

Syed Abdul Mutalip bin Syed Sidek and Another v Public Prosecutor
[2002] SGCA 27

Case Number : Cr App 1/2002
Decision Date : 17 May 2002
Tribunal/Court : Court of Appeal
Coram : Chao Hick Tin JA; Tan Lee Meng J; Yong Pung How CJ
Counsel Name(s) : Gurdip Singh (George Sandosham Gurdip & Partners) and D Vivekananda (Niru & Co) (both assigned) for the first appellant; SS Dhillon (Dhillon Dendroff & Partners) and Suresh Veloo (Suresh & Co) (both assigned) for the second appellant; Bala Reddy and Jason Tan (Deputy Public Prosecutors) for the respondent
Parties : Syed Abdul Mutalip bin Syed Sidek; Another — Public Prosecutor

Evidence – Admissibility of evidence – Retracted confessions – Both accused making incriminating statements to Central Narcotics Bureau – Subsequent retraction of statements – Whether statements confessions – Whether accused can be convicted on own retracted confession – Whether accused's retracted confession can be used against co-accused – Whether confessions voluntary and true – Whether explanations for retractions credible

Evidence – Weight of evidence – Accused's statements implicating co-accused – Weight to be ascribed

Criminal Law – Complicity – Common intention – Both accused handling and repacking controlled drugs in room – Whether possession of drugs in furtherance of common intention to traffic – Whether failure by trial judge to direct himself sufficiently on issue – s 34 Penal Code (Cap 224)

Criminal Procedure and Sentencing – Alibi – Surprise defence of alibi during trial – Whether witness's particulars ought to be furnished earlier to prosecution – Burden of proof of alibi – Whether adverse inference ought to be drawn against prosecution for not calling witness – s 155(1) Criminal Procedure Code (Cap 68) – s 105 Evidence Act (Cap 97, 1997 Ed)

Judgment

GROUND OF DECISION

1. The first appellant, Syed Abdul Mutalip Bin Syed Sidek ("Syed"), and the second appellant, Roetikno Bin Shariff ("Roetikno"), were jointly tried and found guilty of the following charge:

That you, Syed Abdul Mutalip Bin Syed Sidek and Roetikno Bin Shariff, are charged that you, on or about the 17th day of April 2001, at about 5.20pm in room 406 of Taipei Hotel, No 60 Lorong 8, Geylang Road, Singapore, and in furtherance of the common intention of you both, did traffic in a Class 'A' controlled drug specified in the First Schedule of the Misuse of Drugs Act, Chapter 185, to wit, by having in your possession for the purpose of trafficking, 78.85 grams of diamorphine at the said place, without any authorisation under the said Act or the regulations made thereunder, and you have thereby committed an offence under section 5(1)(a) of the Misuse of Drugs Act, Chapter 185, read with section 5(2) of the aforesaid Act and section 34 of the Penal Code, Chapter 224, and punishable under section 33 of the Misuse of Drugs Act, Chapter 185.

2. Both appellants, who were given the mandatory sentence of death for the offence, appealed against the decision of the trial judge.

Background

3. On the evening of 17 April 2001, police officers from the Anti-Vice Branch of the Criminal Investigation Department conducted a vice raid at the Taipei Hotel at No 60, Lorong 8, Geylang Road. During the raid, a police officer, Sgt Stanley Chan, used a master key to unlock the door of Room 406. When he found that the door was latched from within, he identified himself as a police officer and ordered the occupants of the room to open the door.

4. When the door of the room was not opened, the police officers forced their way in. They found no one there and noticed that a window in the room was open. Moments later, an employee of the hotel, one Wong Fong Yin, who was manning the lobby counter, and a police officer, Sgt May Tan, who was stationed at the staircase landing, encountered two Malay men, one with long hair and the other slightly balding, who walked past them.

