Alleging inadequate and improper legal assistance in criminal trials
Abdoll Mutaleb bin Raffik v Public Prosecutor and another appeal
[2023] 1 SLR 1362; [2023] SGCA 12

I. Executive Summary

In a criminal case, common issues that may arise include that of: (a) whether there was inadequate and improper legal assistance; (b) the inadmissibility of a statement due to a threat, inducement or promise given to the statement-maker or the refusal of the statement-maker to sign the statement; and (c) whether the accused's charge can be altered, owing to insufficient evidence to prove it. In *Abdoll Mutaleb bin Raffik v Public Prosecutor and another appeal*, the Court of Appeal ("**CA**") dealt with all three issues.

Regarding the allegation of inadequate and improper legal assistance by one's counsel, the CA held that the requisite standard to satisfy is a high one. There must have been flagrant or egregious incompetence or indifference, resulting in a real possibility of a miscarriage of justice.

Regarding questions of admissibility, the CA held that a statement will be deemed inadmissible only if it has been made involuntarily. Thus, for an allegation of a threat, inducement or promise to succeed, it must have operated on the mind of the statement-maker. The fact that a statement-maker has refused to sign a statement after making it will not constitute a bar to its admissibility as evidence so long as it has been made voluntarily.

Lastly, the CA held that the court is allowed to frame an altered charge if there is sufficient evidence (based on the records before it) to constitute a case against the accused.

II. Material Facts

These appeals were brought by one Mohd Noor bin Ismail ("**Noor**") and one Abdoll Mutaleb bin Raffik ("**Mutaleb**") against their respective convictions and sentences. They had been tried jointly (together with one Mohd Zaini bin Zainutdin ("**Zaini**")) for offences under the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) ("**MDA**").[1]

Zaini, Noor and a man known as "Apoi" had packed bundles of diamorphine in Zaini's car (the "**Car**"), which were discovered by officers from the Central Narcotics Bureau ("**CNB**") when Noor drove the Car from Malaysia to Singapore (with Zaini as a passenger). Zaini and Noor were arrested.

Later the same day, Zaini was instructed by a CNB officer to call Mutaleb, who was the intended recipient of "thirteen" bundles of drugs. In exchange, Mutaleb would pass Zaini "thirty nine thousand Singapore money". Through the CNB-monitored phone calls, Mutaleb and Zaini made an appointment to meet at a car park (the "**Location**") on the same night for this exchange to happen. Following this, two CNB officers went to the Location in the Car with a plastic bag of mock drugs. Mutaleb arrived and accepted the plastic bag containing mock drugs from the CNB officers in the Car. Shortly thereafter, suspecting that it was a setup, he dropped the plastic bag while walking away. He was subsequently arrested by CNB officers.

Following trial in the High Court ("**HC**"), Noor and Zaini were each charged and convicted under section 7 of the MDA read with section 34 of the Penal Code (Cap 224, 2008 Rev Ed) for importing into Singapore not less than 12 bundles containing 5,520.4 grams of

[1] Zaini did not appeal against his conviction and sentence.

granular/powdery substance which was analysed and found to contain not less than 212.57 grams of diamorphine, in furtherance of a common intention between them. As they were found to be mere couriers and thus issued Certificates of Substantive Assistance, they were sentenced under section 33B(1)(a) of the MDA to life imprisonment and 15 strokes of the cane, respectively.[2] Mutaleb was charged and convicted under section 7 read with section 12 of the MDA for abetting by engaging in a conspiracy with (among others) Zaini, Noor, and Apoi, to import into Singapore the drugs. Unlike Noor and Zaini, Mutaleb did not qualify for the alternative sentencing regime under section 33B of the MDA. Thus, Mutaleb was sentenced to the mandatory death penalty.

III. Issues on Appeal

On appeal, Noor argued that he had been given inadequate and improper legal assistance by his former defence counsel. He further alleged that there had been a threat, inducement or promise from the Investigating Officer assigned to his case, Assistant Superintendent Prashant Sukumaran ("**IO Prashant**"). This alleged threat, inducement or promise was in the form of a lie that the CNB Officers had found an additional bundle of drugs in the Car, as well as an exhortation or threat that Noor would be sentenced to hang if he did not admit that he knew Zaini brought the drugs to Singapore. Noor also claimed to have had no knowledge of the drugs.

