IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2021] SGCA 29

Civil Appeal No 194 of 2020

Between

Abdul Kahar bin Othman

… *Appellant*

And

Public Prosecutor

… *Respondent*

In the matter of HC/Originating Summons No 1378 of 2018

In the matter of Section 4 of the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act

And

In the matter of Order 89A, Rule 2 of the Rules of Court (Cap 322, Rule 5)

And

In the matter of CC No 8 of 2013 heard in Court No 6C, High Court

Between

Public Prosecutor

… *Plaintiff*

And

Abdul Kahar bin Othman

… *Defendant*

EX TEMPORE JUDGMENT

[Criminal Procedure and Sentencing] — [Confiscation and forfeiture]

TABLE OF CONTENTS

Abdul Kahar bin Othman
v
Public Prosecutor

[2021] SGCA 29

Court of Appeal — Civil Appeal No 194 of 2020
Andrew Phang Boon Leong JCA, Tay Yong Kwang JCA and Woo Bih Li JAD
30 March 2021

30 March 2021

Andrew Phang Boon Leong JCA (delivering the judgment of the court *ex tempore*):

Introduction

1 This is an appeal by Abdul Kahar bin Othman ("the appellant") against the High Court Judge's ("the Judge") decision in *Public Prosecutor v Abdul Kahar bin Othman* [2021] SGHC 23 ("the Judgment"), granting the Public Prosecutor's ("the respondent") application for a confiscation order for the amount of $167,429.51, being the value of the benefits derived by the appellant from drug trafficking in accordance with s 4 of the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (Cap 65A, 2000 Rev Ed) ("CDSA") ("Confiscation Order") and other related orders.

Facts

Background to the dispute

2 The appellant had been convicted on two charges for trafficking in diamorphine under s 5(1)(*a*) read with s 5(2) of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed). He was sentenced to the death penalty on 4 February 2015. The appeal against his conviction and sentence, as well as a criminal motion filed to reopen his appeal, were dismissed. Following the conclusion of those proceedings, the respondent filed Originating Summons No 1378 of 2018, seeking the Confiscation Order and other related orders against the appellant. The Judge granted the orders sought by the respondent.

3 In reaching the quantum of the Confiscation Order, the Judge agreed with the following findings contained in a financial statement annexed to an affidavit of Senior Staff Sergeant Lim Mei Wah ("Financial Statement"):

(a) The appellant's net worth as at 1 March 2005 was $10,568.55, that date being the day on which he was released after serving 10 years of preventive detention.

(b) On 6 July 2010 (the date of his arrest), his net worth was $278,547.77, consisting of:

(i) $70,296.78 seized from him at the time of his arrest;

(ii) $107,350.99 in various bank accounts that belonged to him;

(iii) $60,000, which had been deposited by the appellant into a bank account that belonged to his mother ("Mdm Bibah");

(iv) a car purchased by the appellant worth $40,900.

(c) Between 1 March 2005 and 6 July 2010 ("the relevant period"), the appellant's total expenditure was $92,814.86.

(d) During the relevant period, the appellant's increase in net worth was therefore $360,794.08, being the sum of $278,547.77 and $92,814.86, less $10,568.55.

(e) However, the appellant's known sources of income during the relevant period amounted to only $193,364.57.

(f) There was therefore a sum of $167,429.51 ($360,794.08 less $193,364.57) disproportionate to his known sources of income.

4 As for the realisation of property to satisfy the Confiscation Order, the Judge held that the sum of $60,000 in Mdm Bibah's bank account was not part of the appellant's realisable property under s 2(1) of the CDSA. The Judge found that the sum was not held by the appellant himself at the time of the hearing and thus, the respondent had to show that it fell within the second category of "realisable property" under s 2(1), *ie*, it had to be "property held by a person to whom the defendant has, directly or indirectly, made a gift caught by [the CDSA]". The respondent argued at the hearing below that the sum was a gift from the appellant to Mdm Bibah and that this gift was caught under s 12(7)(*b*) of the CDSA. However, s 12(7)(*b*) of the CDSA applied only if the gift was of property "which is or is part of the benefits derived by the [appellant] from drug dealing". The Judge held that there was insufficient evidence that the $60,000 constituted benefits derived by the appellant from his drug dealing activities. The respondent had therefore failed to establish that the sum was or was part of the "benefits derived by the [appellant] from drug dealing" in order to constitute a "gift" under s 12(7)(*b*). As the respondent did not rely on

s 12(7)(*a*) of the CDSA, the Judge did not come to a conclusion on whether the sum would have been considered a gift under that provision.