5. In Room 406, the police found yellowish granular substances in packets on the floor and in the exposed false ceiling of the toilet. In addition, they recovered a weighing scale and unused plastic sachets on the bed and elsewhere in the room. Tests by the Department of Forensic Science confirmed that the seized substances contained no less than 78.85 grams of diamorphine.

6. Syed was arrested by Central Narcotics Bureau ("CNB") officers on 20 April 2001 while he was returning a hired vehicle to its owner. On 30 April 2001, Roetikno was arrested while he was at Room 202 of the Compass Hotel at Lorong 22, Geylang .

The case against the appellants

7. The prosecution contended that Syed and Roetikno were packing diamorphine in Room 406 of Taipei Hotel when the anti-vice raid took place on the evening of 17 April 2001. It was asserted that before the two of them escaped though the window and fled to Room 305, which was directly below Room 406, they hid some drugs in the false ceiling of the toilet of Room 406. They then walked briskly past Sgt May and escaped from the premises.

8. The prosecution relied on a number of statements by the appellants to the CNB. In their statements, Syed and Roetikno admitted that they were in Room 406 of Taipei Hotel when the police knocked on the door of that room on 17 April 2001. To begin with, in his statement on 24 April 2001, Syed left no doubt as to his role in Room 406 at the material time when he stated as follows:

On 17.4.2001, my friend "Dino" [Roetikno] and me (*sic*) were in Room 406 of Taipei Hotel. We were repacking the big packets of heroin into smaller sachets on the bed. Dina had asked me to help him. My job was just to seal the plastic sachets after Dino had filled them with heroin. I used a white candle to seal the sachets. While doing this, there was a knock on the door. Dino went to answer. He opened the latched door and then closed it again after the people outside identified themselves as police officers. He then said "Blah, blah!" to me and signalled me to get out of the room using his hands. I then picked up the yellow plastic tray filled with heroin and put it in the false ceiling in the toilet. The false ceiling was already opened. As I was doing this, I saw Dino climbed (*sic*) out of the window. I looked out of the window and saw Dino going into Room 305 below via the window. I also climbed down to the 3rd floor window of Room 305 and

entered it.

9. In another statement on 3 May 2001, Syed again admitted that he and Roetikno were packing drugs in Room 406 when he stated as follows:

"... At Room 406, I knocked on the door. Dino opened it. When I entered the room, I saw a tray of heroin on the bed. I also saw some empty sachets, candles and a small digital weighing scale. Dino told me that he was packing the heroin and asked me to help him seal the packets after he filled them with heroin. I agreed to help him as the room was under registered (*sic*) my name. I also have never done it before and wanted to try it out of curiosity. That was the first time I saw Dino repacking a large amount of heroin..."

10. As for Roetikno, he incriminated himself and Syed in his statement on 3 May 2001 when he stated as follows:

On 17.04.2001, I was in room 406. My friend, 'Talip' was with me. We were putting the heroin into smaller packets. I helped to put the heroin in the small packets and weigh them. Talip helped to burn the plastic to seal the plastic packets. I had opened 2 big packets of heroin. I placed the heroin on a tray. We then laid out the weighing scale, empty sachets, candle, envelopes and the tray of heroin on the bed. Before we could start repacking, there was a knock on the door. I went to see who it was. Before I could reach the door, the person outside had opened it. The door was latched from inside and it could not be opened fully. The person outside identified themselves as police officers. I then panicked and ran back to the bed. I informed Talip that the police are outside. As I was doing that, I heard the sound of the door being break opened (*sic*). I then jumped out of the window to try and escape. I nearly fell but managed to hold on to the window frame at the third storey. I then climbed into the room. I did not know that the room is my own room 305. While I was hanging outside the window, I looked up and saw Talip climbing out of the fourth storey window. After I got into the third storey room, I opened the window frame to let Talip step on it. I then went to the door, opened it and went out of the room

