IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2021] SGCA 47

Criminal Appeal No 35 of 2020

Between

Muhammad Amirul Aliff bin Md Zainal

… *Appellant*

And

Public Prosecutor

… *Respondent*

EX TEMPORE JUDGMENT

[Criminal Procedure and Sentencing] — [Sentencing] — [Appeals]

Version No 1: 05 May 2021 (14:33 hrs)

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Muhammad Amirul Aliff bin Md Zainal
v
Public Prosecutor

[2021] SGCA 47

Court of Appeal — Criminal Appeal No 35 of 2020
Andrew Phang Boon Leong JCA, Judith Prakash JCA and Steven Chong JCA
5 May 2021

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

Introduction

1 This is the appellant's appeal against his sentence of 27 years' imprisonment and 15 strokes imposed in respect of a charge of importing not less than 499.9g of cannabis in furtherance of the common intention of himself and his two co-accused. This is an offence under s 7 of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) ("MDA") read with s 34 of the Penal Code (Cap 224, 2008 Rev Ed) and punishable under s 33(1) of the MDA. The central point of contention on appeal is whether the High Court Judge ("the Judge") erred in finding that the appellant was more culpable than his co-accused, who were only sentenced to 24 years and six months' imprisonment and 15 strokes.

Facts

2 The appellant had pleaded guilty and admitted to the joint statement of facts ("JSOF") prepared by the Prosecution. The material facts in the JSOF were as follows. The appellant was a member of a Malaysian-based drug syndicate which organises illegal drug deliveries from Malaysia to Singapore. The syndicate's *modus operandi* is to conceal illicit drugs in rented cars and to have human couriers drive the drug-laden cars from Malaysia to Singapore in order to facilitate the onward delivery of the drugs to the syndicate's clients in Singapore. Sometime before 30 December 2017, the appellant received about 4kg of cannabis (gross weight) from a member of the syndicate known as "Wan". The 4kg of cannabis was then packed into five bundles ("the Bundles"). The appellant instructed one Mohd Azraa Azwan Bin Yahya ("Azraa") to deliver the Bundles to one Ungku Mohamed Hakim Bin Mohamed Faisal ("Ungku") in Singapore for purposes of onward delivery and sale. The appellant offered to pay Azraa upon the successful delivery of the Bundles. Azraa accepted, and Azraa, Ungku and the appellant thus formed the common intention to import the Bundles into Singapore on 30 December 2017.

3 Thereafter, Azraa obtained a rented red car ("the Red Car") and handed it over to the appellant who brought it to the syndicate's workshop in Malaysia for the concealment of the Bundles. Ungku also rented a silver car in Singapore ("the Silver Car"), as coordinated by the appellant, and thereafter Ungku sent someone to collect the car in Singapore on his behalf as he was still in Malaysia at the time.

4 On 30 December 2017, the three accused persons met to discuss their plans. Ungku was to enter Singapore through the Woodlands Checkpoint first, to monitor the security conditions, and once the coast was clear, Azraa would

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drive the Red Car with the Bundles concealed in it into Singapore through the Woodlands Checkpoint. Before 6am on the same day, Ungku headed from Malaysia to Singapore on his motorcycle and sent WhatsApp text messages to the appellant to report on the traffic conditions in Singapore and the conditions at the Woodlands Checkpoint. The appellant and Ungku decided to proceed as planned whereupon the appellant called Azraa and directed him to drive into Singapore.

5 During this time, Ungku informed the appellant about some drug orders which he had secured and consulted the appellant about the selling price of the cannabis.

6 At around 2pm, Azraa entered Singapore via Woodlands Checkpoint in the Red Car. The car was stopped for a random check and when its steering wheel was swabbed for an IONSCAN analysis, it revealed positive results for the presence of methamphetamine. The Bundles were found buried deep in the respective car doors and were so well concealed that they remained undetected even when the ICA officers conducted a dog search. It was only after a back-scatter vehicle was used to scan the Red Car that anomalies were detected in the car doors and the Bundles subsequently discovered.

7 Acting on information received, the Central Narcotics Bureau ("CNB") arrested Ungku the same day. Before Ungku's arrest, Ungku informed the appellant that he was being followed whereupon the appellant instructed him to delete the messages between them but Ungku did not manage to do so in time. Around six months later in June 2018, the appellant was repatriated from Malaysia to Singapore.

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8 The vegetable matter in the Bundles was analysed by the Health Sciences Authority and found to contain not less than 499.9g of cannabis.

9 As stated earlier, the Judge sentenced the appellant to 27 years' imprisonment and 15 strokes, and the two co-accused to 24 years and six months' imprisonment and 15 strokes.