5 In any event, the respondent confirmed that it was not seeking to realise that sum of $60,000 in Mdm Bibah's bank account to satisfy the Confiscation Order, as the appellant had sufficient balance sums to satisfy the order. The Judge therefore ordered that the full value of the benefits of $167,429.51 be recovered under the Confiscation Order.

6 Against these findings, the appellant made two key arguments in this appeal. First, he argued that he had additional sources of income which should have been taken into account in the calculation of his known sources of income for the relevant period. Second, he argued that the sum of $60,000 which was in his mother's bank account belonged to her and should be returned to her. In relation to the second argument, it should be emphasised that the respondent would not in fact be using this sum of money to satisfy the Confiscation Order. Nevertheless, the argument remains relevant to the appeal in so far as it impacts the calculation of the appellant's net worth as of 6 July 2010. If the appellant's arguments were found to be meritorious, the sum of money assessed to have been derived by him from drug trafficking, and consequentially the quantum of the Confiscation Order, would be reduced.

7 The respondent submitted that the Judge did not err in finding that the appellant's income from known sources over the relevant period amounted to $193,364.57 and that the sum of $60,000 in Mdm Bibah's bank account came from the appellant. The respondent further argued that the sum of $60,000 should have been considered part of the appellant's realisable property.

Issues to be determined

8 The issues to be decided in this appeal are therefore as follows:

(a) Whether the appellant had additional sources of income which should have been considered in the Financial Statement;

(b) Whether the sum of $60,000 should have been included in assessing the appellant's benefits derived from drug trafficking; and

(c) Whether the sum of $60,000 constitutes realisable property within the meaning of s 2(1) of the CDSA.

Whether the appellant had additional sources of income

9 The Judge had accepted the calculations in the Financial Statement in reaching his finding that the appellant's known income was $193,364.57. This sum had come from the following sources: (i) income from Craftwell Teakwood Furniture ("Craftwell"), which was run by his brother Abdul Mutalib bin Othman ("Abdul Mutalib"), from August 2005 to April 2010, calculated at $1200 per month; (ii) income from Craftwell for sub-contractual works from mid-2006 to April 2010, calculated at $30,000 annually (and $30,551.50 in 2009); (iii) interest earned from bank accounts; (iv) income from GST Vouchers, Workfare Income Supplements and the government; and (v) winnings from 4D.

10 The appellant claimed that he had additional sources of income between 2005 and 2007 which had not been included in the Financial Statement, namely: (i) sums earned from sewing cushion covers, amounting to $27,000 over three years; (ii) sums earned from sewing sofa skirting, amounting to $21,000 over three years; (iii) sums earned from sewing curtains, amounting to $21,000 over

three years; (iv) income from being a driver, amounting to $14,400 over three years; and (v) returns on investments of $4000 per year, amounting to $12,000 over three years, from investments made during Hari Raya of $10,000 per year.

11 The appellant had made the same argument before the Judge, but had claimed, *inter alia*, the following sums instead: (i) returns on investments of $6000–$20,000 by investing $5000–$10,000, earning up to $15,000 during festive seasons; (ii) $250 in two days from sewing cushion covers, $200 in one day from sewing skirting covers and $300 in two days from sewing curtains; and (iii) income from being a delivery driver, amounting to $19,200 over four years. The Judge found that his estimated investment earnings were incredible, and yet he did not provide details as to the nature of this investment. In relation to his side-jobs of sewing cushion covers, skirting sofas and curtains, the appellant had not provided any indication of the total amount he had received (see the Judgment at [19]).

12 We agree with the Judge that there was no objective evidence supporting the appellant's claims that he had these additional sources of income. His claim on appeal that he made $12,000 over three years through investments had also been reduced drastically from his initial claim, likely in response to the Judge's finding that his estimated investment earnings were incredible.

13 The appellant's statements taken during the financial investigations carried out shortly after his arrest also do not support his present claims. In his first statement dated 12 July 2010 ("appellant's first statement"), he stated that he had worked at Craftwell from March 2005 to May 2010, where he was paid $450 per month. However, he could earn up to $1200 per month, as extra cash was paid to him as commission for doing upholstery and delivery. He had also invested $5000 in Craftwell to buy furniture with a view to earning profit after

they were sold, but he had only received returns of $1400. In addition, he received $3000 for work done in prison when he was released in 2005. He stated that other than the above, he did not have any other employment income. In his second statement dated 22 September 2011 ("appellant's second statement"), he claimed that he earned $1200 per month but was paid "6 times S$20,000" in 2009 as the business was doing well. There is thus no indication in his statements that he had done any other side jobs that would have increased his monthly income significantly beyond $1200 per month, or made investments that allowed him to earn him returns anywhere close to $4000 a year.

