

Differing Common Intention Charges:
Public Prosecutor v Aishamudin bin Jamaludin [2020] SGCA 70

I. Executive summary

Under section 34 of the Penal Code (Cap 224, 2008 Rev Ed) (“**Penal Code**”), can the Prosecution charge two different people based on a common intention to commit a criminal act between them, but press a more serious charge against one accused person and a less serious charge against the other (“**differing common intention charges**”? The Court of Appeal (“**CA**”) held that there was nothing under section 34 which required the Prosecution to bring identical charges against all who were charged pursuant to a common intention to do a criminal act. Further, there were good reasons why there was no general rule requiring the Prosecution to do so.

The CA stated that the accused person in such situations could make two objections against such charges: an objection based on Article 12(1) of the Constitution (1985 Rev Ed, 1999 Reprint), or an objection based on a genuine inconsistency arising on the face of the charges. The latter was based on the need to ensure *procedural fairness* in criminal proceedings, as well as avoid *prejudicial outcomes*. More specifically, the CA provided an approach for determining whether the Prosecution had pressed charges against two or more accused persons that entailed the *running of inconsistent cases*, as well as a tentative framework for objections against inconsistent cases based on *prejudicial outcomes*.

II. Material facts

The accused person, Aishamudin bin Jamaludin (“**Aishamudin**”) and his co-accused, Suhaizam bin Khariri (“**Suhaizam**”), were colleagues employed as truck drivers to deliver goods from Malaysia to Singapore. In the course of these deliveries, Aishamudin would, for monetary reward, deliver drugs to recipients in Singapore on behalf of drug traffickers (one “**Tambi**” and one “**Suhadi**”).

On 6 October 2015, Aishamudin was informed by Suhadi that there was a “job” that day. Accordingly, Aishamudin went to Suhadi’s house and collected a red plastic bag. Suhadi explicitly told Aishamudin that there were packets in the red plastic bag which contained diamorphine and methamphetamine. Aishamudin asked Suhaizam to help him transport these drugs to Singapore and deliver them, and he agreed.

On the same day, Aishamudin boarded the truck driven by Suhaizam. He had with him the red plastic bag, and he informed Suhaizam that there was diamorphine and methamphetamine in it. After making a cargo delivery in Singapore, Suhaizam drove the truck to Bulim Avenue and parked it along the road. Shortly after, the bag was collected by two other individuals. They were all subsequently arrested by CNB officers at various locations.¹

III. High Court

Aishamudin was charged with trafficking not less than 32.54g of diamorphine under section 5(1)(a) of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) (“**MDA**”), in furtherance of a *common intention* with Suhaizam under section 34 of the Penal Code (the “**original charge**”). Aishamudin claimed trial for his charge. Suhaizam, however, pleaded guilty to a non-capital charge, which was similar in all respects to the charge against Aishamudin save for the amount of drugs involved, being not less than 14.99g of diamorphine.²

The High Court (“**HC**”) found it logically unsound for the Prosecution to have charged both

¹ The two other individuals were tried jointly with Aishamudin. However, the CA issued a separate judgment in respect of their appeals.

² Under section 33(1) of the MDA read with the Second Schedule, the death sentence is generally mandated for the offence of trafficking in diamorphine if the quantity involved is more than 15g.

Aishamudin and Suhaizam with a *common intention* to traffic in *different amounts of diamorphine*. Since Suhaizam had already pled guilty and his case hence disposed of, the HC held that it was out of the question to have him retried in this respect. As such, it amended the quantity of diamorphine in Aishamudin's original charge to one of being not less than 14.99g ("**the amended charge**"), reflecting that stated in Suhaizam's charge. It then convicted Aishamudin on the amended charge, sentencing him to 25 years' imprisonment and 15 strokes of the cane. The Prosecution appealed against the HC's decision to amend the original charge.

IV. Court of Appeal

The CA considered two main issues. *First*, it considered whether the Prosecution could, in general, charge co-offenders in the same criminal enterprise with different offences. The CA also considered whether there was anything concerning *common intention* charges that mandated a different approach from the general position, as well as possible objections for such situations. It then provided the appropriate approaches for such situations. *Second*, it considered whether any of the possible objections were applicable to Aishamudin's original charge, and whether the original charge was indeed made out.

