

21 We therefore allowed the appeal against conviction in respect of the Remaining Charges.

22 Given that the only charges proved beyond a reasonable doubt against the Appellant were the Main Charges, we were of the view that the Appellant's terms of imprisonment in respect of the First Charge and the Second Charge ought to run concurrently rather than consecutively. This would reflect the gravity of the offences proved against the Appellant, and, at the same time, take into account the fact that the Remaining Charges were not made out against him. This would also be an appropriate sentence for the Appellant, having regard to the relative sentences of his conspirators. We therefore ordered the total length of the Appellant's imprisonment in respect of the Main Charges to be reduced from 30 years' imprisonment to 25 years' imprisonment with effect from 2 January 2008.

[\[note: 1\]](#) See the certified transcript of the notes of evidence ("the NE") for the fifth day of the trial (*ie*, 30 July 2009) at p 61, lines 1–12.

[\[note: 2\]](#) See the NE for the fifth day of the trial at p 62, lines 26–28.

[\[note: 3\]](#) See the NE for the seventh day of the trial (*ie*, 3 August 2009) at p 22, lines 21–25.

[\[note: 4\]](#) See the NE for the seventh day of the trial at p 29, lines 19–32 and at p 30, lines 1–4.

[\[note: 5\]](#) See the Record of Proceedings at vol 3A, pp 549–550.

[\[note: 6\]](#) *Id* at vol 3A, p 550.

[\[note: 7\]](#) *Id* at vol 3A, p 512.

[\[note: 8\]](#) *Ibid.*

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