

IN THE SUBORDINATE COURTS OF THE REPUBLIC OF SINGAPORE

[2007] SGDC 220

DAC 13130 of 2007
Magistrate's Appeal No. 133 of 2007

Syed Ahmad Nageeb Bin Syed Idros
(NRIC No. S 6925402J)

Against

Public Prosecutor

FOUNDATIONS OF DECISION

Syed Ahmad Nageeb Bin Syed Idros

v

Public Prosecutor

[2007] SGDC 220

District Court – DAC 13130 of 2007
District Judge Jasvender Kaur

15, 25 & 26 June 2007;
6 August 2007

District Judge Jasvender Kaur:

1. The accused was convicted and sentenced to eight years' imprisonment and the mandatory six strokes on the following charge:

are charged that you, on or about the 24 March 2007, in Singapore, did consume a Class 'A' controlled drug listed in the First Schedule to the Misuse of Drugs Act, Chapter 185, as well as a specified drug listed in the Fourth Schedule to the Misuse of Drugs Act, Chapter 185, to wit, buprenorphine, without authorisation under the said Act or the Regulations made thereunder and you have thereby committed an offence under section 8(b)(ii) of the Misuse of Drugs Act, Chapter 185.

And further,

That you, prior to the commission of the said offence, you were convicted under section 8(b)(ii) of the Misuse of Drugs Act and punishable under section 33A(1) of the Misuse of Drugs Act, Chapter 185 vide DAC 46422/1999 on 24 November 1999 in Court No.24, and sentenced to 5 years and 6 months imprisonment and 3 strokes of the cane, and you are now liable to be punished under section 33A(2) of the Misuse of Drugs Act, Chapter 185.

2. The accused has brought this appeal against his conviction and I now set out my reasons.

THE PROSECUTION’S CASE

3. The prosecution’s evidence was unchallenged by the accused. The facts established were as follows. On 23 March 2007, Senior Staff Sergeant Ahmad Zahari Bin Shaini and his partner Special Constable Armin were on patrol duty when they received instructions at 4.22am to proceed to Block 496C Tampines Street 45 #04-253 to attend to a case of “drug activity and theft”. The said address is the residence of the accused. The officers arrived at the accused’s flat at 4.28am. The accused was in the flat. He was observed to be unsteady in gait and slurred in speech. The accused was arrested on suspicion of consuming a controlled drug.

4. At 5.32am, the officers left the flat with the accused. He was taken to Bedok Police Station where three samples of urine were taken from him. One of the samples was used to conduct an instant urine test (‘IUT’) and it tested positive for opiates and benzodiazepines. The remaining two urine samples were marked and sealed in the accused’s presence and the accused was asked to sign thereon. Thereafter, the accused was asked to deposit the two bottles into the HSA urine security box.

5. On 26 March 2007, the urine samples were sent to the Health Sciences Authority (“HSA”) for analysis. The urine samples were analysed by analysts Bellene Chung and Moy Hooi Yan. Both samples were found to contain buprenorphine. The HSA reports put up by the analysts were admitted as exhibits P2 and P3. Buprenorphine is a Class A controlled drug listed in the First Schedule to the Misuse of Drugs Act as well as a specified drug listed in the Fourth schedule to the Misuse of Drugs Act.

PRIMA FACIE CASE

6. Based on the HSA analysis and the presumption in s.22 of the Act, there was a clear prima facie case established. The standard allocation was administered and the accused chose to give evidence. He called one witness in his defence.

THE DEFENCE CASE

(i) Testimony of Accused (DW1)

7. The accused's defence to account for the presence of buprenorphine in his urine was that he took Temgesic, which was prescribed to him in December 2004 at Singapore General Hospital ("SGH"). He denied consuming Subutex.

8. From December 2003, the accused had been obtaining a daily prescription of 8mg of Subutex from Little Cross Family Clinic at Tampines to treat his addiction to heroin. His last visit to the clinic to obtain Subutex was on 8 September 2006.

