Clarifying the principles in the defence of necessity and the chain of custody process
***Muhammad Hamir B Laka v Public Prosecutor* [2023] 2 SLR 286; [2023] SGCA 23**

I. Executive Summary

Having to choose the lesser of two evils: the defence of necessity deals with a situation where an individual is faced with such a situation. This defence is found in section 81 of the Penal Code (Cap 224, 2008 Rev Ed) (the "**Penal Code**"). It essentially allows an accused person to exonerate themselves of an act that would ordinarily be considered a criminal act (the "***subject act***") if it is done in good faith, to prevent or avoid other harm. In *Muhammad Hamir B Laka v Public Prosecutor* [2023] 2 SLR 286; [2023] SGCA 23, the Court of Appeal ("**CA**") further clarified how the defence applies. In short, the defence may be invoked if the accused acted in good faith to avoid a much greater harm, which he reasonably believes is imminent, more likely and serious, and where he reasonably assessed that there is no reasonable legal alternative aside from the subject act. However, it cannot be invoked where the accused person engages in premeditated criminal conduct or the deliberate and wilful infliction of harm.

Here, the offender, who had been convicted of drug trafficking pursuant to section 5(1)(*a*) read with section 5(2) of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) ("**MDA**"), argued that he had trafficked drugs to pay for his wife's medical treatment. The CA rejected this argument, because the offender made a deliberate, premeditated decision to traffic the drugs. In any event, the offender did not provide sufficient evidence that enabled him to rely on the defence of necessity.

The CA also rejected the offender's alternative ground of appeal, which was that the chain of custody in respect of the evidence relied upon by the Prosecution had been compromised, and therefore that the Prosecution had failed to establish the chain of custody beyond a reasonable doubt. The CA held that the main point of requiring that the Prosecution show that there is a chain of custody is to ensure that the evidence that has been seized in the course of the investigations is the same evidence that has been analysed. The facts relied upon by the offender in his contention that there was a break in the chain of custody were not sufficient to show a reasonable doubt.

II. Material Facts

In September 2019, the offender Mr Muhammad Hamir B Laka ("**Hamir**") was arrested while attempting to deliver drugs to a buyer, "Zainudin". Subsequently, drugs were found both in Hamir's possession and at his residence. The drug analysis showed that he was in possession of 39.71g of diamorphine for the purpose of trafficking. Prior to his arrest, Hamir worked as a part-time deliveryman. However, from early 2019, Hamir struggled to financially support his family as his employer offered him a reduced number of delivery jobs. At the same time, Hamir's wife developed diabetic symptoms, including leg swelling that required surgical intervention. According to Hamir, he then decided to traffic in methamphetamine (and subsequently diamorphine) to fund his wife's medical bills.

After his arrest, Hamir claimed trial in the General Division of the High Court ("**HC**") to one charge for drug trafficking in contravention of section 5(1)(a) read with section 5(2) of the MDA, punishable under section 33(1) of the MDA. At trial, Hamir raised three issues among others: the defence of necessity; that there had been a break in the chain of custody of the evidence submitted

to the HC as exhibits ("**the drug exhibits**"); and that his statements to the investigating officers had been inaccurately recorded.

First, the HC held that Hamir could not rely on the defence of necessity, as he had other alternatives to raise the requisite funds, including selling jewellery that he possessed. Second, regarding the issue of the break in the chain of custody of the drug exhibits tendered as evidence, the HC found that the Prosecution had proven beyond a reasonable doubt that the drug exhibits analysed were the same as those seized from Hamir at the time of his arrest. Third, the HC also rejected Hamir's argument that the statements that he gave to the investigating officers were inaccurately recorded. The issues raised by Hamir did not affect his admission to the various elements of the offence for which Hamir had been charged. The HC accordingly convicted Hamir and sentenced him to the mandatory death penalty.

III. Issues on Appeal

Hamir appealed against his conviction and sentence on three grounds. Here, two grounds of appeal will be discussed: the defence of necessity under section 81 of the Penal Code; and a break in the chain of custody of the drug exhibits.

A. Defence of Necessity

Given that previous decisions had not had the opportunity to fully consider the defence of necessity, the CA decided to clarify the requirements and principles relating to the defence of necessity. The defence of necessity, as set out under section 81 of the Penal Code, requires the following:

- The accused must have done an act that he knew was *likely* to cause harm; and
- The accused must have done the subject act in *good faith* for the *purpose of preventing or avoiding other harm*.

These requirements should be understood within the context of the explanation to section 81, which stated that in every case, it has to be considered as a matter of fact whether the "harm to be prevented or avoided" was "of such a nature and so imminent as to justify or excuse the risk of doing the act". What would normally be unjustifiable – carrying out the subject act – may in certain circumstances be excused because it is done to prevent or avoid imminent injury or harm of such gravity to others that it justifies or excuses the risk of doing the subject act.

(i) Principles

After considering the legislative history of the amendments to section 81 of the Penal Code, the CA held that section 81 of the Penal Code could not be used to justify intended acts which were forbidden by criminal law.

The CA laid out the following principles for this defence:

- The defence will not avail where the accused person engages in deliberate or premeditated criminal conduct or the deliberate and wilful infliction of harm.
- To avail of the defence, the offender must have acted in good faith and must have assessed the risk that inhered in the subject act and the justification for running that risk with due care and attention, though this will be considered having regard to the circumstances he was in.

