

Presumption vs Proof:
Zainal bin Hamad v Public Prosecutor [2018] SGCA 62

I. Executive Summary

In *Zainal bin Hamad v Public Prosecutor* [2018] SGCA 62, the Court of Appeals (“CA”) clarified the application of the presumptions¹ under sections 17 and 18 of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) (“MDA”):

- Section 17 (“presumption of trafficking”) states that anyone who is *proved* to have possessed specified drugs in certain amounts is *presumed to have possessed those drugs for trafficking*;
- Section 18(1) (“presumption of possession”) states that anyone who is *proved* to have possessed anything containing controlled drugs is *presumed to have possessed that drug*; and
- Section 18(2) (“presumption of knowledge”) states that anyone who is *proved* or *presumed* to have possessed controlled drugs shall be *presumed to have known the nature of that drug*.

In this case, Zainal bin Hamad (“Zainal”) and Rahmat bin Karimon (“Rahmat”) were convicted by the High Court (“HC”) of drug trafficking offences under the MDA, and sentenced to the mandatory death penalty. The CA dismissed their subsequent appeals, which were based in part on rebutting the above presumptions. It found that the relevant presumptions were not rebutted. Moreover, the court found that Zainal’s guilt could be proven even without reliance on the presumptions, as the evidence showed he indeed possessed drugs for the purpose of trafficking.

The CA then provided guidance on how to apply the presumptions in future cases:

- The presumption under section 17 cannot run together with the presumption under either section 18(1) or section 18(2);
- The presumption of possession under section 17 can only be invoked if both possession and knowledge of what was possessed are first proven; and
- In future cases where the presumptions under both sections are potentially applicable, the Prosecution must state clearly which presumption(s) it is relying on.

II. Material Facts

In May 2015, Rahmat delivered a green bag to Zainal by placing it in front of him, and collected \$8,000 in return. Zainal did not immediately pick the bag up, but 45 minutes after Rahmat left, moved the green bag to a location in a warehouse behind some pallets where the bag could not be readily seen. Zainal and Rahmat were later separately arrested.

Rahmat was found with his wife, who had \$8,000 hidden in her underclothes (at Rahmat’s direction). Zainal, after his arrest, led the police to where he had placed the bag. It was found to contain not less than 53.64g of diamorphine (more popularly known as heroin).

Each offender claimed that he was dealing with or acting on the instructions of another person. Zainal, who had been a drug dealer, claimed he wanted to move to dealing in uncustomed cigarettes. He stated he had arranged with one “Samba” to obtain 200 cartons of uncustomed cigarettes. 20 cartons of cigarettes would be delivered first, and in return Zainal would pay

¹ In general, a fact is *proven* when, based on the evidence, the court believes that the fact exists. *Presumptions*, on the other hand, allow the court to assume a fact to be proven until it is otherwise disproved.

\$8,000 for the entire shipment of 200 cartons. Although Zainal said that he knew at once on delivery that the bag did not contain the cigarettes, he maintained he had not paid the \$8,000 for the bag but as advance payment for the cigarettes. The bag had been left there by Rahmat for no reason. Zainal's reason for moving the bag was to return it to Rahmat later, whom he hoped and expected would return with the cigarettes. Zainal said that he was extremely uncomfortable throughout the transaction as he suspected surveillance by law enforcement.

On his part, Rahmat claimed he was instructed by one "Kanna" to deliver a package, containing what Rahmat thought were medicines, to one "Bai", who then directed delivery to Zainal. Rahmat would also collect \$8,000 from Zainal, not as payment for the medicines but as Zainal's repayment to Kanna for an unrelated illegal transaction. Rahmat stated that this payment collection was his main task, in return for which Kanna would give him a loan of RM30,000.

Following a joint trial, the HC convicted each offender of one charge of trafficking in not less than 53.64g of diamorphine under section 5(1)(a) of the MDA. As no certificate of substantive assistance was provided, the HC imposed the mandatory death sentence on both offenders.²

III. Issues on Appeal

On appeal, Zainal claimed that he had not possessed the drugs; in the alternative, he had rebutted the presumption of knowledge under section 18(2). Rahmat did not dispute possession of the bag and drugs, but also attempted to rebut the presumption of knowledge under section 18(2). The CA dismissed both appeals.

A. Zainal

(i) Possession

Zainal claimed that the Prosecution had failed to prove possession, because it had failed to prove both his physical control of the bag and knowledge of the existence of the package. The CA rejected Zainal's arguments, and further decided that possession for trafficking would have been made out even without reliance on the presumption under section 17.

The CA agreed that where the Prosecution wishes to prove possession, it must prove not only that the accused *possessed* the package, but also that the accused *knew* that the package contained something – which may later be established to be the controlled drugs. However, the Prosecution need not prove that the accused knew that he possessed *drugs*, as long as it proves the accused was in possession of *something*, and that thing turns out to be the drugs in question. (The converse is where something is planted without the accused's knowledge.)