9. Between 30 November 2004 and 6 December 2004, the accused was warded at SGH for drainage of abscess from his right buttock. According to him, he was prescribed Temgesic on two days during his stay at the hospital. Asked why he was prescribed Temgesic, he answered (pg 9 N.E.):

When I was warded at SGH, I told the doctor I was on other medication. I told him I was on Subutex. After he confirmed that it was true I was on Subutex, he prescribed the substitute of Subutex, which is Temgesic.

He stated he was prescribed 40 Temgesic tablets daily on two days. The dosage of each tablet was 0.2mg and the 40 tablets were equivalent to one 8mg tablet of Subutex which he had been taking daily. He was required to take the 40 tablets at one go but claimed that he only took about five tablets on each day. He said that the five tablets sufficed to overcome his withdrawal. He kept the balance of about

70 tablets, and upon his discharge, he brought them home and kept the tablets in his first aid box.

10. He went back to his Subutex prescription from his general medical practitioner, Dr Chai Chwan from Little Cross Family Clinic. After Subutex became a controlled drug, as he could no longer obtain his prescription of Subutex, he suffered from severe withdrawal symptoms for about two months. Thereafter, he still suffered from insomnia and mild bone pain. He continued to have a strong craving for Subutex. In order to alleviate the withdrawal symptoms, he took sleeping pills for his insomnia, panadol and the leftover Temgesic tablets.

11. He testified that he had about four to five hours prior to his arrest taken six Temgesic tablets and one Dormicum pill. He claimed that the six Temgesic tablets were all that he was left with prior to his arrest.

12. Under cross-examination, the accused stated he was unable to recall the name of the doctor who attended to him at SGH. He told the SGH doctor the name of his general practitioner and the name of the clinic from which he was obtaining Subutex, and the SGH doctor verified his claim with the general practitioner. He said the SGH doctor then agreed to prescribe Temgesic as a substitute as Subutex was not available at SGH.

13. It was put that he had fabricated his defence that he was given Temgesic tablets as a substitute, and the accused replied (pg 14B N.E.): *“I disagree. I am in remand. I do not have access to the doctor and the pharmacy. How would I know of such pills if I were not prescribed with it? I am just a layman.”*

(ii) Testimony of DW2 - Dr Chai Chwan (“Dr Chai”)

14. Dr Chai is a general medical practitioner who practices at the Little Cross Family Clinic at Tampines. He testified that the accused first consulted him on 1 December 2003 for heroin withdrawal. Dr Chai prescribed the accused a home

dosage of Subutex to manage the addiction to heroin. Thereafter, the accused returned to the clinic regularly to obtain his daily dosage of 8mg of Subutex to suppress his craving for heroin. He prescribed the accused two or three 8mg tablets of Subutex on each visit. The accused's last visit to his clinic was on 8 September 2006 where the accused consumed a 4mg Subutex tablet at the clinic under supervision.

15. Dr Chai stated that under the guidelines, a patient was allowed to be prescribed a maximum dosage of 8mg of Subutex daily.

16. On 3 December 2004, the accused's brother, Othman, came to Dr Chai's clinic. He informed him of the accused's admission to SGH and told him he was suffering from withdrawal symptoms. That prompted Dr Chai to put up a memo addressed to the Bones Specialist of SGH to inform him that the accused was taking 8mg of Subutex and that he should not be prescribed opiates. Dr Chai said that his copy of the memo was dated 1 December 2004 and he must have made a mistake in dating it as the memo was prompted by Othman's visit. He forwarded the memo to SGH through Othman and requested him to obtain an acknowledgment of receipt from SGH. However, he did not receive any acknowledgment. Asked if he received a call from any doctor from SGH, Dr Chai said that he did not.

17. On 6 December 2004, Dr Chai called SGH to check on the accused's condition and spoke to a house officer, Dr Low. Dr Low informed him that the accused had a sore abscess drained. He was also informed that the accused did not want to go for treatment at CAMP (Community Addictions Management Programme) at the Institute of Mental Health ("IMH") for his addiction to Subutex.

