IN THE COURT OF APPEAL OF MALAYSIA

Coram: Mohd Zawawi Salleh, JCA; Ahmadi Asnawi, JCA; Kamardin Hashim, JCA

Thankgod Chukwujindu Enenmuo v Public Prosecutor

Citation: [2018] MYCA 190 **Suit Number:** Criminal Appeal No. B-05(M)-436-11/2016 (NGA)

Date of Judgment: 12 June 2018

Criminal law – Trafficking in dangerous drugs – Conviction – Death sentence – Appeal – Whether the conviction safe

Criminal law – Whether the trial court had erred in law and in fact in failing to give due consideration to the defence of Innocent Carrier mounted by the appellant – Whether the trial court had erred in law and in fact in giving unsuitable emphasis on the qualifier of Wilful Blindness – Whether the trial court erred in law and in fact in rejecting the evidence of the appellant's good character

JUDGMENT

Introduction

[1] The appellant was tried before the Shah Alam High Court on the following charge:

> "Kamu pada 27 September 2012 jam lebih kurang 8.00 malam di Cawangan Pemeriksaan Penumpang 1 (CPP1) Balai Ketibaan Antarabangsa, Terminal Utama Lapangan Terbang Antarabangsa Kuala Lumpur (KLIA), di dalam daerah Sepang, dalam Negeri Selangor Darul Ehsan telah didapati mengedar dadah berbahaya iaitu Methamphetamine seberat 1553.6 gram, dan dengan itu kamu telah melakukan kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah seksyen 39B(2) Akta yang sama.".

[2] At the end of the trial, the learned High Court Judge found the appellant guilty, convicted him on the charge and sentenced him to death.

[3] Being dissatisfied with the impugned decision, the appellant appealed to this Court. Hence, this appeal before us.

[4] We have heard learned counsel for the appellant and learned Deputy Public Prosecutor ("DPP")

at some length. We have gone through the records available before us. We unanimously dismissed the appeal and affirmed the conviction and sentence passed by the learned High Court Judge. We now give the reasons for our decision.

Facts of the Case

(A) Version of Prosecution

[5] The evidence adduced by the prosecution from the relevant prosecution's witnesses may be summarised as follows:-

5.1 On 27.9.2012, at about 8.00 p.m, PiK 10885 Mohd. Firdaus bin Abdul Kasim (SP3) was manning X-ray Machine 'D' at Balai Ketibaan Antarabangsa, Terminal Utama KLIA, when the appellant came to scan his bag (Exhibit P6). The result of the scanning produced an image which was suspicious and green in colour in two sections of P6. SP3 then informed PiK 6829 Ismail Bin Idris (SP4) of the said image on the screen and directed the appellant to go to the examination counter for further inspection by SP4.

5.2 SP3 then informed the appellant to take P6 which had been scanned and place it on the examination counter which was manned by SP4, who then instructed the appellant to open P6 and remove its contents. SP4 then instructed the appellant to bring the empty P6 to be scanned for the second time by SP3.

5.3 The result of the second scanning still produced suspicious image. Therefore, SP4 instructed the appellant to bring the empty P6 to the examination counter for a physical examination.

5.4 The physical examination revealed that there was something that was concealed in the lining of P6. SP4 directed the appellant to put back all the contents that was taken out of P6 and follow him to Cawangan Pemeriksaan Penumpang 1 (CPP1) for further action.

5.5 At about 9.45 pm, Muhammad Bin Jaafar (SP6), arrived at CPP1. SP6 was briefed by SP4 in regard to the arrest and he directed SP4 to prepare a search list and mark the exhibits found in P6 i.e Exhibits P6E and P6I. The weight of the substance that were found in between the lining of P6 was approximately 3,400 grammes. SP4 used the test kit on the substance and found it to be Methamphetamine. SP4 then handed over the case to SP6.

5.6 Subsequently, the offending exhibits were sent to the Chemistry Department for chemical examination and analysis. Norhaya Binti Jaafar (SP5), the chemist, confirmed that the offending exhibits contained Methamphetamine weighing in total 1,553.6 grammes.

[6] At the end of the prosecution's case, on the basis of the primary evidence adduced by the prosecution which we had summarised above, the learned High Court Judge held that a prima facie case had been made out against the appellant in respect of the offence charged.

