The Impossibility Defence: *Han Fang Guan v Public Prosecutor* [2020] SGCA

I. Executive Summary

In *Han Fang Guan v Public Prosecutor* [2020] SGCA 11, the Court of Appeal ("**CA**") clarified the law regarding "impossible attempts", which are attempts to commit an offence that could not possibly have been consummated in the circumstances. The accused Han Fang Guan ("**Han**") was charged with the capital charge of *attempting* to possess one bundle containing not less than 18.62g of diamorphine (also known as heroin) for the purpose of drug trafficking, an offence under section 5(1)(a) read with section 5(2) and section 12 of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) ("**MDA**").

Han was convicted following trial in the High Court ("**HC**"). As he had not been issued a certificate of substantive assistance (for assisting officers in disrupting drug trafficking activities within or outside Singapore after their arrest) by the Public Prosecutor, and he was not found to be a mere courier, the mandatory death sentence was imposed upon him.[1] Han appealed. He argued, among other things, that he had not actually ordered *diamorphine* from his drug supplier, but had only ordered 100g of *ketamine* and 25g of "*Ice*" (a street name for methamphetamine).[2]

On appeal, the CA held that for Han's conviction to be sustained, the Prosecution had to prove beyond a reasonable doubt that Han: (a) intended to possess the drugs in question, and knew the nature of the drugs, i.e. that they contained diamorphine; and (b) intended to traffic in those drugs. However, the CA found that there was a reasonable doubt as to whether Han had indeed ordered (and hence intended to traffic) diamorphine from his supplier, as Han was consistent in his assertion that he had ordered ketamine and Ice. This was also supported by objective evidence of a possible mix-up of the orders from the drug supplier. The Court therefore allowed the appeal by Han, and acquitted Han of attempting to possess one bundle containing not less than 18.62g of diamorphine for the purpose of drug trafficking.

However, the CA then had to consider whether the current charge of attempting to possess diamorphine for the purposes of trafficking could be amended to one of attempted possession of some other drugs (i.e. ketamine and Ice) for trafficking. The attempt to possess ketamine and Ice for trafficking was an "*impossible attempt*", as there was no possibility of Han actually obtaining those drugs at that time. The CA decided to apply a two-stage framework to examine such "impossible attempts":

(a) *First*, was there a specific intention to commit a criminal act? ***Only if so*** would the courts look to the second step.
(b) *Second*, were there sufficient acts by the accused in furtherance of the specific intention to commit the criminal act in (a)?

A conviction may only be arrived at if the answer to the second stage was also "Yes".

The CA then adjourned the matter pending submissions from the Prosecution as to whether the charge against Han should be amended to one of attempting to possess ketamine and Ice for the purpose of trafficking, alongside any subsequent responses from Han.

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[1] The courts have the discretion to sentence an offender to life imprisonment (instead of the death penalty) if the offender was found to be merely a courier under section 33B(2)(a) of the MDA, and the Public Prosecutor has issued a certificate of substantive assistance under section 33B(2)(*b*) of the MDA.

[2] Under the MDA, Han's claimed order of 100g of ketamine and 25g of Ice would not ordinarily attract the death penalty.

II. Material Facts

Sometime before 2nd March 2016, Han contacted his drug supplier, known as "Lao Ban", to order some drugs. A drug courier, Khor Chong Seng ("**Khor**"), collected two motorcycle helmets containing several bundles of drugs from Lao Ban in Malaysia, intending to cross into Singapore and deliver the drugs to various recipients in Singapore.

Early morning on 2nd March 2016 (around 12.10am), Khor was stopped and searched by Central Narcotics Bureau ("**CNB**") officers after entering Singapore through Woodlands Checkpoint. In total, the CNB officers found seven bundles of controlled drugs on Khor: (a) three big bundles, wrapped in black tape, each bundle weighing approximately 450 grams, each of which contained diamorphine; (b) one small bundle, wrapped in black tape, weighing approximately 50 grams, which contained methamphetamine; and (c) three bundles wrapped with transparent tape, each of which contained nimetazepam tablets.

Khor informed the CNB officers that he was tasked to deliver the drugs to various recipients in Singapore. He agreed to assist the CNB officers in a follow-up operation against the intended recipients, where he would communicate with Lao Ban and the intended recipients to deliver the drugs, and give the information to the CNB officers. Shortly after 2am on 2nd March 2016, Khor received instructions from Lao Ban, via phone calls, to deliver the drugs to three individuals in the following manner: two big *yellow* bundles to "99", one *yellow* bundle to "T", and the rest to "Ah Ken". Lao Ban also told Khor to collect $3,600 from "T", and later instructed Khor that "T" would call Khor. At 2.47am, Han called Khor and introduced himself as T.