A. Charging co-offenders with different offences

(i) Current legal position

The current legal position was that the Prosecution could, in the exercise of its prosecutorial discretion, charge co-offenders in the same criminal enterprise with different offences, so long as its exercise of discretion was free of bias and untainted by irrelevant considerations. Where this was not the case, the Defence could raise objections based on Article 12(1) of the Constitution. The CA noted that the real issue was not the seeming inconsistency between the charges against different co-offenders, but whether the Prosecution could prove all the elements of the more serious charge.

(ii) Common intention charges

With regard to *common intention* charges under section 34, the CA held there was nothing in the language of that section which mandated that the Prosecution must bring *identical* charges against all those who are charged pursuant to a common intention to do a criminal act. Moreover, there were good reasons why there was no such general rule. *First*, the Prosecution is not obliged to charge every participant in a criminal enterprise. For instance, the Prosecution could have decided not to charge Suhaizam at all, if there had been valid reasons for it to take that position in the exercise of its prosecutorial discretion. In that case, the original charge against Aishamudin would have been made out as long as the Prosecution could prove each and every element of that charge. As such, it was unsatisfactory to prevent the Prosecution from preferring a reduced charge against Suhaizam, when the Prosecution might have determined in its discretion that the more appropriate course was to charge him with a less serious non-capital offence.³

Second, allowing the Prosecution to proceed with differing common intention charges also enabled it to tailor the charges in line with each accused person's culpability and circumstances. For example, if a mastermind manipulated and instigated a young person to carry out the more egregious aspects of a criminal act in furtherance of their common intention, the mastermind's culpability would likely be higher, and it might be in the interests of justice to charge him with a more serious offence.

Third, an accused person who faced a more serious charge relative to his co-accused in a criminal

³ It is not necessarily in the public interest that every offender must be prosecuted, or that an offender must be prosecuted for the most serious offence that arises on the facts. The Prosecution may take into account many factors in determining whether or not to charge an offender and, if so, for what offence(s). These factors may include: whether there is sufficient evidence against the offender and his co-offenders, their personal circumstances, the willingness of one offender to testify against other co-offenders, and other policy factors. Such distinctions may justify offenders in the same criminal enterprise being prosecuted differently.

enterprise cannot be said to be prejudiced, because the Prosecution's legal burden to prove the charge and its evidential burden to adduce sufficient evidence were not compromised. Even when the Prosecution brings differing common intention charges against A and B, with A facing a more serious charge than B, it must still prove each element of that more serious charge against *both* A and B at A's trial. Its burden of proof at A's trial is no more and no less than if both A and B faced the more serious charge.

(iii) Possible objections

The CA noted there were two well-established bases by which an accused person could challenge differing common intention charges: a challenge under Article 12(1) of the Constitution,⁴ or reasonable doubt in respect of the elements of the charge against him. The accused person could also challenge the differing common intention charges as part of a wider objection against inconsistent cases, based on *procedural* fairness as well as the need to avoid prejudicial *outcomes*. The common thread was that of *prejudice*: the court should ensure that an accused person was not prejudiced by any inconsistency in the Prosecution's case.

First, there was a need to ensure *procedural fairness* in criminal proceedings. The Prosecution had to advance a consistent case, whether in single or separate proceedings, so that the accused person would know the case that he had to meet. Where inconsistencies in the Prosecution's case prevent the accused person from understanding, and therefore from being fully prepared to meet, the case which the Prosecution seeks to advance against him, the Prosecution's inconsistent cases may simply result in an acquittal.

Second, there was a need to avoid *prejudicial outcomes*. This could manifest when the Prosecution secured convictions or sentences against different accused persons based on contradictory premises. For instance, the Prosecution could secure a conviction against A based on one set of facts, and then later secure a conviction against B based on a different set of facts which *contradicted* the basis of A's conviction (by giving a contradictory account of the same key events). The convictions of A and B could not both be sound – proving the charge against B implicitly disproved the charge against A. Such an outcome was objectionable, even if there was no procedural unfairness at either trial.

The CA also stated there was no reason why the general prohibition against parties seeking to take the benefit of inconsistent positions, derived from the context of civil proceedings, should not also apply to the Prosecution. Indeed, the Prosecution owed an even greater allegiance to consistent conduct than private parties; it also owed a duty to assist in the determination of the truth. Thus it would be objectionable in principle for the Prosecution to seek to secure prejudicial outcomes (whether convictions or sentences) against different accused persons, on the basis of cases advanced against each accused person in such a way that they were not consistent or compatible with one another.

