

HONG KONG / JUDGMENT

HKSAR v. MOHAMMED SALEEM

COURT

Court of Appeal

DECIDED

15 May 2009

CASE / FILE NUMBER

CACC384/2008

Source: legalref.judiciary.hk · Research copy typeset by Esheria. Not court-issued or certified.

bjbj CACC 384/2008 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF APPEAL CRIMINAL APPEAL NO. 384 OF 2008 (ON APPEAL FROM HCCC 199/2008)

BETWEEN HKSAR Respondent and MOHAMMED SALEEM Applicant

Before: Hon Stuart-Moore VP, Burrell J and Beeson J Date of Hearing: 8 May 2009 Date of Judgment: 8 May 2009 Date of Reasons for Judgment: 15 May 2009

J U D G M E N T

Hon Beeson J (giving the judgment of the Court): On 8 May 2009 we dismissed the applicant's application for leave to appeal against conviction and advised that we would hand down our reasons at a later date. These are our reasons. The applicant was found guilty after trial of one count of Attempted Trafficking in a Dangerous Drug, namely 9.34 kg of powder containing 8.01 kg of Ketamine. He was sentenced to 14 years imprisonment and appealed against conviction only. The prosecution evidence was largely uncontested. The main issue at trial was whether the applicant had any knowledge of the drug contents of a package which he attempted to collect in what was, unknown to the applicant, a delivery controlled by Customs and Excise. The applicant was an Indian national who arrived in Hong Kong on 18 December 2006. On the morning of that day, a package sent from Chennai (Madras) in India arrived in Hong Kong, via the Federal Express Courier Service (Fedex). The package came in a bag marked Diplomatic Mail, the consignee being written as V. Nelson, 36-44 Nathan Road, 4th floor, Flat 132, Kowloon. As the address was of a flat at Chung King Mansions, not a usual repository for diplomatic mail, the customs officers were suspicious and examined the package; inside was found 9.5 Kg of suspected Ketamine. Thereafter a controlled delivery was carried out by a customs officer posing

as a Fedex staff member. The applicant who was found at the address, identified himself to the officers as V. Nelson and produced a corporate identity card in the same name. The applicant signed the Fedex delivery receipt for the package using the name of V. Nelson. The package had been placed on the floor at the doorway of the room and as the applicant went forward to pick up the package he was arrested. Subsequently he was asked if the package was his, to which he replied no. He was then asked if he knew what was inside the package; again he said no. There was no dispute that the illicit contents of the package were not visible unless the package was opened. Later the applicant took part in an interview conducted in English and Tamil. He said that he had been asked by an unknown man, whom he had met a week before in the bazaar in Chennai, to collect a package on its arrival in Hong Kong and that, as instructed, he used a name other than his own in order to do so. He was to be paid 5000 rupees for his assistance on his return to India. In the interview the applicant denied again that he knew what was in the package. The applicant told the interviewer that his purpose in coming to Hong Kong was to purchase mobile telephones and to that end he had brought with him \$500 US dollars. He had planned to buy the telephones in Chung King Mansions. A number of Admitted Facts were produced for the purposes of the trial. They included the fact that the applicant had a clear criminal record, although as he had arrived in Hong Kong on the day of his arrest and was not a Hong Kong resident, that was hardly surprising. It was also an admitted fact that the record of interview was accurate and had been given by the applicant voluntarily. The applicant admitted in the interview that he had used a name other than his own in order to collect the package. He confirmed also that he had been told by the unknown man to use Exhibit P 19, an identity card in the name of V. Nelson but which bore the applicant's photograph, in order to collect the parcel. The identity card which purported to be issued by a company, Chemical India (P) Ltd was found on the applicant's person. He had also signed a letter in the same name produced as Exhibit P