18. On 13 December 2004, the accused went to see him to continue with his prescription of Subutex. Asked if the accused ever informed him that he was

given Temgesic at SGH, he said that he did not. Asked by me if he had ever discussed with the accused about Temgesic, Dr Chai said (pgs 23 & 24 N.E.):

Not in my record, but I might have mentioned verbally. This medication was not a controlled medicine like Subutex at that time. They are manufactured by the same manufacturer and I have mentioned Temgesic to some patients in passing before. What I am trying to say is that Temgesic shares the same properties as Subutex.

19. Dr Chai then gave the following evidence on the nature of Temgesic in response to my questions (pg 24 N.E.):

Ct: The active ingredient for Temgesic is also buprenorphine?

A: Yes, at a much lower dosage.

Ct: What would be the equivalent of 8mg of Subutex?

A: Temgesic comes in two strengths – one is 0.2mg, if I am not wrong. So, 8mg of Subutex you have to divide by 0.2mg. About 40 tables of Temgesic

Ct: When Subutex was made a controlled drug, was Temgesic also made a controlled drug?

A: Yes, at the same time.

20. Dr Chai testified that he had spoken to some of his patients about Temgesic but he was unable to recall if had spoken to the accused about it. He said that the reason why he spoke about Temgesic to some patients was because it could be used to tail off a patient from Subutex.

THE PROSECUTION'S EVIDENCE IN REBUTTAL

(i) Testimony of PW3 - Dr Jeremy Ng Chung Fai ("Dr Ng")

21. Dr Ng is the Registrar of the Department of Surgery at the SGH. As the doctor who attended to the accused had left SGH, Dr Ng was called to give

evidence from the clinical notes made in the course of duty by the doctor who attended to the accused in 2004.

22. Dr Ng testified that the accused was admitted to SGH on 30 November 2004 and discharged on 6 December 2004. From the clinical notes, he stated that the medicines prescribed to the accused whilst he was warded were two painkillers – Tramadole and Anarex, Subutex and an antibiotic. In addition, other antibiotics were administered intravenously. Dr Ng stated that 8mg of Subutex was prescribed daily from 3 to 6 December 2004. He said that there was no record of Temgesic being prescribed or given to the accused.

23. Dr Ng confirmed that there was a memo dated 1 December 2004 from Dr Chai of Little Cross Family clinic in the case notes. He said that he was unable to tell from the record what prompted Dr Chai's note. He also confirmed that there was a note that Dr Chai spoke to Dr Low Han Chong from SGH on 6 December 2004. He said that based on the notes, Dr Chai was informed that the accused had been abusing Subutex and he was supplied with Subutex.

24. Under cross-examination, Dr Ng said that Subutex was available at SGH in 2004 as it was prescribed to the accused based on the case notes.

FINDINGS

25. Section 8(b)(ii) of the MDA states:

Except as authorised by this Act, it shall be an offence for a person to—

b) smoke, administer to himself or otherwise consume —

...

(ii) a specified drug.

The presumption in s. 22 of the MDA is in the following terms:

If any controlled drug is found in the urine of a person as a result of both urine tests conducted under section 31, he shall be presumed, until the contrary is proved, to have consumed that controlled drug in contravention of section 8(b).

As the prosecution adduced evidence that the two urine tests conducted under s. 31 of the Act were found to contain buprenorphine, the s. 22 presumption was triggered.

26. In *Vadugaiah Mahendran v PP* [1996] 1 SLR 289, the High Court held that the statutory presumption in s. 22 was twofold in that proof of the primary fact by the prosecution, i.e. a controlled drug was found in the urine as a result of both urine tests conducted under s. 31, triggered the *actus reus* of consumption and the *mens rea* required for the offence. The burden of proof hence fell upon the accused who would have to disprove either element on a balance of probabilities.

