

IN THE DISTRICT COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
CRIMINAL CASE NO. 939 OF 2005

HKSAR

v

LAI Cheuk-man (D2)

VERDICT

1. The defendant pleads not guilty to one charge of trafficking in 6,819.92 grammes of herbal cannabis, contrary to section 4 of the Dangerous Drugs Ordinance, Chapter 134 (the Ordinance”).
2. The prosecution case in summary is that shortly after 9.00pm on the 1st July 2005 the accused together with his co-accused (D3) arrived at a unit on the 2nd floor of 101-103 Shek Pei Wan Road. The police had the unit under observation and went over to investigate. On walking upstairs to the 2nd floor the police heard the sound of a door closing when they looked upstairs and saw D3 pass a suitcase containing the cannabis to the accused, telling the accused to take the suitcase upstairs to the rooftop quickly. The accused then ran up the staircase where he was stopped by the police and arrested.

3. The defence case in summary is that the accused did not know what was inside the suitcase when the suitcase was handed to him by D3 and did not know cannabis was inside until the police made enquiries of him.

4. In reaching my verdict I direct myself as to the good character of the accused both as to credibility and propensity in accordance with the decision in *HKSAR v TANG Siu-man* [1998] 1 HKLRD 350.

Evidence

5. Facts were admitted pursuant to section 65C of the Criminal Procedure Ordinance, Chapter 221 (exhibit P4) including the chain of exhibits in relation to the seizure of the drugs (exhibit P2) and the Government Chemist Certificate (exhibit P1).

6. The prosecution called 2 witnesses. PC 49316 (PW1) who seized the drugs and arrested and cautioned the accused and PC 49985 (PW2) who stopped and arrested D3.

7. The accused elected to remain silent and called no witnesses. No adverse inference is drawn against the accused for remaining silent. That is his right. This proves nothing one way or the other. The prosecution must prove the charge beyond reasonable doubt.

8. The accused did however give an explanation on arrest, which explanation I have considered in accordance with the decision in *R v Sharp* [1988] 1 WLR 7.

9. I have carefully considered all the evidence in the case and the submissions of Miss Chan and Mr Morley. I do not however set out all the evidence of the prosecution, which was largely unchallenged and has been fairly summarised in the written submission of Mr Morley.

10. The prosecution witnesses both testified that when they were walking upstairs they heard a bang sound like that of a door closing. PW1 and PW2 both looked up to the 2nd floor and saw at the top of the staircase outside the door of the unit under observation D3 passing to the accused a suitcase (exhibit P5), which was later found to contain the cannabis.

11. The defence does not challenge the physical possession of the suitcase by the accused. Physical possession of the suitcase being proved the presumptions in section 47(1) and (2) of the Ordinance are triggered. Section 47(1) provides that any person proved to have had in his physical possession anything containing a dangerous drug shall, until the contrary is proved, be presumed to have had such drug in his possession. Clearly by running up the stairs keeping hold of the suitcase the defendant had shown an intention to possess the suitcase and its contents.

12. The issue to determine in this case is whether the defendant knew that drugs were inside the suitcase when the suitcase was passed to him by D3. Section 47(2) provides that any person who is proved to have had a dangerous drug in his possession shall, until the contrary is proved, be presumed to have known the nature of such drug. To decide whether the contrary is proved the court must look at all the evidence both in the case of the prosecution and the explanations of the defendant.

13. In *HKSAR v HUNG Chan-wa & another* [2005] 3 HKLRD 291 the Court of Appeal held that “until the contrary is proved” imposes only an evidential burden upon an accused. The evidential burden requires that there is adduced sufficient evidence to raise an issue for the determination of the tribunal of fact. In other words unless sufficient evidence is given to the contrary the accused will be presumed to have known the nature of such drug.

14. The evidence that falls for consideration by the court is basically two fold, the observations of the police and the reaction of the accused to the finding of the cannabis in the suitcase.

15. Firstly the observations of the police officers. When the police saw the accused and D3 arrive at the premises neither of them was carrying anything. The only inference to draw from the evidence that the police officers after hearing the sound of the door closing saw D3 passing the suitcase to the accused on the 2nd floor outside the door of the unit under observation is that the suitcase was collected from that unit.

16. The evidence D3 was seen passing the suitcase to the accused on the 2nd floor was unchallenged. I note that under caution the accused said he was given the suitcase by D3 in D3’s house. The prosecution case as opened was that the accused came into possession of the suitcase on the 2nd floor after the door was closed and not that the accused came into possession of the suitcase in D3’s house no doubt because that was inconsistent with the observations of the police officers.