Mutaleb on his part argued that his guilt could not be proven beyond reasonable doubt: he did not know who Apoi was and could not have been engaged in a conspiracy with him; Zaini was not a credible witness so little or no weight should be attached to his evidence against Mutaleb; and the other evidence relied on by the HC to convict Mutaleb was wanting.

The CA ultimately dismissed Noor's allegations with respect to the inadequate legal assistance by his former defence counsel and the threat, inducement or promise by IO Prashant. It also upheld Noor's conviction and sentence for the charge of importing the diamorphine. Regarding Mutaleb, the CA did agree that the charge of conspiracy against him (the "**Trial Charge**") was not proven beyond reasonable doubt. However, it held that there was sufficient evidence to amend Mutaleb's charge to that of attempted possession of diamorphine (the "**Proposed Charge**").[3] Thus, Mutaleb's conviction on his previous charge and sentence were quashed.

The CA discussed these issues in the following order:

(a) Whether Noor's allegations against his former defence counsel and of the threat, inducement and promise by IO Prashant were made out;
(b) Whether Noor's substantive appeal should be allowed;
(c) Whether the Trial Charge against Mutaleb was made out; and
(d) Whether the Trial Charge against Mutaleb should be amended.

A. Whether Noor's allegations against his former defence counsel and threat, inducement and promise by IO Prashant were made out

The CA agreed with the HC that these allegations were not made out.

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[2] Under section 33B(1)(*a*), where a person is convicted of an offence under sections 5(1) or 7 of the MDA, the court has the discretion to sentence the person to life imprisonment and not less than 15 strokes of the cane if the following two conditions are fulfilled. *First*, that the person convicted proves, on a balance of probabilities that his or her involvement was restricted to: (a) transporting, sending or delivering a controlled drug; (b) offering to transport, send or deliver a controlled drug; (c) doing or offering to do any act preparatory to or for the purpose of his or her transporting, sending or delivering a controlled drug; or (d) any combination of the activities in (a)-(c). *Second*, the Prosecution must certify that the person has substantively assisted the CNB in disrupting drug trafficking within or outside Singapore.

[3] The CA's decision on this amended charge would be given after parties were heard on the amended charge.

(i) Noor's allegations against his counsel

There were three broad complaints made by Noor against his former defence counsel, Mr Nicholas Aw ("**Mr Aw**"): (a) not giving proper advice in relation to contesting the charge, including advising him that he would be released if he admitted that he knew that Zaini had brought the drugs into Singapore; (b) not advising on the decision to testify and not allowing Noor to take the stand at the trial; and (c) making insufficient visits.

Mohammad Farid bin Batra v Public Prosecutor and another appeal and other matters ("*Mohammad Farid*") [2020] 1 SLR 907 laid down a two-step approach for determining whether there was indeed inadequate legal assistance: assess (a) counsel's conduct of the case, and (b) whether such conduct affected the outcome of the case, in that it resulted in a miscarriage of justice. The CA agreed with the HC that all three complaints made by Noor did not satisfy this legal test.

First, in relation to the allegation of not giving proper advice, Noor alleged that Mr Aw failed to keep contemporaneous records of their meetings. The CA agreed with the HC that while this failure breached the Legal Profession (Professional Conduct) Rules 2015, it did not amount to egregious or flagrant conduct leading to a real possibility of a miscarriage of justice. Mr Aw's attendance notes and written instructions showed that Mr Aw had advised Noor properly on his options and did not pressurise Noor into admitting that he had knowledge of the drugs. Furthermore, Mr Aw made a strategic decision as regards Noor's trial options, having assessed that contesting the charge at trial would entail a risk of an adverse finding. Deference and latitude would be given to counsel in the conduct of the case and the court would not question strategic or tactical decisions that were legitimate and reasonable. Ultimately, the determination made by Mr Aw was one based on a proper assessment of the law and evidence.

