Nagaenthran a/l K Dharmalingam *v* Public Prosecutor
[2011] SGCA 49

Case Number	: Criminal Appeal No 27 of 2010
Decision Date	: 27 September 2011
Tribunal/Court	: Court of Appeal
Coram	: Chan Sek Keong CJ; Andrew Phang Boon Leong JA; V K Rajah JA
Counsel Name(s)	: Amolat Singh (Amolat & Partners) and Balvir Singh Gill (B S Gill & Co) for the appellant; Bala Reddy and Sabrina Choo (Attorney-General's Chambers) for the respondent.
Parties	: Nagaenthran a/l K Dharmalingam — Public Prosecutor

Criminal Law

[LawNet Editorial Note: The decision from which this appeal arose is reported at [2011] 2 SLR 830.]

27 September 2011

Chan Sek Keong CJ (delivering the grounds of decision of the court):

Introduction

1 This is an appeal from the decision of the High Court judge ("the Judge") in *Public Prosecutor v Nagaenthran a/l K Dharmalingam* [2011] 2 SLR 830 ("*Nagaenthran (HC)*") convicting the appellant, Nagaenthran a/l K Dharmalingam, aged 22 years, of the charge set out below. We dismissed the appeal at the conclusion of the hearing. We now give our grounds of decision.

2 The appellant was charged as follows:

> **YOU ARE CHARGED** at the instance of the Attorney-General as Public Prosecutor and the charge against you is:
>
> That you, **NAGAENTHRAN A/L K DHARMALINGAM**, on the 22nd day of April 2009, at or about 7.45 p.m., at the Woodlands Checkpoint Arrival Motorcycle Lane, Singapore, did import into Singapore a controlled drug specified in Class "A" of the First Schedule to the Misuse of Drugs Act, Chapter 185, to wit, one (01) packet of granular substance containing not less than 42.72 grams of diamorphine, without any authorisation under the said Act or the Regulations made thereunder and you have thereby committed an offence under section 7 and punishable under section 33 of the Misuse of Drugs Act, Chapter 185.
>
> [emphasis in bold in original]

3 The Judge found on the evidence that the appellant had actual knowledge of the contents of a packet wrapped in newspaper in his possession ("the Bundle"), and that, in the alternative, the appellant had failed to rebut the presumption of knowledge of the nature of the controlled drug under s 18(2) of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) ("MDA"). The Judge further found that the appellant could not rely on the defence of duress in s 94 of the Penal Code (Cap 224, 2008 Rev Ed). Accordingly, he convicted the appellant of the offence charged and sentenced him to death as

mandated by s 33 of the MDA read together with the Second Schedule to the MDA.

Background

4 As the facts of this case are set out fully in *Nagaenthran (HC)*, we do not propose to rehearse them. Briefly, at the material time, the appellant was living in a shared apartment in Johor Bahru with some of his friends (including one Kumarsen and Kumarsen's wife) and one Shalini, whom the appellant claimed to be his girlfriend.

5 The appellant testified that he met a Chinese man by the name of King on 21 April 2009, and asked King for a loan of RM500 in order to pay for his father's heart operation on 23 April 2009 in Kuala Lumpur. King agreed. The next day, 22 April 2009, the appellant met King at a food shop in Johor Bahru at about 6.00pm. King handed the appellant what the appellant believed to be a packet of food together with a transparent plastic packet of curry, telling the appellant to deliver those items to a person in Woodlands, Singapore. King gave the appellant a telephone SIM card, and asked the appellant to put the said card into his phone and activate it upon entering Singapore. King also told the appellant to wait in front of a designated "7-Eleven" convenience store, and to give the items to a person in a "dark blue Camry". After the delivery, the appellant was to return to Malaysia. King told the appellant that he had to complete the delivery of the items before he would lend the RM500 to the appellant.

