The Principle of Fairness in Criminal Trials:
***Mui Jia Jun v Public Prosecutor* [2018] SGCA 59**

I. Executive summary

In *Mui Jia Jun v Public Prosecutor* [2018] SGCA 59, the Court of Appeal ("CA") upheld the fundamental principle that an accused person should know with certainty, and thus have a full opportunity to meet, the case advanced against him by the Prosecution.

In this case, after a trial in the High Court ("HC"), Mui Jia Jun ("Accused") and one Tan Kah Ho ("Tan") were jointly convicted on two counts of trafficking in controlled drugs in furtherance of their common intention. The Prosecution's case against the Accused was largely based on Tan's testimony that (i) the Accused handed Tan the pre-packed drugs in question (which Tan had not handled previously) and (ii) the Accused sent Tan text messages which contained instructions regarding the delivery of the drugs (the "Delivery Messages"). On appeal, however, the Prosecution conceded there was a reasonable doubt as to whether the first facet of its case was established, due to evidence of Tan's DNA on the drug bundles. This meant that the Prosecution could only rely on the second facet of its case against the Accused to uphold the conviction.

However, the CA decided against assessing whether the Prosecution had proved the second facet of its case beyond reasonable doubt. This was because the Prosecution had not clearly advanced this facet at trial. Moreover, if it had done so, the evidence might well have unfolded differently. Instead, in the light of the principle of fairness referred to above, the proper course was to order a retrial of the matter before another HC judge.

The CA further stressed the following:

- In joint trials, trial courts must exercise great care in making findings in favour of one accused person which may implicitly amount to findings in favour of the Prosecution concerning its case against the other accused person(s);
- In the context of a criminal trial, a trial court should generally not make a finding that resolves against the accused what would otherwise amount to a vital weakness in the Prosecution's case, when the Prosecution itself has not sought to address that weakness by leading evidence and submissions to support such a finding; and
- Where the Prosecution advances a composite case comprising several facets and it would not be reasonably clear to the accused, absent an express statement to this effect, that the Prosecution is seeking a conviction based on any individual facet of its case, it may be prudent for the Prosecution to make this explicit. This may be done either in the charge, the opening address at the trial, or by any other written means.

II. Material facts

Background. In February 2014, Tan entered Singapore from Malaysia and delivered a blue bag containing three bundles of drugs to a third party. Both Tan and the recipient were later arrested, and the blue bag seized. The police later found, in Tan's car, a white bag with seven bundles of drugs (the "Jorano bag"). Each of these ten bundles contained either a Ziploc bag containing a powdery or crystalline substance, or a packet of tablets. Each such bag or packet had been covered with cling wrap, with several layers of black tape applied over the whole of the cling wrap. The bundles in the blue bag contained not less than 21.74g in total of diamorphine, while three bundles in the Jorano bag contained not less than 323.7g in total of methamphetamine, and the four remaining bundles contained tablets of nimetazepam. The police also seized three handphones from Tan.

Tan denied knowing the contents of the bundles, or having been involved in their packing. He claimed he merely received instructions, in Malaysia, via calls and text messages from one "Ah Jun". Tan said that on the day before his arrest, Ah Jun called, using a Malaysian number ("the Untraced Number"), to inform him of a job for the next day. Tan said he collected the pre-packed drugs from Ah Jun's home the next morning. He then drove to Singapore, where he received the Delivery Messages from Ah Jun. He delivered the drugs accordingly. Separately in April 2014, following investigations arising from a different arrest, the Accused was arrested on suspicion of involvement in drug activities. Three handphones were also seized from him.

Connection between Tan and the Accused. It was undisputed that Tan and the Accused knew each other. When shown a photograph of the Accused, Tan identified him as Ah Jun. Separately, the Accused claimed he knew Tan as "Ah Hao", and that Tan had been working for one "Xiao Hu". The Accused said he also performed errands for Xiao Hu, as he felt indebted to him for previously giving him a loan. This included purchasing paper boxes, cartons of black sticky tape, Ziploc bags, as well as packing pills and white substances. He had been told by Xiao Hu that the pills and white substances contained sexual enhancement pills and solidified fragrance oils, but actually suspected that they were drugs. The Accused admitted he had seen the Jorano bag at Xiao Hu's residence, as well as bundles similar to the seized bundles, but was told not to touch them. He asserted that he had never seen or touched the seized bundles or their contents.

Handphones. The evidence from the handphones centered around the Untraced Number, which Tan claimed Ah Jun used to call him to inform him of the February 2014 delivery job:

- One of Tan's three handphones had the Untraced Number saved under the contact name "Ah Jun" (in Mandarin), and three messages were sent to that handphone from the Untraced Number. These messages were the abovementioned Delivery Messages.
- The Untraced Number was saved in one of the Accused's phones under the contact with a Chinese character which meant "I (or Me)". The Accused claimed it was Xiao Hu who had saved that number in that handphone.
- The Untraced Number was also in another of the Accused's handphones, under a Facebook Contact named "Akira Akimoto". Five Facebook Messenger messages were also received on that handphone from "Akira Akimoto". However, these five messages were in Mandarin. The Accused testified that the messages were sent by Xiao Hu. These messages were never translated, and the Prosecution did not cross-examine the Accused on them.