Indeed, once the Prosecution proves the accused had physical control over or possession of the package which contains the thing at issue, the court may infer that the accused had *knowledge* of the existence of that thing. The accused may then raise a reasonable doubt otherwise.

Here, by taking the bag without taking any steps to inspect it, Zainal was taken to be in possession, not only of the bag but also its contents. He was then required to show evidence to raise a reasonable doubt: that he reasonably should not be taken to be in possession of the bag's contents. However, Zainal's response was, in essence, a bare denial that he should not be taken

² Where a person is convicted of an offence under section 5(1) of the MDA, if the Prosecution has certified that the person has substantively assisted the Central Narcotics Bureau in disrupting drug trafficking within or outside Singapore, the court has the discretion to sentence the person to life imprisonment and not less than 15 strokes of the cane, instead of imposing the death penalty.

to be in possession of the bag's contents. He merely claimed he did not know or care what was in the bag, and had only paid the \$8,000 for uncustomed cigarettes.

Moreover, the facts indicated otherwise: (1) Zainal's explanation that the \$8,000 was an advance payment for cigarettes was incredible, especially given that he also said he was trying to save money for his wedding, and yet was willing to hand over the money to Rahmat for cigarettes which Rahmat did not have, and Rahmat had not informed Zainal how or when he would get the cigarettes; (2) Zainal had asked Rahmat about the contents of the bag on more than one occasion; (3) Zainal had waited for 45 minutes before collecting the bag, suggesting that he thought it contained something suspicious, given his evidence that he was anxious about surveillance; and (4) regardless of who (Kanna or Samba) created the transaction, there was no chance that the drugs were delivered by mistake – the set-up created “the irresistible inference” that the person(s) who arranged the delivery of the drugs and the payment of \$8,000 intended that outcome.

The CA also observed that as it was accepted that Zainal had physical control of the bag, had section 18(1) been applied Zainal would be *presumed* to possess the drugs. However, since possession had been *proved* on the facts, it was not necessary to rely on section 18(1).

(ii) Knowledge

Alternatively, Zainal contended he had rebutted the presumption under section 18(2) that he knew the nature of the drugs. The CA also rejected this argument. The CA stated that the presumption of knowledge under section 18(2) applies either where possession is *proven*, or the *presumption* of possession under section 18(1) is not rebutted. To rebut the presumption of knowledge, the accused has to prove on a balance of probabilities as to what he thought or believed he was carrying. The court will assess this claim against the facts. However, the court should not impose a burden on the accused so onerous that it becomes virtually impossible to discharge.

The CA found that Zainal failed to prove he thought that he possessed something else; indeed, he did not even think the bag contained the cigarettes for which he allegedly paid \$8,000. Instead, he merely stated he did not know and did not care what was in the bag. Indeed, according to him the bag was entirely incidental and just happened to be there for no reason. Thus, Zainal had failed to rebut the presumption that he knew the nature of the drugs.

Furthermore, even if the presumption did not apply, Zainal would still have been proved to know the nature of the drugs. The CA had already rejected his account for the payment of \$8,000 for the cigarettes, with the bag merely making a coincidental appearance. It then made no sense for Zainal to have parted with \$8,000 for anything other than the drugs. Coupled with Zainal's admission to the police that he had dealt with drugs before, the CA concluded that Zainal had actual knowledge of the drugs in the bag.

(iii) Possession for trafficking

Zainal did not appeal against the HC's finding of possession for the purpose of trafficking. Nonetheless, the CA found that the presumption of trafficking under section 17(c) applied, given the above findings that Zainal was proved to be possession of the drugs and had knowledge of the nature of the drugs, and nothing was advanced to rebut this presumption. In any case, possession for the purpose of trafficking would have been made out even without section 17(c), given the substantial quantity of drugs involved and the fact that Zainal had

previously been in the business of selling diamorphine. The only possible inference was that the drugs were in his possession for the purpose of trafficking.

B. Rahmat

To rebut the presumption of knowledge under section 18(2), Rahmat claimed (1) there was no real connection between the payment of the \$8,000 and the delivery of the bag; and (2) he thought he was carrying medicine. The CA rejected both arguments.

The CA found incredible Rahmat's claim that he had delivered medicines for Kanna (upon which he could then collect \$8,000 from Zainal) in exchange for an interest-free loan of RM30,000 to start a legitimate business. The CA found it unlikely that Kanna would grant Rahmat a loan with such conditions, given that Kanna did not have a deep history of close friendship with Rahmat. The CA reasoned that if Rahmat had needed the money, he would have been a prime candidate to either continue working for Kanna, or to be one of Kanna's clients and obtain an illegal loan at the usual interest rates.

