

IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2017] SGHC 31

Criminal Case No 64 of 2016

Between

Public Prosecutor

And

Morgan Kupusamy

FOUNDATIONS OF DECISION

[Criminal Law] — [Statutory Offences] — [Misuse of Drugs Act]

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Public Prosecutor
v
Morgan Kupusamy

[2017] SGHC 31

High Court — Criminal Case No 64 of 2016
Aedit Abdullah JC
3, 12, 17 January 2017

22 February 2017

Aedit Abdullah JC:

Introduction

1 The accused, Morgan Kupusamy, was convicted on 12 January 2017 of drug trafficking under s 5(1)(a) of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) (“MDA”). The agreed statement of facts disclosed that he had transported a Class A controlled drug listed in the First Schedule to the MDA from Malaysia into Singapore, and had given it to the co-accused, Johari Bin Katio, on the instructions of one “Siva”. A certificate of substantive assistance under s 33B(2)(b) of the MDA was issued to him by the Public Prosecutor, and he was found to have played only a limited role as a courier within the scope of s 33B(2)(a). In my exercise of the discretion conferred by s 33B(1)(a) of the MDA, the accused was not sentenced to death, but to the minimum

punishment prescribed by statute, that is, life imprisonment and 15 strokes of the cane. The accused, being dissatisfied with his sentence, has appealed.

The Charge

2 The charge framed against the accused read (“the Charge”):

That you, 1. Morgan Kupusamy,
on 5 December 2014 sometime between 4.10 pm and 4.15 pm,
at No. 24 Jalan Tukang, Singapore, did traffic in a Class A
controlled drug listed in the First Schedule to the Misuse of
Drugs Act (Cap 185, [2008] Rev Ed), to wit, by giving three (3)
packets of substance containing not less than 27.86 gram[s] of
Diamorphine, to one Johari Bin Katio... without any
authorisation under the said Act or the Regulations made
thereunder and you have thereby committed an offence under
s 5(1)(a) of the Misuse of Drugs Act (Cap 185, [2008] Rev Ed),
and punishable under s 33 of the same Act.

3 The co-accused was charged with possession of the same three packets of drugs for the purpose of trafficking under s 5(1)(a) read with s 5(2) of the MDA.

The Proceedings

4 The Prosecution indicated on the first day of the trial that a certificate of substantive assistance would be issued in favour of the accused; as for the co-accused, the Prosecution would not be taking issue with a psychiatric report, to be tendered by the Defence, stating that the co-accused had been suffering from such abnormality of mind as substantially impaired his mental responsibility for the offence at the material time. The Prosecution also indicated that they would not be making submissions as to sentence, or as to the role of the two accused persons in relation to their respective offences. Time was then given for the preparation of an agreed statement of facts, as well as various submissions by the parties.

The Statement of Agreed Facts

5 The Prosecution and the Defence tendered an agreed statement of facts dated 12 January 2017, pursuant to s 267(1) of the Criminal Procedure Code (Cap 68, 2012 Rev Ed). The facts agreed were essentially as follows.

6 On 5 December 2014, a party of officers from the Central Narcotics Bureau (“CNB”) arrived in the vicinity of No 24 Jalan Tukang, Singapore, at between 10.20am and 10.30am. At about 12.15pm that day, the accused drove into the compound of No 24 Jalan Tukang in a car bearing Malaysian registration plate number JGQ9935. Later at 4.10pm, the co-accused arrived at the scene in a taxi and entered No 24 Jalan Tukang through a side gate. About five minutes later, the co-accused left the compound of No 24 Jalan Tukang and walked towards No 19 International Road.

7 At about 4.25pm, the co-accused was arrested by the CNB officers outside No 19 International Road. Three packets of a brown granular substance (“the Packets”, respectively marked “H1A”, “H2A” and “H3A”) were found in a black sling bag in the possession of the co-accused. At 4.30pm, the accused was also arrested at No 24 Jalan Tukang. Immediately upon his arrest, the accused informed a CNB officer that he had given three “chocolates” to one “Jak”.¹ The accused later identified the Packets as drugs that he had handed over to “Jak” on 5 December 2014 prior to his arrest.² He also identified “Jak” as the co-accused.³

¹ Agreed Bundle at pp 126–127.

² Accused’s further statement dated 10 December 2014 at para 39; Agreed Bundle at p 223.

³ Accused’s further statement dated 9 December 2014 at para 31; Agreed Bundle at p 221.

