

HONG KONG / JUDGMENT

HKSAR v. HAQUE AAMIR

[2021] HKCA 1643

COURT

Court of Appeal

DECIDED

26 November 2021

CASE / FILE NUMBER

CACC7/2021

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CACC 7/2021

[2021] HKCA 1643

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF APPEAL

CRIMINAL APPEAL NO 7 OF 2021

(ON APPEAL FROM DCCC NO 157 OF 2019

BETWEEN

HKSAR

Respondent

and

HAQUE AAMIR

Applicant

Before: Hon M Poon JA in Court

Date of Hearing: 19 October 2021

Date of Judgment: 19 October 2021

Date of Reasons for Judgment: 26 November 2021

REASONS FOR JUDGMENT

Introduction

The applicant was convicted after trial of one charge of trafficking in a dangerous drug, namely, 9.84 grammes of a solid containing 2.90 grammes of cocaine, contrary to section 4(1)(a) and (3) of the Dangerous Drugs Ordinance Cap 134, by District Judge Dufton (“the judge”) and was sentenced to 3 years and 2 months’ imprisonment. He now applies in person for leave to appeal against his conviction.

Prosecution case

On 4 October 2017, PW1 (PC 19566) and PW2 (PC 21352), were patrolling in uniform along Middle Road. The applicant was seen with another male Mohammad Mohsan Fiaz (“Fiaz”) leaning against a concrete barrier on the opposite side of the road. Both of them walked in different directions upon seeing the police officers.

PW1 and PW2 approached the applicant and Fiaz. PW1 testified that when he was about 2 meters from the applicant, the applicant took out a red and white Marlboro cigarette packet from his right trouser pocket with his right hand and dropped it on the ground. PW1 took the applicant back to the spot and retrieved the cigarette packet. Twenty re-sealable plastic bags were found inside the cigarette packet containing a total of 9.84 grammes of a solid with 2.90 grammes of cocaine. PW1 described the lighting as sufficient and that he had an unobstructed view. The applicant pointed at Fiaz and said in English “he gave me this to selling to other people”. It was put to PW1 that the applicant had said words to the effect that the drugs belonged to Fiaz. PW1 disagreed. The alleged admission was not relied on by the judge on the basis that no post-record was made and no caution was administered.

PW1 handed the applicant over to his plain clothed colleague and the applicant said in English “it’s not me. It’s him, it’s him”. It was an admitted fact that Fiaz was also arrested for possession of the cannabis found in his trouser waistband, and that Fiaz had pleaded guilty to the offence and was fined \$2,500 in Kowloon City Magistrates Court.

PW2’s evidence was found to have been largely consistent with PW1’s but he was not able to recall whether the applicant had said anything when apprehended.

The applicant’s denial of ownership or possession of the cigarette packet and his claim that the cigarette packet was picked up 10 steps away from his left side was admitted into evidence by way of admitted facts with no challenge to its voluntariness or accuracy. The judge attached no weight to such denials.

The prosecution case was given the Form 8 holder status of the applicant and the street value of the drugs at \$12,900 the only inference to be drawn was that the applicant possessed the cocaine for the purposes of trafficking.

Defence case

The applicant did not give evidence. His case was that he did not possess the cigarette packet or the drugs contained inside. He denied saying that Fiaz gave him the drugs to sell to others. It was Fiaz who was in possession of the cocaine who dropped the packet. He believed that Fiaz was a police informant and the police had falsely implicated him in an effort to protect Fiaz.

Public Interest Immunity (PII) claim

An application for disclosure of whether or not Fiaz was a police informant was made. The applicant was granted police bail after his arrest and was released from bail on 14 November 2018. He was re-arrested on 29 January 2019 and charged with trafficking in a dangerous drug. Fiaz was re-arrested on 9 February 2019 and was only prosecuted for possession of cannabis.

The prosecution opposed the application on the basis that the interception was made when the police carried out a routine patrol rather than acting on information. The delay in prosecution of 15 months was found by the judge to be occasioned by the obtaining of DNA samples from the defendant and Fiaz for DNA analysis. The application for disclosure was refused.

The Applicant's position

The applicant has filed homemade grounds of appeal dated 24 May 2021, which can be summarized as follows:

Lack of incriminating DNA, fingerprint and CCTV evidence against him;

He did not make the alleged admission at the scene on interception;

He was not in possession of the drugs and did not throw them onto the ground as PW1 alleged;

The investigation report by PW3 and PW4 were incomplete; they were in same team as PW1 and PW2 and were assisting them to hide the true facts;

Fiaz was found in possession of cannabis so it was more likely that the drugs belonged to him;

He was a drug abuser and was taking drugs at the material time. He would plead guilty to a possession charge.

