

Ashok Kumar Giri v Public Prosecutor
[2001] SGCA 56

Case Number : Cr App 10/2001, CC 15/2001/02
Decision Date : 03 September 2001
Tribunal/Court : Court of Appeal
Coram : Chao Hick Tin JA; L P Thean JA; Yong Pung How CJ
Counsel Name(s) : Subhas Anandan, Anand Nalachandran and Yeo Khung Chye (Harry Elias Partnership) for the appellant; Bala Reddy and Jill Tan Li Ching (Deputy Public Prosecutors) for the respondent
Parties : Ashok Kumar Giri — Public Prosecutor

Judgment:

1. The appellant, Ashok Kumar Giri, and one Mohamed Abdul Nasser bin Mahamood ('Abdul Nasser'), were jointly tried before the High Court. The appellant was charged with trafficking in five parcels of cannabis, weighing a total of 2370.5 grams nett, by delivering them to Abdul Nasser in a vehicle No. SDD 1802 C at the slip road of Aljunied Road leading to the Mass Rapid Transport ('MRT') station at about 11.30 am on 23 October 2000, an offence under s 5(1)(a) and punishable under s 33 of the Misuse of Drugs Act (Cap 185, 1999 ed). Abdul Nasser was charged with having possession of the same five parcels of cannabis for the purpose of trafficking, an offence under s 5(1)(a) read with s 5(2) and also punishable under s 33 of the Act.

2. At the conclusion of the trial, Abdul Nasser was acquitted but the appellant was convicted and sentenced to suffer death. Against his conviction, the appellant appealed. We dismissed the appeal, and now give our reasons.

Case for the prosecution

3. The facts leading to the arrest of the appellant and Abdul Nasser were not in dispute. Both were arrested on the morning of 23 October 2000, at around 11.50 am, in the midst of a surveillance operation carried out by officers from the Central Narcotics Bureau ('CNB'). A few minutes before the arrest, Abdul Nasser was seen boarding a silver coloured car driven by the appellant along Aljunied Road. The appellant drove the car into a slip road known as Lorong 25, near Aljunied MRT station. There, Abdul Nasser alighted, retrieved a rather large plastic bag from the rear passenger seat of the car, and then walked towards the MRT station. On his way he was arrested. The plastic bag he was carrying was found to have in it five parcels of substances, which were later found by the Department of Scientific Services to contain 2370.5 grams of cannabis.

4. The appellant was apprehended at about the same time as Abdul Nasser. He did not have a chance to turn his car around to make his escape. A search was conducted on him and his car and, among the things found, were: (i) \$317.85 from his wallet, (ii) \$950 from the side pocket of the driver's door, and (iii) \$6,740 from the pocket behind the driver's seat. It was subsequently established that the \$6,740 found in the car belonged to his sister and her husband, as was the car driven by him.

5. Upon the arrest of Abdul Nasser, he was brought to the side of the slip road and questioned by one ASP Chin Chee Meng ('ASP Chin'), the officer-in-charge of the surveillance of Abdul Nasser and the appellant. According to him, he recorded an oral statement from Abdul Nasser at around 11.55 am. At the trial, a voir dire was held to determine whether the statement was made voluntarily. At the conclusion, this statement was found not to have been made by Abdul Nasser voluntarily, and was therefore not admitted in evidence.

6. A statement was similarly recorded by ASP Chin from the appellant after his arrest, but in differing circumstances. According to the appellant, upon his arrest he was made to lie prone on the ground under the hot noonday sun, pinned down by the two CNB officers who arrested him, for about 30 to 40 minutes, before being moved to some shade, but not until he had answered several questions posed to him by ASP Chin. He claimed that ASP Chin told him that only when his questions were answered would he be moved to the shade and given some water. This was in spite of his pleas to the contrary. The appellant testified that he asked for some water not only to quench his thirst but also to wash sweat from his face, which had trickled into his eyes causing him pain. He further alleged that one of the officers who arrested him brandished a gun in his face.