8 On 9 December 2014, the Packets were sent to the Illicit Drugs Laboratory of the Health Sciences Authority (“HSA”) for analysis. On 16 March 2015, Tan Sylvia, an Analyst with the HSA, issued three certificates under s 16 of the MDA stating as follows:⁴

(a) HSA Certificate Lab No ID-1432-02192-010: The exhibit marked “H1A” was found to be one packet containing not less than 461.1g of granular/powdery substance, which was analysed and found to contain not less than 9.89g of diamorphine.

(b) HSA Certificate Lab No ID-1432-02192-011: The exhibit marked “H2A” was found to be one packet containing not less than 461.0g of granular/powdery substance, which was analysed and found to contain not less than 8.17g of diamorphine.

(c) HSA Certificate Lab No ID-1432-02192-012: The exhibit marked “H3A” was found to be one packet containing not less than 461.4g of granular/powdery substance, which was analysed and found to contain not less than 9.80g of diamorphine.

9 In total, the Packets were found to contain 1,383.5g of granular/powdery substance, which on analysis was found to contain not less than 27.86g of diamorphine, which is a Class A controlled drug listed in the First Schedule to the MDA.

10 The accused gave statements, which were accepted as having been voluntarily made,⁵ detailing how he came to have given drugs to the co-accused. It was disclosed that he had met one “Siva” in Johor Bahru,

⁴ Agreed Bundle at pp 65–67.

⁵ Agreed Statement of Facts dated 12 January 2017 at para 14.

Malaysia, around one and a half months before his arrest.⁶ The accused told Siva that he was in financial difficulties and needed about RM7,000 to RM8,000 to pay his debts.⁷ Siva told the accused that he supplied drugs to Singapore, and asked the accused if he would be willing to work for Siva.⁸ The accused subsequently agreed to do so.⁹

11 The accused's work entailed delivering drugs to Singapore following Siva's instructions. The drugs would first be delivered to the accused in Johor Bahru. The accused would then hide these drugs in the car which he would drive to Singapore. When in Singapore, the accused would, according to Siva's instructions, either hand over the drugs to certain individuals or leave them at specific places.¹⁰ The accused would be paid about RM500 for each drug delivery, which would be given to him in Johor Bahru upon his return.¹¹ In all, before his arrest, the accused had worked for Siva for about three weeks, and had delivered drugs into Singapore on several occasions.¹²

12 On 5 December 2014, at around noon, the accused met Siva in Johor Bahru. Siva handed the accused a plastic bag containing drugs, instructing him

⁶ Accused's further statement dated 9 December 2014 at para 20; Agreed Bundle at p 216.

⁷ Accused's further statement dated 9 December 2014 at para 21; Agreed Bundle at p 217.

⁸ Accused's further statement dated 9 December 2014 at para 21; Agreed Bundle at pp 216–217.

⁹ Accused's further statement dated 9 December 2014 at para 22; Agreed Bundle at p 217.

¹⁰ Accused's further statement dated 9 December 2014 at paras 22–28; Agreed Bundle at pp 217–220.

¹¹ Accused's further statement dated 9 December 2014 at paras 28, 30; Agreed Bundle at pp 220–221.

¹² Accused's further statement dated 9 December 2014 at para 30; Agreed Bundle at p 221.

to hide it. There were several packets of drugs, including the Packets, in the plastic bag. The accused checked the contents of the plastic bag and hid these drugs in a secret compartment in his car. The accused then drove to Singapore and arrived at his workplace at No 24 Jalan Tukang at about 12.10pm.¹³ At about 2.15pm, Siva called the accused to ask whether the co-accused could come and collect some of the drugs from the accused. The accused told Siva to inform the co-accused to come after 4.00pm.¹⁴ When the co-accused arrived at or about 3.55pm, the accused met him at the company's parking area where the accused's car was parked. The accused then told the co-accused to stand behind the car so that other workers would not be able to see him. Thereafter, the accused took the Packets out from his car and handed them over to the co-accused, who kept them in his black sling bag.¹⁵ When the co-accused left, the accused informed Siva by phone that the drugs had been collected by the co-accused.¹⁶

13 The co-accused also gave statements which corroborated the material parts of the accused's statements. It was disclosed that the co-accused had been persuaded to work for one "Soya" because he was facing financial difficulties, and wanted to earn money by collecting and delivering drugs on the instructions of Soya.¹⁷ The co-accused had previously collected drugs from the accused on several occasions prior to their arrest.¹⁸ After each collection

¹³ Accused's statement dated 7 December 2014 at paras 3–5; Agreed Bundle at pp 208–210.