[7] In his judgment, the learned High Court Judge proffered the following reasons as to why he came

to the decision that he did at pages 15-16, Volume I Appeal Record:-

> "12. Pihak pendakwaan telah mengemukakan 4 alasan bagi menunjukkan OKT mempunyai kawalan dan jagaan ke atas beg, eksibit P6 tersebut, iaitu:-
>
> (a) OKT ditahan secara rawak, pada setiap masa hanya OKT yang membawa P6, beliau yang mengangkat P6 untuk diimbas di mesin pengimbas D, kemudian membuka P6 dengan kunci di poket seluarnya.
>
> (b) OKT mempunyai akses kepada beg ini sepenuhnya kerana mempunyai kunci beg tersebut. Seterusnya ke atas dadah tersebut juga.
>
> (c) Hasil siasatan ke atas Flight Manifest (P39), OKT adalah penumpang MS 960 (Egypt Air) dari Cairo ke Kuala Lumpur, di mana tag beg penerbangan itu tergantung kepada eksibit P6.
>
> (d) Keterangan daripada SP6, Mohd Farhan bin Izhar, yang bertindak sebagai Pegawai Penyiasat pada hari kejadian, beliau juga turut melakukan ujian "fitting" ke atas pakaian-pakaian yang dijumpai di dalam beg P6, iaitu pada tarikh 2 Oktober 2012. Sebanyak 2 helai pakaian berupa baju dan 2 helai seluar (Eksibit B6, B7, B8 dan B14). Menurut SP6, hasil ujian tersebut mendapati pakaian-pakaian tersebut adalah berpadanan dan bersesuaian dengan tubuh badan OKT.
>
> (e) Pihak pendakwaan bergantung dan mengguna pakai anggapan pengetahuan yang diperuntukkan melalui seksyen 37(d) ADB, 1952 terhadap OKT di mana OKT hendaklah mengakaskan anggapan tersebut di dalam kes pembelaan atas imbangan kebarangkalian.".

[8] The learned High Court Judge continued at pages 18-19, Volume I, Appeal Record:-

> "15. Setelah menilai keterangan saksi-saksi pendakwaan dan hujah oleh kedua-dua pihak saya bersependapat dengan hujah TPR. Adalah penemuan fakta bahawa pihak pendakwaan telah berjaya membuktikan elemen jagaan dan kawalan OKT ke atas beg P6 tersebut. Seterusnya pengetahuan OKT ke atas dadah tersebut boleh diambil satu anggapan di bawah seksyen 37(d) ADB, 1952.
>
> 16. Mengenai elemen pengedaran dadah Methamphetamine seberat 1,553.6 gram tersebut pula, saya berpendapat bahawa dadah sebanyak itu bukanlah untuk kegunaan OKT sendiri, anggapan yang sesuai di sini ialah ia bertujuan untuk diedarkan di negara ini.".

[9] The learned High Court Judge then called upon the appellant to enter his defence.

[10] The appellant elected to give evidence on oath. The appellant called two witnesses, namely, the appellant himself (SD1) and Kenneth Ginikanwa Enenmuo (SD2), his brother. The defence's case may be shortly stated as follows-

> 10.1 According to the appellant, his family engaged in textile business. The appellant joined the

business in 1983 and subsequently went into partnership business in stationary and computer accessories in 1992 in Nigeria. Then, in 1996/1997, the appellant paid for his own office in Baringbase and traded under "Gin-Teka International Est Africa Limited".

10.2 SD2, his brother, encouraged him by giving him financial support to start importing his own goods from foreign countries. The appellant's father-in-law was also very wealthy and his father donated land for the Nigerian Police Station in their district.

10.3 According to the appellant, he first travelled to Dubai to source the goods for sale in Nigeria as it was a good source for his products of computer parts and stationaries. He sold at good profit for himself. The appellant also had a different supplies and cargo agents that cleared his goods from airports and seaports in Nigeria.

10.4 He came to Malaysia to survey the printing consumable, ink and toner market as he had been informed that the quality of accessories manufactured in Malaysia are of a higher quality and cheaper.