Second, in relation to the allegation of not allowing Noor to testify, Noor had made an informed decision, from advice given by Mr Aw, not to take the stand as he might undermine his own case if mistakes were made. Furthermore, Noor had chosen not to take the stand after witnessing Zaini being cross-examined in court. Importantly, the HC had also confirmed with Noor twice during the trial that he did not wish to testify. Finally, even if Mr Aw did advise Noor against taking the stand, his conduct did not fall far short of the standard expected of him that it could be described as flagrant or egregious incompetence or indifference such that there was a real possibility of a miscarriage of justice. *Third*, in relation to the allegation of insufficient visits, while Mr Aw's failure to meet Noor for approximately ten months after being appointed as his defence counsel was somewhat lacking, Mr Aw's overall conduct of the case could not fairly be described as involving flagrant or egregious incompetence or indifference.

The CA stressed that the standard established under *Mohammad Farid* was a high one, and agreed with the HC that Noor did not come near to meeting that standard. Nevertheless, it reiterated that "it is good practice for counsel and their assistants to record instructions from their clients and, where necessary, have the notes signed by them as confirmation. This will protect the lawyers against unwarranted allegations and help them present their side of the story especially when the allegations are made long after the trial and memory has become less reliable".

(ii) Alleged threat, inducement and promise by IO Prashant

Noor alleged that although he was threatened or induced by IO Prashant to make an admission to the offence, he did not give in. However, he claimed he was placed in a "dilemma" which affected his decision-making process on whether to co-operate with the authorities later on.[4] Noor further alleged that IO Prashant made an exhortation or threat that Noor would be sentenced to hang if he did not admit that he knew that Zaini had brought drugs into Singapore. He also alleged that IO Prashant had lied to him about having found an additional bundle of drugs in the Car following a scan of the vehicle, when in fact the CNB officers had been made aware of the results of the scan much earlier. According to Noor, IO Prashant lied to try to deceive Noor into explaining why there was this additional bundle in the Car.

The CA stated that for an allegation of threat, inducement or promise to succeed, there must have been a threat, inducement or promise which operated on the mind of the statement-maker, so as to affect the voluntariness of the statement given. Regarding Noor's allegation that he was placed in a "dilemma", the fact that he did not give in showed that the threat, inducement or promise did not even operate on his mind. Further, his "dilemma" did not amount to oppression which would render his statement involuntary. As regards Noor's allegation of IO Prashant's exhortation or threat, the CA agreed with the HC that this was untrue, as corroborated by evidence of the interpreter present which supported IO Prashant's denial of having made such an exhortation or threat. In any case, IO Prashant would simply have been laying out the consequences of the offence, with the death penalty being a possible punishment.

As regards IO Prashant's "lie", the CA agreed with the HC that IO Prashant's actions were not improper – he had offered an incomplete account to Noor to allow the latter to give his own account as to why there was the additional bundle in the Car. It was the investigator's job to sift through and eliminate possibilities to determine reasonable suspicion of guilt. In any event, Noor denied knowledge of the drugs during the recording of the statements.

B. Whether Noor's substantive appeal should be allowed

With Noor's allegations against his former defence counsel and IO Prashant dismissed, the CA held that he had no real defence before the court. As such, sections 18(2) and 21 of the MDA operated against Noor.[5] As Noor had chosen to remain silent during the trial, he had no substantive evidence to rebut these presumptions. Furthermore, as he had chosen not to testify, an adverse inference should be drawn that he knew the bundles contained drugs.

While Noor argued that he thought the bundles contained illegal cigarettes, the CA held that such a defence could not apply to at least three bundles as he saw Zaini wrapping "clear plastic packets containing what seemed like brown fertiliser". Further, Noor had confessed that he had helped Zaini hide drugs in the Car, and that he went along with Zani to deliver the drugs to Singapore on previous occasions. The items that he had helped to hide were described by him, on his own accord, as "drugs" and "heroin". Lastly, Noor was also very familiar with Zaini's mode of operation as he had seen him return home with three to four packets of heroin and some 40 rolls of black tape and had also seen him wrapping at least some of the bundles.

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[4] See *Public Prosecutor v Mohd Noor bin Ismail* [2022] SGHC 66 at [22].