6 Just as the appellant was about to leave with the said items, King invited him into his (King's) car, where he told the appellant that he had changed his mind and that he needed the appellant to deliver something else instead. King handed the appellant the Bundle. King said that the Bundle contained "company product" or "company spares". King told the appellant that the Bundle had to be tied to the appellant's thigh for the delivery. According to the appellant, he initially resisted King's request, but King slapped and punched him, threatening that if he refused to deliver the Bundle, King would "finish" and "kill" Shalini (the appellant's girlfriend). King made the appellant remove one side of his trousers and raise his leg such that it rested on the dashboard of King's car. Thereafter, King tied the Bundle around the appellant's left inner thigh with yellow tape. King again instructed the appellant to go to Singapore and put the SIM card into his phone, and wait in front of the designated "7-Eleven" convenience store. As before, King informed the appellant that a "dark blue Camry" would come, that the person in the said Camry would be wearing blue-coloured spectacles, and that the appellant was to hand the Bundle to that person.

7 King then sent the appellant to the appellant's apartment to prepare for the delivery trip. When the appellant alighted from King's car, the appellant telephoned Kumarsen and told Kumarsen that he had to take some money to Singapore. Kumarsen agreed to give him a ride. The appellant returned to his room in the apartment and put on a pair of trousers which belonged to one Tamilselvam (Kumarsen's nephew, who was staying in the appellant's room). Because Tamilselvam was much bigger sized than the appellant, the appellant had to use a belt to secure the fit. According to the appellant, he wore Tamilselvam's trousers because King had told him to wear bigger trousers as it was important that what was in the Bundle was not damaged. Although Shalini, Tamilselvam and one Ramesh were in the apartment at that time, the appellant testified that he did not tell any of them what King had done or said to him.

8 Kumarsen rode his motorcycle, with the appellant riding pillion, to the Woodlands Immigration Checkpoint. At about 7.45pm, the appellant and Kumarsen were stopped at the Woodlands Immigration Checkpoint by the passport screening officer and taken to an office. In the office, the appellant called Shalini. The appellant and Kumarsen were thereafter brought to different rooms by various officers of the Central Narcotics Bureau ("CNB").

9 Staff Sergeant Syed Anis Bin Syed Omar Alsree ("SSgt Anis"), a CNB officer, commenced the strip search of the appellant in room C526. During the strip search, the appellant was asked by SSgt Anis to remove his trousers, which he did. At this point, SSgt Anis saw the Bundle secured to the appellant's left inner thigh with yellow tape over the red pair of boxer briefs that he was wearing. Later, Sergeant Muhd Zaid Bin Adam and Sergeant Shahrulnizam s/o Abdullah ("Sgt Shahrulnizam") entered the room and SSgt Anis left the room. Sgt Shahrulnizam spoke to the appellant in Tamil, handcuffed him, and then proceeded to remove the Bundle from the appellant's thigh. While doing so, part of the Bundle's newspaper wrapping tore, enabling Sgt Shahrulnizam to see that the Bundle contained a transparent plastic bag with white granular substance in it. The white granular substance was subsequently analysed and found to contain not less than 42.72g of heroin.

10 At the trial, the appellant disputed the Prosecution's evidence as to what exactly had happened after Sgt Shahrulnizam had removed the Bundle. The appellant's version of events was that Sgt Shahrulnizam asked him what was in the Bundle, and he replied that he did not know. Sgt Shahrulnizam said "*thool*" (a Tamil word colloquially used to mean "powder" or, more precisely, drugs), slapped the appellant on the right and left cheeks, punched the appellant in the chest area just above the stomach and uttered a vulgarity. Sgt Shahrulnizam again told the appellant that the Bundle contained "*thool*", and the appellant again denied knowledge of the contents of the Bundle. Thereafter, Sgt Shahrulnizam put the contents of the Bundle into two bags and left the room with the bags.

11 At the trial, Sgt Shahrulnizam testified that after he had removed the Bundle from the appellant's thigh, he had pointed to the Bundle and asked the appellant, "What is this?", to which the appellant had replied in English, "Heroin". Sgt Shahrulnizam denied assaulting the appellant, using vulgarities on him, or trying to make him admit that the Bundle contained heroin.