10.5 The appellant testified that his travel to Malaysia was arranged by his close friend by the name of Mike. Mike was the one who purchased the ticket for his flight to Kuala Lumpur. The appellant gave Mike 120,000 Naira. His hotel in Malaysia was booked by Gladys.

10.6 The appellant further narrated that when he was at Lagos Airport, an individual named Mr. Reuben approached him and requested his help to send African food to his brother in Kuala Lumpur. According to the appellant, in Nigeria, it was part of their culture to help people, if possible. Appellant agreed to help Mr. Reuben on condition that the Nigerian Customs must check his bag. Mr. Reuben agreed to allow the Nigerian Customs to check his bag and they rejected some of the items in the bag. Thereafter, Mr. Reuben requested the appellant to give him his hand-carry bag to put the items rejected by the Nigerian Customs and transferred his belonging into the bag.

10.7 The appellant said that only after the Nigerian Customs had cleared everything that he agreed to transfer his belonging into the bag and the bag was scanned and check-in by the Nigerian Customs and was tagged.

10.8 The appellant was arrested by Malaysian Customs on 27.9.2012 at KLIA after they found the offending exhibits in P6. The offending exhibits were hidden in such a way that he was not aware of their existence.

10.9 When stopped by the Malaysian Customs, the appellant behaved in a very natural manner and he had no knowledge that the offending exhibits were in P6. The appellant was shocked when the offending exhibits were found in P6 by the Malaysian Customs.

10.10 The appellant asserted that Mr. Reuben is not his figment of imagination but a real person.

10.11 In his evidence, SD2 testified that after he was elected as a member of Anambra State House of Assembly (Nigerian Parliament), he had handed over all his business to the appellant.

The appellant also supervised SD2's business and personal affairs when SD2's was appointed as the Commissioner for Lands, Survey and Town Planning of Anambra State. The appellant also bought lands at Akpaka Forest Reserve Layout, Onitsha and invested his profits in many other secured investments.

10.12 Regarding the attributes of the appellant, please refer to Exhibits D58, pages 253-404 of the Appeal Record.

10.13 In essence, the appellant did not dispute that he had carried the bag (P6) containing the offending exhibits. However, it was his defence that he had no knowledge at all about the impugned drugs found inside P6 and he was carrying the bag for a person by the name of Mr. Reuben.

[11] The learned High Court Judge, however, rejected the appellant's defence that he was an innocent carrier, which would have entitled him to an acquittal. In his judgment at page 36, Volume I, Appeal Record, the learned High Court Judge stated-

"43. Setelah saya meneliti pembelaan OKT di atas sumpah secara terperinci, saya bersetuju dengan TPR bahawa pembelaan OKT hanyalah bersifat "*afterthought"* dan rekaan OKT untuk melepaskan dirinya daripada pertuduhan ini. Versi yang diberikan oleh OKT adalah sesuatu yang "*highly improbable*" dan sukar untuk dipercayai.".

The Appeal

[12] Before us, learned counsel for the appellant raised a sole ground in assailing the decision of the learned High Court Judge, namely, the learned High Court Judge had erred in law and in fact in failing to give due consideration of the defence of innocent carrier mounted by the appellant and instead gave unsuitable emphasis on the qualifier of "wilful blindness". Learned counsel also argued that the evidence of the appellant's good character is material and essential in the determining the innocence of the appellant and the learned High Court Judge had erred in law and in fact in rejecting the same.

[13] To better understand the substratum of learned counsel for the appellant's argument, we reproduce below his submission:-

"g. The learned High Court Judge approached the question of knowledge with **undue scepticism** of what in his opinion a person is expected to know or is expected to have done. The evidence from SD1 (Appellant) including his witness statement and corroborated by SD2 shows:-

i. It is part of the culture of the people of the Appellant's nationality to convey items such as food. The Appellant assisted Reuben by acting on these principles. This was stated in the Appellant's cautioned statement (D45) and this was not challenged by the prosecution.

ii. The Appellant did inspect the contents of the bag but did not find the impugned drugs. Unlike the case **Herlina**, upon opening the luggage bag one would not see any drugs but would instead see three packets containing dried fish, and other personal items such as a bag

containing the Appellant's shoes and clothes. The Appellant could not see the "boxes containing drugs" such as that in **Herlina's** case which could make it reasonable for a person to make enquiries and look inside the box. Not this case. This case is more similar to the case of **Li Qian** where the items are concealed.