14 We also agree with the respondent that the benefit of the doubt had been given to the appellant in the calculations in the Financial Statement. Even though Abdul Mutalib's statement taken during the financial investigations stated that the appellant's pay was $450, the calculations were made on the assumption that his monthly pay was $1200. Further, as Abdul Mutalib claimed that he had paid the appellant $30,000 annually for sub-contractual works and $30,551.50 in 2009, these amounts were calculated as part of the appellant's income source even though Abdul Mutalib could only provide evidence for the payment made in 2009.

Whether the sum of $60,000 should have been included in the appellant's benefits derived from drug trafficking

15 The appellant claimed that the sum of $60,000 in Mdm Bibah's bank account was her savings. However, the evidence showed that the $60,000 came from the appellant. The appellant had admitted in his first statement that the last four transactions in Mdm Bibah's bank account which amounted to $60,000 were his moneys and derived from his illegal money-lending business, and that the rest of the moneys were Mdm Bibah's life savings. It is significant that this

was corroborated by Mdm Bibah's statement taken on 6 July 2010 ("Mdm Bibah's statement"), in which she stated that apart from the last four deposits into her account, the rest of the moneys belonged to her and were her life savings. She said that in relation to those four transactions, the appellant had accompanied her to the bank to deposit moneys on one occasion, and had taken her bank book to make the deposits on the other three occasions. It is also notable that Mdm Bibah's bank account statement showed a sudden exponential increase of a sum of $60,000 via these four disputed transactions.

16 Although the appellant had later attempted to retract this admission in his second statement and claimed that all the moneys in Mdm Bibah's bank account belonged to her, we agree with the Judge that this retraction was an afterthought. The appellant's submission that he was weak in English and that his first statement therefore contained errors was unbelievable. Apart from the fact that the explanation as to the source of the $60,000 in his first statement and that recorded in Mdm Bibah's statement was materially similar, the appellant himself stated in his first statement that he had no problems recording his statement in English. During oral submissions before us, the appellant claimed that there was yet another statement that had been thrown away. However, this was a bare assertion without any supporting evidence whatsoever and was not raised during the High Court hearing.

17 The appellant further submitted that even though Mdm Bibah had signed her statement stating that the $60,000 belonged to the appellant, she was in an unstable condition at the material time. The moneys had in fact been deposited into her account by Abdul Mutalib. In support of this position, Abdul Mutalib sent a letter to the court dated 24 February 2021, claiming that he had deposited the cash that Mdm Bibah kept in her room into the bank account on her behalf (this letter was relied upon once again during oral submissions). However, these

averments have all been made belatedly and are not supported by the available evidence.

18 Finally, in relation to the appellant's argument that there was a wrong judicial finding regarding where Mdm Bibah's bank book was seized, the respondent had sufficiently clarified this concern. The trial judge who presided over the appellant's capital charges had made a finding of fact that Mdm Bibah's bank book was found in the appellant's room; on appeal, the court in *Abdul Kahar bin Othman v Public Prosecutor* [2016] SGCA 11 found that this was erroneous, as the bank book was in fact seized from Mdm Bibah's bedroom (at [93]). The respondent acknowledged that the trial judge's inaccurate factual finding had been relied upon in the respondent's submissions at the hearing below. However, this fact was immaterial in determining whether the sum of $60,000 came from the appellant. The Judge had not relied on where the bank book was found in determining that the $60,000 came from the appellant, but had instead relied on admissions made by the appellant and Mdm Bibah during the financial investigations.

19 We therefore do not think the Judge had erred in finding that the $60,000 came from the appellant and should have been included in his net worth as at 6 July 2010.

Whether the sum of $60,000 constitutes realisable property within the meaning of s 2(1) of the CDSA

20 We next address the issue of whether the sum of $60,000 constitutes "realisable property" under s 2(1) of the CDSA. For reference, "realisable property" is defined as "(a) any property held by the defendant; and (b) any property held by a person to whom the defendant has, directly or indirectly, made a gift caught by [the CDSA]".