Additionally, the number from one of the Accused's handphones was saved in Tan's two remaining handphones under the names "Ah Jun" and "Ah Jun 1", respectively.

Trial. At trial, the Prosecution's case was that Tan and the Accused had together planned for Tan to deliver the drugs. The Accused handed Tan the drugs in Malaysia, with the bundles all pre-packed; Tan had not been involved in packing the bundles. After Tan entered Singapore, the Accused sent Tan the Delivery Messages, and Tan delivered the drugs. The Accused's defence was that he had not entered into a plan with Tan for the drug delivery. Instead, it was Xiao Hu, to whom the Untraced Number belonged, who had done so.

The HC convicted both Tan and the Accused. The Accused received the mandatory death penalty. However, the HC only sentenced Tan to life imprisonment and 15 strokes of the cane, as it found that Tan was merely a courier and the Prosecution had issued him a certificate of substantive assistance.

III. Issues on appeal

There were two main issues on appeal: (a) whether there was reasonable doubt as to whether

the Prosecution had established that the Accused had given Tan the drugs in question, and (b) in view of the answer to the first issue, what was the appropriate outcome in this appeal?

A. Did the Accused give Tan the drugs

The CA held that the Prosecution had rightly, albeit belatedly, conceded there was a reasonable doubt as to whether the Accused had handed Tan the drugs. The Prosecution had relied on Tan's statements for its case that the Accused had given Tan the Jorano bag, with the pre-packed bundles of drugs already inside, and that Tan had not been involved in the packing. However, DNA evidence indicated otherwise. The drugs were in packets or bundles which were first covered in cling wrap before being covered in layers of black tape. Tan's DNA had been found on the adhesive side of the tape on five of the ten bundles, which contradicted Tan's statements that he had not packed *any* of the bundles. The HC Judge dealt with this problem by observing, from photographs of two bundles, that the bundles were not packed tidily, with the edges of tape sticking out of the ends of the two bundles. As such, Tan may have left his DNA on the adhesive side of those edges of tape when he was handling them for delivery.

The CA, however, stated that the presence of Tan's DNA on the adhesive side of the tape suggested that Tan had in fact been involved in preparing or packing at least some of the bundles. This challenged the credibility of Tan's evidence against the Accused, and undercut the Prosecution's case against the Accused. The CA noted that the HC Judge had stated he was giving Tan the benefit of the doubt. Nonetheless, his reasoning was flawed, as (i) it lacked sufficient evidential basis, and (ii) the Prosecution failed to advance any explanation as to why Tan's DNA was found on the bundles.

(i) Insufficient evidence. Once it was established that Tan's DNA was on the adhesive side of the tape around the bundles, the evidential burden shifted to the Prosecution to explain this. If the Prosecution failed to discharge this burden, any doubt arising from this evidence should have been resolved in favour of the Accused. However, the Prosecution did nothing to address this point beyond agreeing with the HC Judge's explanation.

Moreover, the Accused had no control over how the DNA evidence was obtained and presented at trial. In contrast, the Prosecution had control over the investigations, and could conceivably have directed the DNA analysis to be carried out to enable the court to identify exactly where Tan's DNA was found. And if this could not be done, the Prosecution should have faced up to the limitations of the evidence. Thus it was wrong to resolve any doubt in such circumstances in favour of the Prosecution. The CA noted that the HC Judge might not have appreciated the full implications of his statement. Nonetheless, his conclusion (that Tan was merely a courier) implicitly gave the Prosecution the benefit of the doubt for its case against the Accused.

The CA further noted that in joint trials, especially those involving accused persons charged with capital offences under the MDA, findings in favour of one accused person may implicitly amount to findings in favour of the Prosecution concerning its case against the other accused person(s). As such, trial courts must exercise great care in making such findings, and should bear in mind that the Prosecution bears the burden of proving the guilt of *each* accused person beyond reasonable doubt.

(ii) No explanation by the Prosecution. The Prosecution failed to advance *any* explanation as to why Tan's DNA was found on the bundles, resulting in a serious gap in its case. The CA stated the HC Judge should not have filled in this gap (even if he had some evidentiary basis to do so). It stressed that a trial court should generally not make a finding that

resolves against the accused what would otherwise amount to a vital weakness in the Prosecution's case, when the Prosecution itself did not address that weakness by leading evidence and submissions to support such a finding. This is for two reasons. First, the Prosecution must prove the guilt of the accused beyond reasonable doubt. It is for the Prosecution, and not the court, to address any weakness in its evidence, failing which it must accept the consequences that follow for its case against the accused. Second, fairness to the accused demands that he should have the opportunity to address every vital aspect of the factual basis on which he is convicted. Adopting a case theory that the accused did not have the chance to rebut would be fundamentally unfair to him.

