IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2020] SGHC 189

Criminal Case No 19 of 2016

Between

Public Prosecutor

And

Norasharee bin Gous

JUDGMENT

[Criminal Law] — [Statutory offences] — [Misuse of Drugs Act]

Public Prosecutor
v
Norasharee bin Gous

[2020] SGHC 189

High Court — Criminal Case No 19 of 2016
Choo Han Teck J
20 March, 8 July, 26 August 2020

14 September 2020 Judgment reserved.

Choo Han Teck J:

1 The accused, Norasharee bin Gous ("Norasharee"), was charged under s 5(1)(a) read with s 12 of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) ("MDA") for abetting, by instigation, one Mohamad Yazid bin Md Yusof ("Yazid") to traffic in not less than 120.90g of diamorphine. On 1 June 2016, I found Norasharee guilty of the charge against him. The mandatory death penalty was passed on him as he had not received a certificate of substantive assistance and did not qualify as a "courier" within the meaning of s 33B of the MDA.

2 On appeal, Norasharee's conviction and sentence were both upheld. Subsequently, Norasharee filed Criminal Motion No 16 of 2018 seeking to adduce further evidence to re-open the concluded appeal. In particular, he sought to tender evidence from a purported alibi, one Mohammad Faizal bin Zainan Abidin, nicknamed Lolok ("Lolok"), with a view to showing that he (Norasharee) did not meet Yazid at VivoCity shopping centre ("VivoCity") on

23 October 2013 and therefore could not have instructed Yazid on a drug transaction during the said meeting. Norasharee also claimed that his former counsel, Mr Amarick Gill ("Mr Gill"), had acted against his "firm instructions" in deciding not to call Lolok as a witness during the High Court proceedings before me.

3 On 5 August 2019, the Court of Appeal decided that the matter should be remitted to me to receive Lolok's evidence on Norasharee's alleged alibi defence, but ordered that the remission of the matter be stayed pending further consideration of certain matters. The Court of Appeal was also of the view that there was no reason to question Mr Gill's decision not to call Lolok given what Mr Gill understood to be the essence of what Lolok had told him. It clarified that its decision to remit the matter was based on the possibility that there was a misunderstanding as to the facts relating to what Lolok did or did not say to Mr Gill.

4 On 14 November 2019, the Court of Appeal ordered that the stay of the remittal order be lifted and the matter was thus remitted to me accordingly. Having received the fresh evidence and the parties' submissions, I find no new evidence that would have altered the findings I made at trial. Having heard the evidence before me now, I find, beyond reasonable doubt, that the alibi defence is an afterthought on Norasharee's part and that he had met Yazid at VivoCity on 23 October 2013 as proved at trial.

5 Lolok's evidence is that both he and Norasharee had worked as freelance boat cleaners on board a vessel known as the Long Ranger ("the Vessel") for the entirety of 2013. During the time when they were working together, they had gone for lunch together "every day" or "almost every day". On 23 October 2013, Lolok had an argument with Norasharee before lunch time whereby he

had made fun of a two-tone tan line on Norasharee's forehead, a remark that angered Norasharee and led to an argument between them ("the Tan Line Argument"). Lolok recorded the Tan Line Argument on a logbook kept on board the Vessel ("the Vessel's Logbook"). Following the Tan Line Argument, Lolok and Norasharee drove to VivoCity in Norasharee's black Honda Civic bearing registration number SGF5471B to buy lunch, after which they then returned to the Vessel to resume work.

6 Lolok also testified that Mr Gill had told him that he should not be a witness for Norasharee and had warned him to "stay away" from the case. Lolok insisted that he had not told Mr Gill that he had informed the CNB that he was not with Norasharee on the afternoon of 23 October 2013. Instead, he merely told Mr Gill that the CNB had not asked him if he had gone for lunch with Norasharee on that date.