iii. The evidence of SD1 shows that he did make enquiries on the impugned luggage bag and he did submit the same to the Customs of his country, but there was no discovery of the drugs because there was no scanner. This fact was not challenged by the Prosecution, and we submit it is too late for them to do so now.

h. It is unsuitable for the trial court to make assumptions on how a person is expected to behave and impose it on the Appellant. Though we can make assumptions on how a reasonable man may conduct himself, it is unsafe to impose such a legal fiction on the conduct of the Appellant in a criminal matter entailing the death sentence. Even within a group of like-minded individuals, equally intelligent and equally cautious persons may treat differently an invitation to carry a bag overseas by a stranger. It could be an inconvenient truth that the story of liars are similar to the story of innocent yet reckless persons. It is humbly submitted that the learned High Court Judge erred in this respect as the effect of his scepticism would punish an innocent man on account of what he assumed a liar would do. Surely, the law requires the prosecution to bear the burden to prove the crime and not leave it to the benefit of the trial judge's imagination and assumptions of how an innocent person should behave. A sceptical approach of an accused's conduct could perhaps be suited in cases of criminal negligence where a standard of how a reasonable man should conduct himself could be suitably imposed on an accused who behaved negligently. However a criminal case of drug trafficking involves issues of intention and knowledge which, we respectfully submit, are deeper than how we assume a person should behave. Thus it is improper to punish someone with death for his failure to be more careful with his baggage.".

(See pages 8-11, Appellant's Written Submission)

[14] In support of his submission, reliance was placed on the decisions of **PP v Herlina Purnama Seri** [2017] 1 MLRA 499 and **Pendakwa Raya lwn Li Qian** (Appeal No. B-05(LB)-471-12/2016).

Our Decision

[15] The gist of the appellant's defence was that he had no knowledge of the contents of P6. As we have alluded to earlier, the learned High Court Judge, after a careful consideration of the appellant's evidence, rejected his assertion of lack of knowledge and held that the appellant's defence was a mere afterthought, highly improbable and unbelievable. The finding was made based on the totality of evidence, the credibility of witnesses and how they fared in cross-examination. This was a finding of fact and we as the appellate court should be slow in interfering with such findings.

[16] We refer to the case **Munuswamy Sundar Raj v PP** [2016] 1 CLJ 357 wherein the Federal Court stated at page 362:-

> "[9] As said above it is imperative that the success of the defence of innocent carrier depends very much on the facts of each case, **a matter that falls within the realm of the trial judge**. Ignorance simpliciter is not sufficient to let an accused person off the hook as otherwise every other accused person will allude to that defence. It needs more than that. Without any reason for suspicion, or there is no right or opportunity of examination, ignorance may be a good defence. ...". (Emphasis ours)

[17] Proof of knowledge in a criminal case is, short of a voluntary confession by an accused, like many other state of a guilty mind in a criminal case, a fact to be gathered inferentially from proved facts and surrounding circumstances.

[18] In **Warner v Metropolitan Police Commissioner** [1968] 2 All E R 356, Lord Wilberforce observed at page 393:-

> "In order to decide between these two (possession and mere control) the jury should ... be invited to consider all the circumstances-the 'modes or events' by which the custody commences and the legal incident in which it is held. By these I mean, relating them to typical situations, that they must consider the manner and the circumstances in which the substance, or something which contains it, has been received, what knowledge or means of knowledge or guilty knowledge as to the presence of the substance, or as to the nature of what has been receive, the accused had at the time of receipt or thereafter up to the moment when he is found with it; his legal relation to the substance or package (including his right to access of it). On such matters as these (not exhaustively stated) they must make the decision whether, in addition to physical control, he has, or ought to have imputed to him, the intention to possess, or knowledge that he does possess, what is in fact a prohibited substance. If he has this intention or knowledge, it is not additionally necessary that he should now the nature of the substance.".

[19] In this instant appeal, the learned High Court Judge had scrutinised the whole evidence before concluding that such a defence had failed to raise any reasonable doubt on the prosecution's case or it had rebutted the statutory presumption of knowledge of the impugned drugs under section 37(d) of **DDA**.