11. Roetikno's other equally incriminating statement of 5 May 2001 was in the following terms:

On 16.04.2001, I received a call from a male person by the name of 'Mail'. He asked me to standby to receive some heroin to repack ... A few hours later, a male Chinese called 'Ah Boy' called me at my handphone.... He then told me to go to the fourth floor pantry to look for a black box with a silver cover ... I left room 305 and checked the fourth floor pantry. I found a black box with a silver cover in the pantry ... Talip knows that we are waiting for the delivery of some heroin to be repacked. We have agreed to use room 406 to do the repacking ... On 17.04.2001, we had planned to do the repacking early but we had overslept ... About 5 pm, I went into room 406 and waited for Talip. While waiting for Talip, I brought down the items in the false ceiling in the toilet and placed them on the bed. While waiting for Talip to come, I cut open two packets of heroin and placed the contents on a tray... Talip then came to the room. We then start to repack the heroin. We had already repacked some plastic sachets of heroin when the police came ..."

12. Apart from the aforesaid admissions by the appellants, the trial judge took into account other relevant evidence. Wong Fong Yin ("Wong"), an employee of the Taipei Hotel, testified that Syed and Roetikno checked into the hotel together and were the occupants of Rooms 406 and 305 at the material time. Furthermore, both Wong and Sgt May Tan testified that they saw Syed and Roetikno walking briskly past them and out of the hotel premises at the material time. Wong recognised the duo as he had seen them a few times during their stay in the hotel. The hotel register confirmed the date and time when the appellants checked into the hotel and renewed their stay there. Furthermore, some items found in Room 406 belonged to the appellants. These included three packets of medicine bearing Roetikno's name. In their statements to the CNB, the appellants admitted that the items in the room belonged to them.

13. A police fingerprint expert, Snr Staff Sergeant Lim Soy Poh, adduced two Fingerprint Examination Reports, which revealed that two of five fingerprint marks discovered on exhibits recovered from Room 406 were made by Syed, while the remaining three fingerprint marks were made by Roetikno. Of significance was the fact that the appellants' fingerprints were found on different parts of a box found in Room 406. That box was referred to by Roetikno in his statements as the box that was used for the delivery of the diamorphine.

The Defence

14. In their defence, the appellants contradicted the admissions made by them in their statements to the CNB. Both of them denied possessing any of the drugs seized by CNB. They asserted that a mysterious third party had brought the drugs into Room 406 at the Taipei Hotel without their knowledge and consent.

15. Syed's defence was that the box containing the drugs was owned by a friend of his, a Chinese pimp called 'Boy', who had requested him to run certain errands, such as hiring a motor vehicle and booking a hotel room in the Taipei Hotel. Boy had left the box behind in the vehicle and asked him to keep it. Syed said that he asked Roetikno to take the box to the Taipei Hotel. He added that sometime after 4 p.m. on 17 April 2001, Boy telephoned him and invited him to Room 406 to consume some heroin. He went to Room 406 and promptly handed the box and its contents to Boy when the latter asked about the whereabouts of the box. Syed claimed that while he was taking a shower in the bathroom, he heard a knock on the main door. He emerged from the bathroom and it was only then that he noticed that there were drugs on the bed. Realising that the police were trying to gain entry into the room, he panicked and escaped through the window into Room 305 below where Roetikno was. As both of them had consumed drugs and were under CNB supervision, they fled the hotel.

16. Roetikno's defence complemented that of Syed. According to him, his fingerprints were found on the box containing the drugs because Syed had asked him to take the box from the rear seat of the rented motor vehicle and carry it up to Room 406. He claimed to have been in Room 305 of the Taipei Hotel throughout 17 April 2001 and that at around 5 p.m., Syed suddenly appeared in Room 305 and told him that he had entered via the window whilst escaping from a police raid. Both of them then made their escape as they were under CNB supervision.