Subsequently, over four phone calls between 4.02am and 4.40am, Han and Khor made arrangements to meet. CNB officers set up an ambush, subsequently arresting Han. $3,600 in cash was found on Han. In his recorded statements and at trial, Han asserted consistently that the $3,600 found on him was meant for gambling (although he admitted that if someone had arrived with ketamine and Ice, he would have used the money to pay for the drugs), and further that he had ordered ketamine and Ice from Lao Ban, and not diamorphine.

III. Issues on Appeal

The CA considered the following issues on appeal:

(a) Was there a reasonable doubt that Han had ordered diamorphine from Lao Ban?
(b) If so, under what circumstances can criminal liability attach to impossible attempts?

A. Was there reasonable doubt?

Han was charged under section 12 of the MDA, whereby the accused person must intend to commit the underlying offence of attempting to possess one bundle containing not less than 18.62g of diamorphine for the purpose of drug trafficking. The Prosecution had to prove beyond a reasonable doubt that:

i. Han intended to possess the drugs in the *specific* bundle that he was supposed to have received, which contained not less than 18.62g of *diamorphine*, and knew that the bundle contained *diamorphine*; and
ii. Han intended to traffic in those drugs *specifically*.

The CA found that there was reasonable doubt[3] as to whether Han had in fact ordered diamorphine from Lao Ban. It thus allowed the appeal and acquitted Han on the current charge. *First*, there was a significant inconsistency in the Prosecution's case. In a phone conversation shortly after 2.00am on 2nd March 2016 between Lao Ban and Khor, Lao Ban had repeatedly referred to the bundle he intended for Han as a "*yellow* bundle". However, the bundle attributed to Han under the section 12 MDA charge was a *black* bundle.

Further, with regard to that phone conversation, Khor had already been apprehended and was assisting the CNB investigating officer (who was also listening in on the conversation), and the seized (non-yellow) bundles were also in sight of that CNB officer during the phone conversation. Nonetheless, no instruction was given to Khor to clarify with Lao Ban what he meant by the *yellow* bundles.[4] Instead, the investigating officer had chosen to proceed on the "presumption" that Lao Ban was referring to the big *black* bundles when he mentioned the *yellow* bundles.

Additionally, the Prosecution's case was that *all* the three black bundles that Lao Ban had referred to as "yellow bundles" were identical and were referred to interchangeably. While it was true that all three black bundles contained diamorphine, there was a complete lack of evidence that the other two bundles (meant for the buyer referred to as "99") were *intended* to contain diamorphine. 99, who had also been apprehended in the same CNB operation, could well have been called to called to testify that he had ordered diamorphine. Had the Prosecution established that 99 had in fact ordered diamorphine, the CA might have come to a different conclusion as to whether there was a reasonable doubt that Han had also ordered diamorphine from Lao Ban, given that Lao Ban had referred to the three bundles in a way that suggested they were interchangeable.

Second, the CA found that Han had been consistent in his claim that he had not ordered *diamorphine* but instead had ordered ketamine and Ice. He made this claim even before he was aware of objective evidence that supported his claim (i.e. the phone conversation between Khor and Lao Ban), which would have indicated the possibility of a mix-up in the drug orders.

B. Criminal liability for impossible attempts?

Given that the essence of Han's defence was that he had ordered ketamine and Ice instead of diamorphine, the CA then considered whether the current charge against Han should be amended to one that he attempted to possess *some other drug* for the purpose of trafficking. However, such an act would be considered an "impossible attempt": given that there were never any bundles containing 100g of ketamine and 25g of Ice, there was no possibility of Han consummating the primary offence of possessing ketamine and Ice for the purpose of trafficking. Could he then be charged with *attempting* to commit that offence?

The CA stated that, typically, "impossible" attempts arise in two broad situations. The *first* is where an accused person has not completed his intended course of action (e.g. because he was inept, had inadequate tools, or another party intervened).

[3] Reasonable doubt, as explained in *Public Prosecutor v GCK* [2020] SGCA 2, means doubt that is supported by reasons that are logically connected to the evidence.

[4] The investigating officer explained, at trial, that to ask too many questions during the operation would likely raise Lao Ban's suspicions.

