IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2019] SGHC 25

Magistrate's Appeal No 9001 of 2018/01

Between

D Rashpal Singh Sidhu

… *Appellant*

And

Public Prosecutor

… *Respondent*

EX TEMPORE JUDGMENT

[Criminal Law] — [Statutory offences] — [Misuse of Drugs Act (Cap 185, 2008 Rev Ed)]

D Rashpal Singh Sidhu
v
Public Prosecutor

[2019] SGHC 25

High Court — Magistrate's Appeal No 9001 of 2018/01
Aedit Abdullah J
1 February 2019

7 February 2019

Aedit Abdullah J:

1 I have considered the parties' submissions, the evidence and the judgment of the learned District Judge.

2 The facts are sufficiently summarised in the grounds of decision ("GD") in *PP v D Rashpal Singh Sidhu* [2018] SGDC 91. The appellant had been found unconscious at a void deck. He remained unconscious while being conveyed to Ng Teng Fong General Hospital ("the Hospital") and when the Staff Nurse found exhibit DRSS-A1, a red straw containing drugs, near his crotch.[1] The District Judge agreed with the Prosecution that the location where the straw was found meant that "it could only have come from the accused".[2] The District Judge held that the Defence failed to prove "on a balance of probabilities" that the straw could have come from the hospital blanket.[3] She further held that the

1 GD at paras 29 and 31.

2 GD at para 41.

Defence's suggestion that the straw had been caught on the appellant's clothing at an earlier stage was "incredible".[4] Accordingly, she found that the appellant had actual possession of the straw containing the drugs in question.[5] She convicted him on an offence under s 8(*a*) and punishable under s 33(1) of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) ("MDA"), and sentenced him to 43 months' imprisonment.

Parties' submissions

3 I appointed Ms Jo Tay Yu Xi ("Ms Tay") as young *amicus curiae* to assist the court on the issue of whether the presumption under s 18(2) of the MDA operates when a person was unconscious at the time when he had the controlled drug(s) in his possession, and, if so, whether and how the presumption could be rebutted in such a circumstance.

4 Ms Tay's submissions were two-fold. She submitted that the operation of the presumption under s 18(2) of the MDA first required the Prosecution to prove beyond reasonable doubt that the accused had possession of the controlled drug. This required proof of the accused's physical control over the controlled drug and knowledge of the existence of thing in question, *ie*, the controlled drug itself: *Sim Teck Ho v PP* [2000] SGCA 44 at [13]. The fact that the accused was unconscious at the time the controlled drug was found on him did not preclude a finding that he had possession of it, as long as it was proven that he had possessed the controlled drug when he was conscious and that such possession continued throughout the time he was unconscious.

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3 GD at para 41.

4 GD at para 43.

5 GD at para 46.

5 In such circumstances, the Prosecution could discharge its burden of proof by reference to the circumstances in which the accused was found with the controlled drug, or by reference to events that occurred before he lost consciousness. Ms Tay relied on various Malaysian, Hong Kong, English and Canadian authorities that dealt with analogous offence provisions to establish the following propositions:

(a) Possession involves an element of mental consciousness: see *Warner v Metropolitan Police Commissioner* [1969] 1969] 2 AC 256 at 299 and *MacKenzie v Skeen* [1983] SLT 121.

(b) Where a person comes into possession of a thing, such possession is not lost when the possessor loses consciousness or falls asleep: *Public Prosecutor v Tang Chew Weng* [1969] 2 MLJ 17.

(c) Foreign courts have decided the question of whether the accused had the requisite knowledge of the existence of the thing in question by reference to the circumstances in which the accused was discovered or by reference to facts that arose prior to such discovery or arrest. For instance, in *Public Prosecutor v Ho Shui Ngen* [1995] 4 MLJ 758, the Malaysian High Court acquitted the accused of a drug trafficking charge notwithstanding the fact that he had been discovered asleep in a room that contained cannabis. The High Court noted in particular that the door to the room where the cannabis was found had not been closed, let alone locked. If the accused had been asleep for a long time, someone else could have placed the cannabis in the room.

(d) The *mens rea* of possession does not require the requisite knowledge of the existence of the controlled drug to be at the forefront of the accused person's mind. An analogy was drawn to cases where

offenders were found to be in possession of prohibited items despite having forgotten at the time that they were in possession of those items: *R v Martindale* [1986] 1 WLR 1042.

6 In the second part of her submissions, Ms Tay argued that it was only after possession had been proven (or presumed under s 18(1) of the MDA) that the presumption under s 18(2) of the MDA came into operation. Under s 18(2) of the MDA, the possessor of a controlled drug is presumed to have known the nature of that drug. There was no reason why this presumption should not operate where an accused person is unconscious when he is found to be in possession of a drug. The danger that the drug was planted on him would have been dealt with at the first stage of the inquiry, when the Prosecution had to prove that he had the *mens rea* of possession despite his unconsciousness at the time the drug was discovered on him. Where this threshold had been met, the accused's unconsciousness alone could not also be used to rebut the presumption under s 18(2) of the MDA.