7. The prosecution denied the appellant's version of the events. Their account was that after the appellant was arrested, ASP Chin gave instructions that the appellant be brought to the left side of the appellant's car where there was some shade from the hot afternoon sun. ASP Chin then proceeded to take a statement from Abdul Nasser and thereafter he took a statement from the appellant, which took about 20 minutes and ended at around 12.40 pm. Upon completing the statement, the questions and answers were read back to the appellant, who confirmed that it was correct. The statement was then counter-signed by the appellant, ASP Chin and one Sergeant Azhari, another CNB officer at the scene of arrest. The statement was voluntarily made by the appellant and at no time was there any threat, inducement or promise made to him.

8. A voir dire was conducted to determine whether the statement was made by the appellant voluntarily, and at the conclusion the trial judge held that there was no threat, inducement or promise made to the appellant and that the statement was made voluntarily. Accordingly, the statement was admitted in evidence.

9. The appellant's recorded statement stated as follows:

Q1: Can you speak English?

A1: Yes. ...

Q3: What were in the plastics (sic) bag inside the car you were driving?

A3: Drugs.

Q4: What kind of drugs?

A4: What you call it... ahh Ganja.

Q5: How much Ganja were in the plastic bag?

A5: I don't know... 4 or 5 packets.

Q6: How much do you earn for sending these 4 or 5 packets of Ganja?

A6: \$500 Singapore dollars.

Q7: Who were these Ganja you were sending meant for?

A7: Nasir.

Q8: Who is Nasir?

A8: (Recorder's note: [the appellant] indicated subject [Abdul Nasser] arrested with him). That one lah arrested with me.

Q9: Who was (sic) you and Nasser going to meet?

A9: I don't know.

Q10: When did you pass the plastic bag containing the 4 or 5 packets of Ganja to Nasser?

A10: Outside the car when I stopped the car near to Aljunied MRT slip road.

Q11: Exactly how many packets of Ganja were there in the plastic bags?

A11: I really don't know it's my last piece.

Q12: 'Piece' means what?

A12: 'Piece' means Ganja.

10. Soon after the arrest, the CNB officers raided the premises occupied by the appellant and Abdul Nasser respectively. Nothing incriminating was found in the premises of Abdul Nasser; however, three small packets of substances, later found to be cannabis by the Department of Scientific Services, were recovered from the premises occupied by the appellant, namely, the unit 25-D Shelford Road.

11. Later in the early hours of the morning on 24 October 2000, at the office of the CNB, a caution statement under s 122(6) of the Criminal Procedure Code (Cap 68, 1985 ed) was recorded from the appellant by ASP Fan Tuck Chee, the investigating officer. In the statement the appellant said: 'Yes, I did give him'. We shall refer to this statement as 'the s 122(6) statement'.

The defence

12. Both the appellant and Abdul Nasser gave evidence in their respective defences. They each put up what the trial judge termed a 'cut-throat' defence, that is, each denying any knowledge of the drugs and saying that they belonged to the other. Both agreed that they were mere acquaintances of each other. Abdul Nasser stated he was introduced to the appellant by a mutual friend barely three months ago, and had met him only once thereafter prior to meeting on the day of their arrest. He claimed that the appellant telephoned him on the morning of 23 October 2000 and, upon learning that he was on his way to the market, offered him a lift. They agreed to meet by Aljunied MRT station. The appellant picked him up at the appointed place, and drove to Lorong 25. There, the appellant asked him to take out a plastic bag, which was on the rear passenger seat of the car, and hand it to a man dressed in army fatigues who was then waiting at the MRT station. The appellant also said that he would follow him after parking his car. Abdul Nasser followed the appellant's instructions, retrieved the plastic bag and walked towards the MRT station. At this juncture, the CNB officers intervened and arrested him. He claimed he did not see the contents of the bag, nor did he have the opportunity to do so, given that the events all occurred in the space of a few minutes.