The *second* is where the accused person has done all that he intended to do, but the offence has not been consummated for some reason. In such cases, the accused was often operating under a mistaken belief as to some fact. For example, in one case,[5] the accused, who was charged with trafficking diamorphine, claimed that he believed he was actually carrying ecstasy pills. Such cases led to a dissonance between the act that the accused *intended* to carry out (e.g. trafficking in ecstasy), and the act which *he in fact carried out* (e.g. trafficking in diamorphine). The CA found that many previous cases had erroneously assumed that the issue of whether the accused person could be charged with attempting to commit an offence should be assessed by reference to the act that the accused *actually* did, rather than by reference to the act that the accused *intended* to do. For example, in the UK case of *Haughton v Smith* [1975] AC 476, a van that was loaded with stolen corned beef had been intercepted by the police partway through its intended journey; the police decided to let the van continue to where the driver was supposed to meet, and did later meet with, the accused. The police subsequently arrested the accused for handling stolen goods (i.e. the corned beef). However, by the time the accused handled the corned beef, it was no longer considered stolen because it had been restored to lawful custody when the police intercepted the van. The court therefore acquitted the accused of attempting to handle stolen goods. The act that the accused *committed* (attempting to handle goods that were already in police custody) was used as the rationale for the court's decision, instead of the act *intended* (attempting to handle goods that were stolen).

The CA held instead that an "attempt" is criminalised because the intended (or attempted) act is illegal. The imposition of a requirement that there be sufficient acts to corroborate the existence of that guilty intention serves not only as an evidentiary threshold, but also, and more importantly, as a safeguard to ensure that an accused person is not penalised purely for having a guilty intent. Thus, cases involving impossible attempts must be resolved by focusing on the criminality of the *intended* act. If the criminality of the *intended* act was sufficiently established, it would not generally matter if what the accused person did would not objectively amount to an offence. For example, a would-be murderer who stabbed a bolster in the mistaken belief that it was his intended victim could still be charged for attempted murder.

The accused's acts must also be analysed against the *guilty intent* with which he set out to commit the offence. Sufficient actions towards the fulfilment of the *intended* act must have been performed by the accused, so as to filter out cases that are only the products of a guilty mind (without sufficient acts to satisfy the *intended* crime).

The CA thus set up a two-stage framework that could be applied to "impossible attempts":

(a) *First*, was there a specific intention to commit a criminal act? The focus would be on the *act* that the accused person specifically *intended* to do, as well as the criminality of such an act (whether on its face, or due to some mistaken belief harboured by the accused person).
The inquiry would move on to the second stage only if the answer to the above was *yes*. This would sieve out situations where what the accused intended to do was not an offence at all.

(b) *Second*, were there sufficient acts by the accused in furtherance of his specific intention to commit the criminal act under (a)? The inquiry here was directed at whether there were sufficient acts to reasonably corroborate the presence of that intention, and demonstrate substantial movement towards its fulfilment. (This would avoid penalising mere guilty intentions.)

[5] *Public Prosecutor v Mas Swan bin Adnan* [2012] 3 SLR 527.

The CA noted that this framework would resolve several difficulties that have plagued the traditional judicial attitude towards "impossible attempts". For instance, the result in *Haughton* (discussed above) was subject to much criticism. That decision was intuitively unsatisfactory, as the act that the accused had *intended* to do was a crime in every sense of the word. Now, under this two-stage framework, the same situation would have a different result: in specifically intending to deal with stolen goods and coupling that specific intent with sufficient acts, the accused in *Haughton* would be found to be both morally and legally culpable, and therefore would have been convicted of the crime.

IV. Lessons Learnt

There are two important lessons to be applied from this case. *First*, in the process of gathering evidence, it is important for investigators to clarify any discrepancies that might lead to reasonable doubt during trial. The CA pointed out that it might have come to a different conclusion if the CNB officer had instructed Khor to clarify with Lao Ban concerning the apparent discrepancy in the colour of the bundles, or the Public Prosecutor had obtained evidence through "99" that the two similarly coloured black bundles in Khor's possession were meant to contain diamorphine.

Second, parties who have committed "impossible offences" are not protected from criminal liability. An accused person may be found guilty of a criminal attempt, even if the offence could not possibly have been consummated, so long as it is proven that the accused had intended to commit a crime and had taken sufficient steps in furtherance of such criminal intent. For instance, while the CA did not discuss whether Han would be found guilty of attempted trafficking of ketamine and Ice, an analysis of Han's acts under the two-stage framework would seem to imply that he would be found guilty if the current charge were amended to a charge of attempting to possess ketamine and Ice for the purpose of trafficking.

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