21 Section 12(7) of the CDSA provides:

> A gift (including a gift made before 30th November 1993) is caught by this Act if –
>
> (*a*) it was made by the defendant at any time since the beginning of the period of 6 years ending when the proceedings for a drug dealing offence were instituted against him or, where no such proceedings have been instituted, when an application under section 4 for a confiscation order is made against him; or
>
> (*b*) it was made by the defendant at any time and was a gift of property which is or is part of the benefits derived by the defendant from drug dealing.

22 We agree with the Judge that the sum would not be considered a gift under s 12(7)(*b*) of the CDSA. By virtue of s 12(7)(*b*), it has to be shown that the sum of $60,000 "is or is part of the benefits derived by the defendant from drug dealing". There has to be some evidence that the sum of $60,000 is "traceable to the defendant's ill-gotten gains" (see the decision of this court in *Centillion Environment & Recycling Ltd (formerly known as Citiraya Industries Ltd) v Public Prosecutor and others and another appeal* [2013] 1 SLR 444 at [29]). This is a fact-specific inquiry. The Judge considered it significant that in the appellant's first statement, in which he admitted that the sum of $60,000 came from him, it was stated that the sum had been derived from his illegal money-lending business. Mdm Bibah's statement stated that she did not know where the appellant had gotten the sum from. We agree with the Judge that the available evidence did not sufficiently point to the $60,000 as being benefits derived by the appellant from drug dealing (see the Judgment at [30]).

23 On appeal, the respondent took the position that the sum of $60,000 was held by the appellant since he had beneficial interest in it; and that in the alternative, it would have been considered a gift under s 12(7)(*a*) of the CDSA.

However, these arguments were not made before the Judge. The respondent's primary position that the property was held by the appellant, and not by the appellant's mother, is a departure from its case below. As for its alternative argument that it was a gift caught under s 12(7)(*a*) of the CDSA, the Judge had stated that he did not find it necessary to reach a view on whether s 12(7)(*a*) of the CDSA applied as the respondent had not relied on that statutory provision (see the Judgment at [32]). The Judge had also concluded that this sum was not a gift caught under s 12(7)(*b*) of the CDSA, which the respondent did not appear to be contesting on appeal. In any event, these arguments do not make a difference to the outcome in this case and we therefore do not need to make a finding on whether the $60,000 should have been considered as realisable property. Nevertheless, we see some force in the respondent's arguments before us relying on either s 2(2) or s 12(7)(*a*) of the CDSA and offer some observations on this issue.

24 Section 2(2) of the CDSA provides that "property is held by any person if he holds *any interest in it*" [emphasis added]. Mdm Bibah acknowledged in her statement that the sum of $60,000 was deposited by the appellant and that the rest of the moneys in her bank account belonged to her. There was also no indication in the appellant's statements that he was giving the sum to Mdm Bibah as a gift. As such, on these facts, there is merit in the respondent's argument that Mdm Bibah held the sum of $60,000 on behalf of the appellant, who had beneficial interest in the moneys. On this basis, the sum would have constituted property held by the appellant and therefore realisable property under s 2(1) of the CDSA.

25 If the sum had instead been gifted to Mdm Bibah, it would have been caught under s 12(7)(*a*) of the CDSA. Based on Mdm Bibah's bank statement, the appellant's admission in his first statement and Mdm Bibah's statement, the

transactions were made between 11 February to 18 June 2010, just a few months before his arrest on 6 July 2010 and therefore well within the six-year limit in the statutory provision.

26 Therefore, it would appear that the sum of $60,000 would have been considered realisable property under s 2(1) of the CDSA. However, as explained above, this did not impact the orders sought by the respondent.

Conclusion

27 For completeness, the appellant has also made various attempts at impugning his conviction and sentence in his submissions (this was in fact repeated during oral submissions before us). However, as seen from the procedural history of this matter at [2], the appellant has exhausted his opportunities to reopen the substantive merits of his case. The scope of the present appeal is limited to the Confiscation Order and the related orders.

28 There is no basis on which to find that the Judge had erred in his findings in relation to the quantum of the Confiscation Order. In any event, as we have pointed out at [6] above, the sum of $60,000 in Mdm Bibah's bank account would not be used to satisfy the Confiscation Order. The appeal is dismissed.

Andrew Phang Boon Leong
Justice of the Court of Appeal

Tay Yong Kwang
Justice of the Court of Appeal

Woo Bih Li
Judge of the Appellate Division

The appellant in person;
Anandan Bala and Samuel Yap (Attorney-General's Chambers) for the respondent.