[5] Explanatory note: section 21 of the MDA states that the drugs found in a vehicle may be presumed to be in possession of the owner of the vehicle and of the person in charge of the vehicle for the time being. Thus, the Prosecution would not need to prove possession of the drugs by the accused; instead, the onus of rebutting the presumption would be on the accused. Similarly, section 18(2) of the MDA states that a person's knowledge of the nature of the drugs may be presumed if he had possessed the drugs. Therefore, Noor, as the driver of the Car containing the drugs, would be presumed to have been in possession of the drugs. And by virtue of his possession of the drugs, he would be presumed to have known the nature of the drugs, which was an element of his charge of importation in furtherance of the common intention with Zaini.

Therefore, the CA held that Noor had knowledge of the nature of the drugs and was correctly convicted of his charge of importing the drugs in furtherance of the common intention with Zaini. His sentence of life imprisonment and 15 strokes of the cane was also upheld.

C. Whether the Trial Charge against Mutaleb was made out

The CA held that the Trial Charge was not proved beyond reasonable doubt. For a conspiracy to be proven, an agreement between at least two participants must be shown. An agreement between Mutaleb and Apoi to import the drugs could not be shown because Zaini's evidence on this issue kept shifting, and a recorded phone call between Zaini and Mutaleb showed that Mutaleb did not know who Apoi was or, at the least, any illegal activity between Zaini and Mutaleb did not appear to involve Apoi. Further, the last piece of evidence, a statement made by Mutaleb which he had refused to sign (the "**Unsigned Statement**"), made no mention of Apoi. The Unsigned Statement also could not show an agreement between Mutaleb and any of the other parties, i.e. Noor and Zaini.

Indeed, the CA noted that the Prosecution had impliedly acknowledged the difficulty in proving the Trial Charge when it proposed, in response to the CA's concerns and queries, an amendment of the Trial Charge to one of attempted possession of drugs for the purpose of trafficking, *viz*, the Proposed Charge.

(i) Zaini's evidence

The Prosecution's case on the Trial Charge hinged on Zaini's evidence that he had overheard a phone conversation between Mutaleb and Apoi, which was in essence the agreement to collect drugs from Zaini. However, there was no record of any conversation between Mutaleb and a telephone number that could have been Apoi's. Zaini also gave "multiple accounts of the conversation which he overheard, as to who called whom and whether he could hear the conversation". Zaini's evidence was "inconsistent across the trial" and these inconsistencies were not explained.

(ii) Recorded phone call between Zaini and Mutaleb

A recorded phone call between Zaini and Mutaleb showed that Mutaleb did not know who Apoi was; at the least, any illegal activity between Zaini and Mutaleb did not appear to involve Apoi.

(iii) Mutaleb's Unsigned Statement

Mutaleb had refused to sign the Unsigned Statement as he claimed that he had made up the whole story in the statement and it was not the truth. Preliminarily, there was an issue of whether such a statement can be admitted as evidence, as it failed to comply with section 22(3)(d) of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) ("**CPC**"),[6] which states that where a statement made by a person examined under that section is recorded in writing, the statement must be signed by the person.

However, the CA held that the statement was admissible as evidence. Questions of admissibility arose only where the voluntariness of the statement was affected by a threat, inducement or promise. While Mutaleb's statement was unsigned, it was made voluntarily and in an apparent effort to tell much more than he was willing to disclose in the days immediately following his arrest. First, Mutaleb stated that he was "ready to tell the truth about [the] case",

[6] The equivalent of which is now section 22(4)(c) of the Criminal Procedure Code 2010 (2020 Rev Ed).

which demonstrated readiness to tell the truth. Second, the recording of the Unsigned Statement took more than four hours to complete, and it was not filled with gibberish. Instead, Mutaleb's narrative was coherent and contained many details which were consistent with other evidence relating to the events on the day of Mutaleb's arrest. Third, during trial, Mutaleb did not explain why he had to concoct the story, nor did he allege that he was coerced by someone to make the Unsigned Statement. Lastly, he also did not claim that the recording process was procedurally flawed – he was apparently content to continue with the recording for more than four hours. For some reason known only to Mutaleb, he had a change of heart after more than four hours of recording the Unsigned Statement when he made his disavowal of the truth and refused to sign it.

The CA thus held that it cannot be right that an accused person who makes a formal statement in the course of investigation into an offence can glibly disavow all that he has said and refuse to sign the statement so as to render the statement inadmissible as evidence. The fact that Mutaleb refused to sign the Unsigned Statement without good cause in such circumstances should therefore not affect its admissibility as evidence.

