IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2019] SGHC 08

Criminal Case No 11 of 2018

Between

Public Prosecutor

And

(1) Aishamudin Bin Jamaludin
(2) Mohammad Azli Bin Mohammad Salleh
(3) Roszaidi Bin Osman

GROUNDS OF DECISION

[Criminal Law] — [Statutory offences] — [Misuse of Drugs Act]

Public Prosecutor
v
Aishamudin bin Jamaludin and others

[2019] SGHC 08

High Court — Criminal Case No 11 of 2018
Choo Han Teck J
13-16 March, 11-14, 18-20 September 2018; 10 January 2019

21 January 2019 Judgment reserved.

Choo Han Teck J:

1 The three accused persons were jointly tried for offences under the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) ("MDA"). The first accused, Aishamudin Bin Jamaludin ("Aishamudin") claimed trial to a charge of trafficking two packets containing not less than 32.54g of diamorphine, by delivering the packets to the third accused, Roszaidi Bin Osman ("Roszaidi"), in furtherance of a common intention with one Suhaizam Bin Khariri ("Suhaizam"), an offence under s 5(1)(a) of the MDA read with s 34 of the Penal Code (Cap 224, 2008 Rev Ed) ("Penal Code"). The second accused, Mohammad Azli Bin Mohammad Salleh ("Azli"), claimed trial to a charge of abetment by intentionally aiding Roszaidi to traffic two packets containing not less than 32.54g of diamorphine, by driving Roszaidi to collect and subsequently deliver the two packets, an offence under s 5(1)(a) read with s 12 of the MDA. Roszaidi claimed trial to a charge of trafficking two packets

containing not less than 32.54g of diamorphine, by giving the two packets to one Azidah Binte Zainal ("Azidah"), an offence under s 5(1)(a) of the MDA. The offences for which all three accused persons were charged were punishable under s 33(1) or s 33B of the MDA.

2 Aishamudin and Suhaizam are both 34 year-old Malaysian nationals. They were colleagues in a Malaysian company, Tiong Nam, where they worked as lorry drivers. Roszaidi is a 47-year-old Singaporean. He is married to Azidah, a 32 year-old Singaporean. They were married since March 2015. Azli, a 26 year-old Singaporean, was a friend of Roszaidi's. Prior to his arrest, Azli was doing freelance repair works for electronic equipment and audio-visual programming.

3 On the evening of 6 October 2015, officers from the Central Narcotics Bureau ("CNB") were deployed to Jurong West to look out for a lorry that was suspected to be involved in drug activities. CNB officers spotted the lorry and followed it as it made its way to Bulim Avenue. Aishamudin and Suhaizam were in this lorry. A car then entered Bulim Avenue and stopped along the road near the exit. This car was driven by Azli, with Roszaidi and another male, one Muhammad Mirwazy Bin Adam ("Mirwazy"), as passengers. Both the lorry and the car then left Bulim Avenue. The Prosecution accepts that Azli drove to Bulim Avenue on the instructions of Roszaidi.

4 CNB officers began following both vehicles, which led to a series of arrests of the accused persons in this trial and several others. They followed the car as it made its way to a taxi-stand at JCube mall where Mirwazy alighted. Mirwazy was subsequently arrested and other CNB officers continued to follow the car. The car later stopped along Jurong West Street 91. Azidah was waiting along the road with a yellow "Satin Skinz" paper bag. Roszaidi placed a

"Starmart" plastic bag inside the yellow "Satin Skinz" paper bag that Azidah had brought down, and handed it back to her. He told her to bring it up to their apartment. At the time, Roszaidi and Azidah were residing at an apartment nearby. The car drove off and Azidah headed to the lift lobby of her apartment block. She was arrested while waiting for the lift by CNB officers, and the yellow "Satin Skinz" paper bag was seized.

5 Roszaidi alighted from Azli's car, and shortly after Azidah's arrest, Roszaidi was also arrested. Azli, the last person in the car, was arrested in a carpark a few minutes later, while he was still seated in the car.