¹⁴ Accused's statement dated 8 December 2014 at para 8; Agreed Bundle at p 211.

¹⁵ Accused's statement dated 8 December 2014 at para 8; Agreed Bundle at pp 211–212.

¹⁶ Accused's statement dated 8 December 2014 at para 9; Agreed Bundle at p 212.

¹⁷ Co-accused's statement dated 10 December 2014 at para 21; Agreed Bundle at p 241.

¹⁸ Co-accused's statement dated 11 December 2014 at paras 26–27; Agreed Bundle at pp 244–245.

from the accused, the co-accused would drop off the drugs at a location as instructed by Soya, and then collect payment from someone else. On the day of his arrest, the co-accused was similarly instructed to collect the drugs from the accused and to deliver them to an unknown recipient. However, after the collection was made, the co-accused was arrested at No 19 International Road before he could make the delivery.¹⁹

14 The accused admitted that he had delivered the Packets, that is, three packets of substance containing not less than 27.86g of diamorphine, to the co-accused on 5 December 2014 sometime between 4.10pm and 4.15pm. At the material time, the accused knew that the Packets contained diamorphine,²⁰ which is a controlled drug under the First Schedule to the MDA, and he was not authorised under the MDA or the Regulations made thereunder to traffic in a controlled drug.

The Decision

15 On the basis of the matters disclosed in the agreed statement of facts, I found that the accused had satisfied the elements of trafficking under s 5(1)(a) of the MDA and was guilty of the Charge as framed.

16 In respect of the appropriate sentence, under the MDA, while the death penalty is prescribed for offences under the sixth column of the Second Schedule, which includes the offence with which the accused was charged, s 33B(1)(a) of the MDA allows the Court to instead impose imprisonment for life and caning of not less than 15 strokes, if the requirements of s 33B(2) are met. The legislative purpose of this provision is “to provide a less harsh

¹⁹ Co-accused’s statement dated 10 December 2014 at paras 11-14; Agreed Bundle at pp 236-238.

²⁰ Agreed Statement of Facts dated 12 January 2017 at para 25.

sentence for drug couriers who are willing and able to assist the [CNB] ... in disrupting drug trafficking activities within or outside Singapore” (*Public Prosecutor v Chum Tat Suan* [2015] 1 SLR 834 (“*Chum Tat Suan*”) at [4]). The material section of the MDA reads as follows:

Discretion of court not to impose sentence of death in certain circumstances

33B.—(1) Where a person commits or attempts to commit an offence under section 5(1) or 7, being an offence punishable with death under the sixth column of the Second Schedule, and he is convicted thereof, the court —

(a) may, if the person satisfies the requirements of subsection (2), instead of imposing the death penalty, sentence the person to imprisonment for life and, if the person is sentenced to life imprisonment, he shall also be sentenced to caning of not less than 15 strokes; or

...

(2) The requirements referred to in subsection (1)(a) are as follows:

(a) the person convicted proves, on a balance of probabilities, that his involvement in the offence under section 5(1) or 7 was restricted —

(i) to transporting, sending or delivering a controlled drug;

(ii) to offering to transport, send or deliver a controlled drug;

(iii) to doing or offering to do any act preparatory to or for the purpose of his transporting, sending or delivering a controlled drug; or

(iv) to any combination of activities in subparagraphs (i), (ii) and (iii); and

(b) the Public Prosecutor certifies to any court that, in his determination, the person has substantively assisted the Central Narcotics Bureau in disrupting drug trafficking activities within or outside Singapore.

17 The two conjunctive requirements under s 33B(2) of the MDA are: (i) a finding that the accused’s involvement in the offence was restricted to

matters mentioned in s 33B(2)(a), and (ii) that the Public Prosecutor issues a certificate of substantive assistance in his favour. On the evidence before me, I was satisfied that both requirements were satisfied, and the accused was accordingly entitled to be sentenced under s 33B(1)(a) of the MDA.

Certificate of Substantive Assistance

18 A certificate of substantive assistance was issued by the Public Prosecutor under s 33B(2)(b) of the MDA indicating that in his determination, the accused had substantively assisted the CNB in disrupting drug trafficking activities. It was noted that the co-accused was not found to have given substantive assistance.

Findings

19 The accused submitted that he qualified for a life sentence to be imposed under s 33B(1)(a) of the MDA, as his involvement in the offence was restricted to matters mentioned in s 33B(2)(a) – that is, he was merely a courier. The Prosecution did not address me on sentence in respect of either accused persons.