Despite its admission into evidence, however, the Unsigned Statement made no mention of Apoi. There was no hint of any conspiracy between him and Mutaleb. There was no evidence that Alex, who was mentioned in the Unsigned Statement as Mutaleb's boss, was Apoi. Furthermore, while Zaini was mentioned in the Unsigned Statement as a courier, nothing was stated about how Mutaleb and Zaini agreed to import the drugs into Singapore. Finally, Noor was not mentioned at all in the Unsigned Statement. There was also no clear evidence of who might be the "others" implicated in the conspiracy as alleged in the Trial Charge. The Unsigned Statement, at its highest, could only suggest that Mutaleb was a runner for Alex. Therefore, the CA held that Mutaleb's Trial Charge of abetment by engaging in a conspiracy was not made out.

D. Whether the Trial Charge against Mutaleb should be amended

With the Trial Charge not having been made out, there remained the issue of whether Mutaleb's charge could be amended.

The CA found that the Trial Charge against Mutaleb could be amended by invoking section 390(4) of the CPC. Essentially, the court is allowed to frame an altered charge if there is sufficient evidence (based on the records before it) to constitute a case against the accused. Thereafter, the CA could proceed with the altered charge under sections 390(6) to (8), which outline the procedure for the accused to offer his defence against the altered charge.

As the issue of trafficking was not canvassed during trial, the altered charge could not be one of attempted possession for the purpose of trafficking. Instead, the charge was altered to one of attempted possession of drugs without the element of trafficking (the "**Proposed Charge**"), which, on the evidence before the court, was complete. Mutaleb had actual knowledge that the 13 bundles would contain diamorphine – and this was an element of the charge of attempted possession. Mutaleb went to meet Zaini at the Location in the belief that Zaini was going to deliver to him 13 bundles of drugs containing diamorphine. He had discussed with Zaini about the drugs before proceeding to meet him and he had taken all the necessary steps to receive the bundles from Zaini. The offence was complete even though the bundles turned out to be mock drugs.

However, there remained the question of whether it would be fair to charge Mutaleb on the Proposed Charge – which alleged 13 bundles of drugs containing not less than 233.73g of diamorphine – when the Trial Charge stated "not less than 12 bundles" containing "not less than 212.57g of diamorphine". While 13 bundles are still within the meaning of "not less than 12 bundles", and the Proposed Charge now involved a less severe punishment in law than compared to the punishment provided for the Trial Charge, the amount of drugs involved would still be a significant consideration in sentencing for possession in drug offences. The larger the quantity of drugs, the more severe the sentence is likely to be. While section 390(4) of the CPC permits the framing of an altered charge which attracts a higher punishment than the original charge at the trial in any case, the fact remained that Prosecution was proceeding on a new charge on appeal with a modified factual narrative after failing to prove the alleged conspiracy.

Therefore, the CA decided to limit the amount of drugs in the Proposed Charge to that stated in the Trial Charge, i.e. 12 bundles, which was the amount in issue throughout the trial.

The CA also noted that amending Mutaleb's charge would not be a violation of Article 11(2) of the Constitution of the Republic of Singapore (2020 Rev Ed), even if it had ordered a retrial on the Proposed Charge. This is because the exception specified under Article 11(2) exemplifies such a situation.

IV. Lessons Learnt

This case has shed light on several issues. First, the standard to determine if there has been inadequate and improper legal assistance by one's counsel is that of flagrant or egregious incompetence or indifference, resulting in a real possibility of a miscarriage of justice. Second, questions of admissibility as regards a statement given will only arise if it has been made involuntarily – thus, for an allegation of threat, inducement or promise to succeed, it must have operated on the mind of the statement-maker. Similarly, a party's refusal to sign a statement after making it will not generally bar its admission as evidence so long as it is determined to have been made voluntarily. Lastly, the court is empowered to frame an altered charge if there is sufficient evidence (based on the records before it) to constitute a case against the accused. However, as regards drug offences, the quantity of drugs will be considered by the court when framing the altered charge, as the court is mindful that a larger quantity of drugs would attract a more severe punishment.

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