6 On Azli's arrest, the car was searched, and CNB recovered six packets of methamphetamine. Although these packets of methamphetamine are not the subject matter of this trial, the discovery of them in the car is of some relevance to the present charges. Of the six packets of methamphetamine seized, three were contained in a black pouch which was found on the floorboard in front of the driver's seat, two were contained in a plastic bag which was found on the floorboard at the right of the driver's seat, and one was found at the floorboard of the front passenger seat. A plastic pouch containing a digital weighing scale, empty pink envelopes, empty plastic packets and two glass utensils was also found in the car.

7 While the arrests of those who had been in the car was taking place, other CNB officers had followed the lorry. The lorry stopped at a cash-card top-up booth along Jalan Ahmad Ibrahim, where Suhaizam alighted. CNB officers then moved in and arrested Suhaizam near the cash-card top-up booth, and Aishamudin in the front passenger seat of the lorry.

8 The yellow "Satin Skinz" paper bag that Azidah was carrying when she was arrested contained the "Starmart" plastic bag that Roszaidi had placed inside the former paper bag. The "Starmart" plastic bag in turn contained two packets which contained no less than 32.54g of diamorphine. These were the subject matter of this trial. It is the Prosecution's case that the two packets of diamorphine had been brought in from Malaysia to Singapore by Aishamudin and Suhaizam. The day before the arrests were made, Suhaizam was tasked to deliver cargo to Singapore. Aishamudin asked Suhaizam for a ride. Along the way, Aishamudin informed Suhaizam that he was delivering diamorphine to someone in Singapore, and promised Suhaizam a reward for helping him out. Together, they made their way to Bulim Avenue, where they met with the car carrying Azli and Roszaidi. Aishamudin passed a plastic bag containing the two packets of diamorphine to Roszaidi at Bulim Avenue. Thereafter, Azli drove Roszaidi to Jurong West Street 91. Along the way, Roszaidi repacked the two packets of diamorphine from the red plastic bag to the "Starmart" plastic bag. At Jurong West Street 91, Roszaidi passed the "Starmart" plastic bag containing the two packets of diamorphine to Azidah. Azli's role is one of an abettor by intentionally aiding, as he aided Roszaidi's delivery of the drugs to Azidah by driving him to the collection point (Bulim Avenue), and from there to the delivery point (Jurong West Street 91). The Prosecution relies on the presumption in s 18(2) of the MDA to establish that all three accused persons knew that the two packets contained diamorphine. Section 18(2) provides as follows:

> (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.

9 Suhaizam and Azidah are not involved in this trial as they have been dealt with in separate proceedings. Suhaizam pleaded guilty to a charge of

trafficking diamorphine, in furtherance of the common intention with Aishamudin, by delivering the two packets identified above to Roszaidi at Bulim Avenue. The charge reflected that the amount of diamorphine contained in the two packets identified above was not less than 14.99g. Suhaizam also agreed to have a charge of trafficking not less than 249.67g of methamphetamine taken into consideration for the purpose of sentencing. He was sentenced to 25 years' imprisonment and 15 strokes of the cane, and his subsequent appeal against sentence was dismissed.

10 Azidah also pleaded guilty to a similarly reduced charge for trafficking not less than 14.99g of diamorphine. She also pleaded guilty to a further charge of consuming methamphetamine, and agreed to have a charge of trafficking not less than 166.44g of methamphetamine taken into consideration for the purpose of sentencing. She was sentenced to 25 years' imprisonment.

11 I will first deal with the case of Azli. The undisputed facts concerning him were that he drove Roszaidi to Bulim Avenue and was told to look out for a lorry. They spotted the lorry at Bulim Avenue, and Azli saw Roszaidi collecting a plastic bag from the men in the lorry. He then drove Roszaidi to meet Azidah at Jurong West St 91. After meeting her, Azli saw Azidah walking away from the car with the plastic bag that Roszaidi had packed. It is obvious that none of this evidence implicates Azli in a charge of abetting the trafficking of diamorphine because the element of knowledge on his part has not been proved.