[20] We are in full agreement with the Court below in its findings that:-

(a) the defence is only a mere denial of knowledge which was inherently improbable;

(b) the appellant had failed to protest his innocence to the arresting officer (SP4);

(c) the appellant only mention the name of Mr. Reuben but did not give sufficient details of him in his cautioned statement. In fact, the appellant admitted that he did not have Mr. Reuben's phone number nor any knowledge of Mr. Reuben brother's name or his brother's phone number; and

(d) The charge against the appellant is trafficking in dangerous drugs found in the P6 carried by the appellant and not of ownership of the impugned drugs.

[21] We are mindful that the appellant's narration is consistent with his cautioned statement (Exhibit D45). However, a mere consistency of the defence in the cautioned statement with the oral testimony do not prove the truth therein. The Court is entitled to evaluate and assess those consistencies with the surrounding facts and circumstances.

[22] We refer to the case of **Msimanga Lesaly v PP** [2005] 1 CLJ 398 wherein Gopal Sri Ram JCA (as he then was) said:-

> "The degree of credence that a court is reasonably expected to assign to a particular version of events depends on the facts and circumstances of each case**. And, the mere fact that an accused's evidence is consistent with his earlier out of court statements does not require a court in every case to hold that he or she is a witness of truth. Were it otherwise, the assessment of oral testimony would become a robotic function**. But the judicial appreciation of evidence is a human and not a robotic function. There are no fixed rules about it: only general guidelines. That much is made clear by numerous judgments of our courts. But we would in the context of this case cite **Lim Yow Choon v PP** [1972] 1 MLJ 205 where it was held that:-
>
> > notwithstanding that the cautioned statement was part of the evidence for the prosecution and that there were facts in the cautioned statement which appeared to contradict other parts of the evidence led by the prosecution, it was open to the trial judge as a judge of facts to assess the evidence and in so doing accept part of it and reject the rest.".
> >
> > (Emphasis added).

[23] In our view, the facts as narrated by the appellant in his defence would, in the normal circumstances capable of raising suspicion to put him on inquiry as to the legitimacy of the whole transaction. In **PP v Herlina Purnama Seri** (supra), the Federal Court stated:-

> "[47] Most of the cases where the concept was held to apply concerned cases in which the accused was asked to carry certain articles, or a package, or a bag, or to swallow certain items. In these circumstances, where the request to do any of those things mentioned would be such as would arouse the suspicion of a reasonable person as to the contents, it was upon the accused to make sufficient inquiries so as to dispel or to set straight such suspicions. Should the accused not make any or any sufficient inquiries under those circumstances, the concept of wilful blindness would apply so as to fasten upon him or her the necessary knowledge as to the nature of those contents. In other words, if he deliberately "shuts his eyes" to the obvious, because he "doesn't want to know", he is taken to know.".

[24] The learned High Court Judge found that the appellant had ample time to examine the bag (P6) after receiving it from Mr. Reuben. After all, the bag's key was with him. In the circumstances, we agree with the learned High Court Judge's finding that the appellant is, thus, not an innocent carrier but rather a voluntary carrier who was part of the drug trafficking scheme. The appellant was in position to examine thoroughly the contents of P6 entrusted by Mr. Reuben before it was check-in but failed to do so.

[25] The trial High Court Judge found the appellant was guilty of wilful blindness for shutting his eyes to the obvious. In our view, the learned High Court Judge had made a correct finding regarding the defence of innocent carrier.

[26] That, however, is not the end of the matter. Learned counsel for the appellant submitted that the defence had established that the appellant is a genuine businessman and his whole family are businessmen. The appellant was working for his family, running his own business and taking care of the brother's business while his brother was in politics.

[27] Learned counsel submitted that good character is not a defence to the charge but it is relevant for the court's consideration of the case in two ways. First, the appellant has given evidence. His good character is a positive feature which the Court should take into account in considering the appellant's defence. Secondly, the fact that the appellant has not committed any offence in the past may make it less likely that he acted as is now alleged against him. This is the first time in his life the appellant has been accused of a crime of drug trafficking. He is not the sort of man who would be likely to cast his good character side in this way. That is a matter which the Court should pay particular attention and according to the learned counsel, the Court had failed to do so.