17. Both PW1 and PW2 testified that *at the same time* the suitcase was being passed D3 could see them and said to the accused "Take it to the roof top quickly." There was a difference between the officers as to whether this was said in a normal voice (PW1) or was shouted by D3 (PW2). Both men then ran upstairs until they were apprehended by PW1 and PW2.

18. After PW1 stopped the accused he asked why the accused came there and what was inside the suitcase. The accused replied that D3 asked him to come up and that he did not know what was inside the suitcase.

19. The accused was asked to open the suitcase, which he did revealing the cannabis. PW1 testified he then *immediately* informed his sergeant and PW2 that cannabis had been found in the suitcase. PW1 was then asked what was the reaction of the accused when the drugs were found. PW1 replied, "He *once* told me he didn't know that there was herbal cannabis ("cho")." PW1 clarified this was said by the accused after the suitcase was opened and then he informed his colleagues about the cannabis in the suitcase. In cross-examination PW1 disagreed that the accused only mentioned "cho" after PW1 had first mentioned that the drugs were "cho".

20. I have carefully considered this aspect of PW1's evidence. Taking into account his initial evidence was that after opening the suitcase he *immediately* informed his colleagues cannabis had been found in the suitcase and his next answer was the accused *once* told him he did not know that there was "cho" I find I am not satisfied the accused said he did not know there was "cho" inside the suitcase before any mention of "cho" was made by PW1.

21. Under caution the accused said, inter alia, that he did not know that the suitcase contained herbal cannabis until the police made enquiries.

22. In reaching my verdict I have applied the principles set out in paragraph 144 of the judgment in *HUNG Chan-wa*, in particular that the evidential burden is not discharged by the mere mouthing of words by an accused, whether to the police upon apprehension, or to the court in testimony, that he was unaware the suitcase contained a dangerous drug.

23. In my view the evidence to be considered is not merely the denial of knowledge on apprehension. The court has had the advantage of hearing evidence from the police as to the circumstances in which the accused actually came into physical possession of the suitcase, which is not the situation in most cases that come before the court. Ordinarily the only evidence of how an accused person took possession of the container in which there was drugs comes from the accused himself, as was the situation in *HUNG Chan-wa*.

24. This enables the court to properly assess the immediate reaction of the accused that he did not know the suitcase contained a dangerous drug against a correct factual background of how he came into possession of the suitcase. Taking into account that the accused had only just come into possession of the suitcase without the opportunity of inspection I find I am satisfied that the evidential burden has been discharged. That being so the prosecution must prove that the accused did know the suitcase contained a dangerous drug. If what the accused asserted to the police is or may be true, he is entitled to be acquitted.

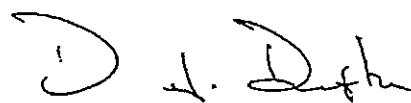
25. On the prosecution evidence the accused had no opportunity to inspect the suitcase, the evidence being that the accused was passed the suitcase on the 2nd floor outside the door of the unit with the exhortation to "Take it to the roof top quickly." If the accused did not know the suitcase contained a dangerous drug he cannot be said to be in possession of the dangerous drug even if being told to "take it to the roof top quickly" made the accused suspicious there was something wrong about the contents of the suitcase.

26. In my view the factual situation presented here is similar to that which confronted the court in *R v Wright* 62 Cr App R 169 although this is not a case where the container is immediately thrown away as in *Wright*. The court held that if a person is handed a container and at the moment he receives it does not know or suspect, and had no reason to suspect, that it contained drugs, and if before he has time to examine the contents, he is told to throw it away and immediately does so, he cannot be said to have been in possession of the drugs even though the instruction to throw away the container, made him suspect there was something wrong about the contents.

27. Although unlikely that D3 would take along someone who did not know he was collecting almost 7000 grammes of cannabis which was worth around \$380,000 and pass to that person the drugs I find that the prosecution have failed to prove in the circumstances of this case that the defendant knew a dangerous drug was in the suitcase at the time D3 passed the suitcase to him outside the unit on the 2nd floor. The accused is given the benefit of the doubt and acquitted of the charge.

28. Finally I would add that I am aware the decision in *HUNG Chan-wa* is subject to appeal to the Court of Final Appeal. If the Court of Final Appeal were to hold that the burden placed on the accused is a persuasive burden and not an evidential burden I would still find on the facts of this case that the accused on a balance of probabilities had proved that it was more likely than not that he did not know the suitcase contained a dangerous drug when D3 passed him the suitcase for the very same reasons given earlier.

Dated this 25th day of January 2006



Deputy District Judge Dufton