- The defence may in principle be invoked if the offender has the oblique intention to cause some harm, but acted solely for the purpose of avoiding much greater harm.
- The harm to be avoided must reasonably be apprehended to: be imminent; be more likely and more serious than the harm risked by the subject act; and leave the accused person with no reasonable legal alternative course to take.

(ii) Whether Hamir could rely on the defence of necessity

The CA held that Hamir could not rely on the defence of necessity for two reasons. *First*, Hamir made a deliberate, premeditated decision to traffic the drugs. He had sought out his supplier to provide him with drugs of increasing potency to increase his profits from his trafficking activities, supposedly to pay for his wife's treatment. *Second*, the harm caused by Hamir trafficking drugs of increasing potency and harm could not be understated.

The CA further held that in any event, Hamir had failed to produce the sort of evidence that would have been needed to enable him to mount the defence. There was no evidence to show: exactly what assets he had access to; what efforts he made to raise funds for his wife's operation; what the projected and actual cost of the operation and hospitalisation might have been; what the urgency of the situation was; and who ultimately paid for the operation.

B. Chain of Custody

Hamir contended that there was a break in the chain of custody of the drug exhibits because of several issues with how the evidence had been handled. On appeal, he focused on these three discrepancies:

- The discrepancy in weight measured of the exhibits by the investigating officer and the Health Sciences Authority ("**HSA**");
- DNA traces of the photographer and swabber being found on the drug exhibits; and
- Inconsistency between the prosecution's witnesses as to the storage medium for the drug exhibits.

The CA first clarified what an accused must prove to succeed on such an argument. The Prosecution bears the burden of proof to prove beyond a reasonable doubt that the drug exhibits analysed by the HSA are the same ones seized by the Central Narcotics Bureau. It is open to the offender to raise a reasonable doubt as to the identity of the exhibits, which could suggest a break in the chain of custody. To raise a reasonable doubt, the defence has to explain how discrepancies may lead the court to infer that there was a break in the chain of custody. Mere speculative arguments which raise a theoretical possibility of a break in chain of custody would not suffice.

First, in respect of the first discrepancy, Hamir argued that there was a difference between the weight of the drugs recorded by the investigating officer when the evidence was collected, and the weight of the drugs recorded by the HSA officer examining the drugs. The CA rejected this argument, holding that there was no need for a perfect match between the "weight recorded by the investigating officer at the time of seizure and the weight recorded by the HSA at the time of analysis."

The CA held that the crux of the issue is on the identity of the drug exhibits – whether the exhibits seized were the ones analysed by the HSA. Even if the weight of the exhibits seized and the exhibits analysed are different, the CA observed that regard had to be had to the different goals of each weighing process. At the point of seizure, the weight reflects the original state of the exhibits, to obtain the weight for inclusion in the holding charge. In contrast, at the point of analysis by the HSA, the goal is meant to ascertain the specific amount of controlled drug in a package. Under these circumstances, the CA held that it was not helpful to focus merely on the discrepancies in the weight of the drugs, without further explanation as to how the discrepancies may lead to the court to determine if there is a break in the chain of custody.

Second, in relation to the second discrepancy, Hamir contended that there was a possibility that the drug exhibits may have been mixed up, as DNA traces of the photographer and swabber were found on the drug exhibits. The CA also rejected this argument. While the CA accepted that contamination of exhibits should have been avoided, it observed that the DNA traces belonged to persons connected with the case, and do not on its own, give rise to an inference that there was a break in the chain of custody. Nonetheless, the CA did note that had the DNA contained traces of persons *unconnected* to the case, it was open to a court to draw such an inference.

Last, in relation to the third discrepancy, Hamir contended that there were inconsistencies in the Prosecution's witnesses' evidence about the type of bag which the drugs were stored in – whether they were stored in tamper-proof bags or Ziplock bags. However, the CA found that the purported inconsistencies were more apparent than real. The type of bag that the drugs had been stored in was of little relevance, given that the location and movement of the drugs had been accounted for in the chain of custody. In any event, Hamir did not allege that the drug exhibits had been tampered with.

IV. Lessons Learnt

In brief, the CA clarified the scope of the defence of necessity, making it clear that individuals who embark on deliberate or premeditated criminal conduct cannot rely on the defence. Further, the CA clarified that the harm which the conduct seeks to avoid must involve grave and imminent danger, which further delineates the limits of the defence. This provides a useful and clear framework for legal professionals to understand and apply the defence of necessity.

Moreover, the CA also clarified the law on the chain of custody. It stressed the focus of the chain of custody analysis – namely, to ensure that the exhibits are the same from the point of seizure to the point of analysis. Where the defence seeks to persuade the court that there is a break in the chain of custody, it should provide evidence that can cast doubt on the identity of the exhibit when the exhibit has been moved at any stage from the time it was seized to the time it was analysed. While these developments have been canvassed in prior decisions by Singapore courts, they present new factual matrices that would be relevant in the future to determine when a break in chain of custody may be established. These also provide a timely reminder for lawyers and investigators of the importance of evidential integrity and emphasises the need to exercise greater care and caution – since any impropriety in handling such exhibits could lead to problematic outcomes.

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