27. Buprenorphine was made a controlled drug on 14 August 2006 and a specified drug on 1 October 2006. Subutex and Temgesic, which both have the active ingredient of buprenorphine and were registered as prescription-only medicine, thus became controlled drugs with effect from 14 August 2006.

28. What the accused's defence amounted to was essentially that he did not knowingly take a controlled drug, in that, he took Temgesic which he did not know was prohibited, as opposed to Subutex.

Did the accused consume leftover Temgesic?

29. The factual issue before me was whether the accused's claim that he took Temgesic was true. To lend support to his claim, the accused contended that he knew about Temgesic only because he was prescribed with it at SGH. Dr Chai testified he had spoken about substituting Subutex with Temgesic to some of his patients in order to wean them off Subutex as Temgesic had a lower dosage of buprenorphine. Whilst Dr Chai was unable to remember specifically if he spoke to the accused about Temgesic, I was unable to accept that the accused, who is not a simpleton, could not have known about Temgesic and that 40 tablets of 0.2mg were equivalent to 8mg of Subutex from other sources.

30. On the accused's evidence, he was given Temgesic on two days at SGH. On the evidence of Dr Chai, the strength of buprenorphine in Temgesic is lower than that of Subutex. It was admitted by the accused that he was taking 8mg of Subutex on a daily basis. This was the maximum dosage allowed per day. He was also suffering withdrawal symptoms which prompted his brother to inform Dr Chai of it. However, the accused claimed that he was able to overcome his withdrawal symptoms with about five 0.2mg Temgesic tablets. This was an incredible claim given his past history of consumption of Subutex.

31. To test his claim that he had six tablets left "hours" prior to his arrest which he had consumed, I asked the accused his pattern of consumption of the Temgesic tablets that he purportedly had after he could no longer obtain his supply of Subutex from Dr Chai. The cautious and equivocal way in which he answered was (pgs 9 & 10 N.E.) as follows:

Ct: Is it correct that your evidence is out of the 68 pills or so, you were left with six pills on 24 March 2007?

A: Yes.

Ct: How many pills would you take per day?

A: I took three to four pills every now and then.

Ct: What do you mean by "every now and then"?

A: Apart from taking Temgesic, I prefer to take sleeping pills. Only when I was running out of Subutex, then I would take Temgesic.

Ct: Question repeated?

A: At that time if I knew the numbers were very important to me, I would have counted them.

Ct: Are you able to tell me how often you took the pills?

A: As far as I remember, I did not finish all until hours before my last arrest.

On the evidence of Dr Chai, the accused last went to his clinic on 8 September 2006 and the accused was given 4mg of Subutex to consume sublingually at the clinic under supervision. This was more than six months prior to his arrest on 24

March 2007. Despite his severe withdrawal symptoms thereafter and his strong craving for Subutex, the accused claimed he took three or four Temgesic tablets “every now and then” and claimed that he was left with six tablets and he consumed all six tablets at one go prior to his arrest. If he had been taking three or four tablets “every now and then” why then did he have to take six tablets at one go just prior to his arrest? It was plain that the accused was simply making up evidence to account for why he allegedly still had some Temgesic left and why no tablets were recovered from him.

32. Moreover, the accused when questioned by the investigation officer did not reveal he took Temgesic. He agreed that he was asked by the investigation officer what he had taken and he only told him that he consumed paracetamol, cough mixture and sleeping pills. On his evidence, he deliberately withheld mentioning a few analgesics. Asked what he had left out, he said that he was only able to recall Temgesic. His explanation for not mentioning Temgesic was that he did not suspect that Temgesic had the same substance as Subutex. This explanation did not cut any ice with me. In the same breadth, it would have been clear to the accused that paracetamol, cough mixture and sleeping pills did not contain the same substance as Subutex and yet he chose to mention them. The accused clearly failed to give any satisfactory explanation as to why he withheld disclosing that he allegedly consumed Temgesic. The natural conclusion was that no mention was made because he did not consume Temgesic and his subsequent assertion that he did so was an afterthought to escape from the serious charge against him.

