

Unpacking the Courier Exception in the Misuse of Drugs Act
Zainudin bin Mohamed v Public Prosecutor [2018] SGCA 8

I. Executive summary

“[W]hen is a drug trafficker who claims to be a mere ‘courier’ not merely a ‘courier’?” The Court of Appeal (“CA”) addressed this question in *Zainudin bin Mohamed v Public Prosecutor* [2018] SGCA 8. The issue was whether a drug trafficker who divided and repacked drugs was merely “transporting, sending or delivering a controlled drug” under s 33B(2)(a)(iii) of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) (“MDA”), and hence eligible for discretionary life imprisonment (rather than the death penalty) under this so-called “courier exception”.

In this case, pursuant to instructions from a friend “Boy Ahmad” (“**Boy**”), Zainudin bin Mohamed (“**Zainudin**”) collected a bag containing two “batu” of the drug diamorphine (each “batu” containing about 500g of drugs) from a third party. When Zainudin returned home, he received further instructions over the phone from Boy to divide one of the “batu” into half, and pack each half into a Ziplock packet. As Zainudin was starting this process, officers from the Central Narcotics Bureau (“**CNB**”) entered his flat. Zainudin was subsequently arrested.

Zainudin was convicted by the High Court (“**HC**”) for the offence of possession of not less than 22.73g of diamorphine for the purposes of trafficking. The HC also stated that Zainudin could not be considered a courier, as his act of repacking the drugs did not fall within the scope of activities set out in s 33B(2)(a) of the MDA. As no other relevant exception applied, the HC imposed the mandatory death penalty on him.

On appeal, the CA agreed with the HC. Conduct which fell within the exception consisted of acts that are (a) *facilitative of* or (b) *incidental to* the *transporting, sending or delivering* of the drugs. *Facilitative* acts enable or assist the offender to transport, send or deliver drugs, such as storing or safekeeping drugs during the period between collecting and delivering them. *Incidental* acts are secondary or subordinate acts that occur or are likely to occur in the course, or as a result, of such sending, transporting or delivering, such as receiving money for delivering the drugs.

As applied to the division and packing of drugs, the offender’s reason or purpose in carrying out such acts was key to deciding if the acts fell within this exception. Division and packing to enable the drugs to be, for instance, transported securely; placed into confined spaces; concealed to prevent detection; or identified more easily, could be *facilitative* or *incidental* acts. However, if the reason or purpose of the acts was to allow the original quantity of drugs to be broken up into smaller portions that would be sent to a wider audience, such action assisted in the *distribution* (rather than transportation, sending or delivery) of the drugs. As such, they did not fall within the exception.

The offender had the burden of proving that his acts fell within the courier exception, *ie*, he had to account for the reason or purpose of his actions. If he did not provide evidence of a permissible reason or purpose, he failed to discharge that burden, and could not be considered under the exception. Zainudin chose to remain silent and did not offer oral evidence in his defence. As such, he failed to discharge his burden (especially given the clear evidence of his actions), and could not be considered under the exception.

The CA also rejected Zainudin's other arguments, including that he was only following instructions, and that the drugs he repacked were not to be delivered directly to consumers, but were to be further subdivided (by others) into smaller portions for retail consumption. The CA held that an offender's ability to exercise decision-making power *may* be a strong reason to find that he is not merely a courier, but the converse is not true; the fact that he does not possess such ability does not, by itself, establish that he is a mere courier. Finally, Zainudin's actions were meant to allow further distribution of the drugs. Division and packing for such a purpose was neither facilitative of nor incidental to the transporting, sending or delivering of drugs, and therefore did not fall within the exception.

II. Material facts

In mid-2013, Zainudin was in dire financial straits. His friend Boy suggested that Zainudin deal with drugs to make cash and Zainudin agreed. Zainudin was to receive diamorphine from a third party, in the form of two "batu" (each "batu" containing about 500g of drugs). Boy would direct Zainudin to repack the drugs into packets of a specified weight, using a digital weighing machine which Boy gave Zainudin. Boy would then instruct Zainudin to hand the packets over to third parties. Zainudin would receive \$300 each time.

On the occasion in question, Boy once again gave Zainudin the money to be paid to the person who would pass Zainudin the drugs, as well as \$300 for Zainudin as payment. Zainudin met the person, gave her the money, and received two "batu" in return. Boy later instructed him to divide one of the "batu" into two, and to pack each half-portion into a Ziplock packet. As Zainudin was cutting open one of the packets containing the "batu", intending to divide and repack the drugs as instructed, CNB officers started attempting to enter his flat. As a result, Zainudin tried to dispose of the diamorphine. However, the CNB officers later retrieved the drugs.

The HC found Zainudin guilty of the offence of possession of not less than 22.73g of diamorphine for the purposes of trafficking, and imposed the mandatory death penalty on him.

III. Issues on appeal

Zainudin appealed the sentence of death imposed on him, asserting that he qualified for discretionary life imprisonment under the courier exception. As part of its decision, the CA conducted a full and structured examination of the courier exception, with close regard for the reasoning found in previous cases, to ascertain Parliament's intention regarding the scope of the provision. The CA focused in particular on whether the division and packing of drugs allowed an offender to remain within the courier exception.