Appellant's arguments on appeal

10 The appellant's key contention on appeal is that the Judge wrongly evaluated his level of culpability as the Judge failed to properly appreciate the facts. In this regard, he argues that the JSOF was erroneous on two counts. First, it wrongly stated that he was a member of a Malaysian-based syndicate. Second, it wrongly stated that he was the coordinator of the drug venture when he was only a conduit and/or messenger used by Wan to pass on messages and instructions to the co-accused. The appellant also argues that Ungku was the true leader among the three accused persons, and that Ungku was in charge of the drug sales in Singapore.

Our decision

11 We are of the view that an appellate court should ordinarily refuse to entertain an accused's challenge to the veracity of a fact which he had previously admitted to, unless the accused is able to provide good reason to explain why he had earlier admitted to it. As pointed out by this court in *Public Prosecutor v Dinesh s/o Rajantheran* [2019] 1 SLR 1289 ("*Dinesh*") at [49], an accused who seeks to retract his guilty plea *post-sentencing* likely does so because he had come to regret his decision to plead guilty, after the sentence had been imposed. In the same vein, an accused who decides to dispute certain aggravating facts in the statement of facts *post-sentencing* likely does so as an

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afterthought, because he is dissatisfied with his sentence. The court should take a dim view of such belated challenges (see *Dinesh* at [49]). In addition, such belated challenges should ordinarily not be granted in light of the need for expeditious conduct and finality in litigation (see also the decision of this court in *Public Prosecutor v Mohd Ariffan bin Mohd Hassan* [2018] 1 SLR 544 at [72]).

12 Applying these principles, we reject the appellant's contention that he was not a member of the Malaysian-based syndicate. This fact was explicitly stated in the JSOF which the appellant had admitted to without qualification. The appellant has not offered any good reason why he had admitted to it if this was not in fact true. Further, the appellant's counsel had in mitigation even admitted to court that the appellant was a paid employee of the drug syndicate.

13 Likewise, we think that it is too late for the appellant to argue that Ungku was the true leader of the drug venture. This fact was not raised in mitigation below and it would be unfair to Ungku to allow the appellant to raise this on appeal. The Judge did not have the benefit of submissions from the parties on this point when he arrived at the sentences for the accused persons.

14 While the appellant had argued in mitigation below, and reiterates in this appeal, that Ungku had a heavier role in the *sale* of drugs in Singapore and that the appellant was not involved in the onward transactions of the drugs, even if we assume this to be true, this does not necessarily render the appellant less culpable than Ungku in relation to the *importation* of the drugs, which is the subject of the present charge. This point thus does not justify appellate intervention as it does not show that the Judge had failed to appreciate the material before him or that he had erred in fact and/or in principle.

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15 Finally, we turn to address the appellant's contention that his role was limited to merely being a conduit of Wan. We note that the appellant had also made similar points in mitigation below, namely, that his role was limited to doing what Wan instructed him, that he was not the one directing or organising the drug trade on a commercial scale, and that various instructions which he gave to the co-accused were based on Wan's instructions. These contentions could be read as *qualifying* the appellant's admission that he was the coordinator of the drug venture. Pertinently, the transcript of proceedings below show that these contentions were *not* contested by the Prosecution during its reply to the mitigation plea. However, in this appeal, the Prosecution disputes these points, arguing that the appellant was *not* merely a conduit for Wan, but had made assessments and directions on the ground, and had functioned independently as a coordinator without close supervision by Wan.

16 In our view, while there is a dispute as to the appellant's precise role in the drug venture, this does not provide a basis for appellate intervention. The Judge did not rely on a wrong factual basis in reaching his decision as he did not rely on the appellant's *role* in sentencing him, but instead relied on his *conduct*, which is not in dispute. In particular, the Judge observed that: (1) the appellant was a member of a Malaysian drug syndicate; (2) the appellant instructed Azraa to deliver the drugs to Ungku in Singapore, in exchange for reward; (3) the Red Car was hired on the appellant's instructions; (4) the appellant brought the Red Car to the syndicate's workshop in Malaysia for the concealment of the drugs; (5) Ungku sent WhatsApp messages to the appellant to report on the conditions at the Checkpoint; (6) when Ungku informed the appellant that he was being followed, the appellant instructed Ungku to delete the messages between them; and (7) Ungku consulted the appellant on the selling price of the drugs. These facts were not disputed by the appellant in

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mitigation below. Even assuming that the appellant's contention is true and that his instructions to the co-accused originated from Wan, this does not change the fact that it was the appellant who gave instructions to the co-accused and that they were looking to him for instructions. There is thus no error of fact or principle which warrants appellate intervention.