33. Lastly, the accused’s claim that he was given Temgesic as a substitute was not borne out by the clinical notes. Dr Ng testified that the clinical notes clearly document that Subutex of 8mg dosage was prescribed on four days between 3 and 6 December 2004. It would be noted that 3 December 2004 was the very day on which Dr Chai forwarded his memo to SGH through Othman stating that the

accused was taking Subutex. The clinical notes also had a note that Dr Low spoke to Dr Chai and confirmed that the accused was given Subutex.

34. After Dr Ng had given evidence, the accused made an application to call someone from the SGH pharmacy to testify on whether Subutex was available at the SGH pharmacy in December 2004. It was quite clear that the accused was simply trying to take me on a wild goose chase and I rejected his application.

35. I rejected the accused's claim that he took Temgesic and found that he had failed to rebut the presumption on a balance of probabilities.

What if he did consume Temgesic?

36. Although I had rejected the accused's claim that he took Temgesic, I also found alternatively that even if the accused's claim that he took Temgesic were to be accepted, it would not avail him.

37. Both Subutex and Temgesic contain the active ingredient buprenorphine, which is the controlled drug in question. Section 8(b) does not expressly state any *mens rea* requirement but the High Court has implied the need for *mens rea* by its interpretation of the presumption. In *Cheng Siah Johnson v PP* [2002] 2 SLR 481, it was held that the defence would have to disprove intention or knowledge of consumption. Thus, the *mens rea* implied appears to be intentionally or knowingly.

38. Essentially what the accused's defence amounted to was that he did not know that the consumption of Temgesic was prohibited. Whether the *mens rea* required that the accused should know that the act is prohibited must depend on the context and subject-matter. The issue boiled down to whether the offence contemplated knowledge of the legality of the conduct. In other words, was knowledge limited to knowledge of the facts which proved the commission of the offence or also knowledge in law that the offence has been committed.

39. In *Grant v Borg* [1982] 1 W.L.R. 638, where the accused was charged with knowingly remaining in England beyond the time limited by his leave, contrary to s 24(1)(b)(i) of the Immigration Act 1971 (UK), the House of Lords held that the word “knowingly” in the section was limited to knowledge of the facts and did not include knowledge of the law. Lord Bridge stated that the principle that ignorance of the law was no defence to a criminal charge was “so fundamental that to construe the word "knowingly" in a criminal statute as requiring not merely knowledge of the facts material to the offender's guilt, but also knowledge of the relevant law, would be revolutionary and ... wholly unacceptable.”

40. In comparison, in *Lim Chin Aik v R* [1963] MLJ 50, where the accused was convicted of contravening s 6(2) of the Immigration Ordinance 1952 for remaining in Singapore after he had been declared a prohibited immigrant and where there was no evidence that the prohibition order had ever been brought to his attention or that any effort to do so had ever been made, the Privy Council held that the accused was not guilty of the charge because there was no practical or sensible way in which the accused could ascertain whether he is a prohibited person or not. It was noted that there did not exist any provision for the publication in any form of the order and neither was there anything that the accused could possibly have done so as to ensure that he complied with the regulations.

41. In the Malaysian case of *PP v Koo Cheh Yew & Anor* [1980] 2 MLJ 235 which involved a prosecution under section 135(1)(a) of the Customs Act, 1967, with being concerned in importing pianos produced in South Africa which were, by law, prohibited goods, the issue raised was whether a denial by the accused persons of knowledge of the relevant prohibition order entitled them to an acquittal. The accused who were convicted were subsequently acquitted on appeal to the High Court. In the High Court, Arulanandom J. took the view that

the *mens rea* included knowledge of unlawfulness. The prosecution then referred certain questions of law of public interest to the Federal Court, one of which was whether it was a defence to deny having knowledge of the prohibition order. The Federal Court held:

... the exception to the rule against ignorance of law as a defence should not be extended beyond the cases where the defendant could not possibly have known of the existence of the law he had offended against...