12 The Prosecution relies on the undisputed evidence that Azli bought a digital weighing scale for Roszaidi on the latter's instructions. Azli also had pink envelopes and empty plastic packets in his possession. He also admitted to consuming methamphetamine. Methamphetamine was also found in his car and

he admitted that they were for his consumption. The car was rented by Azli from one Amimnathlan Bin Rahmat, and he (Azli) was paid between $100 to $200 by Roszaidi each time he drives for him. One important allegation disputed by Azli is that he had an agreement with Roszaidi to drive him around to collect drugs, and he also denies that he delivered diamorphine on 6 October 2015 on Roszaidi's instructions.

13 The Prosecution submitted that on the above facts, "Azli had done an act that facilitated Roszaidi [in collecting the drugs] from Aishamudin at Bulim Avenue and to give the drugs to Azidah". The alleged act of facilitating Roszaidi's crime was in "[driving] Roszaidi around to collect and deliver the drugs [as charged]". Furthermore, the Prosecution submitted that the "presumption under s 18(2) of the MDA applied to Azli, as he was deemed to have possession of the drugs by virtue of s 18(4) of the MDA". Section 18(4) of the MDA provides as follows:

> (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.

14 Azli may be presumed to be jointly in possession of the drugs if he knew of the drugs in Roszaidi's possession, and had consented to Roszaidi having those drugs. To invoke s 18(4) of the MDA as the Prosecution seeks to do, the Prosecution must prove that Azli knew that Roszaidi had drugs in his possession, and consented to them being in his possession. Although s 18(4) may oblige this court to presume that Azli and Roszaidi were in joint possession of the diamorphine, it does not presume that Azli had the knowledge and consent that is necessary to invoke the presumption. Those facts must first be proven by the Prosecution before the presumption in s 18(4) can apply.

15 At this point, I will have to refer to the drugs as "drugs" and not "diamorphine" because the evidence shows that Azli did not seem to care what drugs he was helping Roszaidi traffic with. Both Azli and Roszaidi gave conflicting and contradictory statements in relation to whether Azli knew that Roszaidi was in possession of drugs.

16 Roszaidi's cautioned statement declared that [Azli] "[was] only a driver". Yet Roszaidi's subsequent statements indicated that Azli knew that he (Roszaidi) would be transporting diamorphine, and that they had an agreement for Azli to drive Roszaidi around to collect drugs. At trial, Roszaidi testified that he made a mistake when he previously made statements to the effect that Azli knew that he (Roszaidi) was collecting diamorphine, and that he "knew what job I am doing". I am not convinced by Roszaidi's testimony at trial, which appeared to be a belated attempt to absolve Azli of criminal liability.

17 In his cautioned statement, Azli stated:

> I thought yesterday was just a quick meet-up with [Roszaidi's] friend to collect ice and then go back. I did not know he was dealing in a large amount of drugs.

Subsequent statements given by Azli indicated that he was "suspicious" that Roszaidi was collecting drugs, and not methamphetamine or "ice" in particular.

18 On the whole, it is clear that Azli knew that Roszaidi was out to transport drugs that evening, and had consented to Roszaidi bringing into his car drugs of any nature when he (Azli) agreed to drive him (Roszaidi) around to collect and deliver drugs. Azli's claim that he thought Roszaidi was collecting only methamphetamine is unsubstantiated. Furthermore, there is no evidence that Azli had made any attempts at verifying or enquiring as to the nature of the drugs that Roszaidi was transporting. As the nature of the drugs did not matter

to Azli, I find that he had the necessary knowledge and had given the requisite consent to invoke the application of s 18(4) of the MDA. Therefore, Azli is presumed to be in joint possession of the drugs trafficked by Roszaidi, which in this case, was diamorphine. I am of the view that Azli did not rebut this presumption.