12 At about 12.10am on 23 April 2009, Sgt Shahrulnizam handed the seized exhibits to Sergeant Vasanthakumar Pillai s/o M M Iruthaya Nathen Pillai ("Sgt Vasanthakumar") for the purpose of recording statements from the appellant and Kumarsen in room C527 of the CNB's Woodlands Team C5 office. Sgt Vasanthakumar recorded Kumarsen's statement first, and later recorded the appellant's statement between 1.20am and 1.35am. The material portions of the appellant's statement recorded by Sgt Vasanthakumar read:

Q1) What is this? (Pointing to a zip lock Bag consisting of 1 big packet of white granular substance, Crushed Newspaper & yellow Tape)

A1) Heroin.

Q2) Whom does it belong to?

A2) It belongs to my Chinese friend who goes by the name of king who strapped it on my left thigh.

Q3) Why did he strapped it on your left Thigh?

A3) He Strapped it on my left thigh is because it was for my safety and no one will find it.

Q4) Whom is it to be delivered to?

A4) It is to be delivered to one Chinese recipient who will be driving a dark blue Camry and he will be meeting me in front of [the] 7-11 store at Woodlands Transit.

Q5) Why do you have to deliver the Heroin?

A5) I have to deliver [the] Heroin is because I owe king money & he promised to pass me another five hundred dollars after my delivery.

13 At the trial, the appellant confirmed that he had given his statement voluntarily to Sgt Vasanthakumar, that no one had threatened or promised him anything *vis-à-vis* the giving of the statement, and that he had signed the statement as recorded. He did not challenge its admissibility. However, he challenged the accuracy of the statement. He testified, with regard to Q1 (above), that Sgt Vasanthakumar had said to him: "[y]ou know that this is heroin, right?", to which he had replied that he did not know. Later, when Sgt Vasanthakumar asked him again: "[w]hat is this", he had replied: "Sir, Mr Shah [*ie*, Sgt Shahrulnizam] said that it was heroin. It is *thool* but I do not know what it is".

14 Sgt Vasanthakumar, on the other hand, testified that he was certain that the appellant had merely stated that the white granular substance in the Bundle was "heroin" without qualifying that Sgt Shahrulnizam had earlier suggested it to him. Sgt Vasanthakumar also testified that he had read back the recorded statement to the appellant, including mentioning the word "heroin" as recorded, and the appellant had signed the statement voluntarily.

15 At about 6.02am on 23 April 2009, Assistant Superintendent Sivaraman Letchumanan recorded the appellant's cautioned statement, the material part of which is as follows:

> I was forced and sent into Singapore. I had borrowed money on interest. My father is undergoing an operation this morning. I went and asked the same person an additional RM500/-. And he told me to deliver something. First he gave me a package with Roti Channai and gravy. As I was leaving the shop, he called me by my name 'Raja' and requested me to return to the shop. He asked me to remove my pants and he placed a bundle wrapped up in Chinese Newspaper on my left upper thigh and he used a tape and taped the packet around my thigh. He went 3 time round. I asked him "what is this" and he told me it is for your safety and the thing will be save. He is a male chinese known to me as 'King'. I did not know what was inside the package and only when it was opened up, one of the sirs told me it was Heroin. The rider of the motorcycle does not know anything about this. I was threatened that if I didn't return the money, they will knock down my girlfriend using a car. That is all.

The decision of the Judge

16 On the basis of the evidence before him, the Judge made the following findings:

(a) the appellant had actual knowledge that the Bundle contained heroin;

(b) the appellant had failed to rebut the presumption that he knew the nature of the drug under s 18(2) of the MDA as his evidence that he thought the Bundle contained "company spares" or "company product" was not credible; and

(c) the defence of duress was not made out on the balance of probabilities, and, in any case, even if the appellant's evidence were believed, it did not suffice to establish duress under the law.