B. The appropriate outcome in this appeal

As the Prosecution conceded there was a reasonable doubt as to whether the Accused had handed Tan the drugs, the only issue left was whether the Prosecution had established, beyond reasonable doubt, that the Accused had sent Tan the Delivery Messages. The CA declined to affirm the Accused's conviction on this basis, as (i) the Prosecution did not clearly advance this matter at trial, and (ii) if it had done so, the evidence might have unfolded differently. Instead, the appropriate order was a retrial of the matter before another High Court judge, where the Prosecution would be confined to arguing its case based solely on the Delivery Messages.

(i) Case at trial. The Prosecution did not expressly seek to convict the Accused on the stand-alone basis that he had sent Tan the Delivery Messages. Indeed, the charges did not even set out the way in which the Prosecution claimed the Accused had participated in the alleged offences. While its opening address provided such particulars, it did not expressly state that the two facets of the case were *independent* bases upon which a conviction was sought.

The CA noted that the Prosecution claimed its case against the Accused, based on the Delivery Messages, was "clearly implicit" at trial. The Prosecution claimed that its case against the Accused always had two facets, and it was simply relying on the second facet now. However, the CA disagreed: the Prosecution had taken the "uncompromising" stance at trial, and later during the initial part of the appeal, that Tan's entire account of events was true. It had never considered that Tan's account of how he possessed the drugs might be untrue. Moreover, the Prosecution's case against the Accused, at least in relation to the allegation that the Accused handed Tan the drugs, was largely based on Tan's evidence. As such, it was not plain to the Accused that the evidence from the various handphones would be of central importance.

(ii) Impact on evidence. The CA then considered whether the evidence might have unfolded differently if the Prosecution had expressly set out the alternative case (based on the Delivery Messages) at trial. The CA accepted the Accused's submission that its cross-examination of Tan in relation to the Delivery Messages would have been affected. First, based on Tan's account, the person who had given him the Jorano bag was the same person who had sent him the Delivery Messages. However, the alternative case presupposed that Tan's evidence (that the Accused had given him the Jorano bag) could not be sustained. This would likely have affected how Tan was cross-examined, not just in relation to the Jorano bag, but also in relation to the Delivery Messages and who had sent them.

The CA further noted that the Accused had argued that the messages from "Akira Akimoto" showed that the Untraced Number belonged to someone else. If the Prosecution had clearly stated that it was seeking conviction on the basis that the Accused had sent the Delivery Messages, the Accused would have at least translated these messages. In that case, the

Prosecution might then have scrutinised these messages and cross-examined the Accused on them accordingly.

The CA emphasised that it was a fundamental principle of Singapore's criminal law that an accused person should know with certainty, and be prepared to meet, the Prosecution's case against him. It would violate that principle if a court were to consider a basis for convicting an accused that he was not aware of, and thus not ready to meet at trial, in circumstances where knowledge of that basis might have affected the evidence presented at the trial.

Nonetheless, the CA declined to acquit the Accused, as the allegation that the Accused had sent Tan the Delivery Messages was part of the composite case advanced at trial. The concern was that this element had not been clearly articulated as a stand-alone basis for convicting the Accused, and hence that the Accused might have been prejudiced in his defence. The CA further stressed that it had not determined that the Prosecution had failed to prove, beyond reasonable doubt, that the Accused had sent Tan the Delivery Messages, merely that it was not making that determination at this point.

IV. Further guidance

The CA laid down guidance for the Prosecution for future similar cases, where the Prosecution advanced a composite case comprising several facets and it would not be reasonably clear to the accused (barring an express statement) that the Prosecution was seeking a conviction based on any individual facet of its case. In particular:

- The charge should, if practicable, clearly state the various facets of the Prosecution's case against the accused. For instance in this case, the alleged acts – the Accused's handing of the Jorano bag and sending of the Delivery Messages – could and perhaps should have been included as particulars of the charges against the Accused; and
- The Prosecution should make clear that it was seeking a conviction of the accused based on *any one* of the multiple facets of its case. If it could not be done in the charge, it could be made clear in the opening address at the trial, or by any other written means. The CA noted it was not limiting the ways in which the Prosecution could clearly communicate this to the accused, so long as it was in writing. For instance, where a Case for the Prosecution was served for the criminal case disclosure regime prior to a trial in the State Courts, the Prosecution might clearly state there that it was seeking a conviction of the accused based on any one of the alternative elements of its case.

The CA recognised that there might be strategic disadvantages for the Prosecution in clearly articulating an alternative case, which proceeded from the premise that its primary case against the accused might fail. Nonetheless, the CA considered that this was what fairness in the conduct of criminal proceedings demanded.

Thus the Prosecution had to make a choice in such situations. It could choose not to clearly articulate its alternative case – but where the evidence supporting that case might have been different if that case had been made clear at trial, it may not rely on that case to secure the accused's conviction or (as the case may be) uphold the accused's conviction on appeal. On the other hand, if the Prosecution wished to be assured that it would be able to rely on an alternative case if its primary case failed, it should give the accused clear notice of the alternative case, and take any consequences that followed for its primary case at the trial.

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