16/3/84

IN THE COURT OF APPEAL OF NEW ZEALAND

C.A.229/83
C.A.187/83

203

THE QUEEN

v.

MORGAN LEE
SUN KIANG TAN

No Special Consideration

cited c.
R v Pickering
[1975] 1
NZLR

Coram: Woodhouse P.
Cooke J.
Hardie Boys J.

Hearing: 9th March 1984

Counsel: P. J. Kaye for the Crown
B. J. Hart for Lee
E. P. Leary for Tan

Judgment: 9th March 1984

ORAL JUDGMENT OF THE COURT DELIVERED BY WOODHOUSE P.

Morgan Lee, Sun Kiang Tan and Meow Khim Yeo were jointly charged with conspiracy to import heroin into New Zealand. There was an associated charge of conspiracy to supply the heroin. At the outset of the trial Yeo pleaded guilty while Lee pleaded guilty on the third day of the trial. At its conclusion several days later the jury returned a verdict of guilty in the case of Tan. Each man was then sentenced to lengthy though varying terms of imprisonment. Tan now seeks leave to appeal against both conviction and sentence while Lee seeks leave to appeal against sentence. No application has been received from Yeo.

It is unnecessary to embark upon a close analysis of the facts associated with these offences which are related to a

lengthy period beginning in March 1981 and ending on 23rd December 1982. In a temporal sense there are two significant aspects of the evidence. The one encompasses the large-scale heroin dealing activities as an intermediary of a young university student named May Ling Helen Sie which ended when she was arrested in August 1982. She was then found to be in possession of large sums of money and considerable quantities of heroin. At once she proceeded to co-operate with police enquiries which were intended to reach out to those for whom she had been acting or who had been making supplies of heroin available to her. She gave evidence at the trial which directly involved both Yeo and Lee during the relevant time of her activities although Lee appears to have been in direct communication with her in New Zealand on only two occasions.

Other evidence at the trial comprised transcripts of sound recordings of conversations which took place between all three men in Auckland during the latter part of the alleged period of conspiracy, and there were some pictorial recordings as well. In addition evidence was given by Australian witnesses concerning the interception by Australian Federal police at the Sydney airport of a large consignment of heroin being brought into that country by a man named Choo. This evidence was open to an inference that Choo was associated in that Australian importation with the man Tan who was arrested by the Federal police on the same evening and charged with involvement in Choo's offence or on the basis of an Australian conspiracy. It seems however that at the conclusion of a preliminary hearing Tan was discharged by the judge or justices who were dealing with the matter. This last material was not led by the Crown

but was brought out in cross-examination of the Australian witnesses by Mr. Leary who appeared at the New Zealand trial on Tan's behalf. It provides a ground advanced in this Court that the trial judge in Auckland should have acted on Mr. Leary's application to have the Australian evidence regarded as inadmissible. It is said that its prejudicial effect far outweighed any probative value it might have, that the New Zealand Courts could not feel satisfied that all evidence relevant to the Australian charge had been brought before the Court here in terms of fairness to Tan, and in any event that the evidence is irrelevant to the charge of conspiracy in New Zealand.

As to the matter of fairness it is sufficient to remark that Mr. Leary has freely conceded that he would be unable to point to any precise aspect of the investigation in Australia or the conduct of the preliminary hearing there which should have been but was not before the Court in New Zealand. In that situation there is literally no foundation upon which this Court could examine any complaint of unfairness. We think we should add that in any event discharge by an Australian Court at the preliminary hearing of some charge which may or may not encompass aspects of offences alleged here in New Zealand could have no bearing upon whether or not the material under consideration in Australia is actually relevant to the present charges.

On the point of relevance the real question is whether the account of Tan's activities in Sydney on the occasion in question and his arrest there by the Australian police has been linked for purposes of identification to the New Zealand allegation that at least by the time of that Australian arrest he was a member of the New Zealand conspiracy. In other words was it

relevant to the New Zealand conspiracy in operation as an aspect of an attempt to get heroin through Sydney to this country? Upon this point an undercover policewoman described conversations which she said had taken place between herself and the man Yeo. She explained, for example, that Yeo had told her that "friends in Sydney got picked up about three weeks ago"; and in the context of the conversation and the evidence she gave generally, this statement was open to the inference that Yeo was speaking of Tan and also that the heroin that had been intercepted in Sydney had been destined by the conspirators to be brought on to New Zealand. In making that observation we simply remark that whether or not a jury would inevitably draw the inference is not the point: the real question is whether considered within the whole environment of the evidence put forward in the case it was open for this jury on a proper direction to decide the identification point against Tan on the basis that Yeo, clearly a conspirator, was speaking of Tan as a co-conspirator when he spoke of "friends in Sydney" who had been arrested by the police there.