7 In my view, there are material discrepancies between Lolok's and Norasharee's accounts of the events which had transpired in 2013. Norasharee testified during cross-examination that he would sometimes go to VivoCity with colleagues other than Lolok, and that he could not recall how frequently he went to VivoCity for lunch. When pressed as to why he remembered that he was with Lolok on what would (according to him) have been an uneventful day, Norasharee's only response was "I was really with him." In contrast, Lolok was confident that he had gone to lunch together with Norasharee "every day" or "almost every day". If this were indeed the case, Norasharee could easily have made reference to this fact to explain why he was certain that he was with Lolok at VivoCity on 23 October 2013. The fact that he did not do so undermines the credibility of his alibi defence.

8 Lolok's reliance on the Vessel's Logbook to buttress the reliability of his evidence is untenable. I am not convinced of the existence of the Vessel's Logbook. Notably, no logbook of any kind was produced in the proceedings before me, and the Defence has no explanation to justify its inability to procure the Logbook. During cross-examination, the owner of the Vessel, Mr German Ponomarev ("Mr German"), testified that no logbook had been kept upon the Vessel. The Defence seeks to discredit Mr German's evidence by demonstrating that he has poor recollection of certain features of the Vessel (such as its license number) as well as incidents involving the Vessel (such as an engine failure incident which allegedly took place sometime in or around October 2013). I accept that Mr German may not have been entirely familiar with the day-to-day operations of the Vessel, which he was content to leave in the hands of the boat crew. Nevertheless, I see no reason to disbelieve Mr German's evidence that he had personally managed all of the Vessel's services, and that he "knew exactly what kind of documentation [the Vessel] had". I agree with the Prosecution that there is simply no reason as to why Mr German might lie about the existence (or non-existence) of the logbook.

9 After the proceedings before me had ended, counsel for Norasharee submitted a statutory declaration (dated 16 July 2020) by Captain Haji, stating that he kept a logbook on board the Vessel recording "[his] duties for the day, the charter for the boat, any incidents that occurred on the boat as well as who enters and exits the boat at any given time". The delayed submission of this statutory declaration was consistent with the Defence's practice of adducing fresh evidence as and when it was deemed necessary to 'catch up' with the developments in these proceedings. In my view, it would be prejudicial to admit Captain Haji's evidence at this stage given that (a) he was present in court while Mr German was giving evidence; and (b) the Prosecution has not had an

opportunity to cross-examine him on the contents of his statutory declaration. Furthermore, Captain Haji's evidence is of little assistance to this court since he did not confirm that he has seen the specific entry which Lolok allegedly recorded in the Vessel's Logbook. Lolok's evidence on the occurrence of the Tan Line Argument therefore remains uncorroborated.

10 I add, for completeness, that the maritime legislation does not support the Defence's submission that there was a mandatory practice of keeping a logbook to record incidents which took place on board the Vessel. The Defence has referred me to the following statutes and regulations:

(a) The Merchant Shipping Act (Cap 179, 1996 Rev Ed) ("MSA");

(b) The Merchant Shipping (Official Log Books) Regulations (Cap 179, R 22, 1997 Rev Ed) ("Logbook Regulations");

(c) The Maritime and Port Authority of Singapore (Port) Regulations (Cap 170A, R 7, 2000 Rev Ed) ("Port Regulations"); and

(d) The Maritime and Port Authority of Singapore (Pleasure Craft) Regulations (Cap 170A, R 6, 2000 Rev Ed) ("Pleasure Craft Regulations").

11 Contrary to what the Defence suggests, there is nothing in these statutes and regulations which indicates that a logbook must be maintained on board the Vessel. First, the Logbook Regulations, which are enacted under s 89 (found in Part IV) of the MSA, require an official logbook to be kept in every ship registered in Singapore "unless otherwise stated" (see s 3(1) of the Logbook Regulations). However, it is undisputed that the Vessel is licensed and flagged as a pleasure craft for commercial use. According to s 52(1)(b) of the MSA,

Part IV of the MSA does not apply to any pleasure crafts. The Logbook Regulations are thus inapplicable in the present context.