13. The appellant's evidence, on the other hand, was a complete denial that he had knowledge that the plastic bag, which he delivered to Abdul Nasser, contained the cannabis. He said that he was a

maintenance manager for one Mr Loo Choon Beng ('Mr Loo') in his condominium at 25 Shelford Road as well as for Windsor Nursing Home from which he derived his pay. Working for Mr Loo entitled him to the use of the unit, 25-D Shelford Road which he shared with a gardener, although Mr Loo made it clear that this unit could not be rented out for residential purposes. The appellant took it to mean that Mr Loo would have no objection if it was rented out as a store.

14. The appellant said that his friend Sidek brought Abdul Nasser to Shelford Road sometime last year with a view to renting some space from his unit to store 'jamu', an Indonesian herbal medicine. He quoted a fee to Abdul Nasser but no agreement was concluded and the matter was left at that. Since then he met Abdul Nasser twice, including the meeting on the day of the arrest.

15. On the morning of 23 October 2000 (which was the day of the arrest), the appellant said that Abdul Nasser telephoned him and told him that he was going over to Shelford Road. The appellant told Abdul Nasser that he was not free to entertain him, as he was going to his mother's home to bring her for her medical check-up. Abdul Nasser said that he would call again. Several minutes later, he called, and told the appellant he had left a 'red bag' in the appellant's store room, and asked if the appellant could bring it to him. A few minutes later, Abdul Nasser called again, and this time he asked the appellant to meet him at the bus stop at Aljunied MRT station, and that he would pay the appellant \$50 for his trouble. The appellant claimed that Abdul Nasser later did pay him this sum. Abdul Nasser also told the appellant that the things he left behind were in the 'red bag' and that as the bag had holes, he did not want it any more and asked the appellant to transfer the contents into two plastic bags. Following this conversation and on Abdul Nasser's instructions, the appellant transferred the contents of this 'red bag' into a plastic bag which he then put into another plastic bag so that he needed to carry only one plastic bag for convenience. The contents in the 'red bag' consisted of five parcels all wrapped in masking tapes and the actual contents could not be seen. He said that they were emitting a 'funny' odour, and he thought that the contents contained herbs. He then proceeded to meet Abdul Nasser, and placed the plastic bag on the front passenger seat.

16. The appellant met Abdul Nasser at their pre-arranged meeting place. Instead of retrieving the plastic bag, Abdul Nasser boarded the appellant's car and placed the bag in the rear passenger seat. He instructed the appellant to drive to the slip road, Lorong 25 and upon arrival there, he alighted and soon thereafter he was arrested. So was the appellant.

17. As regards the three packets of cannabis recovered from 25-D Shelford Road, the appellant admitted that they belonged to him. The learned judge felt that although this evidence was not strictly relevant to the offences committed by the appellant, nonetheless it added weight to the prosecution's case that the appellant was lying when he stated he had no knowledge that he was delivering cannabis to Abdul Nasser.

The decision below

18. The charge against the appellant was that he trafficked in the five parcels of cannabis by delivering them to Abdul Nasser. He was found in possession of a plastic bag which contained the cannabis. The fact of possession of the plastic triggered the presumption under sub-ss (1) and (2) of s 18 of the Misuse of Drugs Act. He had to rebut these two presumptions by showing, on the balance of probabilities, that he did not know and could not reasonably have known that the bag he delivered to Abdul Nasser contained the drugs.

19. The trial judge found the evidence against the appellant compelling. It was not disputed that the 'red bag' containing the five parcels of cannabis was kept in the store-room of 25 - D, Shelford Road, which at the material time was occupied by the appellant. The appellant admitted that he packed the