30. The letter purported to be written on the letterhead of the British High Commission issued by Joseph O Neil and was supportive of V. Nelson collecting the package of Diplomatic Mail. The applicant did not give evidence at trial, nor did he call any witnesses, but relied on the record of interview in which he reiterated his lack of knowledge of the contents of the package. The perfected grounds of appeal against conviction alleged that the trial judge failed, or failed adequately, to give appropriate directions about the appellant's previous good character. In particular there was a complaint that the judge had qualified the direction by referring to aspects of the applicant's admitted actions as being open to the jury to decide whether it was discreditable conduct such as to derogate from the manner in which the jury could consider his previous good character. Mr Stirling, who appeared as counsel for the applicant at trial and on appeal, argued that the aspects of the applicant's conduct relied upon by the trial judge in this regard were an integral part of the commission of the alleged offence and as such, in law, should not have been regarded as discreditable conduct in relation to the commission of the alleged offence. The character direction given by the judge appears at AB 8 H U and 9A-C of his summing up in these words: It is an admitted fact that the defendant is a man of clear record; that is, he has no previous criminal convictions. The fact that somebody has a clear record does not mean that he cannot have committed the

offence with which he is charged, but it is a factor to which you are entitled to have regard in two ways. In the first place, although the defendant has chosen not to give evidence before you, he did give explanations upon arrest and in interview. In considering those explanations and what weight you should give to them, you should bear in mind that it was made by a person without convictions and take that into account when deciding whether you can believe what he has said. Secondly, the fact that he is a man without previous convictions may mean that he is less likely that otherwise might be the case to commit this crime. In deciding how much weight is to be attached to his clear record, you will bear in mind that it is not disputed that he had come to Hong Kong from India with an identity document bearing his photograph but not his name, that he used that document to identify himself when the bag was delivered to Chungking Mansions, and that he signed a name that was not his. Furthermore, it is not disputed that he signed the letter, Exhibit 30, which is at page 74 in your bundle, in a name which was not his own. It is a matter for you to decide whether you think that this is in any way discreditable conduct and, if so, whether it balances the positive aspects of being a man with a clear record and if so to what extent. It is conduct which you can consider when evaluating the weight to be attached to his clear record. Guidance as to the limit of a discretion in the judge to give a credibility and propensity direction whenever a defendant has testified, or made pre-trial answers or statements was given by the Court of Final Appeal in *Tang Siu Man v HKSAR* No 2 [1998] HKCFAR 107. The court concluded inter alia that where there is evidence of good character it would not always be necessary to give both limbs of the direction and the mere absence of any previous convictions does not necessarily oblige the judge to give a good character direction. Tang confirmed that the principles in *R v Vye* [1993] 1 W.L.R. 471, need not be imposed on Hong Kong judges as they could be highly artificial and had not been shown to work well in other jurisdictions. At the extreme, *Vye* directions required trial judges to give directions and then to add qualifications in an attempt to return to the confines of common sense. A need to qualify a good character direction heavily to avoid an affront to common sense might make the words meaningless or might confuse the jury. Where positive evidence of good character has been adduced and nothing discreditable concerning the defendant has emerged, the court considered that a summing up which failed to give a full *Vye* direction might render a summing up unbalanced or unfair. The court however recognized that where a person with a clear record is before the court, but in the course of the trial discreditable matters concerning him or her were revealed, the judge has a wide margin of assessment. The court gave as an example that dishonest conduct may be very relevant to credibility, but irrelevant to propensity towards sexual offences. The court commented that good character directions were not directions on law which a jury was bound to follow. However entrenched such rules might be, they amounted only to an indication of the way a jury might properly make use of such evidence. Mr Stirling argued that discreditable conduct must refer to previous conduct independent of the actus reus of the alleged offence. Conduct which was an integral part of the actus reus and which was part and parcel of the commission of the offence was not previous discreditable conduct so as to deprive an offender of a full direction. He advanced no authority in support of this