(iv) Inconsistent charges

In the context of differing common intention charges, the court should consider whether, when all the facts and arguments material⁵ to establishing the Prosecution's case against each of the accused persons were spelled out, would it be possible for all of these facts and arguments to be cumulatively true? In other words, were the Prosecution's cases capable of constituting part of a single coherent

⁴ Article 12(1) requires the Prosecution, in the exercise of its discretion, to give unbiased consideration to every offender and disregard any irrelevant consideration. A breach of Article 12(1) might occur where a less culpable offender is charged with a more serious offence as compared to his more culpable co-offender, and where there are no other facts to show a lawful differentiation between their respective positions.

⁵ Material facts and arguments are those which were material to any outcome that has been secured (regarding a charge where judgment has been obtained), and those which are material to the outcome that is presently being sought (regarding the charge that is currently before the court).

world of facts? If the answer to this was no, it would seem to point to a material inconsistency.

In this particular case, the question was whether the Prosecution had pressed a set of charges against two or more accused persons that necessarily entailed the running of inconsistent cases (“**inconsistent charges**”). The CA held that inconsistent charges arose if, when all the elements of each charge were spelled out, there was some inconsistency in holding that all the elements of all the charges were cumulatively established. On the other hand, a set of charges may not be inconsistent *on their face*, but the case run by the Prosecution on each of the charges may give rise to an inconsistency *in the course of the proceedings* – such as by virtue of inconsistencies in the evidence adduced, or in the case theories advanced.

The CA also noted that inconsistencies that arise between inconsistent charges can be legal or factual, or they can be of mixed law and fact. *Legal* inconsistency arises, for example, where the elements of a charge are incompatible because of an express statutory provision.⁶ *Factual* inconsistency arises when the particulars of the charge are mutually incompatible as a matter of logic, even without the need to consider any evidence or case theory.⁷

(v) Inconsistent cases based on prejudicial outcomes

The CA then provided a tentative framework for objections against inconsistent cases based on prejudicial outcomes. It stressed that the law’s primary concern was that accused persons not be prejudiced by inconsistent outcomes against them, rather than the mere fact of the inconsistency. Thus, an inconsistent outcome which consisted of an unduly lenient outcome against an accused person was not necessarily objectionable in the way that an unjustifiably harsh outcome would be.

The CA noted that although the objection against inconsistent cases could potentially arise in any permutation of proceedings, it was important to distinguish between cases which (1) could be resolved on the basis of the Prosecution’s burden of proof, and (2) those which could not. The first category included instances where the Prosecution ran inconsistent cases against co-offenders at a joint trial. Since only one of the mutually incompatible cases could be true, there would be a reasonable doubt in its case against *at least* one of the co-offenders. The first category also included instances where the Prosecution ran inconsistent cases against co-offenders tried in separate proceedings, but where the court’s conclusion at the subsequent trial was that the Prosecution *had not* proved its case beyond reasonable doubt. In such an event, the court would not have to depart from any of the findings in the earlier proceedings, and the Prosecution’s initially inconsistent cases would not have resulted in outcomes resting on inconsistent bases.

The second category of cases (which could not be resolved based on the Prosecution’s burden of proof) would include instances where the Prosecution ran inconsistent cases against co-offenders tried in separate proceedings, and the court concluded at the subsequent trial that the Prosecution *had* proved its new case beyond reasonable doubt. In such a scenario, if the court at the subsequent trial were concerned solely with the evidence produced at that trial, it should find fully in favour of the Prosecution’s case. However, it seemed objectionable for the court to convict the accused person at the subsequent trial, because the court would thereby be endorsing the Prosecution’s securing of

⁶ For example, assume A is charged with murder (under section 300(d) of the Penal Code), by committing a dangerous act that would in all probability cause death, pursuant to a common intention with B. But in respect of the same criminal act, B is charged with causing death by a rash act (under section 304A(a) of the Penal Code), pursuant to a common intention with A. These appear to be inconsistent charges, because section 304A specifically provides that it applies to a rash (or negligent) act “not amounting to culpable homicide”, whereas a charge under section 300(d) requires the act to amount to “culpable homicide”. Hence, this charge against B requires that A and B share an intention to act in a manner which, by definition, falls short of the common intention required by the charge against A. Thus these two charges allege inconsistent common intentions, i.e. these cannot both be true.

⁷ For example, it is factually inconsistent to charge A with killing V pursuant to a common intention to B on one date, and to also charge B with killing V pursuant to a corresponding common intention with A, but on a *different* date.

favourable outcomes against multiple accused persons by running inconsistent cases.