[28] Before he was arrested in 2012 by the Malaysia Customs, the appellant never had a single case with law enforcement authorities in Nigeria or elsewhere. In view of the appellant's clean record and personal integrity, the Commissioner of Police, Lagos State Police Command, inducted him into the Police Community Relation Committee (PCRC). The principal responsibility of such committee is to assist the police and other law enforcement agencies to monitor the activities of members of the community and promptly report persons of dubious and suspicious tendencies to the law enforcement agencies for appropriate actions.

[29] It was the contention of learned counsel for the appellant that the learned High Court Judge had failed to consider adequately the good character of the appellant. A person of good character is not likely to commit a crime which is contrary to his nature and evidence of good character may by itself raise reasonable doubt of appellant's guilt.

[30] Now, section 53 of the **Evidence Act, 1950 (the Act)** provides that in criminal proceedings, the fact that the person accused is of a good character is relevant. It has been said that the innocence or criminality of an accused can easily be judged by looking at his character and the accused must be allowed to prove his innocence with the help of his good character. In **Habeeb Mohammed v State of Hyderabad**, AIR [1954] SC 51, the Indian Supreme Court observed:-

> "In criminal proceedings a man's character is often a matter of importance in explaining his conduct and in judging his innocence or criminality. Many acts of an accused person which appear to be suspicious become free from the suspicion, when we come to know the character of the person by whom they are done. Even on the question of punishment an accused is allowed to prove general good character. When the allegation against the appellant was that he was acting in pursuance of the policy of Ittehadul-Muslameen, that his state of mind was to exterminate the

Hindus, he was entitled to lead evidence to show that he did not possess that state of mind, but on the other hand, his behaviour towards the Hindus throughout his official career had been very good, and he could not possibly think of exterminating them.".

[31] We venture to say that the character and conduct of people play a very important role in our day to days lives, people act and react and go about their daily lives based on their assumption of what people will do. Thus, when a court is asked to judge a person's conduct on particular occasion it may become pertinent to question the person's conduct.

[32] In the case of **Commonwealth of Pennsylvania, Appellee, v James Neely, Appellant,** 522 Pa.236 [1989] 561 A.2d 1, Justice Larsen of the Supreme Court of Pennsylvania had succinctly summarised the importance of good character as follows:-

"In Cleary [**Commonwealth v. Cleary**, 135 Pa. 64, 82-83, 19 A. 1017, 1018, (1890)] we recognized the importance of reputation evidence when we stated: "Of what avail is a good character, which a man may have been a lifetime in acquiring, if it is to benefit him nothing in his hour of peril?" Id., 135 Pa. at 84, 19 A. at 1018 (1890). As my distinguished colleague, Justice James McDermott has commented:

> "To offer evidence of an otherwise unblemished life is not a plea of mercy. It is, in fact, to be weighed against any present allegation to the contrary. Character evidence may give a name to damning combinations different than what they seem, and be the truth that sets one free."

Indeed the value of a good reputation has been highly regarded since antiquity. Reputation has been characterized as more valuable than riches, precious materials and gold: "A good name is better than great riches". Cervantes, Don Quixote pt. ii, ch. 15 (1615); "A good reputation is more valuable than money". Publilius Syras, Sententive No. 108. "A good name is better than precious ointment". Old Testament: Ecclesiastics, vii, 1; "Reputation is a jewel". Vanburgh, The Provoked Wife Act i, sc., 2; "The purest treasure mortal times afford. Is spotless reputation. . ." Shakespeare, Richard II, Act i, sc. 1, In. 177; "It is better to have nobility of character than nobility of birth". (Unknown).

Famous scholars, philosophers and writers have analogized "reputation" to the dominating force that sustains life and to life itself: "Reputation is the life of the mind, as breath is the life of the body". Gracian, The Complete Gentlemen; "Character is the governing element of life, and is above genius". Frederick Saunders, Stray Leaves; *240 "Good name in man and woman, dear my lord, Is the immediate jewel of their souls . . ." Shakespeare, Othello, Act iii, sc. 3, In. 155; "A good name is a second life, and the groundwork of eternal existence". Bhascara Acharya, Lilawati (Longfellow, Kavanaugh ch. 4.); "Take away my good name and take away my life". Thomas Fuller, Gnomologia No. 4306; "Character is destiny". Heraclitus (500 B.C.).