19 Section 18(2) of the MDA in turn applies to deem Azli as having known the nature of the drugs as diamorphine. I also see no basis on which he can rebut this presumption. Azli's unsupported assertion that he thought Roszaidi was trafficking in methamphetamine is not sufficient to rebut this presumption. Furthermore, Azli had the opportunity to verify or enquire about the nature of the drugs, but deliberately declined to do so. In this case, there is no evidence that allows me to find that Azli had good grounds not to enquire.

20 In view of the above, I am satisfied that Azli was abetting Roszaidi by transporting Roszaidi and the diamorphine in his (Azli's) car. For a charge of abetment to be made out, the abettor must have the intention for the primary offender (in this case Roszaidi) to carry out the conduct abetted (namely, to traffic in diamorphine). Azli had the intention to aid Roszaidi to carry out the trafficking of diamorphine, the nature of which he is presumed to know by virtue of the presumptions in ss 18(2) and 18(4) of the MDA. I am therefore satisfied that the charge against him has been proved, and I find him guilty and sentence him to suffer death.

21 I next turn to the case against Roszaidi. Suhaizam drove the lorry with Aishamudin in the passenger seat from Malaysia to Bulim Avenue in Singapore where Aishamudin handed the plastic bag containing diamorphine to Roszaidi. I am satisfied that it was Roszaidi who collected the diamorphine from Aishamudin, and that he repacked the diamorphine in Azli's car before handing

them to Azidah. Roszaidi denies any knowledge of what he had taken from Aishamudin, or what he had handed to Azidah, but his testimony in court was not consistent with his own statements, and he had no satisfactory explanation in respect of the evidence of Aishamudin, Mirwazy, and Azli against him. With the diamorphine in his possession, he was obliged to rebut the presumption under law that he knew that he was in possession of diamorphine. His testimony fails to free him from that presumption. I therefore find Roszaidi guilty as charged and sentence him to suffer death.

22 Finally, I turn to the case against Aishamudin. Unlike Azli and Roszaidi, who were both separately charged although for the same bag of diamorphine, Aishamudin was charged with Suhaizam with having the common intention of trafficking in that same bag of diamorphine. I shall set out in full the charge against Suhaizam and Aishamudin.

23 The charge against Suhaizam reads as follows:

> … on 6 October 2015 sometime before 10.00 p.m., in the vicinity of Bulim Avenue, Singapore, together with one [Aishamudin], and in furtherance of the common intention of you both, did traffic in a Class 'A' controlled drug listed in the First Schedule to the [MDA], *to wit*, by delivering two (02) packets containing not less than 921.50 grams of granular/powdery substance, which was analysed and found to contain not less than 14.99 grams of diamorphine, to one [Roszaidi], without authorisation under the [MDA] or the Regulations made thereunder, and you have thereby committed an offence under section 5(1)(a) of the [MDA] read with section 34 of the [Penal Code], and punishable under section 33(1) of the [MDA].

24 The charge against Aishamudin reads as follows:

> … on 6 October 2015 sometime before 10.00 pm, in the vicinity of Bulim Avenue, Singapore, together with one [Suhaizam], and in furtherance of the common intention of you both, did traffic in a Class 'A' controlled drug listed in the First Schedule to the

> [MDA], *to wit*, by delivering two (02) packets containing not less than 921.50 grams of granular/powdery substance, which was analysed and found to contain not less than 32.54 grams of diamorphine, to one [Roszaidi], without authorisation under the [MDA] or the Regulations made thereunder, and you have thereby committed an offence under section 5(1)(a) of the [MDA] read with section 34 of the [Penal Code], and punishable under section 33(1) or section 33B of the [MDA].

25 The charge against Suhaizam refers to the bag as containing diamorphine analysed to contain not less than 14.99g of diamorphine, whereas the charge against Aishamudin refers to the bag as containing not less than 32.54g of diamorphine. The Prosecution submitted that the difference was due to the Public Prosecutor exercising his prosecutorial discretion.