Our decision

17 The same issues of law and fact that were canvassed below were reiterated before us. We considered, first, the issue of the appellant's knowledge of what was in the Bundle. At [33] of *Nagaenthran (HC)*, the Judge said:

> … [T]he [appellant] was in possession of the Bundle when he was stopped at Woodlands Checkpoint in Singapore. However, the degree or extent of the [appellant's] knowledge of what exactly was inside the Bundle wrapped in newspaper was disputed. In the course of its submissions, the Prosecution endeavoured to make out a positive case, beyond reasonable doubt based on the available evidence, that the [appellant] did have actual knowledge or imputed knowledge (by virtue of wilful blindness) of the actual contents of the Bundle at the material time of the offence. I accepted that the statements made to the CNB officers had been accurately recorded. The statements, admitted by the [appellant] to be voluntarily given to the CNB officers, showed that the [appellant] had actual knowledge that the Bundle contained heroin, and not merely some kind of controlled drug the nature of which was unknown to him.

18 On the established principle that an appellate court would not interfere with a trial judge's findings of fact unless they were plainly wrong (*eg*, contrary to the evidence), we held that we had no basis to disagree with the Judge's factual findings. In fact, looking at the evidence adduced at the trial, we were convinced that the appellant had actual knowledge that the Bundle he was carrying contained heroin. The Judge further held that if his finding of actual knowledge was wrong, then he would find that the appellant had failed to rebut the presumption of knowledge – also relied upon by the Prosecution as its alternative submission – under s 18(2) of the MDA.

19 At [34] of *Nagaenthran (HC)*, the Judge explained why he rejected the appellant's defence of duress (a finding with which we agreed):

> My reasons are as follows. The version of facts that the Defence had put forth in support of the [appellant's] defence of duress were inextricably the same alleged facts relied upon to show that the [appellant] lacked knowledge of the actual contents found in the Bundle. The [appellant] alleged that he was forced by King to deliver the Bundle containing "company spares" or "company product" (not heroin) to King's brother in Singapore as he feared for Shalini's life. For reasons already given, I did not accept the [appellant's] version of facts to be true, in particular the alleged fact that King had assaulted the [appellant] and threatened to kill Shalini if the [appellant] refused to (a) let King strap onto his left thigh the Bundle, which King told him contained "company spares" or "company product" and (b) deliver the strapped Bundle to King's "brother" in Singapore. *On this basis alone, the Defence was therefore left with no other credible evidence upon which to discharge the burden of proof placed on the [appellant] to rebut the presumption imposed by s 18(2) of the MDA*, ie*, that the [appellant] knew that the Bundle found in his possession in fact contained heroin*. [emphasis added]

Whether the appellant had the requisite knowledge for finding liability under section 7 of the MDA

The presumption as to the nature of the controlled drug in section 18(2) of the MDA

20 Section 18(2) of the MDA provides that a person who is proved or presumed to be in possession of a controlled drug under s 18(1) of the MDA is also presumed to know "the nature of that drug". In the present case, the Judge found that the appellant knew that the Bundle found in his possession in fact contained heroin. In making this finding, he equated the phrase "the nature of that drug" in s 18(2) with the actual drug that was found in the Bundle. We agree with the Judge's approach in the interpretation of that phrase. But, as some uncertainty persists as to the meaning of the term

"controlled drug" in s 18(2) of the MDA (which has arisen from the judgment of this court in *Tan Kiam Peng v Public Prosecutor* [2008] 1 SLR(R) 1 ("*Tan Kiam Peng*")), it is desirable that we clarify the approach which a court should adopt in applying s 18(2) of the MDA to the facts of a case.

21 Section 18 of the MDA provides as follows:

> **Presumption of possession and knowledge of controlled drugs**
>
> **18**.—(1) Any person who is proved to have had in his possession or custody or under his control —
>
> (*a*) anything containing a controlled drug;
>
> (*b*) the keys of anything containing a controlled drug;
>
> (*c*) the keys of any place or premises or any part thereof in which a controlled drug is found; or
>
> (*d*) a document of title relating to a controlled drug or any other document intended for the delivery of a controlled drug,
>
> shall, until the contrary is proved, be presumed to have had that drug in his possession.
>
> (2) Any person who is proved or presumed to have had a controlled drug in his possession shall, until the contrary is proved, be presumed to have known the nature of that drug.
>
> (3) The presumptions provided for in this section shall not be rebutted by proof that the accused never had physical possession of the controlled drug.
>
> (4) Where one of 2 or more persons with the knowledge and consent of the rest has any controlled drug in his possession, it shall be deemed to be in the possession of each and all of them.