Other authors and luminaries teach us that reputation is virtually immutable:

A great character, founded on the living rock of principle, is, in fact, not a solitary phenomenon, to

be at once perceived, limited, and described. It is a dispensation of providence, designed to have not merely an immediate, but a continuous, progressive, and never-ending agency. It survives that man who possessed it: survives his age, perhaps his country, his language. Edward Everett, Speech: The Youth of Washington, July 4, 1835;

"If you hear a mountain has moved, believe; but if you hear that a man has changed his character, believe it not". Mohammedan Proverb.

Additionally, inspired writings show us that a good character/ reputation ensures trustworthiness: "A good character carries with it the highest power of causing a thing to be believed". Idem, Rhetoric; "Put more trust in nobility of character than in oath". Solon, Dioenes Loertius, sec. 16; "Reputation is a hallmark: it can remove doubt from pure silver . . ." Mark Twain (from an unmailed letter dated 1886); "Fame is a vapor, popularity an accident, riches takes wings, those who cheer today may curse tomorrow, only one thing endures character. Horace Greely.".

[33] No doubt good character is a good defence, but it is very weak evidence; it cannot outweigh the positive evidence in regard to the guilt of a person. In **Bhagwan Swarup v State of Maharashtra** AIR 1965 SC 682, 696 Subba Rao J said:-

"Whether, when admitted, it should be given weight except in a doubtful case, or whether it may suffice of itself to create a doubt, is a mere question of the weight of evidence, with which the result of admissibility have no concern.

But, in any case, the character evidence is a very weak evidence; it cannot outweigh the positive evidence in regard to the guilt of a person. It may be useful in doubtful cases to tilt the balance in favour of the accused or it may also afford a background for appreciating his reactions in a given situation. It must give place to acceptable positive evidence. The opinion expressed by the witnesses does credit to the accused, but, in our view, in the face of the positive evidence we have already considered, it cannot turn the scales in his favour.".

[34] In this instant appeal, the learned High Court Judge had considered the appellant's good character evidence testified by his brother, SD2, but in the end, His Lordship decided that this evidence does not help the appellant to rebut the presumption of knowledge. The learned High Court Judge reasoned as follows at paras 54-55, pages 46-47, Appeal Record, Volume 1:-

"54. Seterusnya saya ingin merujuk kepada keterangan SD2, SD2 adalah abang kandung OKT, di dalam keterangannya, SD2 menceritakan bahawa OKT adalah seorang yang berwatak baik dan berjaya di dalam bidang perniagaan yang diceburinya sejak daripada beliau berhenti daripada persekolahannya. Menurut SD2 lagi, OKT adalah seorang yang tidak mengalami masalah kewangan, beliau seorang yang jujur dan bertanggungjawab kepada keluarga mereka dan keluarganya sendiri.

55. Di sini saya berpendapat, bahawa, keterangan SD2 ini walaupun telah menyokong keterangan OKT pada beberapa fakta, akan tetapi adalah tidak relevan untuk mematahkan anggapan

pengetahuan OKT di bawah seksyen 37(d) ADB, 1952 walaupun di atas imbangan kebarangkalian. SD2, tidak mempunyai pengetahuan sendiri berkenaan apa yang terjadi pada 27 September 2012, sebelum OKT berangkat ke Malaysia. Oleh itu saya berpendapat keterangan SD2 ini tidak dapat membantu OKT untuk menimbulkan satu keraguan yang munasabah terhadap kes pendakwaan.".

[35] Similarly, the learned High Court Judge also had duly considered the evidence of the so called culture practiced by the people in Nigeria in helping other persons. At pages 36-37 Appeal Record, Volume 1, the learned High Court Judge said:-

"44. Alasan pertama ialah, OKT mengatakan beliau bersetuju untuk menolong "Mr. Reuben" untuk membawa makanan Nigeria kepada adik "Mr. Reuben" di Malaysia, sedangkan beliau tidak mengenali, tidak pernah berjumpa dan berkenalan dengannya sebelum itu. OKT memberikan alasan bahawa memang menjadi adat untuk orang-orang di Nigeria untuk membantu saudara-saudara senegara mereka apabila di dalam kesusahan. Pada pendapat saya alasan ini adalah tidak munasabah dan tidak logik untuk dipercayai.".