It is unnecessary to tabulate or analyze the various short references in the evidence which are related to the matter and which speak for example of the same hotel which was the location of Tan's arrest. It is enough to say that we are satisfied the evidence was not merely relevant to the identification issue but also that the prosecution was entitled to have it left for consideration by the jury in terms of sufficiency.

In support of the conviction appeal it is right to say that Mr. Leary carefully referred to all of the evidence and put forward every argument which might support his submission, but

for the short reasons we have given we are satisfied that the Judge rightly concluded that the matter in the end was a jury question and that the evidence therefore should be left to the jury for their conclusions upon it. In those circumstances leave sought by Tan to appeal against conviction must be and is refused.

The applications in respect of sentence by Tan and Lee respectively were heard together and may conveniently be dealt with in the same way. It happens that by the time of sentence all three men had been in custody for the considerable period of eight months. However, Yeo was sentenced to imprisonment for twelve years on each of the two counts of importing and to lesser concurrent terms of imprisonment on associated charges of supplying or offering to supply heroin. In imposing that sentence the Judge said that he would make some allowance for the plea of guilty but he referred to the very considerable amount of heroin involved in the Sie transactions on the one hand and the large amount of heroin which had been intercepted at the Sydney airport on the other. So that in Yeo's case he decided that a major drug dealing enterprise, as he said, "had been conducted throughout the earlier period which involved Miss Sie and also that subsequent efforts had been made to bring in further heroin". He said that throughout Yeo was clearly a prime mover and organizer of the New Zealand end of the transaction. Concerning all this we would merely remark that this was most clearly a bad case and required a condign reaction by the Courts.

It is against that background that we were invited to consider the somewhat lesser sentences that were imposed by the

Judge when dealing with Lee and then with Tan on the basis that insufficient concessions had been made taking into account relative culpability.

In sentencing Lee to imprisonment for ten years on each of the conspiracy charges the Judge accepted that Lee did not have, as he put it, "the same profile on the evidence as Yeo did". He said however that quite clearly Lee had been "substantially involved from a very early date". It will be seen that by imposing a sentence shorter by two years than the sentence to be served by Yeo the Judge was intending to make some allowance for the somewhat reduced level of culpability while at the same time acting on the basis that Lee had been implicated both in the Sie transactions or period of dealing as well as the subsequent abortive effort to get the heroin in through Sydney which had led to Tan's arrest there. The allowance that has been made by the sentencing judge is not a great one but in the end we are left satisfied that we are unable to interfere with this exercise of his discretion. In reaching that conclusion we do not overlook of course the plea of guilty that had been entered by this man Lee and which the Judge intended to take into account.

The man Tan was sentenced to nine years' imprisonment in respect of each of the two charges of conspiracy the terms to be served concurrently. The question in his case is whether sufficient attention has been given by the Judge to the absence of any evidence that Tan was involved during what may be described as the Sie period of activity. The Judge himself remarked -

> "There is no evidence of your involvement earlier than the episode at Sydney, when you were engaged there with

> Lee at the time that large shipment of heroin was intercepted. I can treat you accordingly, so far as the evidence in this Court is concerned, on a somewhat more lenient basis than the other two, although your part in it as the overseas member of the conspiracy was clearly bad enough."

In effect it is said by Mr. Leary that although this was the view of the sentencing Judge he gave inadequate practical effect to it.

As we have indicated, there can be no doubt that the involvement of all three men was at a serious level of culpability but we are satisfied nonetheless that some further allowance should be made in the case of the man Tan. He has been found guilty of involvement only in the abortive Sydney episode and from a period after the actual successful dealing in New Zealand had ended. Already the man had been in custody for eight months prior to sentence and some kind of argument can be advanced perhaps that in a practical sense such a period would be equivalent to imprisonment for about one year. That consideration applies of course to the other two men as well. And against the effective sentences imposed on the other two offenders we think a proper effective sentence in Tan's case would have been eight years. Taking the period of custody into account that term would reduce to seven years. In his case the application for leave to appeal against sentence is granted. The appeal is allowed. The sentence of nine years' imprisonment on each charge will be reduced to concurrent terms of seven years.

P.D. Williams P