17 That said, we think that it is imperative that the Prosecution ensure that there is no contradiction between the facts admitted to by the accused in the statement of facts and the facts put forward by the accused in his or her mitigation plea. If the accused in mitigation qualifies a fact which he or she had previously admitted to in the statement of facts, the Prosecution should highlight this to the Judge in its reply submissions. If the fact constitutes an essential element of the offence, the guilty plea must be set aside (see *Dinesh* at [66]). If the fact does not constitute an essential element of the offence but is material to sentencing, we think that the court should expressly rule on the factual dispute and call for a Newton hearing if this is required to resolve the dispute of fact (see the High Court decision in *Ng Chun Hian v Public Prosecutor* [2014] 2 SLR 783 ("*Ng Chun Hian*") at [24]). However, the following observations by Sundaresh Menon CJ in *Ng Chun Hian* (at [24]) also bear noting:

> … [A] Newton hearing is the exception rather than the norm and should not ordinarily be convened unless the court is satisfied that it is necessary to do so in order to resolve a difficult question of fact that is material to the court's determination of the appropriate sentence: see *R v Kevin John Underwood* [2005] 1 Cr App R (S) 90 ('*Underwood*') (at [10(e)]), adopted in *PP v Soh Song Soon* [2010] 1 SLR 857 (at [3]–[4]). Undoubtedly, the sentencing judge has a discretion to decline to hear such evidence if he is satisfied that the case advanced on the defendant's behalf is, with good reason, to be regarded as 'absurd or obviously untenable'. In such a case, the judge should explain his conclusion: *Underwood* (at [10(f)]). Ultimately, the sentencing judge must do justice and sentence the offender as far as possible on the basis of accurate facts: see *PP v Aniza bte Essa* [2009] 3 SLR(R) 327 (at [62]).

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18 Where the Prosecution does not agree with any fact put forth by the accused in mitigation, it should explicitly state so in its reply submissions. As observed by the High Court in *Public Prosecutor v Andrew Koh Weiwen* [2016] SGHC 103 at [12] (citing and applying the observations of this court in *Public Prosecutor v Aniza bte Essa* [2009] 3 SLR(R) 327 at [61]), if the Prosecution does not object to facts put forth in the mitigation plea, the court is entitled to accept them as true and give them such weight as it thinks fit.

19 In the present case, it seems that the Judge did not think that it was necessary to resolve the apparent conflict in the facts put forth by the appellant in mitigation and the facts in the JSOF. We are of the view that this was the correct approach as the disputed facts were not material to the Judge's determination of the appropriate sentence. As stated at [16] above, the Judge relied on the appellant's conduct, and not his role, in calibrating his sentence. Regardless of whether the appellant was a coordinator or a mere conduit, the fact remains that he gave instructions to his co-accused, who in turn complied with them.

20 For the above reasons, there is no basis to find that the Judge had erred in fact or in principle. The only remaining question is whether the sentence was manifestly excessive. We do not think so.

21 We agree with the sentencing framework put forth by the Prosecution and we agree with the Judge that the indicative starting point should be 29 years. This much is not challenged by the appellant.

22 While the appellant argues that the Judge erred in *not* giving any weight to his "assistance" to the Prosecution, despite giving weight to the assistance of his two co-accused, we do not think that the Judge had erred in doing so. The

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court is entitled to accord weight to an accused's assistance depending on the precise circumstances of each case (see the High Court decision in *Vasentha d/o Joseph v Public Prosecutor* [2015] 5 SLR 122 at [72]). The Prosecution pointed out that Azraa had cooperated with CNB immediately upon arrest and gave them information that led to the identification and arrest of Ungku on the same day. Likewise, Ungku had provided CNB with information that led to the identification of the appellant. In contrast, the appellant was only repatriated from Malaysia about six months after the drug operation and even if the information he provided to the CNB about Wan and the syndicate was genuine, its value was reduced due to the lapse of time. Further, Wan remains unidentified by the CNB to date.

23 The appellant also argues that his culpability was lower than that of the accused in *Public Prosecutor v Tamil Alagan a/l Gunasekaran* (HC/CC 38/2017) ("*Gunasekaran*"), and that he should hence be given a sentence lower than 27 years' imprisonment and 15 strokes, which was the sentence given to the accused in *Gunasekaran*. The appellant points out that the accused in *Gunasekaran* was the mastermind of the entire drug operation, had successfully delivered drugs on other occasions prior to the arrest, was not only involved in the importation of drugs but also the distribution of drugs, and also had another drug charge taken into consideration.

24 We do not think that the appellant's culpability is so much lower than the accused in *Gunasekaran* that it would be *manifestly excessive* to award him the same sentence. The appellant had instructed his co-accused in the present drug venture, was a member of the Malaysian-based drug syndicate, received payment from Wan for his role, and had prior drug offences.

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Conclusion

25 For the reasons set out above, we find that there is no basis for appellate intervention and accordingly dismiss the appeal.

Andrew Phang Boon Leong
Justice of the Court of Appeal

Judith Prakash
Justice of the Court of Appeal

Steven Chong
Justice of the Court of Appeal

The appellant in person;
Anandan Bala, Claire Poh, Lim Woon Yee and Wee Yang Xi
(Attorney-General's Chambers) for the respondent.

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