[36] Finally, the learned trial Judge concluded in his Lordship's judgment at para 47 page 39 Appeal Record Volume 1:-

"47. Menurut OKT lagi beliau adalah merupakan seorang "frequent travelier", dan cukup maklum berkenaan prosedur penerbangan, tidakkah beliau boleh berfikir yang beliau tidak dengan mudah boleh menurut permintaan seorang yang tidak dikenalinya untuk membawa sebuah beg? Mahkamah ini boleh menerima penjelasan OKT ini, sekiranya beliau hanya diminta tolong oleh "Mr. Reuben" untuk membawa makanan Nigeria di dalam satu peket yang kecil, bukannya di dalam satu beg. Sebab itulah saya menolak pembelaan OKT ini sebagai sesuatu yang "highly improbable".".

[37] The evidence of custom and culture of the people are also rejected in the case of **Manggal Singh v The King** [1938] 1 MLJ 198, wherein Mcelwaine, CJ held:-

"A person may be identified by his own conduct or by his own attributes but he cannot be identified by the habits of a class even if he belongs to that class. "There must be something to connect the circumstance tendered in evidence, not only with the accused, but with his participation in the crime" per Lord Sumner in **Thompson v. The King** (supra) at page 234.

…

If it is permissible to prove, as a step towards establishing the present accused's guilt, that other Sikhs commit this kind of crime, then if a man is charged with bestiality or other unnatural offence, is it permissible to prove that the accused's race does not consider such offence wrong, or to prove that it is addicted to such unnatural offence? This, I think, would go further than anything which is allowed under our system of evidence.".

In the same case, Terell & Mills, JJ held:-

"To deal first with the alternative submission, it would certainly appear from the record that the accused put his good character in evidence. In fact, apart from the defence of alibi which will be dealt with later, the substance of the defence was that he was an Indian Officer of high character. He says "As I was an Indian Officer, I would not do such a thing to bring shame on myself".

If therefore the cross-examination was directed to prove that the accused was of bad character, it would certainly appear to be admissible under the express terms of the section. But in our opinion the cross-examination was not directed to character at all. The existence of a custom affecting Sikhs generally does not affect the character of any individual Sikh.

As regards the admissibility of the evidence as establishing the identity of the accused, the case of **Thompson v. The King** [1918] AC 221 was relied on. It does not appear that this case is any, authority for the introduction of evidence of custom. The evidence in Thompson's case was evidence of certain matters personal to Thompson himself which tended to identify him with the offence which was charged. The evidence of a custom among Sikhs generally is of no value for the purpose of identifying a particular Sikh with the commission of the offence.".

Conclusion

[38] For all the reasons above stated, we would dismiss the appellant's appeal. The conviction recorded and the sentence passed by the High Court Judge are hereby affirmed. So ordered.

Dated: 12 June 2018

sgd.

DATO' SETIA MOHD ZAWAWI SALLEH
Judge
Court of Appeal
Malaysia

COUNSEL

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LEGISLATION REFERRED TO:

Dangerous Drugs Act, Section 37(d)

Evidence Act 1950, Section 53

JUDGMENTS REFERRED TO:

Bhagwan Swarup v State of Maharashtra AIR 1965 SC 682, 696

Commonwealth of Pennsylvania, Appellee, v James Neely, Appellant, 522 Pa.236 [1989] 561 A.2d 1

Habeeb Mohammed v State of Hyderabad, AIR [1954] SC 51

Manggal Singh v The King [1938] 1 MLJ 198

Msimanga Lesaly v PP [2005] 1 CLJ 398

Munuswamy Sundar Raj v PP [2016] 1 CLJ 357

Pendakwa Raya lwn Li Qian (Appeal No. B-05(LB)-471-12/2016)

PP v Herlina Purnama Seri [2017] 1 MLRA 499

Warner v Metropolitan Police Commissioner [1968] 2 All ER 356