At the leave hearing he supplemented those grounds by stressing that he was not in possession of the drugs and that he did not say anything in the video recorded interview. He ventured to give evidence to the effect that he was there to purchase drugs as he was a drug abuser.

The Respondent's position

The respondent opposes the leave application. It was submitted that the applicant failed to comply with the direction to file written submission by 13 May 2021 and any written submissions filed afterwards should not be considered by the Court. In any event, the respondent submits that the judge had rightly refused the application for disclosure, and to reject the suggestion that there was concoction or bad faith on the part of the police to protect Fiaz at the expense of the applicant. Further, the unfortunate delay during the investigation process of this case does not go towards showing any bad faith on the part of the prosecution. The allegations made were nothing more than pure speculation and conjecture.

Discussion

The applicant did not comply with the Master's direction and filed his home-made grounds late. He explained that he although he had been refused legal aid before, he was still hoping that legal aid be granted so it was not until 24 May 2021 that he wrote out his grounds. I did consider those grounds although he was late in filing them for about 2 weeks. In those grounds, he seeks, effectively, to re-argue the points made on his behalf at trial. At the trial he disputed possession of the drugs and the credibility of the arresting and investigating police officers was in issue.

In determining who had dropped the cigarette packet, the judge took into account the following arguments advanced by the defence:

that had the applicant and Fiaz been involved in a drug transaction they would not have remained at the scene on seeing the arrival of the police;

the failure to recover the CCTV footage of the area and to test the cigarette packet and the cocaine packaging for DNA and fingerprints indicated bad faith on the part of the police.

The judge dealt with those in length in his reasons. He took into account how everyone reacted differently on seeing the police. He noted that the investigating officers (PW3 and PW4) were not asked questions about CCTVs and found there was no evidence before the court that CCTV cameras existed. The absence of CCTV footage did not deprive the applicant of a fair trial and no prejudice was occasioned by the absence of such evidence. He further noted that the absence of fingerprints and DNA had been described by the courts as a neutral factor. The judge found that, whilst the delay in prosecuting the case was unfortunate, it did not cause him to doubt the evidence of PW1 or PW2.

The judge also dealt with the evidence of PW3 (DPC 54258), who had, since the offence, been convicted of possession of dangerous drugs and sentenced to the Drug Addiction Training Centre. PW3's recollection of the applicant's case was limited to his assisting a colleague (PW4) in conducting a video recorded interview ("VRI") with one of two South Asia males arrested for a drug case. He said PW4 was the main investigating officer. He was cross examined as to his previous conviction. The judge accepted that PW3 was not involved in the initial stages of the investigation and that he would not bend the rules to protect a good informer (as the defence was

suggesting) and that he and his colleagues were not protecting Fiaz. Although the difference in PW3 and PW4's evidence as to who was the main investigating officer was not reconcilable, the judge found that did not cause him to doubt the evidence of PW1 and PW2.

The judge was satisfied with the evidence of PW1 and found that the applicant did take out from his trouser pocket the cigarette packet and throw it on the ground and thus was in possession of the drugs in question.

Whilst the applicant endeavoured to say, at the leave hearing, that he was only there to purchase drugs and to submit a urine test report in support of the fact that he was a drug abuser at the material time, he was not permitted to do so as he did not give evidence in the lower court and his case was never put on that basis at all.

The applicant's submission that he did not say anything in the VRI was clearly contrary to paragraph 7 of the re-amended admitted facts, that he did take part in such interview voluntarily and the contents of what he said under caution were accurate. In any event, the judge did not attach any weight on the denials on the basis that they were not made or repeated on oath, and had not been tested by cross-examination.

The judge was correct to draw the only reasonable inference that the applicant was trafficking in dangerous drugs from the facts of the early hours of interception, that the cocaine was found in twenty re-sealable plastic bags, the applicant was a Form 8 holder and so barred from working with limited income, and the street value of the drugs was \$12,900. The judge also explained that there was no evidence to suggest the applicant was a consumer of drugs.

None of the grounds are reasonably arguable and I refuse leave. I remind the applicant of his right to renew his application for leave to the Court of Appeal and that may attract a consequence of a direction for loss of time spent in custody pending his appeal, should the Court come to the view that there is no justification for the renewal of his application.

(Maggie Poon)

Justice of Appeal

Ms Ranee Khubchandani, SPP of the Department of Justice, for the Respondent

The Applicant acting in person

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