7 Instead, such an accused person must rebut the presumption under s 18(2) of the MDA on the balance of probabilities by relying on observable facts preceding his state of unconsciousness, or by relying on the circumstances in which he was found with the controlled drug. For instance, in *Chee Chiew Heong v Public Prosecutor* [1981] 2 MLJ 287, the accused ("Chee") was found asleep on a train in possession of a parcel that was found to contain 1146.33g of heroin and 81.03g of morphine. The presumption under s 37(*d*) of the Malaysian Dangerous Drugs Ordinance 1952 operated such that Chee was deemed to be in possession of and to know of the existence of the drugs. Chee successfully rebutted the presumption by relying on a cautioned statement that constituted evidence of what happened *before* she was found asleep on the train, to convince the court that she genuinely believed that she was in possession of a package of

dried prawns which her friend had passed to her. Ms Tay noted that it was because Chee did not dispute possession of the parcel in the first place that she could run arguments to rebut the presumption. It would, however, be difficult for an accused person to adduce evidence to rebut the presumption in s 18(2) of the MDA if he were to also dispute possession by running the defence that he was not aware of the presence of the drug on him: *Public Prosecutor v Sibeko Lindiwe Mary-Jane* [2016] SGHC 199 at [76].

8 For completeness, Ms Tay set out general principles to guide the court's assessment of when the presumption under s 18(2) of the MDA may be found to be rebutted. She highlighted that this was a fact-sensitive analysis that turned on the veracity and credibility of the accused's evidence: *Zainal bin Hamad v Public Prosecutor* [2018] 2 SLR 1119 at [23].

9 At the appeal, the Prosecution agreed with Ms Tay's analysis as set out above. The Prosecution limited its submissions to the facts that had been established at trial. The Prosecution argued that the straw could not have originated from the hospital bed, blanket or nurses, and that it was incredible that the sharp edges of the straw could have been caught on the appellant's clothing without his knowledge and remained on his clothing until the straw was found. The appellant was also not a credible witness and there was nothing to substantiate his bare assertions that he had been framed. Given that the straw had been found in an intimate place, *ie*, near the appellant's crotch area, these combined circumstances gave rise to the irresistible inference that he had to have known that the straw was in his possession prior to his being brought to the hospital.

My decision

10 In proving possession, it was for the Prosecution to discharge its burden of proving beyond reasonable doubt that the appellant had both physical control over the straw, as well as knowledge of its existence. It was not at this point for the Defence to prove on the balance of probabilities that there were alternative explanations that accounted for the presence of the straw at the location where it was found.

11 I found that there was insufficient evidence, or no evidence, at trial to show that the appellant had any knowledge of the existence of the straw before or when it was discovered on his person. In discharging its burden of proof, it was insufficient for the Prosecution to assert that there "was no other reasonable way [the straw] could have appeared at the [appellant's] crotch area",[6] without at least establishing the circumstances during or leading up to the period when the appellant was unconscious. Without knowing these circumstances, there was insufficient evidence to conclude that there was no other reasonable explanation to account for the appearance of straw.

12 I should note that this case was quite different from cases where the circumstances rule out any reasonable explanation for the appearance of the drug on an offender, so as to remove any reasonable doubt that the offender had not been in possession of the drug before he fell unconscious. This was not a situation where an unconscious offender had been found in possession of drugs in a locked room that only he had access to. The appellant had been found unconscious in a void deck, where he had lain for an indeterminate period of time and in unknown circumstances. No doubt, the drugs in this case were found on a private area of the appellant's body, but I could not in the circumstances

6 Prosecution's Closing Submissions at para 5.

conclude that there was no other reasonable explanation for how the drugs came to be there, and the burden remained for the Prosecution to prove at least the element of possession before the presumption under s 18(2) of the MDA came into play.

13 In terms of the submissions on law, I do accept that the presumption under s 18(2) of the MDA could not operate against an unconscious person, unless it was shown, at least, that that person had possession of the drug before he fell unconscious. Going beyond that goes beyond the intention of the legislative regime, and imposes an unwarranted burden on an accused person: it is hard to envisage how a person who is unconscious the whole of the time could be culpable legally or even morally.

14 Accordingly, I allow the appellant's appeal against conviction, and acquit him of the charge under s 8(*a*) and punishable under s 33(1) of the MDA. I thank Ms Tay for her thorough and comprehensive submissions which greatly assisted the deliberations of the court and look forward to having Ms Tay make submissions before the court in future. I would also like to record my appreciation to the Prosecution for the principled stance it has taken in this appeal.

Aedit Abdullah
Judge

The appellant in person;
Muhamad Imaduddien and Sia Jiazheng (Attorney-General's Chamber) for the Prosecution;
Jo Tay Yu Xi (Allen & Gledhill LLP) as young *amicus curiae*.