17. While both Syed and Roetikno retracted their confessions in their statements to the CNB, they did not allege that those statements had not been made voluntarily. They merely claimed that the statements to the CNB were untruthful. As for why Boy was not mentioned in his statements to the CNB, Syed explained that he did not say anything about Boy as the CNB was looking for Roetikno and not Boy. In any case, he was worried that the CNB would not believe him as he did not know the full

name and particulars of Boy. He therefore decided to make use of Roetikno by implicating him as he thought that the latter had gone to Malaysia. He claimed that he was in a confused state of mind and did not realise the consequences of his statements to the CNB.

18. As for Roetikno, he said that he had substantially fabricated his voluntary statements to the CNB in order to help Syed, since he felt obligated to the latter for help given to him in the past. He did not consider the implications of his incriminating statements. It was only when he was aware of the quantity of the drugs seized from Room 406 that he realised that he had made a grave mistake. He said that as Syed advised him to tell the truth, he decided to retract his statements to the CNB.

The trial judge's decision

19. The trial judge said that the explanations offered by Syed and Roetikno for retracting their incriminating statements to the CNB were illogical and unbelievable. He had no doubt that Syed and Roetikno were packing drugs in Room 406 of the Taipei Hotel when the police appeared on the scene during the course of their anti-vice raid and that both of them were in possession of the diamorphine. In any event, they had explicitly confessed to re-packing the drugs in smaller sachets in Room 406 at the material time. The judge said that both Syed and Roetikno had a common intention to traffic in the drugs. As they offered nothing credible to rebut the presumption of possession for the purpose of trafficking, under s 17 of the Misuse of Drugs Act, he found them guilty of the charge and passed the mandatory sentence of death on them.

The appeal

20. The main plank in the appellants' appeal is that with the retraction of their statements to the CNB, the trial judge had insufficient evidence to convict them. They contended that the trial judge failed to consider the ramifications of the retraction of their statements to the CNB, which were inconsistent with their sworn testimony during the trial.

21. The admissions made by Syed and Roetikno in their statements to the CNB were undoubtedly confessions of their guilt. In innumerable cases, including *Chai Chien Wei Kelvin v PP* [1999] 1 SLR 25 and *Anandagoda v The Queen* [1962] MLJ 289, it was made clear that the test as to whether or not a statement is a confession is an objective one. It depends on whether to the mind of a reasonable person reading the statement at the time and in the circumstances in which it was made, it can be said to amount to a statement that the accused committed the offence or suggest the inference that he committed the offence (*Per* Lord Guest in *Anandagoda v The Queen* at p 291). An accused person who retracts during his trial a confession he made earlier on can still be convicted on the basis of the confession if the court is satisfied that it was made voluntarily and that it was true. In *Yap Sow Keong v PP* [1947] MLJ 90, 91, Willan CJ who delivered the judgment of the Malayan Union Court of Appeal said as follows:

In our view the law as to the admissibility of retracted confessions in evidence is clear and put shortly it is that an accused person can be convicted on his own confession even when it is retracted, if the court is satisfied of its truth. We do not agree with those Indian decisions which lay down that before a person can be convicted on his retracted confession there must be corroborative evidence to support it.

22. A similar position was taken by this Court in *Ismail bin U K Abdul Rahman v PP* [1972-74] SLR

232. While the court should consider any explanation that the accused person gives for his change of position, the explanation can be rejected if it is found to be untrue.

23. It must be noted that neither Syed nor Roetikno denied that they had given the statements to the CNB voluntarily. Syed's reasons as to why his confessions were fabricated were not credible. He claimed to have falsely incriminated himself and Roetikno although he knew that the offence in question carried the death penalty. In any case, the exculpatory version of facts given by Syed at the trial did not appear anywhere in his statements to the CNB. As for Roetikno, his reasons for lying in his statements to the CNB were understandably rejected by the trial judge. Although he claimed that he wanted to help Syed, he incriminated the latter in his statements. If he was, as he claimed, innocent, all that he had to do was to assert his innocence. Instead, he chose to admit that he and Syed were packing drugs in Room 406 of Taipei Hotel at the material time. In our view, the judge had good grounds for holding that the appellants' confessions in their statements to the CNB were true.