The CA also rejected Rahmat's claim that he thought he was carrying medicines: (1) Rahmat first said he thought he was carrying crackers and never looked in the bag, but later changed his evidence on both points; (2) the intricate arrangements involved were unnecessary for a medicine delivery; (3) if the \$8,000 had been a repayment of a loan Kanna extended to Zainal (and in turn a fresh interest-free loan to Rahmat), there was no reason for Rahmat to ask his wife to hide the \$8,000 in her underclothes, or to think he would be apprehended by the authorities and be unable to account for the money; and (4) nobody would pay \$8,000 for a medicine delivery.

IV. Guidance for Future Cases

The CA then provided guidance for the Prosecution and Defence for future cases where the presumptions under sections 17 and 18 MDA may potentially be applicable.

As stated above, Section 17 provides that anyone who is *proved* to have possessed specified amounts of certain drugs is *presumed* to have possessed those drugs for trafficking ("*presumption of trafficking*"). Section 18(1) provides that anyone who is *proved* to have possessed anything containing controlled drugs is *presumed* to have possessed that drug ("*presumption of possession*"), while section 18(2) provides that anyone who is *proved* or *presumed* to have possessed controlled drugs shall be *presumed* to have known the nature of that drug ("*presumption of knowledge*").

(1) *The presumption under section 17 cannot run together with the presumption under either section 18(1) or section 18(2).*

With regard to the three elements of the offence of trafficking, it was important to distinguish between *proving* and *presuming*:

- (a) The *possession* of the drugs;
- (b) The *knowledge* of the nature of the drugs; and
- (c) The possession of the drugs *for the purpose of trafficking*.

First, the section 17 presumption of trafficking and the section 18(1) presumption of possession cannot run together. Section 17 only applies where possession is *proved*, while section 18(1) will only lead to a *presumption* (and not proof) of the fact of possession. This interpretation was established by past cases, and is supported by the plain language used in section 17. Furthermore, Parliament had acted to deliberately narrow the language of section 17: it

originally applied where possession was “proved or presumed”, but was later restricted to situations where possession was only “proved”. Thus, Parliament must have intended that the presumption under section 17 only applied when an accused was *proved* (and not merely *presumed*, as under section 18(1)) to be in possession of a controlled drug.

Second, the section 17 presumption of trafficking and the section 18(2) presumption of knowledge of the nature of the drug also cannot run together. The statutory scheme of the MDA makes it clear that section 18(2) operates as an ancillary provision to section 18(1), meaning that where an accused is in physical control of an object, the Prosecution may rely on section 18 *as a whole* to invoke both a presumption of possession and of knowledge of the item that the accused is in possession of. Section 18 thus deals with the issue of *knowing possession*, while section 17 deals with the *purpose* of the possession, which were two distinct matters. Thus, in cases where both may apply, while the presumptions under section 18 may be run as a whole, the presumptions under sections 17 and 18 cannot run together.

(2) *The presumption of possession under section 17 can only be invoked if both possession and knowledge of what was possessed are first proven.*

The presumption of possession under section 17 stands by itself: once the premise of possession is proved, the presumption may be invoked, and no other elements of the offence need to be proved. But one cannot be found to be trafficking without knowledge of the nature of the drugs in question. As such, the premise of section 17 (proof of possession) includes both the fact of physical possession and the element of knowledge (collectively termed “*knowing possession*”). The CA further clarified that this analysis and interpretation of the word “possession” was confined to section 17 and did not apply to other sections within the MDA, as the word was used to mean different things in different contexts in the rest of that Act.

(3) *In future cases where the presumptions under both sections are potentially applicable, the Prosecution must state clearly which presumption(s) it is relying on.*

It was incumbent on the Prosecution to make clear which presumption(s) it was relying on in the trial court and on appeal, because it would assist the courts’ assessment of whether the Prosecution’s case was made out. More fundamentally, this gives the accused a fair chance of knowing the case being made against him and what evidence he has to adduce (and to what standard of proof) to respond. For instance, it would be insufficient for the Prosecution to simply state that the elements of possession of the drugs, knowledge of the nature of the drugs and possession for the purpose of trafficking have either been proved or presumed, without making clear the precise nature of the primary case being advanced against the accused.

In this case, the CA noted that the Prosecution had changed the presumptions it relied on. In the HC, it relied on the presumptions under sections 18(1) and 18(2), but in the CA it changed its case to rely on the presumption under section 17. This change in the Prosecution’s case could have been prejudicial to an accused, on a different set of facts. In this case, the outcome was unaffected, and no prejudice was suffered. Nonetheless, in future cases where sections 17 and 18 could potentially apply, it would be important for the Prosecution to state clearly which presumptions it relied on.