five parcels of cannabis into a plastic bag and brought them to Aljunied MRT station. The judge found unsatisfactory the appellant's evidence that Abdul Nasser stored the 'red bag' at his store-room and that on the morning of 23 October 2000 Abdul Nasser requested him to bring the contents of the 'red bag' to him (Abdul Nasser) at Aljunied MRT station. The judge could find no cogent reason why Abdul Nasser, who was merely an acquaintance of the appellant, would have stored such a large quantity of cannabis at the store-room and have the appellant deliver them to him the following day for a fee of \$50. Further, his cautioned statement under s 122 (6) of the CPC gave no indication of his defence, which was that he had no knowledge of the contents of the bag or that the contents belonged to Abdul Nasser. A sum of \$950 was found in the side pocket on the driver's door of the car he was then driving. The judge did not find satisfactory his explanation as to how he came to this sum. Three small packets of cannabis were found in the premises which he occupied, and he admitted that they belonged to him and that he smoked cannabis from time to time. Summing up his case against the appellant, the learned judge held at 25: 25 Taking all the evidence into account, including the manner in which the second accused [the appellant] gave his testimony, I am satisfied that the prosecution had proved its case beyond reasonable doubt against the second accused, and nothing he or his witnesses have said had created any doubt in my mind that he did not know that the plastic bag he brought to the first accused [Abdul Nasser] contained cannabis.

The appeal

20. The appellant's appeal was straightforward. In his submission before us, Mr Subhas Anandan, counsel for the appellant, made two principal arguments. The first related to the judge's acceptance of the prejudicial evidence of Abdul Nasser against the appellant. The second related to the statements made by the appellant to the CNB officers after his arrest.

Evidence of Abdul Nasser

21. The appellant and Abdul Nasser each put up a defence which cast the blame on the other. Each claimed that he had no knowledge of the drugs in the plastic bag and each said that the contents of the plastic bag belonged to the other and that he was used as a mere pawn in the drug trafficking operation carried out by the other. Before the judge, the respective counsels for the appellant and Abdul Nasser each urged the judge to exercise great caution in accepting the evidence of the other accused against his own client.

22. Before us, counsel for the appellant submitted that the judge failed to consider adequately the likelihood of Abdul Nasser giving unreliable evidence so as to exonerate himself and implicate the appellant. He pointed out that the appellant and Abdul Nasser were *participes criminis* in the offence with which they were charged, and that under s 116 of the Evidence Act the court may presume that an accomplice was unworthy of credit and his evidence be treated with caution. Counsel therefore submitted that Abdul Nasser's evidence should be presumed to be unworthy of credit and should be treated as such, and that the judge erred in accepting the evidence of Abdul Nasser on the material events showing that he had no knowledge of the drugs, despite the material discrepancies and inconsistencies therein.

23. It is true that Abdul Nasser's evidence in substance was that he had no knowledge of the contents of the plastic bag. His evidence was that he retrieved the bag from the rear seat of the appellant's car because he was asked by the appellant to bring it out and hand it to a man in army fatigues who was then waiting at the MRT station. In this respect, there was evidence from the prosecution that there was a man in army fatigues at the MRT station and an unsuccessful attempt was made to arrest that man.

24. The evidence of Abdul Nasser was crucial to his defence. The judge considered this evidence against all the evidence adduced against him and evaluated it at 30 as follows: 30. ... So, having put the case against the first accused [Abdul Nasser] as highly as I can on the evidence, I weigh them against the testimony of the first accused himself. He was clearly not as articulate or alert as the second accused [the appellant]. If he had a devious or sophisticated mind it was not apparent from his evidence or the manner in which he gave it. I am prepared to attribute the inaccuracies in his evidence to forgetfulness and simplicity of mind. I had also taken into account that he had no previous connections with drug-taking or drug-trafficking; nor were there any drugs or drug related paraphernalia in his possession anywhere; and that his s 121 CPC statement (admitted in evidence by the defence) which appeared to have been comprehensively and fairly recorded by ASP Fun, about a week after the arrest, bears out what he had said in court. I am satisfied that that on the balance of probabilities, the first accused did not know that he was carrying cannabis at the time of his arrest.

In our judgment the judge had properly evaluated the evidence of Abdul Nasser and was justified in coming to the conclusion that Abdul Nasser did not know that the plastic bag contained cannabis.