24. The other arguments advanced by the appellants against their conviction also lacked merit. Syed asserted that the trial judge failed to direct himself sufficiently on the issue of common intention under Section 34 of the Penal Code, Cap 224. We were satisfied that the trial judge, who relied on, inter alia, the decision of this Court in *Foong Seow Ngui & Ors v PP* [1995] 3 SLR 785 and other cases, including *Mahbub Shah v Emperor* (1945) 47 Bom LR 941 and *Barendra Kumar Ghosh v Emperor* AIR 1925 PC 1, carefully considered the applicable principles and case law on common intention. The judge was clearly right when he concluded that, on the basis of the finding that Syed and Roetikno handled and repacked the drugs in Room 406 of Taipei Hotel at the material time, they were in possession of the drugs in furtherance of the common intention to traffic in them.

25. As for Roetikno, he alleged that the trial judge erred when he failed to treat Syed's statements with caution as the latter had a reason for giving incriminating evidence against him. He pointed out that at the time of the police raid, he was in room 305 of Taipei Hotel with one Sasha at the time of the police raid. This was confirmed during the trial by Syed. Furthermore, Syed had testified that the said drugs belonged to Boy. Roetikno also contended that the trial judge erred by not drawing an adverse inference with respect to the prosecution's failure to call Sasha, who was in room 305 with him at the material time, to testify.

26. As far as Syed's statements to the CNB are concerned, it ought to be reiterated that an accused person's confession, though retracted, can be used against a co-accused so long as the court is satisfied after taking into account the explanation given for the retraction, that the confession is true and that it was made voluntarily. This was made clear by this Court in *PP v Rozman bin Jusoh & Anor* [1995] 3 SLR 317 and *Panya Martmontree v PP* [1995] 3 SLR 341. Needless to say, there is a question as to the proper weight to be ascribed to the statement of one accused who implicates the co-accused. We are satisfied that the trial judge gave this question sufficient attention and see no reason to disagree with his conclusion.

27. As for the prosecution's failure to call Sasha to testify, it should be borne in mind that by testifying that he was in Room 305, and not in Room 406, at the material time, Roetikno relied on an alibi. In such a case, Sasha's particulars ought to have been furnished (see section 155(1) of the Criminal Procedure Code). The purpose of such particulars is to enable the prosecution to verify the genuineness of the alibi: *Lee Choon Chee v PP* [1996] 1 SLR 264. This could not have been a difficult task as Sasha was Roetikno's girlfriend. It ought not be overlooked that section 105 of the Evidence Act provides as follows:

The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof

of that fact shall lie on any particular person.

Illustration (b) of the said section adds as follows:

B wishes the court to believe that at the time in question he was elsewhere.
He must prove it.

28. In our view, the trial judge adequately dealt with the question of drawing an adverse inference from the fact that Sasha was not called as a witness. In paragraph 83 of his Grounds of Decision, he explained why he was not inclined to draw any adverse inferences that the prosecution was hiding unfavourable evidence by not calling Sasha as a witness in the following terms:

The second accused, having given a voluntary statement admitting to his involvement in the offence and his presence in room 406 when the raiding party was at the room door, had a measure of burden, however little, to render self-help and lift himself out of the quagmire which was entirely of his own making. In fact, his defence in court was one almost bordering on alibi. If it was indeed his defence, such a defence should have been disclosed to the prosecution at the earliest opportunity in order to give the prosecution time to investigate that defence. The tactics adopted by or for and on behalf of the second accused in springing a surprise defence of alibi midway through trial did not bode well for his defence."

Conclusion

29. As the appellants were not able to establish that the trial judge erred in convicting them, their appeals were dismissed.

Sgd:

YONG PUNG HOW
CHIEF JUSTICE

Sgd:

CHAO HICK TIN
JUDGE OF APPEAL

Sgd:

TAN LEE MENG
JUDGE

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