...

Even if he (accused) proves to the satisfaction of the court that he in fact does not know the existence of the prohibition, he is still not entitled to be acquitted unless he proves on a balance of probabilities that he could not have reasonably known of the prohibition ...”

42. The Penal Code (Cap 224) defences apply equally to other penal statutes (s. 40(2) of the Penal Code). Section 76 and 79 of the Penal Code explicitly exclude mistake of law as a defence and thus embody the general common law maxim that ignorance of the law is no excuse. In *Lim Chin Aik* (above), the maxim ignorance of the law was held not to be applicable where there was no provision designed to enable a man by appropriate enquiry to find out what the law was. In *PP v Koo Cheh Yew & Anor* (above) the Federal Court recognised a similar exception to the common law maxim where a person could not possibly with reasonable diligence know of the existence of the law. Apart from the strict maxim being tempered by this exception, in my view, to allow ignorance of the drug being prohibited as a defence would be unacceptable in view of the serious nature of drug offences. It would seriously impair the policy of the law.

43. Here, if the accused was truly ignorant that Temgesic was a controlled drug with effect from 14 August 2006, then clearly that would be a mistake or ignorance of law and not of fact. It was for the accused to prove on a balance of probabilities that he could not reasonably have known or acquired knowledge

which the law imputes to him. A mere denial of knowledge by the accused would clearly not be sufficient. On the accused's evidence, Temgesic was given as a substitute for Subutex to alleviate his withdrawal symptoms. He thus must have known it was in the same genus as Subutex. It is notable that he did not in the course of investigations disclose that he consumed Temgesic. If the accused was truly unaware that it was a controlled drug and was taking it innocently, then there was no reason for him to have concealed that fact. Hence, I was firstly not satisfied that the accused was ignorant that buprenorphine was also available under the brand name of Temgesic apart from Subutex. Even if he was, a mere denial of knowledge was not sufficient to discharge the onus. Unlike in *Lim Chin Aik*, this was not a situation where the accused could not reasonably have ascertained if Temgesic was a controlled drug.

SENTENCE

44. The offence prescribes a minimum sentence of seven years' imprisonment and six strokes and a maximum of 13 years' imprisonment and 12 strokes. I did not find the minimum sentence of seven years' imprisonment to be appropriate. The accused is a hardcore addict as evident from his antecedents. His first drug related conviction was 20 years ago in 1987 when he was 18 years. He is now 38 years of age. Thereafter, he was sent to the drug rehabilitation centre on six occasions. Unfortunately, the six admissions did not reform or deter him. In November 1999, he was sentenced under the LT-1 regime to five years and six months' imprisonment and three strokes and six months' imprisonment for failing to return to the drug rehabilitation centre after leave granted to him had been cancelled under Regulation 12(5) of the Misuse of Drugs (Approved Institutions and Treatment and Rehabilitation) Regulations 1976. Both terms of imprisonment were ordered to run consecutively. This substantial term and caning also failed to deter him and, in June 2005, he was sentenced to 16 months' imprisonment in

total for three counts of failing to report for urine tests and with another three similar counts being taken into consideration for sentencing.

45. The accused did not have the benefit of a plea of guilty. It is plain that he does not have much resolve in giving up his addiction. He did not wish to attend the addiction programme CAMP at IMH after he was discharged in December 2004 from SGH and he also did not attend the Subutex Volunteer Rehabilitation Programme which was implemented by the Ministry of Health to help all those currently on Subutex wean off their dependence after buprenorphine was made a controlled drug.

46. Accordingly, I imposed a term of eight years' imprisonment and the mandatory six strokes. This would keep him out of circulation as well as hopefully deter him from relapsing after his release.

Jasvender Kaur
District Judge

*Jayarajan Gopalakrishna (Assistant Public Prosecutor) for the prosecution
Accused-in-person*