22 In *Tan Kiam Peng*, this court embarked on an extended discussion of whether the term "controlled drug" in s 18(2) of the MDA should be given a narrow or a broad meaning (see *Tan Kiam Peng* at [83]–[95]). The broad interpretation is that "knowledge in s 18(2) … is only a reference to knowledge that the drug concerned is a controlled drug" (see *Tan Kiam Peng* at [83]), and not knowledge that the drug in question is the actual drug found in the possession of the accused (*ibid*). The narrow interpretation is that the knowledge referred to in s 18(2) of the MDA is the "knowledge that the drug is *not only* a controlled drug *but is also* the ***specific*** *drug* which it turns out the accused was in possession of" [emphasis in italics in original; emphasis added in bold italics] (see *Tan Kiam Peng* at [90]). At [95], the court concluded that the narrow interpretation was to be preferred:

> … [G]iven the specific language of s 18(2) of the [MDA], the need (given the extreme penalties prescribed by the [MDA]) to resolve any ambiguities in interpretation (if they exist) in favour of the accused, as well as the fact that no case has (to the best of our knowledge) adopted the [broad] interpretation, it would appear, in our view, that (whilst not expressing a conclusive view in the absence of detailed argument) the [narrow] interpretation appears to be the more persuasive one and … will in fact be adopted in the present appeal.

23 In our view, while there may be a conceptual distinction between the broad view (that the knowledge in s 18(2) of the MDA refers to knowledge that the drug is a controlled drug) and the

narrow view (that the knowledge in s 18(2) of the MDA refers to knowledge that the drug is a specific controlled drug, *eg*, heroin or "ice"), the distinction has no practical significance for the purposes of rebutting the presumption of knowledge of the nature of the controlled drug. To rebut the presumption of knowledge, all the accused has to do is to prove, on a balance of probabilities, that he *did not know* the nature of the controlled drug referred to in the charge. The material issue in s 18(2) of the MDA is *not* the *existence* of the accused's knowledge of the controlled drug, *but* the *non-existence* of such knowledge on his part.

24 As to the meaning of the phrase "the nature of that drug", our view is that it refers to the actual controlled drug found in the "thing" (*eg*, the bag or container, *etc*) that was in the possession of the accused at the material time. For instance, if heroin is found in a bag or a container in the accused's possession and he is unable to prove, on a balance of probabilities, that he had no knowledge of that heroin (see [27] below), he would be presumed under s 18(2) of the MDA to have known of the heroin in his possession.

25 In the present case, as the appellant was found to be in possession of the Bundle containing a controlled drug, he was presumed to have had that drug in his possession under s 18(1) of the MDA (by virtue of his possession of the Bundle) unless he proved the contrary. He was unable to do so because he could not prove that he had no knowledge of the Bundle or the contents of the Bundle. In fact, he knew the Bundle strapped to his thigh contained something (which he alleged to be "company product").

26 Consequently, the s 18(2) presumption applied, and the appellant was presumed to have known the nature of the aforesaid (controlled) drug (which he was presumed to have had in his possession), unless he proved the contrary. He was again unable to do so because the Judge rejected his defence that he believed or thought that the Bundle contained "company product", and found that he had actual knowledge that the Bundle contained heroin. We should add that the presumption in s 18(2) of the MDA also applies to a case where the accused is *proved* to have been in *possession* of a *controlled drug*, *eg*, where the accused knew or was wilfully blind to the fact that he was carrying a controlled drug. Another illustration of proven possession, without the aid of the presumption in s 18(1) of the MDA, would be where the accused has direct possession of a controlled drug (as opposed to possession of something containing a controlled drug, the keys of something containing a controlled drug, *etc*), *eg*, where the accused has some white pills in his trouser pocket (whatever he believed them to be) that turn out to be a controlled drug. Ultimately, regardless of whether possession is *proved* or *presumed*, s 18(2) of the MDA would apply to presume that the accused knew the nature of that drug, unless he proves the contrary.