12 In addition, while pleasure crafts are not exempt from Part V of the MSA (which deals with "Survey and Safety"), there is nothing in Part V of the MSA which requires a logbook to be kept on board the Vessel. This Part only makes provisions for the circumstances under which ships may be "surveyed or inspected" by the relevant authorities. It does not specify that logbooks must be kept for the purposes of such surveys. Similarly, the Port and Pleasure Craft Regulations do not mandate a practice of keeping a logbook. They merely suggest that that the Vessel may be surveyed and that documents relating to the Vessel — if any — must be produced if required by the relevant authorities.

13 Ms Wan Fei Fei ("Ms Wan"), an Assistant Director with the Maritime and Port Authority ("the MPA"), testified that it was also the view of the MPA that the Vessel was not required to maintain a logbook or mileage book at the material time.

14 I do not accept the Defence's theory that there had been a "miscommunication" between Mr Gill and Lolok. Mr Gill's evidence – which remained unshaken in cross-examination – was that Lolok had informed him that he had told the CNB that he was not with Norasharee at the material time. The Defence has not adduced any evidence to show why or how Mr Gill could have misunderstood Lolok's instructions. Furthermore, I do not agree that the onus was on Mr Gill to take steps to verify the existence of such a CNB statement. In CM 16 of 2018, the Court of Appeal made clear that that it saw no reason to question Mr Gill's decision not to call Lolok given what he understood to be the essence of what Lolok had told him. I am likewise of the view that

Mr Gill had fully and responsibly discharged his duties as Norasharee's defence counsel at the material time.

15 Lolok's evidence is also inconsistent in several material respects. For example, in his first statutory declaration, Lolok stated that he had recorded the Tan Line Argument in "Marina Keppel Bay's logbook" ("the MKB Logbook"). In his second statutory declaration, Lolok explained that he had not recorded the Tan Line Argument itself, but rather the fact that both he and Norasharee were working on the Vessel on 23 October 2013. Moreover, this fact was not recorded in the MKB Logbook, but in a "boat attendance list" which was kept on board the Vessel. On the stand, Lolok changed his position once more and stated that he had made an incident report regarding the Tan Line Argument on the Vessel's Logbook. Given that Lolok has, on his own evidence, worked at Marina Keppel Bay for at least eight years, I find it difficult to believe that he was unable to differentiate between the MKB Logbook and the Vessel's Logbook, or that he regarded the two as interchangeable. It is far more likely that Lolok amended his evidence when he realised that the MKB Logbook did not contain details of the incident which had allegedly taken place on board the Vessel.

16 Lolok also gave inconsistent evidence regarding the contents of the Vessel's Logbook. In his second statutory declaration, Lolok stated that the the logbook was a "boat attendance list" maintaining records of people who boarded the vessel, as well as the times which the boat crew started work, paused for lunch, and ended work. Subsequently, Lolok's oral evidence was that the logbook was more akin to a "mileage book" that was also used to record incidents occurring on the boat. It did not record the times during which the crew members went for and returned from lunch. These inexplicable

discrepancies cast significant doubt on the existence of the Vessel's Logbook and the entry which Lolok allegedly made therein.

17 Lolok's late appearance further detracts from the credibility of his testimony. As the Prosecution points out, no alibi notice was filed pursuant to s 278 of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) ("CPC"), and the first time that Lolok surfaced as a possible alibi was during Norasharee's evidence-in-chief. Lolok also testified during cross-examination that he did not, at any point in time, inform Mr Gill that he had been with Norasharee at VivoCity on 23 October 2013. If Norasharee is in fact, as Lolok claims, somebody that Lolok "loves", it is unthinkable that Lolok would have kept his alibi evidence to himself without attempting to inform the CNB or Mr Gill of the same. Even if Lolok had only been reminded of the Tan Line Argument after his interview with the CNB, he could readily have informed the CNB and/or Mr Gill that he would, in all likelihood, have been with Norasharee at VivoCity during lunch time since they had lunch together "everyday" or "almost every day". In the circumstances, it is clear to me that Lolok's evidence is an afterthought and that he was not at VivoCity with Norasharee on 23 October 2013.