26 The Public Prosecutor has an absolute discretion to prosecute an accused for a lower offence than another accused on similar and related facts. In this case, Aishamudin can only be said to be trafficking in not less than 32.54g of the drugs seized if he is charged with the common intention with Suhaizam to do so. The corresponding charge of Suhaizam refers to not less than 14.99g of diamorphine. The two men cannot have the common intention if they intended to traffic in different amounts. Logically, one can say that the larger amount of Aishamudin includes the lower amount of Suhaizam, but the lower amount of Suhaizam cannot possibly include the larger amount of Aishamudin. Let us examine this argument further.

27 Assume the situation of two men, A and B, who formed a common intention to steal a bag of money amounting to $500. They are caught and the bag of money is seized. They may be charged with the common intention of stealing a bag containing $500, or they may be charged with the common intention of stealing a lower, but same amount. A cannot be charged for having the common intention of stealing not less than $100 with B, when B is charged

with having a common intention with A to steal not less than $500. The logic seems skewed, the math does not add up.

28 The facts and the charges against Aishamudin and Suhaizam are not the same as those in *Chan Heng Kong and another v PP* [2002] SGCA 18 ("*Chan Heng Kong*"). In that case, Sng was convicted of a capital offence for abetting the principal offender, Choong Peng, to be in possession of drugs for the purpose of trafficking. The key was the weight of the drugs that each was charged for. Choong Peng was charged and convicted of a lesser amount, and thus spared the death penalty, but Sng was charged for abetting Choong Peng to be in possession for the purpose of trafficking the full amount. The Court of Appeal held that there was nothing wrong with Sng's charge. The result in *Chan Heng Kong* may be logically justified but I am not sure if that was the best way to analyse that case. Although it bears some ostensible similarities with Aishamudin, it does not concern s 34 of the Penal Code and that, in my view, is a critical difference.

29 In this case, Suhaizam and Aishamudin may have the common intention to traffic but the common intention must correlate to the same amount of diamorphine. Suhaizam's case is already done and dusted. He had pleaded guilty before another court and sentenced to 25 years' imprisonment with effect from 8 October 2015 and 15 strokes of the cane. I am therefore of the view that it is out of the question to have Suhaizam retried for having the common intention with Aishamudin to traffic in 32.54g of diamorphine; but I can, and do hereby amend the charge against Aishamudin by replacing the quantity of diamorphine stated as not less than 32.54g to not less than 14.99g.

30 I am satisfied that Aishamudin delivered the red plastic bag containing diamorphine to Roszaidi. Aishamudin claimed that the red plastic bag contained

only methamphetamine, but his testimony in court was not consistent with his own statements, and he has no satisfactory explanation in respect of the evidence of Suhaizam and Roszaidi against him. With the diamorphine in his possession, he failed to rebut the presumption that he knew that he was in possession of diamorphine. I find that he had the common intention with Suhaizam to traffic not less than 14.99g of diamorphine by delivering it to Roszaidi. I find him guilty on the charge as amended and convict him accordingly. I am also sentencing him to the same mandatory sentence that was imposed on Suhaizam, namely 25 years' imprisonment with effect from the date of his (Aishamudin) remand, 8 October 2015, and 15 strokes of the cane.

- Sgd -
Choo Han Teck
Judge

Shahla Iqbal, Lim Jian Yi and Soh Weiqi (Attorney-General's Chambers) for the Public Prosecutor;
Hassan Esa Almenoar (R. Ramason & Almenoar) and Diana Foo (Tan See Swan & Co) for the first accused;
Mervyn Cheong Jun Ming (Advocatus Law LLP), Daniel Chia Hsiung Wen and Ker Yanguang (Morgan Lewis Stamford LLC) for the second accused;
Singa Retnam (I.R.B. Law LLP), Terence Tan Li-Chern (Robertson Chambers LLC) and Subir Singh Grewal (Aequitas Law LLP) for the third accused.