27 How can an accused rebut the presumption of knowledge of the nature of the controlled drug found in his possession (*eg*, in a bag he is carrying or on his person)? He can do so by proving, on a balance of probabilities, that he genuinely believed that what was in his possession was something innocuous (*eg*, washing powder, when it was in fact heroin (see *Warner v Metropolitan Police Commissioner* [1969] 2 AC 256)), or that he thought it was a controlled drug other than the one actually found in his possession (*eg*, where he genuinely believed he was carrying "ice", rather than heroin (see *Khor Soon Lee v Public Prosecutor* [2011] 3 SLR 201)).

28 Whether the accused's evidence is to be believed is a question to be determined in all the circumstances of the case.

Actual knowledge and wilful blindness

29 In the present case, the Judge did not make a finding that the appellant was wilfully blind. He

did not need to, as he had already found that the appellant had actual knowledge that the Bundle contained heroin. We agreed with the Judge's finding that the appellant had actual knowledge that the Bundle he was carrying contained heroin. Accordingly, the appellant was properly convicted under s 7 of the MDA. Nonetheless, we think it will be useful to make some observations on the concept and role of wilful blindness in the context of the MDA.

30 In *Tan Kiam Peng* at [141], this court held that s 18(2) of the MDA included both *actual knowledge* in its "purest form" (also referred to as "actual knowledge *simpliciter*" in *Public Prosecutor v Lim Boon Hiong and another* [2010] 4 SLR 696) as well as *wilful blindness*. However, one must be careful to avoid unnecessary refinement of the *mens rea* of knowledge. Wilful blindness (or "Nelsonian blindness") is merely "lawyer-speak" for *actual knowledge* that is *inferred* from the circumstances of the case. It is an indirect way to prove actual knowledge; *ie*, actual knowledge is proved because the inference of knowledge is *irresistible* and is the *only rational inference* available *on the facts* (see *Pereira v Director of Public Prosecutions* [1988] 63 ALJR 1 at 3). It is a subjective concept, in that the extent of knowledge in question is the knowledge of the *accused* and not that which might be postulated of a hypothetical person in the position of the accused (although this last-mentioned point may not be an irrelevant consideration) (*ibid*). Wilful blindness is not negligence or an inadvertent failure to make inquiries. It refers to the blindness of a person to facts which, in the relevant context, he *deliberately refuses* to inquire into. Such failure to inquire may sustain an inference of knowledge of the actual or likely existence of the relevant drug. It must also be emphasised that where the Prosecution seeks to rely on actual knowledge in the form of wilful blindness, the alleged wilful blindness must be proved *beyond a reasonable doubt*.

31 In so far as *rebutting* the s 18(2) presumption of knowledge is concerned, we have stated earlier that the accused only needs to prove that he had no knowledge of the *nature* of the controlled drug. Consistent with the burden which he has to discharge, the accused has to adduce sufficient evidence to demonstrate, on a *balance of probabilities*, that he did not know the *nature* of that drug. This is a question of fact in each case, and turns very much on the trial judge's assessment of the credibility of the defence witnesses (especially that of the accused, if he chooses to testify).

Whether there was duress

32 We turn now to the appellant's defence of duress under s 94 of the Penal Code. The Judge rejected this defence on the evidence before him. He found that:

(a) there was no credible evidence of a threat to kill Shalini; and

(b) *even if* there was such a threat, it could not be said that it had "reasonably cause[d] the apprehension that instant death to … [Shalini] w[ould] otherwise be the consequence [of non-compliance with King's request to deliver the Bundle]", as is required under s 94.

33 We agreed with the Judge's finding that on the facts, there was no duress under s 94 of the Penal Code.

Conclusion

34 The appeal was accordingly dismissed.

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