18 Aside from the alibi defence, counsel for Norasharee raise two other grounds for setting aside Norasharee's conviction. The first is the argument that Norasharee has been "dogged by failures in investigating procedures throughout his arrest, remand, and initial sentencing", causing him to suffer a miscarriage of justice that renders his conviction unsafe. The alleged "failures in investigating procedures" are as follows:

(a) In non-compliance with s 22 of the CPC, the CNB failed to record a statement from Lolok after Norasharee's arrest.

(b) In non-compliance with s 17 of the CPC, the CNB failed to conduct a comprehensive investigation into Norasharee's line of work and place of employment.

(c) The Attorney-General's Chambers ("AGC") failed to fulfil their obligations under *Muhammad bin Kadar and another v Public Prosecutor and another matter* [2011] 3 SLR 1025 ("*Kadar* obligations") by failing to direct the CNB to furnish its knowledge of the fact that a statement had not been taken from Lolok.

(d) The CNB failed to promptly seize documents and records from MKB after Norasharee's arrest. Due to the intervening lapse of time, any documents containing evidence which could have exonerated Norasharee may have been discarded.

19 In my view, the manner in which the investigations were conducted did not prejudice Norasharee or result in a miscarriage of justice. It is undisputed that when Lolok was approached by the CNB in November 2015, he did not inform the CNB that he was Norasharee's alibi on 23 October 2013. In the circumstances, neither the CNB nor AGC was aware of the significance of Norasharee's employment details and/or his relationship with Lolok. There was therefore no apparent necessity for the CNB to (a) take a statement from Lolok, (b) conduct an investigation into Norasharee's line of work, and/or (c) seize documents from MKB when it was investigating the matter in 2015.

20 Similarly, I find that the Prosecution was not in breach of its *Kadar* obligations by failing to direct the CNB to furnish its knowledge of the fact that a statement had not been taken from Lolok. The Prosecution was not made aware of Mr Gill's "misapprehension" until Mr Gill filed a response to

Norasharee's supporting affidavit in CM 16 of 2018, stating that Lolok had informed him that he had told the CNB that he was not with Norasharee on 23 October 2013. Prior to this, the Prosecution had not been privy to the discussions between Mr Gill and Lolok before or at the time of trial. The Prosecution had also informed Mr Gino Hardial Singh (Norasharee's then-counsel), in response to his letter dated 5 December 2018, that no statement had been recorded from Lolok in relation to this case.

21 The second ground raised by the Defence is that the testimony of the co-accused, Yazid, ought to be re-examined in light of the investigative failures and the introduction of the alibi evidence adduced.

22 The reliability and weight of Yazid's testimony has already been analysed in comprehensive detail by the Court of Appeal in *Norasharee bin Gous v Public Prosecutor and another appeal and another matter* [2017] 1 SLR 820. In that case, the Court of Appeal assessed that Yazid's testimony that he had met Norasharee at VivoCity was truthful because, *inter alia*: (a) it was consistent with VivoCity's car park records, (b) it was consistent with Yazid's phone records, and (c) there was no other explanation as to why Yazid could have known that Norasharee was at VivoCity on that day. The Court of Appeal also noted (at [99]) that even though Yazid had not mentioned the meeting in VivoCity until 22 June 2015 – approximately one-and-a-half years after his arrest – he had made a statement, recorded as early as 30 October 2013, that he had met the person who had instructed him on the drug transaction on 23 October 2013. As no further clarification was sought from Yazid, he did not have an opportunity to elaborate on the said meeting until 22 June 2015.

23 In the circumstances, there is no basis for me to re-examine the veracity and the weight of Yazid's testimony. For the reasons that I have stated in my

judgment of 1 June 2016, and for the reasons stated above, I find that the alibi defence cannot stand and report these findings back to the Court of Appeal.

- Sgd -
Choo Han Teck
Judge

Yang Ziliang and Daphne Lim (Attorney-General's Chambers) for the prosecution;
Ravi s/o Madasamy (Carson Law Chambers) for the accused.