A. Scope of the courier exception

The CA emphasised that Parliament intended the conditions for the courier exception to be "limited" and "tightly-defined" exceptions to the general rule that the death penalty is the appropriate punishment for those who traffic or import drugs in a quantity exceeding the prescribed threshold. Thus, the acts of a courier would be restricted to those identified in the provision, *ie*, acts centred on the transportation, sending or delivery of drugs, and nothing else. Indeed, the courts had adopted a cautious and generally narrow approach in interpreting the requirements of this exception.

Examining prior cases involving the courier exception, the CA found that the common thread running through the types of conduct that fell within the courier exception was that they were all acts that were *facilitative of* or *incidental to* the transporting, sending or delivering of the drugs by the offender to the intended recipient. *Facilitative* acts are acts which are preparatory to, or for the purpose of transporting, sending, or delivering the drugs. They enable or assist the offender in transporting, sending or delivering the drugs (and not any unrelated aims of the offender). *Incidental* acts are secondary or subordinate acts that occur, or are likely to occur, while the offender is transporting, sending or delivery the drugs, or as a result of such acts. The primary act must still be the offender's transportation, sending or delivery of the drugs.

Examples of *facilitative* acts include the safekeeping or storage of drugs from the time of collection till delivery; and wrapping a packet of drugs to render it more compact for ease of transportation or to better camouflage and conceal it during transportation. Examples of *incidental* acts include the receipt of money in exchange for the delivery of drugs; and the relaying of instructions from one courier to another, exclusively concerning information that the latter needs to transport, send or deliver the drugs handed to him by the former.

B. Dividing and packing drugs

The CA then considered whether the division and packing of drugs could come within the courier exception, *ie*, as a facilitative or incidental act. A key consideration would be the reason or purpose for the division and packing. Dividing and packing to enable drugs to be transported securely without fear of leakage; placed in confined spaces within the transporting vehicle; concealed to avoid detection; or more easily identifiable, could be considered purely facilitative or incidental acts. However, where the dividing and packing was to allow the offender to distribute the original quantity of drugs to a wider audience, by breaking up the original bulk into smaller packets, such conduct could not fall within the exception. It did not facilitate the mere transportation, sending or delivery of drugs, but in fact assisted in the *distribution* of drugs. Indeed, drug distribution networks are only possible because of such division and packing.

The CA emphasized that the burden was on the offender to prove, on a balance of probabilities, that his conduct fell within the scope of the courier exception. Where an offender fails to provide a permissible reason or purpose for his actions (or supporting evidence for such reason or purpose), he has failed to discharge his burden, and will be ineligible for sentencing under the exception.

As applied to Zainudin's case, the court observed that Zainudin had chosen to remain silent in court at the close of the Prosecution's case, and had not offered oral evidence in his defence. As such, he failed to discharge his burden, especially given the clear evidence (based on Zainudin's own statements) that Zainudin was to await instructions from Boy on how the drugs that he had divided and repacked into smaller packets were subsequently to be distributed.

IV. Other arguments

The CA dismissed Zainudin's argument that he was only acting on instructions when dividing the drugs into smaller packets, and not exercising any decision-making powers. The CA stated that while an offender's ability to exercise decision-making power may be a strong reason to find that he is not merely a courier, the converse is not true. The fact that he does not possess such ability does not, by itself, establish that he is a mere courier. The crucial point was that he

carried out the acts of division and packing for the purpose of intended distribution; as such, his conduct fell outside the scope of the courier exception.

The CA also rejected Zainudin's argument that the drugs he repacked could not have been meant for end-consumers but were merely a part of the chain of distribution, especially given that the divided "batu" were many times above the retail size. Regardless, Zainudin was dividing and packing the drugs for the purposes of distribution to Boy's customers; in fact, that was his central role. Indeed, it would not be unreasonable to characterise Zainudin's home as a sort of "distribution hub."

V. Legal implications

The case has a number of implications for future cases where offenders intend to plead that they were mere couriers.

First, it serves as a reminder to offenders and their counsel that they bear the burden of proving that an offender's conduct falls within the scope of the courier exception, *ie*, that his conduct could be categorised as either a facilitative or incidental act. While it is the offender's prerogative to remain silent, he must equally accept the consequence that his election of silence may result in him failing to discharge his burden of proof. To discharge this burden, the offender must prove to the court's satisfaction that he had a reason and purpose for his actions that fell within the courier exception, as well as sufficient evidence thereof.

Second, this case also highlights the different fate that may await an offender who divides and packs the drugs himself, as opposed to an offender who merely transports pre-packed drugs to various recipients. While the effect of both offenders' conduct would be the delivery of drugs to various recipients, the courier exception specifically considers the offender's role in the drug syndicate. If the offender plays a role larger than that of merely transporting pre-packed drugs from point to point, such as dividing and packing the drugs into smaller packets, the court may find that such division and packing was for the purpose of the *distribution* of drugs to a wider audience (unless the offender is able to satisfy the court that he had some other purpose in mind), and consequently that the offender's role was more than that of a mere courier. This would render him ineligible for discretionary life sentencing.

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