20 Based on the language of s 33B(2)(a), the accused bears the burden of proving on a balance of probabilities that he was a mere courier (*Chum Tat Suan* at [19]). A courier is narrowly defined as one whose involvement is limited to delivering or conveying drugs between two points (*Public Prosecutor v Abdul Haleem bin Abdul Karim and another* [2013] 3 SLR 734 at [51]). The Court of Appeal in *Chum Tat Suan* similarly noted that “the statutory relief afforded under s 33B does not apply to those whose involvement with drugs extends beyond that of transporting, sending or delivering the drugs” (at [66]). This is, however, subject to the fact-specific

qualifier that “the mere incidental act of storage or safe-keeping by the accused person in the course of transporting, sending or delivering the drugs, should not take him outside of the definition of a courier”, although conduct that is not a necessary element of the transportation of the drugs, such as packing, would so disqualify the accused (*Chum Tat Suan* at [67]–[68]).

21 Based on the evidence before me, I was satisfied that the accused had proven on a balance of probabilities that his role in the offence was restricted to that of transporting the diamorphine within the scope of s 33B(2)(a) of the MDA. Indeed, according to the agreed statement of facts, the task assigned to the accused by the said “Siva” was precisely to deliver drugs from Malaysia to Singapore.²¹ Those facts also showed that, on 5 December 2014, all that the accused did was to collect the drugs in Johor Bahru, and meet up with the co-accused in Singapore to pass the drugs on to the latter. The accused did keep the drug in his car for a few hours on that day, but I accept that that was merely “incidental” to the transportation and delivery of the drugs to the co-accused, and therefore within the qualifier identified in *Chum Tat Suan*. There was nothing to suggest that the accused had gone beyond the scope of s 33B(2)(a). I therefore found that the requirements in s 33B(2) of the MDA were satisfied.

The Sentence Imposed

22 Satisfaction of the requirements in s 33B(2) of the MDA confers upon the court a discretion to impose, instead of death penalty, life imprisonment and caning of not less than 15 strokes under s 33B(1)(a) (*Chum Tat Suan* at [3]).

²¹ Agreed Statement of Facts dated 12 January 2017 at para 16.

23 In the present case, in respect of the accused, there was nothing that called for either a sentence of death rather than life imprisonment, or the imposition of more than 15 strokes of the cane. The culpability or criminal responsibility of the accused was not higher than that of other couriers. The agreed statement of facts indicated that the accused had carried out similar acts for a period of a few weeks; he had also obtained some money as a reward for his activities, though the amount was not high. The level of culpability was thus not so substantial in respect of the trafficking as to outweigh both his limited role as a courier and the substantive assistance that was certified. While the harm caused by acts of trafficking is always significant – drug abuse remains a major social problem – it was in this case not so significant as to call for either the imposition of a sentence of death, or for more than the minimum number of strokes. The Prosecution did not submit otherwise. In the light of all these factors, I was of the view that a sentence of life imprisonment and 15 strokes of the cane was sufficient, and I sentenced the accused accordingly.

Conclusion

24 The basis of the accused’s dissatisfaction with the sentence imposed is not clear. The sentence imposed was the minimum permitted under the law. If the accused seeks a shorter sentence, this is not allowed. The imprisonment regime does, however, provide for the review of sentences of life imprisonment at the 20-year mark under Division 3 of Part VB of the Prisons Act (Cap 247, 2000 Rev Ed).

25 As for the co-accused, he was sentenced to life imprisonment, as required under s 33B(1)(b) of the MDA. This was on the basis of a similar finding that he acted only in the limited role of a courier, as well as an Institute of Mental Health psychiatric report dated 22 January 2015, which was

tendered by the Defence and not contested by the Prosecution, stating that the co-accused had been suffering from depression at the material time which substantially impaired his mental responsibility in the commission of the offence.²² Accordingly, the requirements under s 33B(3) of the MDA were satisfied, and I was bound under s 33B(1)(b) to sentence the co-accused to life imprisonment instead of death.

Aedit Abdullah
Judicial Commissioner

Terence Chua and Michelle Koh (Attorney-General's Chambers)
for the Prosecution;
Amolat Singh (Amolat & Partners) and
Tham Lijing (Ascendant Legal LLC) for the accused;
A P M Ferlin Jayatissa, Lum Guo Rong (Lexcompass LLC) and
Dhanaraj James Selvaraj (James Selvaraj LLC) for the co-accused.

²² Co-accused's Submission on Sentencing dated 11 January 2017 at Annex A.