The CA then stated that such a situation could be addressed through a form of the doctrine of abuse of process (which would be available where a party in civil proceedings seeks judgment on the basis of inconsistent positions). However, it left the precise analysis for an occasion where the issue squarely arose. The CA did note that there appeared to be at least two avenues open to the Prosecution if, in such a situation, it wished to advance an inconsistent case theory in a subsequent proceeding because it had changed its assessment of the true course of events: it could seek a revision or review of the earlier proceeding under the relevant provisions of the Criminal Procedure Code (Cap 68, 2012 Rev Ed), or seek to satisfy the court in the subsequent proceeding that the outcome of the earlier proceeding remained safe on some other basis.

The CA concluded that the objection against inconsistent cases was part of the panoply of protections that aimed to secure fairness to accused persons and ensure the integrity of the criminal justice system. It was impermissible for the Prosecution to advance inconsistent cases where this would result in either procedural unfairness or prejudicial outcomes, whether within a single set of proceedings or across multiple proceedings. Where such prejudice could not be adequately addressed by the making of appropriate findings by the court in the case before it, the doctrine of abuse of process may apply to enjoin the Prosecution from proceeding without addressing the inconsistency. Conversely, there was no separate notion of abuse of process or a failure by the Prosecution to make out its case arising merely from common intention charges that appear inconsistent because they involved differing offences, if they are in fact not inconsistent pursuant to the analysis set out above. If there was any objection based on the appearance of disparate treatment arising therefrom, it could only be made under Article 12(1) of the Constitution.

B. Original charge

Based on the above, the CA held that Suhaizam's charge and Aishamudin's original charge were not *inconsistent charges*. The differing elements of the two charges, which related to the actual quantity of diamorphine trafficked and the quantity intended to be trafficked, were entirely consistent with each other. Both of these charges were capable of constituting part of a single coherent world of facts, in which Suhaizam and Aishamudin both shared the common intention to traffic in 32.54g (or more) of diamorphine.

The CA also held that the Prosecution did not run *inconsistent cases* against Suhaizam and Aishamudin. Suhaizam's statement of facts, which constituted the four corners of the Prosecution's case in the proceedings against him, showed that the Prosecution's case against him was based on precisely the same factual matrix as its case against Aishamudin. The only question was whether Suhaizam, who admitted to an intention to traffic in not less than 14.99g of diamorphine, should be taken to have limited his admission to an intention to traffic in less than the full quantity of 32.54g of diamorphine contained in the drugs. The CA concluded that there was no basis to conclude that Suhaizam's intention was limited to an intention to traffic in anything less than the entire quantity of diamorphine (and methamphetamine) contained in the red plastic bag in Aishamudin's possession. As such, an objection based on inconsistent cases would not have been sustainable in the present case.

The CA then held that the Prosecution had established each of the elements of the original charge against Aishamudin in accordance with the requirements for liability under section 34 of the Penal Code. The evidence proved beyond reasonable doubt that Aishamudin did hand the drugs to a third party at Bulim Avenue, and that he did have the necessary intention to traffic in the drugs, which he knew were diamorphine. This was supported by Aishamudin's own investigative statements, as well as the statement of facts to which Suhaizam pleaded guilty and which he accepted to be true.

The evidence also showed that Suhaizam agreed to drive Aishamudin to a stipulated location so that

the drug delivery could take place; this amounted to participation by Suhaizam in the criminal act. Finally, the Prosecution had proved that Suhaizam shared a common intention with Aishamudin to traffic in diamorphine, and that, for the reasons discussed above, this common intention pertained to the entirety of the 32.54g of diamorphine that was actually in the red plastic bag. As such, the HC should have convicted Aishamudin on the original charge. In any event, even if the original charge against Aishamudin was flawed on the basis that Suhaizam only shared an intention to traffic in 14.99g of diamorphine, there would still be the question of what amendment the HC ought to have made to the original charge. The CA held that the HC should have amended the original charge by deleting the reference to common intention, leaving it as a simple drug trafficking charge against Aishamudin for the full quantity of not less than 32.54g of diamorphine, as Aishamudin's own acts, taken alone, constituted the complete offence of trafficking. The HC's decision to instead frame the amended charge amounted to an undue reduction of the charge framed by the Prosecution.

Thus, the CA allowed the Prosecution's appeal and convicted Aishamudin of the original charge. As the Prosecution confirmed that it would be issuing Aishamudin with a certificate of substantive assistance and the evidence showed that Aishamudin was a mere courier, the CA exercised its discretion under section 33B(1)(a) of the MDA to sentence Aishamudin to life imprisonment and 15 strokes of the cane.

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