The appellant's evidence

25. Turning to the evidence of the appellant, we did not find that the judge evaluated his evidence relying solely on the evidence of Abdul Nasser. The judge found that the evidence against the appellant was compelling and in arriving at this conclusion no reliance was placed on Abdul Nasser's evidence. The judge said at 21: 21. The evidence against the second accused [the appellant] is compelling. He packed the five parcels of cannabis into the plastic bag and brought them in his car to the Aljunied MRT station. ... His cautioned statement gave no indication of his defence which was that he had no knowledge of the contents, or that the contents belonged to the first accused [Abdul Nasser]. Instead, it was an admission of the fact of his giving the bag (and cannabis) to the first accused. A large sum of money was found in the car driven by the second accused at the time of his arrest. Cannabis was found in his place of abode; and he freely admitted that those belonged to him and that he smoked cannabis from time to time. His testimony must, therefore, be considered against this background.

26. Next, the judge considered the inherent improbabilities of the appellant's evidence that he did not know that the five parcels in the plastic bag contained cannabis. The judge held at 22: 22. The evidence of the second accused [the appellant] is unsatisfactory in certain aspects. First, there was no cogent reason why the first accused [Abdul Nasser] could not have kept the "red" bag (containing the five parcels of cannabis) in his own home. The bag was not at all a large one and could easily have been kept almost anywhere in a flat. No evidence or suggestion was put forward as to why he could not have done so. Secondly, no reason was given or suggested as to why the first accused would go unannounced to the residence of the second accused, a person he had only met twice before, and leave a consignment of cannabis there, unguarded, without telling him. The incontrovertible evidence was that the "red" bag was kept in an unlocked store-room at the second accused's flat at 25-D Shelford Road. If the cannabis belonged to the first accused, would he have done that? I think it most unlikely. Furthermore, no reason was offered as to why he would leave the bag there for just the night and Sunday and have the second accused deliver them to him for a delivery fee of \$50. I am of the view that the testimony of the second accused that the first accused instructed him to transfer the cannabis from the "red" bag to two plastic bags was an embellishment. The second accused said that the first accused told him that he no longer required the "red" bag because it was full of holes. When examined in court, the bag was rather new and no holes were found on it.

The judge could not be faulted in his evaluation of this evidence of the appellant. We agreed entirely

with the judge.

The appellant's statements

27. We now turn to counsel's arguments in relation to the two statements made by the appellant after his arrest, namely, the statement made by the appellant to ASP Chin immediately after his arrest, and the s 122(6) statement made by the appellant to ASP Fan Tuck Chee.

28. We turn first to counsel's argument on the s 122(6) statement. That statement was taken in the wee hours of the morning, and counsel submitted that insufficient weight was given to the fact that the appellant was under extreme exhaustion then and that statement should have been excluded altogether. We were unable to agree. The judge clearly took into account that the statement was taken from the appellant at the very early hours of the morning and the appellant's state of mind at the time. Nonetheless, he came to the conclusion that the statement was given by him voluntarily. We only needed to refer to the relevant parts of the learned judge's reasons, which was stated at 23: 23 ... I take into account that the second accused [the appellant] was under some stress on the day of his arrest, and that he was led from one place to another in the course of assisting the CNB in their investigations such that by 3 am the following morning when his cautioned statement was recorded he was probably exhausted. In the circumstances, how ought his cautioned statement be evaluated? There is no doubt that the statement was properly recorded by the investigating officer ASP Fan Tuck Chee. All the second accused said was, "Yes, I did give him." I do not think that, given his character and disposition, the second accused could not, even in those circumstances, have at least said, "Those drugs did not belong to me" or words to that effect. .. The cautioned statement of the second accused was of no assistance to him even if no adverse inference was drawn from it.

In our judgment, the judge did not erred in his evaluation of the appellant's s 122(6) statement.