submission. That is unsurprising as there is nothing in Tang, or indeed in any of the other associated authorities, which states, or suggests, that a judge must confine discreditable conduct in that manner. In summary his argument meant that it was impermissible for the judge to qualify a good character direction by reference to any act, fact or deed which gave rise to the offence with which he was charged. In Aziz the court considered inter alia whether an accused who has no previous convictions but has admitted other criminal behaviour is entitled to the benefit of directions as to good character according to the guidelines. The court held that prima facie the directions are required in such a case, although the judge has a residual discretion to add words of qualification concerning other proved or possible criminal conduct of the accused that has emerged during the trial, so as to place a fair and balanced picture before the jury. It is clear as a matter of commonsense that the discreditable conduct can be related to, or be contemporaneous with, or peripheral to the offence or offences with which a defendant is charged. This applicant had admitted that to collect the package he was using a false name, had produced a forged identity card and that he had signed the delivery receipt in a false name. Those matters, which were indicative of dishonesty, were squarely before the jury in the Admitted Facts and in his Record of Interview. Jurors are entitled to take into account all they have heard about a defendant in assessing what weight they should place on a defendant's clear record. The judge gave a standard good character direction which incorporated both the credibility and propensity limbs. He exercised his discretion and reminded the jury of undisputed matters of evidence, which they might regard as discreditable conduct and which might affect their view of the applicant's credibility. This he did succinctly without convoluted or confusing qualification of the direction given. Not to have reminded the jury of those matters of evidence would have been the affront to commonsense which judges are exhorted to avoid when giving a character direction. In *R v Durbin* [1995] 2 Cr App R 84, the court laid down guidelines for situations where a modified direction could be appropriate. However the court stressed the importance of the principle that, The jury should not be directed to approach the case on a basis which is artificial or untrue. For the judge in the instant case not to have referred to the possibly discreditable material would have been to breach that principle. Mr Simon Tam, for the Respondent, drew our attention to the comment of the English Court of Appeal in *Vye* that provided a judge indicates to a jury the two respects in which good character might be relevant, in accordance with the guidelines it will be slow to criticise any qualifying remarks he might make based on the facts of an individual case. One question that might be asked in this case is whether a character direction should have been given at all, when the evidence of good character amounted to no more than an admitted fact that the applicant, who was not a Hong Kong resident and who had been in Hong Kong for a few hours only, did not have any criminal convictions in Hong Kong. Certainly in Tang the court acknowledged that a bare lack of convictions, absent any positive evidence of good character, did not justify, necessarily, a character direction. In many cases in Hong Kong a good character direction is meaningless, because the defendant is not a Hong Kong resident, or has resided in Hong Kong for a short time only, or is here illegally, or is in transit. In such cases it is arguable that a defendant should not be entitled to a character direction, either as

to credibility or propensity, beyond a simple statement to the effect that there is no criminal record which exists in Hong Kong. A jury must be puzzled and confused when listening to a judge give a good character direction for a defendant whose only link to Hong Kong is an intention or desire to come here to commit offences; who may be in Hong Kong for the first time; where no reliable material establishes a clear record in the country of origin and where no character witnesses are called. To require a judge to give a full and unqualified character direction in such circumstances runs the risk of being an affront to common sense. The discretion accorded a judge to determine whether a defendant is entitled to a good character direction is a wide one. Similarly the form of that direction is a matter for the judge's discretion, subject, where necessary, to prior discussion with counsel. Whether one or both limbs of the direction should be given, whether there is to be any qualification of the direction and whether such direction needs to be balanced vis-à-vis co-defendants are all matters the court must consider. The court in Tang made it clear that the test of any good character direction is whether what is said is fair and balanced. Here the judge summed up the case carefully, fairly and in some detail. Although the applicant had only been in Hong Kong a few hours, and in the absence of any proof that the applicant had a clear record in India, the judge nevertheless gave a full character direction in terms of both propensity and credibility. Bearing in mind that in this case, where the evidence of good character was limited to a mere absence of information of previous criminal convictions and thus the propensity limb of the character direction need not have been given at all, the qualification made by the judge, which Mr Stirling has criticised, was in our opinion sensible and proper and made the entire direction more, rather than less, balanced and fair. The judge had drawn the jury's attention to those parts of the evidence which they might consider to have shown discreditable conduct on the part of the applicant, pointing out that it was for them to decide what weight, if any, those matters had in relation to the question of good character. This application for leave to appeal is without merit and is dismissed. (M. Stuart-Moore) Vice-President (M. P. Burrell) Judge of the Court of First Instance (C-M Beeson) Judge of the Court of First Instance Mr Simon Tam, SPP, of the Department of Justice, for the Respondent Mr William N.C. Stirling, instructed by Director of Legal Aid, for the Applicant - PAGE - A B C D E F G H I J K L M N O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V 1udk 1udk i\$&j CACC.dot setup Microsoft Word 9.0 Title Microsoft Word Document MSWordDoc Word.Document.8

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=65794

CASE PAGE <https://chat.esheria.ai/case-law/hong-kong/hksar-v-mohammed-saleem-2009>

Prepared on 28 October 2026 · Esheria