29. Counsel's argument against the admission of the statement made to ASP Chin was more contentious. It will be recalled that the appellant claimed that he was pinned down on the ground for more than 30 minutes after his arrest whilst a statement was elicited from him. It was further claimed that he was told he would only be moved to some shade after he answered several questions posed by ASP Chin. Counsel argued that such treatment and handling of the appellant by the CNB officers after the arrest was tantamount to oppression sufficient to justify the exclusion of the statement, as it was obvious that in the circumstances the statement was not made by the appellant voluntarily. It was not disputed that oppression could render inadmissible a confession in the present instance under s 24 of the Evidence Act: see *Gulam bin Notan Mohd Shariff Jamalddin v PP* [1999] 2 SLR 181 at p 203.

30. The prosecution's witnesses, however, denied the appellant's allegations. In particular, Sgt Khairudin who was present in the arrest of the appellant denied that the appellant was pinned to the ground for 40 minutes. ASP Chin also denied the appellant's allegations. He said that he asked the officers who had arrested the appellant to bring him to the left side of the car, where there was some shade, so that he could keep an eye on him, while he recorded a statement from Abdul Nasser. The appellant was seated on the road from the time of his arrest to 12.20 pm when he began recording a statement from the appellant, which took about 20 minutes.

31. Unfortunately, the judge did not make a clear finding on all this evidence before him. We were in no position to determine on the evidence whether in fact the appellant was so treated as he alleged. Suffice it to say that if what the appellant said was substantially true, then the circumstances in which the statement was taken were oppressive and the burden was on the prosecution to prove otherwise. For our purpose, this was not a material point. Even if this evidence was excluded - and in

this appeal we proceeded on that basis - there was ample evidence to justify the conclusion of the judge that the prosecution had proved the charge against the appellant beyond reasonable doubt.

Decision on appeal

32. Like the judge, we found the evidence against the appellant compelling. It was admitted by him that the five parcels containing drugs were stored at 25-D Shelford Road, the store-room of which he was in occupation at the material time. He did pack the five parcels into the big plastic bag and brought the bag in his car to Aljunied MRT station. At the time he packed the five parcels, he noticed a funny odour emitting from them. It was apparent to us that he knew what the odour was. On his own admission, he was a drug user, and upon a raid carried out at 25-D Shelford Road, three small packets of cannabis were found there and he admitted that they belonged to him. His evidence was that the five parcels were stored in the store-room by Abdul Nasser. The judge found this highly improbable and did not accept it. Nor did we. We could find no reason why Abdul Nasser, being only a mere acquaintance of the appellant, whom he had met only twice previously, would leave such a large quantity of cannabis at his store-room only to be delivered to him later.

33. The charge against the appellant was that he trafficked in the five parcels containing cannabis by delivering them to Abdul Nasser, an offence under s 5(1)(a) of the Misuse of Drugs Act. On the evidence, it was proved that he packed the five parcels, placed them in a large plastic bag, brought them in his car and delivered them to Abdul Nasser. As a result, there arose the presumptions under sub-ss (1) and (2) of s 18 of the Act. Under s 18(1) of the Act, as he had in his possession, custody or control of the plastic bag which contained the drugs, he was presumed, until the contrary was proved, to have the drugs in his possession. Under s 18(2) of the Act, he was presumed, until the contrary was proved, to know the nature the drugs. The burden therefore was on him to rebut the statutory presumptions. He clearly failed to do so. His own evidence was that he did not know that the five parcels contained cannabis. In view of the weight of evidence against him, his evidence was not accepted by the judge, nor was it accepted by us. In our judgment, he had not rebutted the presumptions. He had possession of the drugs and he delivered them to Abdul Nasser. Therefore, the charge of trafficking in the five parcels containing the cannabis had been proved beyond reasonable doubt. Accordingly, the appeal was dismissed.

Appeal dismissed

**- Sgd -
YONG PUNG HOW
Chief Justice**

**- Sgd -
L P THEAN
Judge of Appeal**

**- Sgd -
CHAO HICK TIN
Judge of Appeal**

Date: 3 September 2001

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